
THE LAW AND
PRACTICE OF THE
INTERNATIONAL
CRIMINAL COURT

EDITED BY
CARSTEN STAHN



OXFORD

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OXFORD
UNIVERSITY PRESS



Oxford University Press is a department of the University of Oxford.
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First Edition published in 2015

Impression: 1

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2015934530

ISBN 978-0-19-870516-1

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

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Editor's Preface and Acknowledgements

The law and practice of the ICC is in constant flux. The Court navigates between success and failure. Accountability is part and parcel of discourse in almost any modern conflict situation. The ICC has witnessed some unexpected successes and certain drastic failures. There are many ‘knowns’, but also significant ‘known unknowns’ and ‘unknown unknowns’. In the ebb and flow of practice, it is often difficult to keep track of the large amount of decisions and documents that shape ICC jurisprudence and policy. It is even more difficult to understand their impact and context, including their effect on conflict dynamics, politics, and affected societies. While key decisions and policy papers of the Court receive considerable attention, many procedural decisions or working practices behind the scenes go partly unnoticed, although they set important footprints for future directions. Discussion on achievements and challenges of the Court remain often entrenched in disciplinary boundaries or other dichotomies (e.g., law v. politics, peace v. justice, international v. local justice, substantive law v. procedure, retributive v. restorative justice).

This work seeks to refine this vision. It examines major areas of jurisprudence and practice, as well as the broader impact of the Court. It covers many well-known sites of debate but also areas that are rarely treated (e.g., funding, governance, interim release). It combines normative and critical analysis of ICC law and policies with context-related assessment and reflection on alternative approaches. Many authors will be known to the reader based on their work in the field of international criminal justice. But some space is also given to fresh voices.

Several contributions were discussed on the occasion of a Conference on the tenth anniversary of the entry into force of the Rome Statute, held at the Peace Palace on 26-27 September 2012, with the kind support of the Open Society Justice Initiative and the MacArthur Foundation. All chapters are newly written and revised for this book. The focus of this work is linked to a research project of the Grotius Centre for International Legal Studies on the theme of ‘Post-Conflict Justice and Local Ownership’, funded by the Netherlands Organization for Scientific Research (NWO).

The book is a truly collective effort. It involves scholars, practitioners, and voices from different disciplines, parts of the globe and communities of practice. Huge thanks go, first of all, to all contributors for their immense care, dedication, and fresh thinking on core issues, and most of all for making diversity an asset. Together, they have provided a spectrum of perspectives that no single author could have offered alone.

Many other individuals have played a key role in bringing this project to fruition. Deep gratitude is owed to Teodora Jugrin and Luca Ferro who have provided invaluable editorial help and support in the production of the book. Noah Al-Malt, Stephanie Fowler, Daniel Huck, Vanessa Otero, Anda Scarlat, Havneet Sethi, and Nivedita S, who graduated from the Advanced LL.M. Programme in Public International Law at Leiden, deserve special credit for reviewing chapters and assisting in editing. Many of the ‘partners in crime’ at the Grotius Centre for International Legal Studies have contributed to ideas in this book, in their own individual way, including but not limited

to Larissa van den Herik, Joseph Powderly, Dov Jacobs, Catherine Harwood, Jens Iverson, Jennifer Easterday, Sara Kendall, Christian de Vos, and Marieke Wierda. I further owe gratitude to Judges Neroni Slade and Ekaterina Trendafilova who shaped my vision and approach towards international criminal justice at the ICC.

A special thank you goes to John Louth, Merel Alstein, Anthony Hinton, and Emma Endean for supporting this project since its inception and ensuring its successful publication.

This book is dedicated to the memory of the late Judge Hans-Peter Kaul whose relentless fight and support for the ideals enshrined in the Statute have pushed the frontiers of international criminal justice and brought the law a step closer to reality. As he put it in the 2011 LI Haopei Lecture,¹ with his unique sense of idealism and pragmatism: 'Leaders all over the world... may reflect on which policy should henceforth be followed in the field.'

The Hague, January 2015
CS

¹ H-P Kaul, 'Is It Possible to Prevent or Punish Future Aggressive War-Making?', FICHL, Occasional Paper Series (Oslo: Torkel Opsahl Academic Epublisher, 2011), at http://www.fichl.org/fileadmin/fichl/documents/FICHL_OPS/FICHL_OPS_1_Kaul.pdf.

Foreword

HE Judge Sang-Hyun Song
President, International Criminal Court, 2009–2015

When the first judges of the International Criminal Court (ICC) met in March 2003 after their inauguration, a first fundamental task lay ahead with the drafting of the Regulations of the Court. We initially struggled to overcome the differences of our legal traditions while applying the provisions of the Rome Statute for the first time in practice. However, guided by the spirit of compromise and a common objective in mind, only one year later, during the fifth plenary session in 2004, we adopted the Regulations, and States Parties accepted them in accordance with Article 52 of the Rome Statute. Over the years, we have successfully overcome countless legal obstacles and found suitable solutions—through amendments of the law or through practice—always safeguarding the fairness and integrity of the proceedings. As a result, today the Court looks back at a large body of jurisprudence on a variety of fundamental legal issues, paving the way for a smoother second decade of the ICC's proceedings. This book bears testimony of these achievements to date.

In the current geopolitical context, the Court has managed to stand its ground as a well-accepted international organization. Since its creation in 1998, the ICC has exceeded expectations in many ways. It came into being much faster than expected—less than four years after the adoption of the Rome Statute. It has not only survived but thrived with States Parties—despite early opposition by some powerful countries which sought to discredit it. The fact that, to date, four countries have referred situations on their own territory to the ICC shows the confidence States have in the Court. The first referral of a situation by the Security Council, namely the Darfur situation in 2005, also exceeded expectations, as many observers thought the United States would veto any Security Council effort to refer a situation to the ICC. The second, unanimous referral of the Libya situation in 2011 fostered international confidence in the ICC. Finally, every *ad hoc* acceptance of the Court's jurisdiction, including by Ukraine, demonstrates States' growing confidence in the Court, often followed by an accession to the Rome Statute system. This, in turn, marks an important step towards a universal coverage of jurisdiction and thus a comprehensive protective system for victims of mass violence.

After the first seven years of the Court's operations, the Review Conference in Kampala in 2010 marked another important step in the ICC's development. By way of yet another small revolution after the adoption of the Rome Statute itself, the ICC's Assembly of States Parties agreed on a definition for the crime of aggression and the conditions under which the Court could exercise jurisdiction with respect to this crime, setting an important contribution to the Court's role in solidifying the corpus of international criminal law. It is my sincere hope that in 2017 we will see the final adoption and acceptance of these amendments in the Rome Statute, activating the fourth of the Rome Statute's core crimes.

One of the other crucial outcomes of Kampala was the momentum that it created for developing the effectiveness and reach of the Rome Statute system. The focal areas of cooperation, complementarity, and universality have been stressed countless times and we have to keep stressing them as key factors in the success of the ICC system. With regard to substantive modifications, the Kampala Review Conference provided new vigour for the Court to move forward on many levels, from investigations to cooperation and victim participation in the proceedings.

The Court's achievements following Kampala are manifold. The ICC is now engaged in a wide variety of situations around the globe. The Court has active cases at all stages of proceedings, from pre-trial to trial to appeals. Eight situations are under active investigation and ten under preliminary examination. Over twenty cases involving more than thirty suspects have been brought before the ICC. The Court has delivered its first three judgments, one of which—the case of Germain Katanga in the Situation of the Democratic Republic of Congo—recently became final.

Further, the ICC has continued to breathe life into the victim-oriented provisions of the Rome Statute, enabling victims to participate in the proceedings, seek reparations, and receive humanitarian assistance from the Trust Fund for Victims. For some victims, perhaps, seeing justice done has alleviated an urge for violent retribution. More victims now have reason to hope that their tormentors will answer for their crimes. More communities can see that their voice is heard and that the right to justice is vigorously defended. Finally, and I come back to my first words in this introduction, internal policy and practice have further matured since 2010 and continue to do so across the organs of the Court.

At the same time, there are clearly some areas for potential improvement. In my view, judicial proceedings must speed up, and they are in fact speeding up as more and more issues are resolved and become routine. The ICC's 'lessons learnt' process—with a view to improving the efficiency of the criminal process while preserving the rights of the accused—is an important initiative in this regard, yielding effective results now in its third year. However, the biggest challenge for the ICC remains ensuring sufficient cooperation from States, especially with respect to the arrest and surrender of suspects. The lack of execution of arrest warrants is the biggest obstacle to the full implementation of the ICC's mandate.

One of the great merits of this book is that it illustrates in a comprehensive manner the achievements of the Court as well as its remaining challenges. And it does not stop there. Numerous contributions by well-respected experts in the field deal with very tangible issues of law, policy, and practice of crucial importance in the ICC's day-to-day operations. I commend Professor Stahn for having assembled a blend of seasoned academics as well as top practitioners from various institutions including the ICC itself. The topical selection of cross-disciplinary pieces on substantive international criminal law, procedural issues, policy dimensions, and also topics such as sexual and gender-based violence, protection of witnesses, victims' participation and redress, or capacity building at the national level is truly exhaustive.

Indeed, these essays reflect the many dimensions of the International Criminal Court, and they display more than just the law and practice at this institution;

they bear testimony of a vibrant, rapidly developing area of international law at the helm of which stands the ICC. Just as the ICC does through its proceedings and jurisprudence, this book contributes to the further development of a stout body of international criminal law, protecting victims of mass atrocities and deterring future crimes.

*The Hague
September 2014*

Foreword

Fatou Bensouda

Prosecutor, International Criminal Court

The International Criminal Court (ICC) is the world's first permanent international judicial institution designed to hold perpetrators of international crimes accountable and to end impunity for such crimes. The Court has been in existence for more than a decade. This provides a timely opportunity to examine the law and practice of the Court, its contribution to international criminal law and policy, and its potential role in countries where such crimes have been committed.

During the first nine years of the existence of the ICC, the Office of the Prosecutor (OTP) was able to create a fully functioning and independent investigative and prosecutorial organ, capable of responding to the highest demands for intervention in strict accordance with the legal framework established by the Rome Statute. Over the years, the practice of the Court and the Office has evolved, and has in many ways been refined and enhanced in order to meet present and future challenges. On the strength of the early experiences acquired by the Office, as well as through candid self-assessment and lessons learned, the Office has been working on further honing its prosecutorial strategy, as well as developing policies and operating procedures, where necessary, in order to address the challenges it has faced. These changes and developments are now reflected in the Office's Strategic Plan for 2012–2015.

As an important part of this new Strategic Plan, and as one of the three core activities of the Office, stronger emphasis is now placed on the Office's preliminary examinations activities. Through its preliminary examinations work, the Office is committed to contributing to two overarching goals: the ending of impunity, by encouraging genuine national proceedings through its positive approach to complementarity, and the prevention of crimes.

Furthermore, the Office has also revised its investigative and prosecutorial strategies in order to enhance the quality, efficiency, and effectiveness of its work, and also to offset some of the challenges the Office has been facing with regard to witness intimidation and tampering. Moreover, in order to investigate effectively in complex and often difficult environments, the Office has moved from focused investigations to the concept of in-depth, open-ended investigations, while still maintaining a clear investigative focus. This has been necessitated by the fact that in some situations, it may be necessary to build cases upward gradually by investigating and prosecuting a limited number of lower- or mid-level perpetrators, with a view to reaching those alleged to be most responsible for the crimes. Lastly, in relation to more thematic aspects of its work, the Office has recently finalized its Policy Paper on Sexual and Gender-Based Crimes following extensive consultations with, amongst others, States, civil society, and relevant agencies of the United Nations. The Office has embarked on a similar process of consultations in preparation for the drafting of a new Policy Paper

on Children which will be a comprehensive elaboration of how the Office handles children's issues in all aspects of its work and at all stages of the Court's proceedings.

Yet another important development worth highlighting is the adopted Code of Conduct for the Office, which entered into force on 5 September 2013. This Code assists the Office in shaping a common organizational culture on the principles enshrined in the Rome Statute, and also provides clear guidance on the professional conduct and the standards that the Office as a whole, including myself and the deputy prosecutor, have chosen to be measured by.

The ICC continues to face important challenges. One of the main challenges faced not only by the Office but by the Court as a whole is the question of resources. Over the years, the number of preliminary examinations, investigations, and prosecutions has increased without a corresponding increase in resources to match the ever growing workload. Since the Office cannot sacrifice quality, the challenge is how consistently to ensure high quality performance without the necessary resources.

Another challenge is to receive full and timely cooperation from States. The ICC has no police force or enforcement powers of its own: it relies on States to implement its decisions and to support its work, and more importantly to execute warrants of arrest issued by the Court's judges.

Lack of knowledge about the Court is yet another challenge. Misconceptions about the Court and its mandate still pervade, and there is indeed a real need for a better and more accurate understanding of the Office and the Court's work.

As such, I believe that *The Law and Practice of the International Criminal Court* will serve as a valuable and informative resource for practitioners, scholars, and students of international criminal law, and also others with an interest in the work of the ICC. The book is an important contribution to promoting understanding and enhancing in-depth analysis and reflection on the practices of the ICC, its impact, and its challenges as we forge ahead in our endeavour to rid the world of the most atrocious crimes known to humanity and to end impunity for these crimes. It is my hope and sincere belief that through the vector of international criminal law—impartially and independently applied—we can alter the calculus of would-be perpetrators of mass crimes and build added support for the ICC as the nucleus of an evolving international criminal justice system. Will we ever reach the next eon of civilization where mass atrocities are a distant memory in the annals of time? Human history to date seems to suggest such a coveted outcome is unlikely. What is certain, however, is that with the creation of the ICC, the foundational stones have been set for a more secure and enlightened path for humanity. It is incumbent upon us today to ensure that the Court realizes its full potential as envisaged in its founding treaty, the Rome Statute.

*The Hague
September 2014*

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List of Abbreviations

ACLT	Advisory Committee of Legal Texts
ACT	Accountability, Coherence, and Transparency Group
AFISMA	African-led Support Mission in Mali
AMIS	African Union Mission in Sudan
ASP	Assembly of States Parties
AU	African Union
AUC	United Self-defence Forces of Colombia (<i>Autodefensas Unidas de Colombia</i>)
B&H	Bosnia and Herzegovina
CALS	Aids Consortium, Centre for Applied Legal Studies
CAR	Central African Republic
CATS	Crimes Against the State
CBF	Committee on Budget and Finance
CICC	Coalition for the International Criminal Court
CNDP	National Congress for the Defence of the People
CPA	Comprehensive Peace Agreement
CSVR	Crime Prevention Centre for the Study of Violence & Reconciliation
DCC	Document Containing the Charges
DPCI	Directorate for Priority Crimes Investigation
DPRK	Democratic People's Republic of Korea
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EDS	Electronic Disclosure Suite
EIDHR	European Instrument for Democracy and Human Rights
Ex Com	Executive Committee
FARC	Armed Revolutionary Forces of Colombia
FDLR	Forces Démocratiques de la Libération du Rwanda
FIDH	International Federation for Human Rights
GDR	German Democratic Republic
HURIFO	Human Rights Focus
HURISA	Human Rights Institute of South Africa
IACHR	Inter-American Court of Human Rights
IAP	International Association of Prosecutors
IBA	International Bar Association
IBE	Inference to the Best Explanation
ICC	International Criminal Court
ICCPP	ICC's Witness Protection Programme
ICCPR	International Covenant on Civil and Political Rights
ICD	International Crimes Division
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTJ	International Centre for Transitional Justice

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHAT	Iraqi Historical Allegations Team
ILC	International Law Commission
IMT	International Military Tribunal
IND	Dutch Immigration and Naturalization Services
IOM	Independent Oversight Mechanism
IRA	Individual Risk Assessment
IRS	Initial Response System
ISS	Institute for Security Studies
JCCD	Jurisdiction, Complementarity, and Cooperation Division
JCE	joint criminal enterprise
KLA	Kosovo Liberation Army
LHR	Lawyers for Human Rights
LRA	Lord's Resistance Army
LCRC	Legal Resources Centre
MICT	Mechanism for International Criminal Tribunals
MINUSMA	Multidimensional Integrated Stabilization Mission in Mali
MONUSCO	United Nations Mission in the DRC
MoU	Memorandum of Understanding
MRN	Media Review Network
MSF	<i>Médecins Sans Frontières</i>
NCP	National Congress Party
NGOs	Non-governmental organizations
NOW	Netherlands Organization for Scientific Research
NPA	National Prosecution Authority
ODM	Orange Democratic Movement
OPCD	Office of Public Counsel for the Defence
OPCV	Office of Public Counsel for the Victims
OSCE	Organization for Security and Co-operation in Europe
OSF-SA	Open Society Foundation of SA
OSISA	Open Society Initiative of Southern Africa
OSP	Organized Structure of Power
OTP	Office of the Prosecutor
PCIJ	Permanent Court of International Justice
PCLU	Priority Crimes Litigation Unit
PIDS	Public Information and Documentation Section
PSA	Palestinian Solidarity Alliance
PTC	Pre-Trial Chamber
RoC	Regulations of the Court
ROK	Republic of Korea
RPE	Rules of Procedure and Evidence
RTLM	<i>Radio télévision libre des mille collines</i>
RUF	Revolutionary United Front
SAHA	South African History Archive
SAHRC	South African Human Rights Commission
SALC	Southern African Litigation Centre
SAPS	South African Police Services

SCSL	Special Court for Sierra Leone
SOFA	Status of forces agreements
SOMA	Status of mission agreements
SPLM	Sudan People's Liberation Movement
SRA	Security Risk Assessment
STL	Special Tribunal for Lebanon
SWGCA	Special Working Group on the Crime of Aggression
TC	Trial Chamber
TRNC	Turkish Republic of Northern Cyprus
UN	United Nations
UNAMID	African Union-United Nations Hybrid Operation in Darfur
UNGA	UN General Assembly
UNHAS	UN Humanitarian Air Service
UNICRI	United Nations Interregional Crime and Justice Research Institute
UNSC	United Nations Security Council
UNSMIS	United Nations Supervision Mission in Syria
UPC	Union of Congolese Patriots
UPDF	Ugandan People's Defence Forces
UPR	Universal Periodic Review
VCLT	Vienna Convention on the Law of Treaties
VPRS	Victims Participation and Reparations Section
VWRG	Victims' Rights Working Group
VWU	Victims and Witnesses Unit
WCL	Washington College of Law
WCRO	War Crimes Research Office
WGLL	Working Group on Lessons Learnt

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Introduction

More than a Court, Less than a Court, Several Courts in One?

The International Criminal Court in Perspective

*Carsten Stahn**

1. The International Criminal Court and Crisis

The International Criminal Court (ICC) has been in existence for more than a decade. It has faced criticisms from many sides in its lifespan.¹ Shortcomings and risks of failure have been associated with the Court for almost two decades, yet it still stands, partly as a beacon of hope and partly as a symbol of deception. Before its establishment, the Court was said to have been crippled at birth due to its limited jurisdiction and lack of means of enforcement. This was gently captured by the image of the ‘giant without arms and legs’.² After entry into force of the Rome Statute, the ICC managed to gain significant importance in international law and international relations, despite opposition or divided support by major powers (e.g. the USA, Russia, China). In particular, the Statute has seen unexpected successes. Although it is a compromise text with many imperfections,³ it serves as a *primus inter pares* among treaty instruments in international criminal justice. It has been applied as a model in many contexts, judicial and non-judicial settings, inside and outside the ICC. But the ICC as an institution has stepped from crisis to crisis. Critiques have evolved in cycles.

When the Court started its activities, it was diagnosed with ‘teething’ problems.⁴ First, there were problems related to timing issues, such as the long start-off phase, delayed action in relation to Darfur, and political mistakes, such as the London press conference of the Prosecutor with President Museveni at the beginning of the Ugandan situation. At five years, the ICC was criticized for performing poorly in comparison to the *ad hoc* tribunals,⁵ with its failure partly being tied to performance problems. It was deplored that the Court had not ‘yet’ developed a deterrence capability.⁶

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¹ For an account, see D Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014).

² See A Cassese, ‘On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’ (1998) 9 *European Journal of International Law* 13.

³ See G Bitti, Chapter 21 in this volume.

⁴ See A Cassese, ‘Is the ICC Still Having Teething Problems?’ (2006) 4 *Journal of International Criminal Justice* 434.

⁵ See C Hall, ‘Developing and Implementing an Effective Positive Complementarity Prosecution Strategy’ in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (The Hague: Brill, 2008), 219, 225.

⁶ See C Bassiouni, ‘The ICC—Qui Vadis?’ (2006) 4 *Journal of International Criminal Justice* 421.

Dilemmas became more apparent with the commencement of the first trials. With its focus on one defendant and relatively narrow charges, the *Lubanga* case marked an apparently easy start for the Court. But it was on the verge of collapse throughout trial due to disputes over provider confidentiality and disclosure of exculpatory evidence, as well as non-disclosure of the identity of intermediaries by the Office of the Prosecutor (OTP).⁷ These problems led to several stays of proceedings that nearly derailed the case. Other cases have advanced rather slowly. The docket of preliminary examinations has grown significantly over the years, with some high-profile situations, such as Iraq, Palestine, and Ukraine.⁸ Several preliminary examinations (e.g. Colombia, Afghanistan) have endured for years, with few signs of progress. In Uganda, Darfur, and Libya, the issuance of warrants of arrest was perceived either as an obstacle to peace negotiations (e.g. the Juba talks, Sudanese peace negotiations) or as an impediment to a quick ending of conflict (e.g. exile for Gaddafi).⁹ In cases where proceedings went ahead, ICC procedure triggered a flood of motions which engaged armies of lawyers from parties (Defence, Prosecution) and participants (Victims, States). In several instances, charges were not confirmed at pre-trial stage (e.g. *Mbarushimana, Abu Garda, Kosgey and Hussein Ali*), were withdrawn by the Prosecution (e.g. *Muthaura*), or failed to be supported by necessary evidence at trial (e.g. *Ndugjolo Chui, Kenyatta*). The *Katanga* conviction remained deeply split.¹⁰

This outcome is a partial victory for Defence strategies and testimony of the application of standards of fairness in proceedings, but it has caused significant concern relating to the work of the Prosecutor. The Prosecutor was blamed for outsourcing investigations, ill-founded speculation on political outcomes, and pursuing too much, too thinly.¹¹ Non-governmental organizations (NGOs) that counted among the most loyal supporters of the Court have partly turned against the Court. Prosecutorial strategy and means and modalities of investigations were called into question.¹² The effectiveness of the Court as a whole was more openly questioned.¹³ This has triggered some review and internal reform, reflected in the Strategic Plan (2012–15) of the OTP¹⁴ and the ‘Lessons Learned’ initiative.¹⁵

More fundamentally, some of the very foundations of ICC justice have come under challenge. Performance problems were followed by impact and perception problems. Victims were gradually frustrated by lack of communication, limited charges, delays, or

⁷ Alex Whiting, Chapter 40 in this volume.

⁸ P Seils, Chapter 13 in this volume. On Palestine, see Chapter 8, in this volume.

⁹ L Vinjamuri, Chapter 2 in this volume.

¹⁰ See C Stahn, ‘Justice Delivered or Justice Denied: The Legacy of the Katanga Judgment’ (2014) 12 *Journal of International Criminal Justice* 809.

¹¹ S Sácouto and K Cleary Thompson, Chapter 14 in this volume; J Turner, Chapter 17 in this volume.

¹² N Hayes, Chapter 32 in this volume.

¹³ See Expert Initiative on Promoting Effectiveness at the International Criminal Court, December 2014, at <<http://ilawyerblog.com/wp-content/uploads/2014/12/Final-Report-Swiss-Expert-Group-2-Dec-2014.pdf>>.

¹⁴ OTP, Strategic Plan 2012–15, 11 October 2013, at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf>.

¹⁵ P Ambach, Chapter 50 in this volume.

outcomes of proceedings.¹⁶ Some judges contested the feasibility of criminal proceedings to provide an appropriate forum for restorative justice.¹⁷ Ten years on,¹⁸ ICC selection policy has been criticized for its reluctance to confront ‘hard cases’ that threaten powerful states,¹⁹ and its inability to address the relationship between economic interests and criminal networks.²⁰ In Africa, the ICC was perceived as an instrument of Western politics or as an impediment to regional solutions.²¹ The Court faced similar critiques to former colonial regimes, namely, equality concerns (e.g. afro-centricity), sovereignty objections (e.g. immunity of acting heads of states), and identity challenges. It prompted unintended side effects, such as threats of African States to withdraw from the Statute and the extension of the jurisdiction of the African Court on Justice and Human Rights to provide a regional solution to ‘African problems’.

Initially, the Court was praised as an illustration of the obligation-related side of sovereignty, i.e. the claim that domestic sovereignty becomes answerable internally and externally²² or even subject to jurisdictional substitution. But situations such as Kenya show that the ICC system is struggling to put this promise into practice. Investigation, evidence, and courtroom problems coincided with deep political controversies over the feasibility and impact of ICC action. The Prosecutor used its bargaining power and *proprio motu* authority to demonstrate that electoral violence is an impermissible means of maintaining state authority. But this ambition failed due to a number of interrelated factors, including evidentiary shortcomings, miscalculation of the effects of the charges, shifting public opinion over the ICC, witness problems, and cooperation struggles. Problems became thus more systemic. The termination of proceedings against Kenyatta and the deadlock in the *Ruto* case call into question a fundamental premise of ICC justice, namely, its very ability to successfully pursue cases against the will of a government in power.

A certain amount of faith was placed in the idea that the Court could overcome some its weaknesses (e.g. lack of jurisdiction over non-States Parties, cooperation problems) through support and interaction with the Security Council. But this relationship has been marked by friction and disappointment.²³ The Council effectively used the ICC as a drop box for unsettled human security problems in Darfur and Libya, while providing it with very limited means to succeed. None of the existing referrals have resulted in trial proceedings. The close nexus between the Security

¹⁶ On dichotomies and challenges, see S Kendall and S Nouwen, ‘Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood’ (2014) 76 *Law and Contemporary Problems* 235.

¹⁷ See C Van den Wyngaert, ‘Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge’ (2012) 44 *Case Western Reserve Journal of International Law* 475.

¹⁸ See A Ušacka, ‘Promises Fulfilled? Some Reflections on the International Criminal Court in its First Decade’ (2011) 22 *Criminal Law Forum* 473.

¹⁹ See W A Schabas, Chapter 16 in this volume; id. ‘The Banality of International Justice’ (2013) 11 *Journal of International Criminal Justice* 545.

²⁰ See M Delmas-Marty, ‘Ambiguities and Lacunae: The International Criminal Court Ten Years On’ (2013) 11 *Journal of International Criminal Justice* 553.

²¹ O Maunganidze and A Plessis, Chapter 4 in this volume.

²² B Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003) 6.

²³ R Dicker, Chapter 1 in this volume; D Ruiz Verduzco, Chapter 3 in this volume. See also C Stahn, ‘Marital Stress or Grounds for Divorce? Re-Thinking the Relationship Between R2P and International Criminal Justice’ (2015) 26 *Criminal Law Forum* 13.

Council referral in Libya and the politics of intervention has triggered calls for greater separation of ICC justice and collective security, in order to protect the independence of the Court.²⁴ In December 2014 the ICC Prosecutor openly criticized the Council's lack of support and follow-up action in relation to Darfur, noting that there would be 'little or nothing to report' to the Council in the foreseeable future 'unless there is a change of attitude and approach'.²⁵

2. Refining Premises and Narratives

This account of the first decade appears to present a rather grim picture of the *status quo*. As David Luban put it in 2013, the 'honeymoon' is over.²⁶ Much of the optimism associated with the Court at the turn of the millennium has turned into realism and, at times, scepticism. One might thus be tempted to say that, rather than managing crisis, the Court has been in a permanent state of crisis since its inception. But this judgment is deceptive. Reality is more nuanced.

2.1 Reality and perception

There is a strong discrepancy between expectation and reality. From the outside, the Court is often viewed as a unitary entity; it is seen as one voice (i.e. Hague Justice²⁷), although it encompasses a spectrum of voices with partly competing interests. This unified makes the Court an easy target of criticism and vulnerable to unfair claims. The ICC is a highly diverse entity, with multiple identities. Its actions, outputs, and effects are the result of complex institutional processes and multiple dependent variables. It is misleading to criticize ICC effectiveness in relation to Court management or length of proceedings without determining relevant comparisons,²⁸ or taking into account resources and investment by the Assembly of States Parties.²⁹ Each situation is a universe of its own in terms of crime-base, complexity, structure, and context. Each stage of proceedings, i.e. preliminary examination, investigation, pre-trial,³⁰ trial,³¹ and appeal,³² has its own functions and methodologies. Outcomes cannot merely be judged by quantitative considerations, such as the number of convictions. Nor are ICC proceedings easily comparable to those of the highest courts in municipal systems or

²⁴ See L Arbour, 'Doctrines Derailed? Internationalism's Uncertain Future', at <<http://www.crisisgroup.org/en/publication-type/speeches/2013/arbour-doctrines-derailed-internationalism-s-uncertain-future.aspx>>.

²⁵ See Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), 12 December 2014, at <<http://www.icc-cpi.int/iccdocs/otp/stmt-20threport-darfur.pdf>>.

²⁶ D Luban, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice' (2013) 11 *Journal of International Criminal Justice* 505.

²⁷ On geography images, see D Koller, '... and New York and The Hague and Tokyo and Geneva and Nuremberg and ...: The Geographies of International Law' (2012) 23 *European Journal of International Law* 97.

²⁸ S Ford, Chapter 5 in this volume.

²⁹ J O'Donohue, Chapter 6 in this volume.

³⁰ I Stegmiller, Chapter 35 in this volume.

³¹ H Friman, Chapter 36 in this volume.

³² V Nerlich, Chapter 38 in this volume.

other international criminal courts and tribunals. ICC action is unique in some respects³³ and defies external comparison. It can only be viably judged over time.

All organs of the Court have different roles, functions, and constituencies which are governed by different checks and balances, hierarchies, and institutional pressures. Not everything that happens inside the Court is visible to the outside. Controversies on specific issues (e.g. investigation practices, disclosure,³⁴ Regulation 55,³⁵ function of the pre-trial) show that failure by one entity may mean partial success or even victory for another, or be an indication that judicial safeguards work. ICC action must thus be judged systemically, i.e. with regard to operational processes and institutional dynamics as a whole, rather than in an isolated fashion.³⁶

Most importantly, the Court is not a single court, but multiple courts in one.³⁷ It is first and foremost a criminal court, but it encompasses aspects of inter-state litigation (e.g. complementarity), civil litigation (e.g. reparation³⁸), human rights functions that go beyond fairness or fair trial protection (e.g. assessment and scrutiny of human rights violations), and certain general (prevention, deterrence³⁹) and specific security-related functions (e.g. protection of witnesses and victims⁴⁰). These functions involve different types of power⁴¹: coercive powers over individuals; formal and informal institutional powers (e.g. rules, procedures, decision-making affecting other actors); structural power, i.e. the ability to transform social reality through discourse and interaction; and productive power, i.e. the capacity to create new subjectivities (e.g. victim), stigmas (suspect, perpetrator), or labels (e.g. conflict,⁴² crimes) through action.⁴³

Most criticisms have been voiced in relation to the ICC's functioning as a criminal institution. With three final judgments, the trial record of the Court in its first decade is modest.⁴⁴ Existing trials (e.g. *Lubanga*, *Njudgolo Chui*, *Katanga*, *Bemba*) have presented challenges relating to fairness and expeditiousness of proceedings. While there are some indications that the ICC as a 'system of justice' enhances the prospects for greater application and adherence to law,⁴⁵ it remains difficult to provide hard scientific grounding for prevention and deterrence on the ground. Involvement of the Court in ongoing conflict has remained divisive in light of conflicting priorities and

³³ On uniqueness and ICC procedure, see C Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' (2003) 1 *Journal of International Criminal Justice* 603.

³⁴ K Khan and C Buisman, Chapter 41 in this volume.

³⁵ K Heller, Chapter 39 in this volume.

³⁶ On the ICC and the role of practice, see J Meierhenrich, 'The Practice of International Law: A Theoretical Analysis' (2014) 76 *Law and Contemporary Problems* 1.

³⁷ F Jessberger and J Geneuss, 'The Many Faces of the International Criminal Court' (2012) 10 *Journal of International Criminal Justice* 1081; G P Fletcher and J D Ohlin, 'The ICC—Two Courts in One?' (2006) 4 *Journal of International Criminal Justice* 428.

³⁸ C McCarthy, Chapter 46 in this volume.

³⁹ N Grono and A de Courcy Wheeler, Chapter 47 in this volume.

⁴⁰ M Eikel, Chapter 44 in this volume.

⁴¹ M Barnett and R Duvall, 'Power in International Politics' (2005) 59 *International Organization* 39.

⁴² A Cullen, Chapter 30 in this volume.

⁴³ On stigmatization, see F Mégret, 'Practices of Stigmatization' (2014) 76 *Law and Contemporary Problems* 287.

⁴⁴ H Friman, Chapter 36 in this volume.

⁴⁵ For a study of complementarity, see C Stahn and M El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011).

competing interests of victim groups. Fears have been expressed that ICC intervention marginalizes or stifles other creative ways of addressing situations of mass atrocity.⁴⁶

Despite these concerns, the ICC remains a persistent object of faith.⁴⁷ The threat of ICC investigation and prosecution is routinely used as a political argument (e.g. as a strategic tool), a human rights instrument (e.g. as leverage for international attention), or a factor mitigating guilt or failure. Its role navigates between salvation and apology. The ICC is part and parcel of justice discourse in almost any conflict situation. There is a quasi-automatic reflex by some actors to view the ICC as a solution to human security dilemmas. States and the Security Council use ICC jurisdiction to solve all kinds of societal conflict, ranging from the protection of civilians to electoral politics, gender biases, or specific patterns of victimization. Humanitarian actors promote ICC engagement to draw attention to human rights abuses or to strengthen accountability strategies. The imagined vision of the Court often transcends its actual capacity. The Court is presented or perceived as a giant, although it might *de facto* be no more than a paper tiger. Where ICC scrutiny is not present or not visible enough, its absence is partly deplored as a loss or even a failure (e.g. Syria, North Korea), triggering calls for alternative forms of action (e.g. fact-finding, hybrid courts).

The relationship between the ICC and human rights protection is governed by a similar paradox. The Court has a dual face: it is both a protective agent and a potential violator of human rights. The ICC has transformed dimensions of human rights discourse. Some scholars argue that international criminal trials improve human rights protection, e.g. through their normative impact and their catalytic effect on domestic justice and accountability approaches.⁴⁸ Certain victims and human rights actors associate participation and reparation with restorative features, such as material support or transformation of social reality, but ICC proceedings have also revealed significant human rights dilemmas.

Ethical dilemmas caused by ICC intervention, including agency, disengagement,⁴⁹ and care after trial, remain underdeveloped. Many of the victims recruited by intermediaries and NGOs have fallen off the radar after communication with the Court due to capacity and logistical problems, lack of nexus to the charges, and limited follow-up. The treatment of defendants has caused human rights concerns. The Court has claimed that ‘deprivation of liberty should be an exception and not the rule’.⁵⁰ But due to the unwillingness of States to receive suspects, it has been put in a decision to hold defendants in custody, despite doubts as to the need for continued detention.⁵¹

⁴⁶ S Nouwen and W Werner, ‘Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity’ (2014) 12 *Journal of International Criminal Justice* 157.

⁴⁷ On the role of faith, see C Stahn, ‘Between “Faith” and “Facts”: By What Standards Should We Assess International Criminal Justice?’ (2012) 25 *Leiden Journal of International Law* 251.

⁴⁸ E.g. K Sikkink, ‘The Justice Cascade: How Human Rights Prosecutions are Changing World Politics’ (New York: Norton, 2011).

⁴⁹ E Evenson and A Smith, Chapter 49 in this volume.

⁵⁰ A Dumbyte, Chapter 42 in this volume, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, *Situation in the Central African Republic, Bemba*, PTC II, ICC-01/05-01/08-475, 14 August 2009, para. 77.

⁵¹ Ibid.

Similar dilemmas have arisen in relation to witnesses testifying before the ICC. Relocation of witnesses after testimony remains a continuing problem, since it requires States' consent and cooperation.⁵² Asylum claims by detained witnesses in the Netherlands have created a 'catch 22' situation.⁵³ The Court found that it had no jurisdiction over the Detained Witnesses' asylum claims, 'as they fall within the sole purview of The Netherlands'.⁵⁴ Witnesses were held in the Court's detention unit for more than two years after completion of their testimony, until Dutch authorities agreed to host the witnesses once the decision on their asylum applications had been made.

2.2 Productive and irreconcilable tensions

The mandate of the Court is shaped by tensions and contradictions. Some of the Court's lofty primary goals (e.g. ending impunity, prevention) can at best be understood as optimization commands. Not all tensions can be solved. With its move from the periphery to the centre, the Court is likely to disappoint one group or entity, whatever it does.

Some alleged symptoms of crisis are productive tensions. One example is the interplay between law and politics.⁵⁵ The debate has moved in artificial binaries. In some cases (e.g. Darfur, Columbia), ICC action has been perceived as undue external interference by States; in other cases, inaction has been branded as undue non-interference. The Court has sought to gain legitimacy for unpopular choices by relying on its role as legal agent following the evidence, or shifting the burden onto others such as the UN (e.g. Palestine⁵⁶). This strict separation between political and legal space is partly misleading.⁵⁷ Political choice and engagement with politics are an inherent and legitimate part of situation- and case-related analysis, such as selection strategy, assessment of context, arrest, charging policy, or security assessments. Reliance on legal formalism is not always the best strategy to demonstrate judicial or prosecutorial independence. Court inaction may be interpreted as a false sign of endorsement of violations by actors not targeted. Ultimately, ICC justifications may be more convincing and credible if difficult choices are properly explained and grounded in legal and policy

⁵² M Eikel, Chapter 44 in this volume. On preventive relocation, see Judgment on the appeal of the Prosecutor against the 'Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules' of Pre-Trial Chamber I, *Katanga and Ngudjolo Chui, Situation in the Democratic Republic of Congo*, ICC-01/04-01/07-776, AC, 26 November 2011.

⁵³ J van Wijk and M Cupido, Chapter 43 in this volume, See G Sluiter, 'Shared Responsibility in International Criminal Justice: The ICC and Asylum' (2012) 10 *Journal of International Criminal Justice* 661.

⁵⁴ Order on the implementation of the cooperation agreement between the Court, and the Democratic Republic of the Congo concluded pursuant to Art 93(7) of the Statute, *Njudgolo Chui, Situation in the Democratic Republic of the Congo*, ICC-01/04.02/12 A, AC, 20 January 2014, para. 24.

⁵⁵ K Rodman, 'Justice as a Dialogue between Law and Politics: Embedding the International Criminal Court within Conflict Management and Peacebuilding' (2014) 12 *Journal of International Criminal Justice* 437.

⁵⁶ M El Zeidy, Chapter 8 in this volume.

⁵⁷ S Nouwen and W Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941.

considerations, rather than legal categories (e.g. gravity) that do not always offer a proper fit.

A second productive tension is the relationship between the ICC and other jurisdictions. The ICC continues to be presented as a threat to domestic or other justice mechanisms. Overall, this is a healthy phenomenon. The Statute establishes a ‘system of justice’, and mandates the pursuit of justice but leaves some leeway as to where, when, and how by virtue of the complementarity principle. Complementarity does not require uniformity.⁵⁸ Competition over the choice of forum or the establishment of additional regional mechanisms illustrates that the system works. One of the main challenges of the future is to ensure that the Court and other jurisdictions positively complement each other’s strengths, instead of mirroring each other’s weaknesses.⁵⁹ There is a need to put in place structures and forms of action that allow two-way dialogue, reception, translation, and possible internalization of accountability strategies.⁶⁰ Otherwise, ICC justice may reproduce narratives that remain detached from local constituencies or leave superficial footprints.

Similar considerations apply in relation to the interplay between retributive and restorative justice.⁶¹ The Statute contains traces of both and requires both; the two work in tandem. Restorative dimensions are typically invoked as a comparative advantage of the ICC when the case for ICC engagement is made. The focus on retributive features moves to the forefront when limitations of the Court are explained, or when the budget is negotiated. The essential question is what forms of punishment and sanction⁶² ICC justice should allow in a specific case, and what restorative features it should promote.

Other tensions are more difficult to reconcile. Victim participation is one example,⁶³ marked by an inherent agency dilemma. The Court needs to satisfy conflicting imperatives, namely, to give voice to victims and mediate that voice through representation, neither of which can be sacrificed for the benefit of the other without altering the statutory framework. Another example is the peace versus justice debate.⁶⁴ In six out of eight situations (Democratic Republic of Congo, Central African Republic, Uganda, Darfur, Libya, and Mali) the Court has acted in ongoing violent political conflict. These challenges cannot be addressed solely on the premise that there can be no lasting peace without justice. ICC intervention causes immediate and mid-term effects that need to be more fully understood. The underlying tensions can be mitigated, but they cannot be solved, let alone by the ICC. They require continuing inquiry from both angles—peace and justice—and their respective constituencies. One of the challenges of the future is not to buy too easily into entrenched dichotomies, but rather to develop the shades of grey.

⁵⁸ C Stahn, Chapter 10 in this volume.

⁵⁹ H Van der Wilt, Chapter 9 in this volume. See also S Nouwen, *Complementarity in the Line of Fire* (Cambridge: Cambridge University Press, 2013), 400 ('catalysing effect paradox').

⁶⁰ O Bekou, Chapter 48 in this volume.

⁶¹ C Garbett, ‘The Truth and the Trial: Victim Participation, Restorative Justice, and the International Criminal Court’ (2013) 16 *Contemporary Justice Review* 193. See also Chapter 2 in this volume.

⁶² M deGuzman, Chapter 37 in this volume. ⁶³ S Vasiliev, Chapter 45 in this volume.

⁶⁴ J Clark, ‘Peace, Justice, and the International Criminal Court: Limitations and Possibilities’ (2011) 9 *Journal of International Criminal Justice* 521.

3. The Law in Motion

The law of the ICC is clearly in motion. The ICC Statute differs from the legal framework of other international criminal courts and tribunals by its high degree of regulation and its commitment to precision (e.g. Elements of Crime). But the diversity of decisions, legal motions, and policy specifications in the ICC context shows how many issues have been left open or are in need of interpretation or clarification.

The work of the OTP has been subject to multiple criticisms, but the OTP deserves considerable praise for its transparency in clarifying prosecutorial strategy. The Statute and the Rules of Procedure and Evidence are relatively silent on monitoring and assessment processes, criteria for selection of situations and cases, the scope of prosecutorial discretion, and options for judicial review. The OTP has shaped many new directions and approaches through policy papers and strategies that have been open to consultation and dialogue with NGOs and other stakeholders, and these serve as a paradigm example of how informal processes and subsequent institutional practice may inform treaty clarification and evolution.

In the context of the *ad hoc* tribunals, gaps in the law were closed through regulatory law-making by judges or Appeals Chamber jurisprudence. In the ICC context, the legal framework is both more predetermined and more decentralized. ICC practice has reversed the methodology of the International Criminal Tribunal for the former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR). The ICC Appeals Chamber has exercised caution and restraint,⁶⁵ while pre-trial chambers have served as forces of innovation and creation. Some dissents at pre-trial or trial (e.g. Judge Kaul on the ‘policy’ requirement of crimes against humanity,⁶⁶ Judge Ušacka on the ‘same conduct test’,⁶⁷ or Judge Van den Wyngaert on standards of proof⁶⁸ or construction of modes of liability⁶⁹) count among the most significant contributions to jurisprudence.

The ICC has been relatively introverted. With a few exceptions (e.g. application of the ‘overall control’ test in the qualification of armed conflict, interpretation of material elements of crimes), the ICC has been cautious in relying on external sources. The most striking deviation from other courts and tribunals is the construction of modes of liability under Article 25. The ICC has devised a system which distinguishes principal and accessory liability by the contribution and degree of control over the crime, rather than subjective elements.⁷⁰ It has also considerably developed the concept of indirect perpetration,⁷¹ and distinguished ‘common purpose’ liability under Article 25(3)(d) from the concept of ‘Joint Criminal Enterprise’,⁷² applied by UN tribunals.

At the same time, there are striking parallels to other international courts and tribunals. Like other courts, the ICC struggles with certain issues, such as charging

⁶⁵ V Nerlich, Chapter 38 in this volume.

⁶⁶ D Robinson, Chapter 28 in this volume.

⁶⁷ C Stahn, Chapter 10 in this volume.

⁶⁸ S De Smet, Chapter 34 in this volume.

⁶⁹ E Van Sliedregt, Chapter 20 in this volume.

⁷⁰ J D Ohlin, Chapter 21 in this volume; H Olásolo and E Carnero Rojo, Chapter 23 in this volume.

⁷¹ T Weigend, Chapter 22 in this volume.

⁷² K Ambos, Chapter 24 in this volume.

practice,⁷³ disclosure, including disclosure of exculpatory evidence, fact-finding at trial, and sentencing.⁷⁴

4. Structure and Content of the Book

This book examines ICC practice, including its reception and critiques. It differs partly from commentaries,⁷⁵ since it does not merely present the *status quo* of law and jurisprudence, but also seeks to present ICC practices, approaches, and challenges in context. Contributors combine analysis with proposals to refine or improve the law. The chapters reflect different, and sometimes divergent, positions on key aspects of ICC practice. The work includes academic voices and practitioners from different contexts (e.g. Judiciary, Prosecution, Defence, NGOs). Some contributions (e.g. Chapters 15 and 16, Chapters 40 and 41) stand in dialogue with each other in order to reflect different strands of opinion.

This work is organized by six major themes that will continue to evolve in years to come: (i) the context of ICC investigations and prosecutions; (ii) the relationship to domestic jurisdictions; (iii) prosecutorial policy and practice; (iv) the ICC's applicable law; (v) fairness and expeditiousness of proceedings; and (vi) impact and lessons learned.

4.1 Context, challenges, and constraints

Part I of the book puts existing controversies and dilemmas into perspective, and analyses the four major challenges that the Court faced in its operation in its first decade: the interplay with collective security and regional organizations, engagement in ongoing conflict, funding, and governance issues.

In his opening chapter, Richard Dicker addresses the double standards of international criminal justice. He argues that more equal application of the ICC Statute may be facilitated through greater coherence and less selectivity in Security Council decisions on referrals, changing and strengthening the substantive text of referring resolutions, and better follow-up. Leslie Vinjamuri examines the tension between the ICC and peace and justice. She endorses justice intervention in principle, but argues that it should be deployed in circumstances where it is likely to deliver both more peace and more justice. Deborah Ruiz Verduzco analyses the controversial relationship between the ICC and the Security Council. She claims that the ICC has been predominantly treated as an instrument of the Council, to the detriment of two other modes of interaction: institutional autonomy and strengthening of ICC action through collective security structures. Chapter 4 explores the relationship between the Court and the

⁷³ C-F Stuckenberg, Chapter 33 in this volume; K Heller, Chapter 39 in this volume.

⁷⁴ M deGuzman, Chapter 37 in this volume.

⁷⁵ A Cassese, P Gaeta, and J R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002); O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court Observers' Notes, Article by Article*, 2nd edn (Baden-Baden: Nomos, 2008); W A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010).

African Union, and discusses the origin and foundation of divergent positions (e.g. head of state immunity and cooperation duties) and the extension of jurisdiction of the African Court on Justice and Human Rights. It cautions against an oversimplification of 'African' views, arguing that a broad understanding of complementarity emerging in Africa is key to the success of international criminal justice on the continent. Stuart Ford deals with the issue of funding and its relationship to effectiveness. His analysis suggests that the ICC is less efficient than the ICTY at conducting trials. He concedes that the structural differences between the two entities make it difficult to draw accurate comparisons. Chapter 6 examines the link between the Court and the Assembly of States Parties (ASP), and provides a differentiated picture. It argues that the ASP had a positive impact on some aspects of the law and practice, such as efficiency, accountability for misconduct, complementarity, and cooperation, and stresses that the ASP must respect the independence of the Prosecutor and the Judiciary, the importance of the work of the ICC, and the integrity of the Statute.

4.2 Relationship to domestic jurisdictions

Part II of the book examines the relationship of the ICC to domestic jurisdictions, which has come under challenge. In multiple situations (Democratic Republic of Congo, Kenya, Libya), the Court has been criticized for transforming complementarity into primacy through its reading of Article 17 and the interpretation of the 'same conduct' test. Jurisprudence on jurisdictional issues, immunity, and the relationship to non-States Parties remain contested. This second part considers the core issues of debate: jurisdictional and conceptual dilemmas related to the distinction between 'situation' and cases, the interpretation of complementarity, and cooperation.

Rod Rastan analyses the jurisdictional regime of the ICC, including jurisdiction *ratione materiae*, *ratione personae*, *ratione loci*, and *ratione temporis*. He clarifies that jurisdictional parameters are relevant not only for the Court's competence, but also for the nexus between specific alleged acts and the situation under consideration. Mohamed El Zeidy examines dilemmas of declarations under Article 12(3) based on discussion of the case of Palestine. He argues that the Court should take responsibility for resolving questions of a purely judicial nature (jurisdictional questions), instead of 'dumping' them on the United Nations or on the ASP. Harmen van der Wilt addresses controversies over the practice of self-referrals in Chapter 9, claiming that the Court has largely side-stepped the issue of inability in its admissibility assessments. Chapter 10 revisits admissibility challenges, and argues that the modalities of deference to domestic jurisdiction need to be refined in order to take into account the process-based nature of complementarity and challenges in situations of transition. It suggests that ICC practice should pay greater attention to 'qualified deference', i.e. management of parallel proceedings, strengthening of monitoring structures, and clarification of conditions of deference. Robert Cryer examines problems arising in the relationship between the ICC and non-States Parties. He argues that principles such as the duty not to evade treaty obligation under the UN Charter, *ex injuria jus non oritur*, or estoppel might provide justification for the Court to disregard immunity in the context of Security Council referrals. He concludes that the ICC is largely

dependent on the goodwill of non-States Parties in the absence of coercive powers or Council support. Dov Jacobs addresses the relationship between immunities and State cooperation, including the interplay between Articles 27 and 98 of the Statute. He identifies possible legal avenues to circumvent the obstacles posed by immunities, which include reference to customary international law, analysis of the powers of the UN Security Council, and the Genocide Convention.

4.3 Prosecutorial policy and practice

ICC prosecutorial strategy has brought some innovations, in terms of analysis, investigative methods, or approaches to complementarity and cooperation. Particular aspects (e.g. selection criteria, use of intermediaries, sequencing of investigations, disengagement strategy) have been subject to criticism, and some are under review. Part III of this book examines the principles and policies of ICC prosecutorial practice, combining perspectives from within and outside the Court. It covers key aspects of prosecutorial strategy, including preliminary examination, investigation, selection of situations and cases, and prosecutorial accountability.

Preliminary examination has turned into one of the most important and powerful instruments of prosecutorial practice.⁷⁶ The OTP has been criticized for opening too many situations without follow-up and lacking effectiveness in promoting national proceedings. Paul Seils, former Senior Analyst at the OTP, proposes an adjustment of policies. He argues that the OTP should make more constructive use of ambiguity, keep situations under investigation until the State has taken reasonable steps to address cases, and take a more assertive stand on the analysis of national proceedings. Chapter 14 examines problematic aspects of investigative practices that have been identified by the judges of the Court and outside observers, and offers targeted recommendations to improve organization and administration of the OTP, investigative teams, and collection of evidence. Fabricio Guariglia and Emeric Rogier provide an OTP perspective on the practice and criteria guiding the selection of situations and cases, noting that cases chosen should present, whenever possible, a representative sample of forms of victimization. They defend a wide conception of prosecutorial discretion under Article 53, arguing that disagreements as to where the Prosecutor is focusing her investigative and prosecutorial efforts are outside the ambit of judicial review. William Schabas presents a different perspective. He criticizes the coherence of prosecutorial choices and charging practice based on an analysis of ICC criteria (e.g. gravity) and methods, and argues that existing practice has made the ICC vulnerable to criticisms of selective justice and politicization, for example with respect to Palestine and Iraq. Jenia Turner addresses the issue of accountability of prosecutors, which is only randomly treated in practice. She argues that the ICC should adopt a structured balancing approach in relation to prosecutorial misconduct, including

⁷⁶ OTP, Policy Paper on Preliminary Examinations, November 2013, at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf>.

internal bureaucratic controls within the OTP, judicial intervention, and disciplinary measures by the ASP, the Independent Oversight Mechanism (IOM), and national or international bar associations.

4.4 The ICC and its applicable law

The subsequent part of the book is devoted to the ICC and its applicable law. ICC practice offers fresh perspectives on the theorization and conception of crimes, charges, and individual criminal responsibility. This jurisprudence has repercussions for domestic law, criminal theory, and the law of other international courts and tribunals. Part IV examines the contribution of ICC practice to three core areas: the treatment of sources, the interpretation of modes of liability, and the adjudication of ‘core crimes’. Finally, it reflects critically on the choices taken in existing practice.

Gilbert Bitti considers Article 21 and the hierarchy of sources. He shows that the drafters introduced a ‘multiplicity of hierarchies’, namely, a hierarchy between the different formal sources of law in Article 21(1), between formal and material sources of law in Article 21(3), and between the different sources of law described in Article 21(1)(a). He examines how the ICC interpreted and applied internal law and external sources. Joseph Powderly addresses statutory interpretation and the space for judicial creativity, and concludes that judges managed to breathe life into the law, despite the required focus on textualism and sources under Article 21 and the rule of strict construction under Article 22(2).

The following chapters provide a detailed discussion of individual criminal responsibility. Elies van Sliedregt introduces the structure of Article 25, its doctrinal specificities, and controversies over the application of the control of the crime theory in the *Lubanga*, *Katanga*, and *Bemba* cases. She pleads for greater grounding of existing interpretive approaches in the text of the Statute, cautioning that the law should not be moulded to fit the facts. Jens David Ohlin situates current doctrines on co-perpetration within a historical context and an emerging international *Dogmatik*. He argues that the ICC should not be blamed for relying on German doctrine, including Claus Roxin’s control theory. He submits that the Court has done insufficient work to justify its methodology and properly ground its importation of domestic criminal law theory within a general theory of sources of international law. Thomas Weigend analyses the concept of indirect perpetration, including ICC approaches on perpetration through an organization⁷⁷ and indirect co-perpetration. He argues that ICC practice should concentrate more closely on the key requirement of indirect perpetration: control over another person. Chapter 23 considers the accessory forms of liability under Article 25(3)(b) and (c), and examines the differences in the material and mental elements of ordering, instigating, planning, and aiding and abetting, also in relation to other international courts and tribunals. It shows that the accessory must make use of a ‘position of authority’ over the perpetrator only in cases of liability for ordering under

⁷⁷ C Roxin, ‘Crimes as Part of Organized Power Structures’ (2011) 9 *Journal of International Criminal Justice* 193.

Article 25(3)(b), while instigators, planners, and aiders and abettors are not required to enjoy the same degree of influence. Kai Ambos explores common purpose liability under Article 25(3)(d), including the relevant contribution required. He makes it clear that the provision is distinct from the concept of ‘Joint Criminal Enterprise’ as applied by the UN *ad hoc* tribunals, and that it does not cover responsibility for mere membership in a criminal or terrorist organization, as envisaged in Nuremberg. He argues that it is necessary to develop further normative criteria, such as legality/illegality or risk creation, in order to deal with the controversial problem of ‘neutral’ acts of assistance. Alejandro Kiss discusses the concept of command responsibility under Article 28, which was developed to hold individuals in positions of authority responsible for mass criminality. He covers the unique features of the ICC regime and main legal controversies, including the superior–subordinate relationship, the requirement of effective control, the duties imposed on commanders and superiors, the role of causation, and the mental element. This contribution is followed by an in-depth treatment of the mental elements of crimes by Mohamed Badar and Sara Porro in Chapter 26. The authors discuss ICC interpretation of Article 30, including the treatment of *dolus eventualis*, recklessness, and wilful blindness, as well as the implications of the opening clause (‘Unless otherwise provided’). They show that the ICC contains a strict regime on *dolus*, which excludes extensive forms of risk-taking.

Subsequent contributions deal with different categories of crimes and charging practice. The concept of genocide has only received marginal attention in ICC practice. Claus Kress discusses the definition, structure, and elements of the crime in light of the *Bashir* jurisprudence. His analysis supports the view that genocide requires the existence of a real danger for the targeted group and the need for the existence of a planned genocidal campaign. He criticizes the superficial treatment of the intent versus knowledge debate in the Pre-Trial Chamber decision on *Bashir*, and argues in favour of a knowledge-based approach, which embodies the concept of realistic genocidal intent, using the *Eichmann* case as an example. Darryl Robinson treats the controversy over the interpretation of the policy element under crimes against humanity. In existing scholarship, most attention has been devoted to the question whether the organization behind a policy must be state-like. He focuses instead on broader problematic trends in the early jurisprudence of the ICC (e.g. *Gbagbo*, *Mbarushimana*), and argues that ICC jurisprudence has conflated policy with ‘systematic’ and infused the policy element with exceedingly formalized requirements or ulterior purposes. Michael Newton examines the war crimes provisions from a military perspective, showing that the structure of Article 8 and its accompanying Elements of Crimes were intentionally designed to comport with the historical understandings embedded in established *jus in bello*. He defends the view that certain compromises, such as the treatment of collateral damage under Article 8(2)(b)(iv), are grounded in international humanitarian law. He cautions against judicial creativity that might detach statutory interpretation from reality in combat. Chapter 30 examines the qualification of the nature of the armed conflict and its impact on the exercise of subject-matter jurisdiction over war crimes. The ICC relied significantly on concepts derived from case-law of the ICTY in the interpretation of the notion of armed conflict and the application of the ‘overall control test’. It concludes that maintaining the integrity of armed conflict

as a concept of international humanitarian law is one of the greatest challenges facing the Court in the longer term. The crime of aggression is analysed by Roger Clark, who was closely involved in the negotiation process. He presents details of the Kampala Amendments and the efforts to obtain the necessary ratifications. He concludes that States ratifying the Kampala Amendments should implement Article 8bis and its Elements as closely as possible, and provide jurisdiction at least over crimes by their own nationals.

The last two contributions in Part IV deal with charging practice. Niamh Hayes provides a critical perspective on ICC approaches relating to sexual and gender-based violence. She argues that the record of the ICC has been ‘just as fraught and frustrating as its predecessors’, despite innovations of the Statute and new hopes raised by the 2014 OTP Policy Paper on Sexual and Gender-Based Crimes.⁷⁸ According to her analysis, investigations and prosecutions suffered from deficient evidence and investigation strategies, uncertainties relating to modes of liability, and ‘conservative’ interpretations of crimes and legal characterizations by the Pre-Trial Chamber. Carl Friedrich Stuckenberg covers the problem of cumulative charges and convictions, which has not received enough attention in doctrine and practice. He makes the case that future practice should develop criteria beyond the ‘logical inclusion’ theory, to which the *Blockburger* and Čelebići tests refer.

4.5 Fairness and expeditiousness of proceedings

Criminal procedure has become ever more important and complex in past years,⁷⁹ and is a foundation of fairness and expeditiousness of proceedings. The procedural system of the ICC draws on features of common law and the Romano-Germanic tradition, but moves in many respects towards a *sui generis* regime. Part V examines pre-trial, trial, sentencing, appeals, as well as evidence and disclosure problems. It then reviews institutional practices relating to victims and witnesses and neglected problems, such as interim release.

The opening chapter by Simon De Smet discusses the issue of standard of proof which cuts across proceedings. He argues that determination of standards of proof involves two different elements: identification of the relevant model of judicial fact-finding, and a balancing exercise to determine where to set the applicable standard. He demonstrates that the subjective approach applied by the ICC makes it difficult to identify and correct mistakes, since it offers no benchmark for what is reasonable and what is not in the context of fact-finding. Ignaz Stegmiller analyses the confirmation of charges process at the ICC, which marks an intermediary phase between investigation and trial. The function and effectiveness of this mechanism remains contested. He argues that the confirmation decision should primarily serve as a filter

⁷⁸ OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014, at <<http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>>.

⁷⁹ See G Sluiter, H Friman, S Linton, S Vasiliev, and S Zappalà, *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013); C Safferling, *International Criminal Procedure* (Oxford: Oxford University Press, 2012).

to determine whether a case should be sent to trial; it might also contribute to trial preparation, but should not turn into a ‘mini-trial’ or pre-adjudicate guilt or innocence. Håkan Friman follows up with a general analysis of the relationship between pre-trial and trial, based on experiences in ICC practice. He takes the view that the trial forms the centre of gravity in criminal proceedings and that the Trial Chamber should be the ‘master of its own proceedings’, including crucial parts of trial preparation. Like Stegmiller, he argues that the Pre-Trial Chamber has a limited role in coordinating disclosure, redactions, or admissibility of evidence for the purpose of trial. Margaret deGuzman discusses dilemmas of sentencing in Chapter 37, and suggests that the ICC should develop a theory of proportionate punishment to increase the perceived legitimacy of its sentencing judgments. She takes the position that sentences should be better explained and aimed at global crime prevention, rather than at local justice objectives. Volker Nerlich examines the role and approaches of the ICC Appeals Chamber, including its marked differences to the *ad hoc* tribunals. He shows that the ICC Appeals Chamber has exercised judicial restraint in decision-making by adopting a strict approach to the ‘material effect’ requirement under Article 83(2) and providing minimal reasoning. He justifies this practice by several considerations, including the density of legal regulation at the ICC, the strategic advantage of step-by-step development of the law, which leaves room for growth, and the comparative lack of hierarchy among Chambers at the ICC.

The following contributions address particular procedural issues. Kevin Heller examines ICC practice in relation to Regulation 55. He argues that the Pre-Trial Chamber and the Trial Chamber have routinely applied the Regulation in a manner that undermines both prosecutorial independence and the accused’s right to a fair trial. Alex Whiting discusses disclosure problems from a prosecutorial perspective, and argues that imperfection is inherent in disclosure processes given the complexity of the task and institutional limitations. He notes that the ‘core of the disclosure’ can be provided in advance, but stresses the need for some continuing disclosure on a ‘rolling basis’ in light of gradual refinement and review of the Prosecution and the Defence cases. Karim Khan and Caroline Buisman provide a Defence perspective. They agree with Whiting that the OTP must ‘focus on devising an adequate disclosure system to manage … disclosure challenges’, but argue that a complete review of the current ICC disclosure regime is necessary, since it often remains difficult for the Defence to even grasp the factual matrix of the case. They propose firm and final deadlines and full disclosure as a rule. Chapter 42 addresses ICC practice in relation to interim release. It argues that existing jurisprudence fails to strike an appropriate balance between the right of the accused to liberty and the effective administration of justice, since it makes interim release *de facto* impossible. Judges should give greater importance to the conduct and personal circumstances of the defendant, rather than to factors that are beyond his/her control or common to all cases (e.g. advanced stage of proceedings, potential support for the defendant).

Chapters 43 and 44 discuss the role and protection of witnesses. Joris van Wijk and Marjolein Cupido examine the dispute over asylum applications of detained witnesses, and argue that the threat of future asylum applications could hamper the functioning of the ICC in light of the lack of coordination of different protection regimes. They

propose three possible solutions: protective measures for detained witnesses in their home countries; video-link testimony; and rogatory commissions—all of which retain a risk that detained witnesses will not testify. Markus Eikel analyses the ICC framework relating to protection of witnesses and identifies two main weaknesses of the Court’s protection system: lack of internal coordination and lack of external support (e.g. state cooperation, budgetary constraints). He proposes a comprehensive inter-organ approach for protective measures in order to improve the *status quo* of protection.

Chapters 45 and 46 cover victims who play a crucial role in ICC procedure. The input and status of victims as independent voices in ICC proceedings have triggered complex litigation. Sergey Vasiliev revisits ICC approaches towards victim participation, and argues that participation is inherently tied to collective forms of application, participation, and representation. He proposes a greater realignment with the Court’s criminal mandate, notably the determination of truth. Conor McCarthy addresses the ICC reparation regime, including early ICC practice, and the tension between fairness and consistency in the treatment of victims and the effectiveness of remedies. He argues that reparations and social or humanitarian assistance serve different purposes that should be carefully distinguished, and pleads for a system of redress that supports rather than substitutes measures at the domestic level.

4.6 Impact, legacy, and lessons learned

The final part of the book engages with the larger issues of impact and legacy, studies the goals and effects of ICC intervention, and identifies potential exit strategies from situations. It also explores options for review of ICC practices.

Nick Grono and Anna de Courcy Wheeler analyse whether and under what conditions ICC engagement curtails the action of government or rebel leaders, based on practice in existing situations. They claim that the prospect of ICC prosecution may be one of a range of domestic and international factors that affect strategic calculation, and conclude that the success or failure of the ICC in deterring atrocity crimes rests to a large degree on its ability to pursue successful prosecutions. Olympia Bekou revisits the effect of the ICC on domestic jurisdiction and problems of capacity-building, arguing that the success of the ICC as a mechanism of accountability relies on the strength of national legal orders. She claims that national justice institutions should not imitate the ICC, but rather serve the needs of the societies they represent, while complying with requisite international standards. Elizabeth Evenson and Alison Smith study possible ICC disengagement strategies for the ICC from situations. They distinguish ICC closure of situations from completion strategies in the context of other international or internationalized tribunals, but also identify lessons in three key areas: capacity-building, outreach, and archive management. They recommend early planning, consultation with affected communities and national authorities, and strengthening of domestic jurisdiction as part of ICC disengagement. The final chapter in this book by Philipp Ambach addresses future challenges and lessons learned. He examines initiatives of the Court and the ASP to review ICC approaches and procedures, and suggests that flaws in criminal procedures should be corrected through revision of procedural practices and regulations, rather than statutory amendment.

5. Not a Conclusion

The sheer number of topics and themes treated in this volume illustrates that the ICC has come a long way. With institutional growth, the visibility of the ICC has grown. Its identity has become more diverse and its effects have become more contested. The Court is in a process of transformation. This process involves experimentation, partial deconstruction, and re-invention. There is still a long way to go until the Court reaches some of its ambitious goals and meets expectations.

Some assumptions need to be revised. The very idea of the ICC, and its imagined action, continue to reform international relations, but its actual role is rather modest. The Court does not provide a solution to many problems with which it is associated. Some of the most important contributions of the ICC lie on a broader normative level (i.e. social alarm, impact on discourse, etc.), and have long-term effects rather than providing immediate conflict resolution or actual law enforcement. ICC engagement has a spin-over effect on treatment of accountability in the human rights context or other fields (e.g. humanitarian law, transitional justice, development), although doubts remain as to whether and how the Court can contribute to political stabilization or reconciliation.

In many contexts, the ICC is only one among many concurrent factors driving change. Most attention is devoted to ICC action, which is visible in the structure of the Statute (e.g. triggering procedure, Article 53) and studies on ICC intervention. One important lesson is that inaction may be as equally important as action, and that both can produce positive and negative effects that need to be carefully evaluated and studied.

ICC procedures serve only partially as an example for domestic or local structures. The Court has set a limited demonstration effect through its own investigations and prosecution. Procedures and approaches in some areas (e.g. preliminary examination, investigation, Court management, fact-finding and evidence, victims) may need to be further revised. Critical self-scrutiny is a necessary first step towards reform. Voices of dissent, inside and outside the Court, are a natural and healthy illustration of this process.

Complementarity is fundamental to many aspects of the Court's work (e.g. admissibility, prevention, protective measures, reparation, exit strategy); it is a two-way street. The Court needs to leave sufficient space for pluralism and diversity. Domestic jurisdictions should be cautious in replicating ICC models and approaches. ICC definitions and structures require adaption to context.

After more than a decade, the Court is neither at the beginning of its end (as predicted by some) nor at the end of its beginning. Its history continues to be written, and it needs to be rewritten. This volume is part of this process. It is testimony to the changing nature of the Court and provides perspectives on some of the factors and actors that drive this process. To be continued ...

PART I

CONTEXT, CHALLENGES,
AND CONSTRAINTS

The International Criminal Court (ICC) and Double Standards of International Justice

*Richard Dicker**

1.1 Introduction

The ICC faces a profound challenge in applying its mandate worldwide. The landscape on which the Court works is uneven and marked by double standards of justice. In the Court's first decade, the equal application of law to all those who may be responsible for 'the most serious crimes of concern to the international community'¹ has not been possible. Those who represent the most powerful states are beyond its reach and are unlikely to find themselves the target of an ICC arrest warrant. These governments also protect states with whom they share close economic, political, or security interests.

One actor influencing the Court's reach to those in states that have not ratified the ICC Statute is the United Nations (UN) Security Council. It is authorized, acting according to Chapter VII of the UN Charter, to refer situations to the Court's Prosecutor.² The Council has used this 'referral' authority twice³ and rejected it once.⁴ The Council's practice has been deeply flawed. The referrals have prompted criticism that the resulting investigations and prosecutions are tainted by their genesis in a political body and diminish the Court.

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¹ Preamble Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 3 ('ICC Statute').

² Arts 12 and 13 ICC Statute. See generally L Condorelli and S Villalpando, 'Referral and Deferral by the Security Council' in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press 2002) 627–56; D Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333–52; J Trahan, 'The Relationship between the International Criminal Court and the UN Security Council: Parameters and Best Practices' (2013) 24 *Criminal Law Forum* 417–73; The Relationship between the ICC and the Security Council: Challenges and Opportunities, International Peace Institute (2013) <http://www.regierung.li/files/medienarchiv/icc/IPI_E-Pub-Relationship_Bet__ICC_and_SC__2__01.pdf?t=635522210891596707> accessed 11 September 2014. See also D Ruiz Verduzco, Chapter 3, in this volume.

³ UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593; UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970. On the Sudan referral, see R Cryer, 'Sudan, Resolution 1593, and International Criminal Justice' (2006) 19 *Leiden Journal of International Law* 195. On the Libya referral, see C Stahn, 'Libya, the ICC and Complementarity: A Test for "Shared Responsibility"' (2012) 10 *Journal of International Criminal Justice* 325–51. See also D Ruiz Verduzco, Chapter 3 in this volume.

⁴ 'Russia, China Block Security Council Referral of Syria to International Criminal Court', *UN News Centre*, 22 May 2014.

Security Council practice has shown three distinct negative features: (i) selectivity, (ii) substantive shortcomings in the referral resolutions, and (iii) the lack of meaningful follow-up. The Council mandates Court investigations in some situations like Darfur and Libya, but has rejected a referral of Syria. It has not even considered referring Sri Lanka. As a result, the Court is depicted as a tool of the permanent members—especially the United States.⁵ This permanent member advocates justice for the most serious international crimes in certain situations, but not others. Using the Council, it is seen as pursuing a political agenda against weaker actors.⁶ Meanwhile, the Russians and the Chinese have protected allies in Damascus and Colombo. The referral resolutions have also contained disturbing concessions to the United States that exacerbate discrepancies in the equal application of the ICC Statute.⁷ Furthermore, following its two referrals, the Council has done little to support the Court in implementing the very judicial mandate that it triggered. Linked to changed political circumstances on the ground⁸ or lack of agreement among the permanent members,⁹ this fickle support contributes to the perception that the ICC is an instrument to achieve political objectives desired by Council permanent members. This reality has given rise to intense debate.

1.2 Context

Accountability for the most serious crimes through international judicial mechanisms emerged for the first time after the Second World War with the Nuremberg and Tokyo tribunals.¹⁰ The Nuremberg tribunal, more than the Tokyo tribunal, created a positive judicial legacy.¹¹ The trials in Nuremberg were unprecedented and represented a seismic shift towards accountability in the face of unspeakable crimes on an incomprehensible scale. For the first time ever, senior leaders were held to account in legal proceedings for massive crimes. The accused had legal counsel who were able to conduct a vigorous defence. While the tribunals undoubtedly prosecuted the most serious crimes committed, the allies' own wartime actions went unexamined.¹² There was no serious consideration of investigating potential criminal liability for the mass rape of German women, the fire-bombing of Hamburg and Dresden, and the nuclear

⁵ See generally W Schabas, 'The Banality of International Justice' (2013) 11 *Journal of International Criminal Justice* 545–51.

⁶ See e.g. 'Sudan Reiterates Rejection of ICC Proceedings', *Sudan Vision*, 18 June 2014.

⁷ See UNSC Resolutions 1593 (2005) and 1970 (2011) (n 3), operative para. 6.

⁸ Three years after referral, the Security Council has yet to make any statements about Libya's obligation to cooperate with the ICC arrest warrants.

⁹ Differences between the Council's permanent members have precluded any statement on Sudan's failure to cooperate with Security Council Resolution 1593 (n 3).

¹⁰ T Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Alfred A Knopf 1992); A Neier, *The International Human Rights Movement: A History* (Princeton: Princeton University Press 2012), 127.

¹¹ The IMTTF was established by a Proclamation issued by Allied Supreme Commander General Douglas MacArthur. MacArthur made the decision not to try Japanese Emperor Hirohito. The presiding judge was appointed by General MacArthur. See P Maguire, *Law and War: An American Story* (New York: Columbia University Press 2000).

¹² See G Mettraux, *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press 2008).

devastation of Hiroshima and Nagasaki. While creating an invaluable precedent, international criminal justice for the most serious crimes was born with the mark of ‘victor’s justice’. The victors tried the vanquished and ignored the possible criminality of some of their own acts.¹³ Along with Nuremberg’s enduring accomplishments, this provenance was frozen in place for 40 years amid the paralysis of the Cold War.

In 1993 and 1994 the Security Council created two ad hoc tribunals for the former Yugoslavia and Rwanda.¹⁴ This new application of Security Council authority to maintain international peace security through the creation of ad hoc tribunals triggered the revival of international criminal justice for genocide, crimes against humanity, and war crimes. These tribunals were a hoped-for step beyond the ‘victor’s justice’ of the post-war international military tribunals. The International Criminal Tribunal for the former Yugoslavia (ICTY) was mandated, before the end of the Balkans conflict, to try those responsible regardless of ethnic or political association.¹⁵ The tribunal, to its great credit, implemented that mandate. Unfortunately, the International Criminal Tribunal for Rwanda (ICTR) prosecuted only those from the Hutu side and failed to investigate crimes believed to have been committed by the Rwandan Patriotic Front.¹⁶ The ICTY indicted Croats, Serbs, and Bosniaks.¹⁷ Nevertheless, because of the ethnic polarization in the communities most affected by the crimes, the tribunal was disparaged by many in the countries of the accused, and because the majority of indictees were Serb, the ICTY was harshly criticized in Belgrade. As the tribunal’s work progressed and senior Bosnian Serb and Serbians were indicted, Russia became increasingly critical of the tribunal. This contrasted sharply with Western pressure on Belgrade to arrest and surrender indictees.¹⁸

The back-to-back genocides in the former Yugoslavia and Rwanda and the creation of the two ad hoc tribunals prompted the recognition of the need for a permanent Court created by multilateral treaty negotiations, as opposed to Security Council resolution, that could respond to recurring mass atrocity crimes. In November 1994 the General Assembly’s Sixth Committee decided to create an ad hoc committee to consider the draft text of a treaty for a permanent international criminal Court that had been finalized by the International Law Commission (ILC) that summer.¹⁹ Negotiations on the ICC draft treaty got under way at UN Headquarters in April 1995.²⁰

¹³ Maguire (n 11) 151; G Bass, *Stay the Hand of Vengeance* (Princeton: Princeton University Press 2000), 203.

¹⁴ Statute of the International Criminal Tribunal for the former Yugoslavia, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, Annex ('ICTY Statute'); Statute of the International Criminal Tribunal for Rwanda, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Annex ('ICTR Statute').

¹⁵ See generally W Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press 2006); B Swart et al., *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press 2011).

¹⁶ The ICTR indicted no members of the victorious Rwandan Peoples’ Front.

¹⁷ The ICTY also indicted Macedonians and Kosovar Albanians.

¹⁸ The European Union and the United States used economic and diplomatic pressure on Serbia to arrest and surrender ICTY indictees. See V Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press 2008).

¹⁹ Report of the International Law Commission on the work of its 46th session, 2 May–22 July 1994, UN Doc A/CN.4/SER.A/1994/Add.1 (Part 2) in (1994) 2 *Yearbook of the International Law Commission* 15.

²⁰ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 50th Session, Supp. No. 11, UN Doc A/50/22, 6 September 1995. See M Bassiouni (ed.), *The Legislative History*

Significantly, these negotiations followed or coincided with the demise of repressive governments in several states in the Global South and the end of the Cold War. Dictatorial regimes in Argentina, Chile, South Africa, and South Korea were replaced by governments supportive of human rights and the rule of law. This shift had a profound positive impact on the negotiations finalizing an ICC treaty. Driven by their own recent and difficult transition from repression to the rule of law, government delegations and civil society groups from these states energetically participated in the ICC negotiations. They were at the core of the ‘like-minded group’ of states that emerged in 1996. These governments infused an intangible yet distinct dynamism into the ICC drafting process between 1996 and 2002 that helped break down a sense of north–south divide.²¹ A broad multi-regional like-minded group emerged to drive the effort for a fair, effective, impartial, and independent Court. This group became a leading force in the negotiations. The commitment emanating from these newly transformed governments in Latin America, Africa, and East Asia was a game changer.

This input also contributed to a sense of possibility for a more universal justice. There was hope that the writ of the permanent Court would reach those in the most powerful states as well as those representing the least powerful. There was a feeling that the negotiations offered a unique historical opportunity in which many hoped to level the playing field so the rule of law would apply *more* equally to all. Unfortunately, the ICC has not been able to realize that potential to minimize the unevenness. The Court’s critics condemn it harshly and unfairly for that failing.

1.3 Double Standards in ICC-Related Practice

The fundamental source of the unevenness that frames the ICC’s application of its statute flows from the underlying disparity of wealth, power, and influence that marks the international system. While less pronounced, this disparity affects the application of international human rights standards. Even with the positive impact of a broad like-minded group, the Rome Statute, created in multilateral negotiations, was heavily influenced by the prevailing notions of state sovereignty and the views of the most powerful states. In fact, the negotiation process codified a limited jurisdictional regime for the Court. The ICC’s exercise of jurisdiction, with some important exceptions,²² requires the consent of the state where the crimes occurred or the state of the nationality of the accused.²³

In addition to the systemic power disparities and the jurisdictional limitations in the Rome Statute, the double standards apparent in the UN Security Council’s ICC referral practice exacerbate the limitations of the ICC’s reach.²⁴ This highlights the tension between the norms of international criminal justice on the one hand, and the

of the International Criminal Court: Introduction, Analysis and Integrated Text (Ardsley: Transnational Publishers 2005).

²¹ Between 1997 and 2000 governments convened regional conferences for an effective, impartial, and independent Court in Pretoria, Dakar, Port-Au-Spain, Guatemala City, and Budapest.

²² Arts 12(2)(a) and 13(b) ICC Statute. ²³ Art 12 ICC Statute.

²⁴ On limitations, see D Akande, ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits’ (2003) 1 *Journal of International Criminal Justice* 618–50.

political imperatives that routinely drive the Security Council's decision-making on the other. The Council has referred situations twice to the ICC: the Darfur region of Sudan in March 2005, and later the deteriorating situation in Libya in February 2011. In May 2014 a resolution referring Syria to the ICC was blocked by a double veto.²⁵ The Council has failed to even consider referring many situations where grave international crimes have occurred.²⁶ There has been no coherence, let alone consistency, in the way the Council, a political body, refers to the ICC.

Perceptions of Council selectivity and double standards referring—and more often not referring—are exacerbated by the prerogatives of the five permanent members. Three of these—China, Russia, and the United States—are not parties to the Rome Statute. Through their status as non-States Parties and veto power, they are insulated from the Court in that they have twice mandated to investigate alleged crimes on the territory of other non-States Parties. These three powerful states have also shielded some of their respective allies from the reach of the ICC, creating a virtual ‘accountability free zone’, most starkly in Syria, but also in Israel, Palestine, and Sri Lanka, to name a few. ICC officials did not create these circumstances, but the Court is certainly affected by them.

In addition to the selectivity characterizing referral decisions, there have also been serious shortcomings in the substance of the referral resolutions. Both successful referral resolutions (1593 and 1970) contained provisions that imposed the entire financial burden of investigation and prosecution on the Court and its States Parties.²⁷

Moreover, all the referral resolutions have allowed exemptions for the nationals of non-States Parties should they be implicated in serious crimes committed in the country situation referred.²⁸ This exemption codifies a double standard in applying justice. Furthermore, in its referral resolutions, the Security Council has failed to require all UN Member States to cooperate with the Court.²⁹

The sense of political instrumentalization of the Court has been exacerbated by Council inaction after referral. The Security Council has not adopted any subsequent resolutions to support the referrals. There has been one Presidential Statement on Darfur that recalls the language of Resolution 1593.³⁰ The Council has failed to respond to judicial findings of non-cooperation by a small number of UN Member States. This ‘on again, off again’ support makes the ICC seem like a tool of political interests at the Council rather than an expression of commitment to seeing justice done for serious crimes.

On 22 May 2014 the Council rejected, by a vote of 13–2, a French text referring the situation in Syria to the Court.³¹ Russia, backed by China, vetoed the resolution to

²⁵ See Russia, China Block Security Council Referral of Syria to International Criminal Court (n 4).

²⁶ The Council has never been seized with a resolution to refer the situation in Sri Lanka, Democratic People’s Republic of Korea (DPRK), or Lebanon to the ICC.

²⁷ See UNSC Resolution 1593 (n 3) operative para. 7; UNSC Resolution 1970 (n 3) operative para. 8.

²⁸ Ibid., para. 6. ²⁹ Ibid., para. 2.

³⁰ Statement by the President of the Security Council, UN Doc S/PRST/2008/21, 16 June 2008.

³¹ For an account, see Security Council 7180th Meeting, ‘Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution’, UN Doc SC/11407, 22 May 2014 <<http://www.un.org/News/Press/docs/2014/sc11407.doc.htm>> accessed 11 September 2014.

shield the Assad regime to which it had tied itself over decades and in the last years of civil war. With more than 160,000 dead and huge numbers of Syrians living as refugees or internally displaced persons, the conflict had been fuelled by a sense of impunity on all sides. The negotiation process and the vote reflected both new and familiar aspects. The rejection, the first ever by the Security Council, was emblematic of Council selectivity,³² this time with Russia and China wielding selectivity.

By opening the draft resolution to co-sponsorship by all UN Member States, the separation between Council and non-Council members on referral resolutions was pierced.³³ In the negotiations over the text, as penholder, France, unlike in the 2005 Darfur Resolution, initially limited itself to bilateral negotiations with the United States. The latter insisted, as the price of its acceptance, the same exemption of nationals of non-States Parties that had appeared in Resolutions 1593 and 1970. When, after weeks of negotiations, the text was presented to Council members, it gave rise to strong principled objections.

One initiative aimed at changing these shortcomings was put forward at the Council in October 2012. At that time, Guatemala, which had recently acceded to the Rome Statute, decided to use its Council Presidency to convene an unprecedented Open Debate on the relationship between the Council and the ICC.³⁴ This provided like-minded ICC States Parties a high-profile forum from which to convey their views on the relationship. Previously, it seemed as if the Council was the exclusive stakeholder. In the Open Debate States Parties advocated several corrective measures to the Security Council practice of ICC referrals.³⁵ These included

- i. A coherent approach for referrals to the Court to avoid double standards;
- ii. UN funding for investigations and prosecutions resulting from Council referrals;
- iii. Deletion of the exemptions shielding nationals of third non-States Parties from ICC jurisdiction;
- iv. Creation of a subsidiary Council unit to deal with referrals to the ICC;
- v. Support to the Court following a referral; and
- vi. Response to judicial notifications from the Court highlighting the lack of cooperation by states.

Both before and after the October 2012 Open Debate there was constructive discussion at think tanks and academic institutions on the overall relationship between the Security Council and the ICC.³⁶ These meetings involved diplomats, former diplomats,

³² Ibid., see statement by Syria, invoking double standards in the UN system.

³³ The draft resolution was backed by 100 non-governmental organizations, 65 co-sponsors, and 13 Council members. See also Letter dated 19 May 2014 from the Permanent Representative of Switzerland to the UN addressed to the Secretary-General, A/68/884-S/2014/361, 21 May 2014.

³⁴ See Security Council, Open Debate on 'Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security', UN Doc S/PV.6849 (Resumption 1), 17 October 2012.

³⁵ Ibid.

³⁶ For example, an event at Chatham House, 'The UN Security Council and the International Criminal Court', 15 March 2012; Panel Discussion at the International Peace Institute, 8 November 2012; and the Laguna Beach Workshop convened by the University of California, Irvine, 28–30 November 2012.

academics, and representatives of civil society. The exchanges deepened understanding and heightened expectations of the prospects for *some* change.

In 2013, however, the situation at the Council became much less favourable for Court-related initiatives. This was due to several factors. First, events in Libya: three weeks after the unanimous adoption of Council Resolution 1970 that referred the situation in Libya to the ICC, the Council adopted Resolution 1973 authorizing a no-flight zone over the country.³⁷ As a result, the Court became associated with the ‘regime change’ agenda of the powerful Western permanent members. However unfair this imputation was to the Court, it was convenient for opponents of the Court on and off the Security Council.

The situation in the Council became further polarized over the situation in Syria. The Russians and Chinese vetoed financial and travel sanctions against Syrian leaders on three different occasions.³⁸ In January 2013, 58 UN Member States sent a letter to the Security Council calling for a referral of the situation in Syria to the ICC.³⁹ Following that initiative, there was no Council action for nearly 18 months.

On 1 January 2013 Rwanda joined the Council as an elected member. Because of Kigali’s intense opposition,⁴⁰ references to the ICC in both thematic and country-specific resolutions, even previously agreed upon language, became more difficult to obtain in 2013.⁴¹ In the second half of 2013, the terrain at the Security Council regarding the ICC became even more highly charged. A few African states mounted an unprecedented drive against the Court. Some in the African Union (AU) had initiated opposition against the arrest warrants for Sudanese President Omar Al-Bashir in 2009,⁴² but even more virulent opposition to the Court arose around the case of Kenyan President Uhuru Kenyatta.⁴³ In October 2013 the African Union convened an Extraordinary Session of the Assembly of Heads of States and Governments that

³⁷ See UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973. The implementation of that no-flight mandate, however, became the focus of intense controversy, as the NATO powers implemented it very broadly in their effort to topple the Gaddafi regime. Those states that felt misled by the application of UNSC Resolution 1973 tended to conflate the two very different Council resolutions on Libya into one.

³⁸ ‘Security Council Fails to Adopt Draft Resolution Condemning Syria’s Crackdown on Anti-government Protestors, Owing to the Veto by Russian Federation, China’, *Security Council*, UN Doc SC/10403, 4 October 2011 <<http://www.un.org/News/Press/docs/2011/sc10403.doc.htm>> accessed 11 September 2014; ‘Security Council Fails to Adopt Draft Resolution on Syria that would have Threatened Sanctions, Due to Negative Votes of China, Russian Federation’, *Security Council*, UN Doc SC/10714, 19 July 2012 <<http://www.un.org/News/Press/docs/2012/sc10714.doc.htm>> accessed 11 September 2014. ‘Security Council Fails to Adopt Resolution on Syria’, *UN News Centre*, 19 July 2012 <<http://www.un.org/apps/news/story.asp?NewsID=42513>> accessed 11 September 2014.

³⁹ Letter dated 14 January 2013 from the Chargé d’affaires a.i. of the Permanent Mission of Switzerland to the UN addressed to the Secretary-General, A/67/694-S/2013/19, 16 January 2013. The letter called upon ‘the Security Council to refer the situation in the Syrian Arab Republic as of March 2011 to the International Criminal Court’.

⁴⁰ Rwanda was elected to a two-year term on the Security Council and took its seat on 1 January 2013.

⁴¹ Kigali was concerned over potential liability for crimes in eastern Congo.

⁴² African Union (Assembly), Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Thirteenth Ordinary Session, 1–3 July 2009 (Sirte, Great Socialist People’s Libyan Arab Jamahiriya), Doc Assembly/AU/Dec 243–67 (XIII) Rev1 Assembly/AU/Decl 1–5 (XIII). On the relationship between the ICC and the AU, see also Maunganidze and Du Plessis, Chapter 4, this volume.

⁴³ *Prosecutor v Uhuru Muigai Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11.

focused squarely on the ICC.⁴⁴ The session's final declaration called for, among other steps, a Security Council deferral of the cases against Kenyan President Kenyatta and Deputy President Ruto.⁴⁵ It created a Contact Group to press the Security Council to suspend both cases.⁴⁶ It requested the ICC to postpone the trial of President Uhuru Kenyatta and called on the Court to suspend the proceedings against Deputy President William Samoei Ruto.⁴⁷

Among other lines of argument, proponents cited double standards in Security Council practice as a means to delegitimize the ICC.⁴⁸ The Contact Group rooted its arguments in the staunch defence of national sovereignty augmented by an appeal to regional solidarity that drew on the rightful resentment over the ravages of colonial rule in Africa. This was a rejection of the fight against impunity that used history, the unevenness of the terrain on which the Court works, and the hypocrisy of states that ignore the double standards in their own espousal of justice.

At that Extraordinary Session, President Kenyatta elaborated on these themes. Citing the spectacle of Western decline, he stated 'they abuse whatever power remains in their control'.⁴⁹ He furthermore said that 'the most active global powers... declined to ratify the Treaty, or withdrew along the way, citing several compelling grounds'.⁵⁰ Those same world powers 'were hesitant to commit to a process that might make them accountable for such spectacularly criminal adventures as the wars in Iraq, Syria, Libya, Afghanistan... and such hideous enterprises as renditions and torture'.⁵¹ He contrasted this stance with those states of good faith that had hoped 'the ICC would administer and secure justice in a fair, impartial and independent manner and, as an international Court, could bring accountability to situations and perpetrators everywhere in the world'.⁵²

The challenge driven by the Extraordinary Summit to 'terminate' the Kenya cases⁵³ ultimately reached the Security Council in November 2013. The AU leadership's objective was to use the Council to suspend the ICC's judicial proceedings and more broadly roll back the fight against the most serious crimes under international law. After a number of closed consultations with the Contact Group in New York, it was clear that the nine votes necessary to gain passage were lacking. Nevertheless, Rwanda on behalf of the Contact Group pushed its resolution to a vote. On 15 November 2013 eight Council members decided to abstain and seven voted in favour of the Rwandan

⁴⁴ African Union (Assembly), Decision on Africa's Relationship with the International Criminal Court, Extraordinary Session of the Assembly of the African Union, 12 October 2013, Doc Ext/Assembly/AU/Decl. 1–2 (October 2013) Ext/Assembly/AU/Decl.1–4.

⁴⁵ Ibid., para. 10.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid., para. 4 (AU's concern on the politicization and misuse of indictments against African leaders by ICC).

⁴⁹ See President Uhuru Kenyatta's Speech at the Extraordinary Session of the Assembly of Heads of States and Governments of the African Union, 12 October 2012 <<http://www.newvision.co.ug/news/648328-uhuru-blasts-us-uk-in-his-au-speech-full-speech-below.html>> accessed 11 September 2014.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Note verbale dated 2 May 2014 from the Permanent Mission of Kenya to the UN Security Council <www.kenyastockholm.files.wordpress.com/2013/05/secret-letter-to-un.pdf> accessed 11 September 2014.

Resolution seeking to defer the Kenyan cases.⁵⁴ This unfolded amidst heated exchanges in the Council chamber.

1.4 Beyond the *Status Quo*

It is not only Court opponents who have taken the field in this confrontation. The multiple challenges facing the ICC at the Security Council have generated different responses from Court supporters.⁵⁵ To increase chances for a referral in the intractable Syrian situation, the Court's former prosecutor, Luis Moreno-Ocampo, suggested a 'conditional referral' to the Court.⁵⁶ He highlighted the flexibility the Council has in setting temporal limits on an ICC referral and recommended that the Council 'establish a deadline in the near future that would trigger the jurisdiction of the Court'.⁵⁷ He argued that a future deadline 'could provide an incentive to begin a different style of negotiations to end a conflict'.⁵⁸ This approach, however, distinctly ties the Court and its judicial mandate to a political goal, however worthy. Such linkage would explicitly merge the ICC's role with political negotiations. The former prosecutor further stated that 'should the conflict effectively stop before the deadline the national leadership could discuss adequate ways to promote justice for the past'.⁵⁹ This proposal, were it to be adopted, would have the effect of making justice through the ICC a bargaining chip in negotiations for peace. This would play directly into the arguments of Court opponents and diminish the ICC's judicial mandate.

Other justice supporters have taken an even more draconian approach on referrals. This view argues that Security Council referrals are inherently too problematic to be worth the cost. It concludes that the two referrals have brought few real results for justice and at the same time exposed the ICC to charges of politicization that taint its independence as a judicial body.⁶⁰ In the run-up to the proposed referral of Syria to the Court, that critique grew more vehement. Louise Arbour was quoted in *The New York Times* as saying, 'The only question in my mind is, "Will it belong to the cemetery of good intentions or the museum of political scoring?" This is, in a sense, an exercise in using the ICC and accountability for posturing'.⁶¹

This approach posed the alternatives starkly: abandon referrals which extend the potential reach of justice to victims where it would otherwise be unavailable, or strive to make them more effective. The former amounts to abandoning referrals on the basis of the limited, albeit flawed, practice to date.

⁵⁴ 'Security Council: Bid to Defer International Criminal Court Cases of Kenyan Leaders Fails', *UN News Centre*, 15 November 2013 <<http://www.un.org/apps/news/story.asp?NewsID=46499>> accessed 11 September 2014.

⁵⁵ For a discussion, see also C Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment: On "Red Lines" and "Blurred Lines"' (2013) 11 *Journal of International Criminal Justice* 955, 976.

⁵⁶ L Moreno-Ocampo, 'Between Bombing or Doing Nothing', *The Huffington Post*, 4 September 2013.

⁵⁷ Ibid. ⁵⁸ Ibid. ⁵⁹ Ibid.

⁶⁰ See L Arbour, 'Doctrines Derailed?: Internationalism's Uncertain Future', 28 October 2013 <<http://www.crisisgroup.org/en/publication-type/speeches/2013/arbour-doctrines-derailed-internationalism-s-uncertain-future.aspx>> accessed 11 September 2014.

⁶¹ S Sengupta, 'UN Will Weigh Asking Court to Investigate War Crimes in Syria', *The New York Times*, 21 May 2014.

Encouragingly, some UN Member States have taken a proactive approach.⁶² A group of UN Member States that called themselves the Accountability, Coherence, and Transparency Group (ACT) was launched on 2 May 2013. The ACT group consists of 22 small and medium-sized states.⁶³ ACT is aimed at enhancing the effectiveness of the Council through the improvement of its working methods. It includes a sub-group on accountability. The accountability cluster looks at: (i) obtaining a commitment by permanent Council members to forgo the use of the veto in situations where genocide and crimes against humanity are involved and (ii) Security Council referrals to the ICC.

A prerequisite in changing Council practice may be engaging UN Member States to press the Security Council and, in particular, its permanent members to adopt a different approach. This is an uphill prospect. A consistent voice for accountability that represents a multi-regional membership could pose a credible alternative to the Council's political imperatives. While not leading to any quick change in practice, asserting a principled approach could also, over time, raise the political price for wilful inaction where the most serious crimes have been committed. This should happen in the three areas of Council practice where shortcomings have been pronounced. Equal application of the ICC Statute may be facilitated through (i) greater coherence and less selectivity in Council decisions on referrals; (ii) changing and strengthening the substantive text of referring resolutions; and (iii) more follow-up on future referral resolutions to maximize chances for effective justice.

A key challenge may be to achieve a few intermediate goals to build a sense of momentum. While meaningful change in the Council's approach will be difficult to achieve, adopting short-sighted solutions, simply abandoning referrals, or denigrating the Court for shortcomings beyond its power, is hardly the path to obtain justice in those situations where victims would have no other access to redress.

There is an inherent flaw in the ICC's not being able to render justice equally wherever the most serious crimes occur. This tension is exacerbated by the approach of the Security Council, as a political body. The Court is not responsible for the latter, but it is certainly affected by it. There is no easy solution to remedy these problems, but addressing them in the Court's second decade will be crucial to the ICC's ability to fulfil its mission and mandate.

⁶² V Lehmann, Reforming the Working Methods of the UN Security Council—The Next ACT, Friedrich-Ebert-Stiftung (2013) <<http://library.fes.de/pdf-files/iez/global/10180.pdf>> accessed 11 September 2014.

⁶³ For a survey, see <<https://www.globalpolicy.org/component/content/article/200-reform/52474-reforming-the-working-methods-of-the-un-security-council-the-act-initiative.html>> accessed 11 September 2014.

The ICC and the Politics of Peace and Justice

*Leslie Vinjamuri**

2.1 Introduction

The indictment of sitting heads of state and rebel leaders during active conflict, though still more exceptional than normal, has radically altered the debate surrounding international justice.¹ Arrest warrants for former Yugoslav president Slobodan Milošević, Sudanese president Omar al-Bashir, Liberian president Charles Taylor, and Colonel Gaddafi all ignited an intense controversy over the timing of justice and its impact on the prospects for peace. In the former Yugoslavia, Sudan, Liberia, Libya, and even Syria, it has become clear that there are still significant barriers to achieving both peace and justice simultaneously, especially when perpetrators of atrocities maintain significant power. Nonetheless, advocacy for justice continues to reflect the view that such trade-offs do not exist. Leading advocacy organizations and even the first Chief Prosecutor of the ICC have stressed the role of international justice in delivering results, especially peace, the rule of law, and stability.² Such an approach presents a stark contrast to rationales for prosecution that claim that there is a *moral*

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¹ E Lutz and C Reiger (eds), *Prosecuting Heads of State* (Cambridge: Cambridge University Press) 2009; R Teitel, ‘Transitional Justice Genealogy’ (2003) 16 *Harvard Human Rights Journal* 69, 94; F Guariglia, ‘The Rules of Procedure and Evidence for the International Criminal Court: A New Development in International Adjudication of Individual Criminal Responsibility’ in A Cassev et al. (eds), *The Rome Statute of the International Criminal Court* (Oxford: Oxford University Press 2002); E Haslam, ‘Victim Participation at the International Criminal Court: A Triumph of Hope over Experience?’ in D McGoldrick et al. (eds), *The Permanent International Criminal Court—Legal and Policy Issues* (Oxford: Hart Publishing 2004) 319; H Friman, ‘Participation of Victims in the ICC Criminal Proceedings and the Early Jurisprudence of the Court’ in G Sluiter and S Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (London: Cameron May 2009) 204; C Van den Wyngaert, ‘Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge’ (2011) 44 *Case Western Reserve Journal of International Law* 475, 494–5.

² Notably, even key advocacy organizations promoting international justice have issued important reports evaluating it on the basis of its contributions to other values. Several recent reports reflect this trend. See e.g. most notably, Human Rights Watch, ‘Selling Justice Short: Why Accountability Matters for Peace’ (July 2009); D Orentlicher, ‘Shrinking the Space for Denial: The Impact of the ICTY in Serbia’, Open Society Justice Initiative (May 2008). There are also numerous academic studies evaluating transitional justice, and the 2010 Special Issue of the *International Journal of Transitional Justice*, ‘Transitional Justice on Trial: Evaluating its Impact’ is devoted to evaluations of its impact.

obligation or a *legal* duty to prosecute the perpetrators of genocide, crimes against humanity, and war crimes.³ Instead, recent arguments have emphasized the instrumental purposes of justice, essentially recasting justice as a tool of peacebuilding and encouraging proponents and critics alike to evaluate justice on the basis of its effects on atrocities, violence, and peace negotiations. Indicting national leaders and rebels pivotal to ongoing peace talks has turned previously academic conversations about the relationship between peace and justice into pressing policy dilemmas.

Since the 1990s two historical ‘facts’—that war crime trials are held by victors, and that they are only initiated after war’s end—have been challenged. Proponents of trials for Nazi war criminals emphasized the moral value of a legal approach, but deferred discussions of justice until an Allied victory was clearly in sight. The International Military Tribunal at Nuremberg was convened only when Germany was defeated and occupied.⁴ The expectations for what justice could achieve were transformed by the outbreak of war and, especially, by the horrors associated with the attempt to ethnically cleanse Bosnia. During the summer of 1992, as war raged in Bosnia and Herzegovina, human rights advocates campaigned successfully for the immediate establishment of a war crimes tribunal even before any prospect for peace had emerged. A tribunal was established in the spring of 1993. In its 1994 Annual Report, the ICTY stated: ‘the Tribunal is intended to act as a powerful deterrent to all parties against continued participation in inhuman acts’.⁵ Bosnian Serb political and military leaders Karadžić and Mladić were indicted in the summer of 1995, just months before a peace agreement was signed in Dayton, Ohio. And, five years later, in 1999, the speed with which the indictment of Yugoslav president Slobodan Milošević followed the NATO bombing of Serbia contributed to the public perception that justice and peacemaking were part of the same project.

This judicial intervention during the war in Bosnia unleashed a discussion about the effects of justice on peace. Very quickly an unofficial consensus seemed to emerge that justice could be legitimately evaluated on the basis of its effects.⁶ In the former

³ D Orentlicher ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, *Yale Law Journal*, 100.8, 2537–615.

⁴ The American Jewish Conference argued for the ‘moral obligation’ to prosecute those who had committed crimes, but also suggested this would serve as ‘a warning against future attempts to instigate or commit similar crimes’. Statement on Punishment of War Criminals Submitted by the American Jewish Conference to the Secretary of State, Cordell Hull (25 August 1944) (National Archives, RG 107). See also A Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill: University of North Carolina Press 1998).

⁵ Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, UN Doc A/49/342 and S/1994/1007 (29 August 1994), cited in Orentlicher, ‘Shrinking the Space for Denial’ (n 2) 15.

⁶ Most notably, reports such as Human Rights Watch, ‘Selling Justice Short’ (n 2) emphasize the effects of justice on the peace process and renewed cycles of violence; by contrast, one of the most influential post-cold war statements about accountability stressed the legal duty to prosecute. See D Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 100 *Yale Law Journal* 2537; P Akhavan, ‘Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism’ (2009) 31 *Human Rights Quarterly* 3; O Thoms et al., ‘The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners’, Centre for International Policy Studies, University of Ottawa (April 2008); K Hunjoon and K Sikkink, ‘Explaining the Deterrence Effects of Human Rights Trials’, 2 <<http://www.iilj.org/courses/documents/Sikkink-Kim.HC2009Oct21.pdf>> accessed 6 August

Yugoslavia, Uganda, the Democratic Republic of the Congo, Libya, and even Syria, the potential for justice to facilitate peace negotiations, reduce violence, consolidate peace, and introduce the rule of law has been the subject of advocacy, research, and policy analysis.⁷ On the first day of peace talks designed to bring Liberia's civil war to a close, an arrest warrant against the then Liberian president and warlord Charles Taylor was unsealed. Taylor exited the talks and within weeks accepted an offer of exile in Nigeria. When Taylor was later transferred to The Hague, an intense debate broke out about the credibility of future deals designed to remove brutal dictators. Many feared that the 'Taylor precedent' would make it impossible to remove spoilers from peace talks in the future.

This focus on the short-term effects of international justice has left some advocates wary that the basic value of a criminal justice approach to accountability is being overshadowed by the emphasis on deterrence and peace. In the following pages, I discuss the shift in international justice advocacy from a *principle or duty-based* logic to one that is results based. I then evaluate the results-based rationales that have played an increasingly central role in public advocacy for international justice. Finally, I examine the implications of evaluating justice on the basis of its ability to deliver peace to situations of ongoing conflict.

2.2 Arguing for Justice

The most prominent arguments about justice have stressed two outcomes: peace and democracy.⁸ First and most visibly, a deterrence rationale has been strategically deployed as a logic that links justice to peace through its ability to prevent atrocities. This rationale has been central in the most highly visible and hotly contested cases. Second, a rule-of-law rationale has been championed for justice. The symbolic power of trials increases the appeal of the law as a mechanism for dealing with atrocities. This, combined with a direct material transfer of legal skills and resources, makes justice an important mechanism for consolidating the rule of law, a central component of democracy.

2014; L Payne et al., *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, D.C.: United States Institute of Peace Press 2010); J Snyder and L Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2003/2004) 28 *International Security* 5.

⁷ A Dworkin, 'International Justice and the Prevention of Atrocities' (*European Council on Foreign Relations*) <<http://www.ecfr.eu/ijp/case/introduction>> accessed 6 August 2014; Human Rights Watch, 'Selling Justice Short' (n 2).

⁸ A third category of rationales that stress the effects of justice draws on the notion of restorative justice. Although many theorists of restorative justice are solely concerned with restoring relations between victims and perpetrators, this type of explanation can also be used to suggest the positive effects of justice on state building. Establishing guilt and innocence may be crucial not as a means to punish perpetrators and assuage victims, but instead as a mechanism designed to reintegrate these two communities and thereby lay a foundation for reconciliation and restoration. International justice is a weak cousin of other non-legal strategies preferred by those who seek to promote restorative justice. Mechanisms designed to bring victims and perpetrators together through truth telling have been at the centre of this approach to justice. Efforts to advance international justice on the basis of its capacity to restore and repair social relations and thereby advance the project of state building are as suspect as those that base their support of justice on its capacity to deter and democratize.

Deterrence emerged as an important justification for war crimes trials in Bosnia. The boldest claim made on behalf of criminal law was summed up in the argument most central to international justice in the 1990s: ‘no peace without justice’.⁹ This was trumpeted as a core motivation for holding perpetrators of mass atrocities in the Balkans accountable. Its proponents argued that justice was crucial for its purported capacity to prevent and deter individual perpetrators from committing further atrocities.¹⁰ Since these individuals faced personal sanction, the prospect of accountability would directly alter their incentive to commit war crimes.¹¹ Advocates of this deterrence rationale have made claims about the capacity of this model to deliver both *specific* deterrence and *general* deterrence.¹² The most basic claim about deterrence is a general one. The effects of international justice are not confined to a particular individual or territory nor time-bound. This is a long-term project that increases the costs to perpetrators of atrocities—one that will gradually lead individual would-be perpetrators to make a rational choice to comply with human rights and humanitarian norms.¹³

Despite this overarching claim, advocates of judicial deterrence have increasingly emphasized the capacity of tribunals to deter ongoing crimes in specific conflicts.¹⁴ The logic rests implicitly on two distinct causal mechanisms. The first assumes the threat of justice will lead perpetrators of atrocities to engage with peace processes. A second logic anticipates that justice will marginalize perpetrators from power and enable peace. The logic of engagement assumes that indictments of particular perpetrators reduce their options and give them an incentive to participate in peace talks by removing the opportunity to retain or extend their power through military methods. Human Rights Watch and others have argued that the ICC’s indictment of leaders of the Lord’s Resistance Army (LRA), a sectarian Christian militant group based in northern Uganda, is evidence of the validity of this deterrent mechanism. The LRA’s decision to negotiate with the Ugandan government in July 2006, they argued, was a direct consequence of the ICC action.¹⁵ The ability of tribunals to execute, that is, to

⁹ An Italian NGO established in 1993 used this name and became a key advocate of international criminal justice. See No Peace Without Justice <www.npj.org/> accessed 6 August 2014.

¹⁰ P Akhavan, ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’ (2001) 95 *American Journal of International Law* 7.

¹¹ Mark Drumbl develops a critique of this assumption that international criminal justice can prevent collective violence in M Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press 2007).

¹² See e.g. P Akhavan, ‘Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal’ (1998) 20 *Human Rights Quarterly* 737; R Lebow, *Coercion, Cooperation, and Ethics in International Relations* (New York: Routledge 2007) 188.

¹³ ICTY Judge Wolfgang Schomburg argued strongly on behalf of the long-term deterrent effect of contemporary tribunals. See Orentlicher, ‘Shrinking the Space for Denial’ (n 2) 94 footnote 34.

¹⁴ This claim has underpinned much of the logic behind arguments in support of recent ICC indictments. It also guided the logic of those who argued that the ICTY would reduce violence and contribute to state building within the former Yugoslavia and especially in Kosovo. Indeed, Human Rights Watch argued in its study *Under Orders: War Crimes in Kosovo* (New York: Human Rights Watch 2001) that the violence in Kosovo was muted because of the work of the ICTY.

¹⁵ This argument is made, e.g., in P Hayner, ‘Negotiating Justice: Guidelines for Mediators’, Centre for Humanitarian Dialogue and International Center for Transitional Justice (February 2009) 17. Human Rights Watch, ‘Selling Justice Short’ (n 2).

enforce arrest warrants, is essential for the success of a strategy that seeks to engage perpetrators by threatening their arrest.

A second logic holds that justice is a tool for marginalizing rather than engaging perpetrators of mass atrocities.¹⁶ Indictments undermine the domestic legitimacy of their targets and thereby weaken their base of support. This facilitates a transition of power away from those who threaten to spoil the prospects for peace. Even in the absence of an arrest, proponents of justice argue that indictments alone have powerful shaming effects. The logic of marginalization is compelling but flawed. Indictments and arrest warrants may have the opposite effect. Savvy leaders in Sudan and Kenya under arrest warrant by the ICC have mobilized domestic support by treating the ICC as a threat to sovereignty and democracy. Sudan's president al-Bashir was not marginalized by the ICC arrest warrant. Instead, he ran for political office and succeeded in securing the presidency once again. In the short term, the indictment generated a backlash from the African Union and the Arab League, and prompted al-Bashir to force the exit of many key humanitarian agencies providing relief in Sudan. In Libya, an arrest warrant against Muammar Gaddafi did not diminish his determination to fight. In the former Yugoslavia, the indictment of Bosnian Serb political and military leaders Karadžić and Mladić reinforced the Milošević strategy which entailed a decision by the US government to work directly with Milošević, and not the Bosnian Serbs, to secure a peace agreement. Justice followed, but it did not lead in the former Yugoslavia.¹⁷

The assumption that removing key individuals is a sufficient basis for ending violence is central to both logics for pursuing justice in conflict. At its core, criminal justice assumes that individuals rather than groups are central to preventing atrocities. International justice has been seen as a tool that can help shift responsibility away from the group and back to the individual.¹⁸ By refocusing polities away from dangerous clan identities and attributions of guilt, the focus on individual accountability seeks to defuse future cycles of violence, and especially revenge killings. Thus, rather than blaming 'the Serbs' for the atrocities in Srebrenica, for example, this form of accountability seeks to ensure that blame is placed squarely on the shoulders of key individuals. International tribunals do not take the side of any particular warring party. In this sense they are at least theoretically neutral; they seek to deter all perpetrators of the crimes associated with war rather than to privilege the values, interests, or rights of a particular party to conflict. In practice, though, international criminal tribunals have more often pursued only one side in a conflict.

Ultimately, deterrence is difficult to measure and even more difficult to achieve. The capacity of justice to deter atrocities is undermined in part because enforcement is so difficult to achieve. The threat to inflict justice also cannot easily be matched by a promise not to pursue justice. The law lacks this kind of flexibility.¹⁹

¹⁶ See K Roth, 'Why Indictment Matters' <<http://www.hrw.org/video/2009/03/03/why-indictment-matters>> accessed 6 August 2014.

¹⁷ Snyder and Vinjamuri, n 6.

¹⁸ For a critical perspective on this and related issues, see Druml^b (n 11).

¹⁹ For contrasting perspectives, see e.g. K Rodman, 'Darfur and the Limits of Legal Deterrence' (2008) 30 *Human Rights Quarterly* 529; K Sikkink and C Walling, 'The Impact of Human Rights Trials in Latin

A second rationale for promoting international criminal justice is that this strengthens the rule of law in post-conflict and transitional states through a demonstration effect.²⁰ Trials perform a symbolic and social function that spreads the rule of law by example. This logic has been central to campaigns for justice. Its moral appeal rests in part on its use of one morally desirable value (international justice) to advance a second morally desirable value (democracy and the rule of law). War crimes trials provide a beacon of hope, a symbol of moral authority for all of humanity, and it is the power of this symbol that facilitates an acceptance and embrace of the rule of law. This logic is intuitively compelling, but only in the presence of other conditions that facilitate a transition to democracy. All too often, elite perpetrators have drawn on a range of tactics to counter any positive symbolic effects of international justice by casting international courts especially as the handmaiden of colonial powers.

On a more practical level, advocates have argued that international tribunals help consolidate the rule of law by providing groups and individuals in civil society with a legal resource that facilitates their ability to mobilize and press for compliance with the law.²¹ In some cases linkage has been fostered by international non-governmental organizations (NGOs) that have sought out local NGOs and national governments to develop accountability strategies and practices. In Kenya and Liberia, for example, the International Center for Transitional Justice worked extensively with local NGOs to develop practical solutions for increasing accountability in the aftermath of serious crimes.

Democracy promotion through the mechanism of international tribunals also operates through tangible material transfers. Skills and practices associated with the rule of law are transferred through a ‘spillover’ logic that involves the transfer of human and material resources, such as courtrooms and support for reform of the legal sector. The material component of democracy promotion has been formalized through a range of institutional mechanisms, such as the ICC’s ‘complementarity principle’ and the ICTY’s ‘Rules of the Road’. In effect, complementarity encourages states to develop legal capacity by offering the carrot of national rather than international trials if they are found to be both ‘willing and able’ to investigate the crimes of their own nationals. Similarly, the Rules of the Road sought to inspire legal capacity building by introducing a formal mechanism for transferring expertise and cases from the ICTY to the former Yugoslavia.

America’ (2007) 44 *Journal of Peace Research* 427; H Kim and K Sikkink, ‘Explaining the Deterrence Effect of Human Rights Prosecutions’ (2010) 54 *International Studies Quarterly* 939.

²⁰ The effort to build institutions is complicated by the pursuit of justice during conflict, making it seem that the logic of this argument is more naturally conducive to the pursuit of international justice in the aftermath of conflict than during ongoing violence. For an example of this type of argument, see K Sikkink, ‘Contra Trial Skepticism’ (*African Arguments*, 16 July 2008) <<http://africanarguments.org/2008/07/16/contra-trial-skepticism/>> accessed 7 August 2014.

²¹ Similarly, Beth Simmons argues that treaties foster greater compliance with human rights norms because they serve as a resource for civil society that enables citizens to more easily mobilize and pressure their governments to comply. See B Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press 2009).

2.3 The Triumph of Consequences

Deterrence and democracy promotion have formed the basis of advocacy campaigns for justice, inspired criticism, and defined research programmes across a broad array of public policy and academic institutions. Public justifications that stress the fundamental values of ‘guilt and innocence’ have become less common paradoxically as have attacks on the basic principle of justice and accountability, even by those who adamantly oppose specific cases or are themselves targets of arrest warrants.²² Instead, advocates and opponents alike have debated the effects of international justice. In some cases, opponents of international justice have sought to challenge the legitimacy of particular forms of institutional authority to be the arbiter of justice. But, international human rights advocates share a commitment to the non-negotiable nature of core universal human rights. Individuals who have come under the purview of the ICC have refrained from undertaking overt attacks on the basic tenets of justice. In Kenya, elites asserted that heads of state should have immunity but did not contest the basic principle of accountability. Likewise, Sudan’s President al-Bashir challenged the legitimacy of the ICC, but not the basic principle of justice.

The consensus that has emerged on an impact-based evaluation of international justice is the by-product of several closely related developments, most notably the international community’s use of soft policy instruments, especially international justice, to respond to violence and mass atrocities, and an inherent organizational tendency, especially in new institutions, to expand and extend their role.

In the former Yugoslavia, soft policy instruments were a substitute for military intervention. Pressure for military intervention in the former Yugoslavia was initially met with great reluctance. The European and American response stressed diplomatic negotiations, peacekeepers, and an ad hoc international war crimes tribunal. In Sudan and especially Libya, the ICC was also conceived in part as an instrument deployed by the international community to enhance the prospects for peace.²³ In each of these cases, discussion about the effects of justice on peace intensified.

New tribunals created to investigate abuses and atrocities have also taken on increasingly challenging cases and sought to extend rather than limit their engagement in ongoing conflict. The ICTY’s indictments of Radovan Karadžić and Ratko Mladić during the conflict in Bosnia and Herzegovina and its pursuit of Slobodan Milošević during the bombing of Kosovo ensured that the Court would be viewed as a player that could not be ignored in any analysis of the peace process. The pursuit of justice prior to a settlement radically altered the terms of the ensuing debate, and

²² Remarks by Juan Mendez, ‘Fifteen Years of International Justice: Assessing Accomplishments, Failures and Missed Opportunities—Lessons Learned’ (14–15 April 2008).

²³ Many of the debates, e.g., about the ICC and Sudan focus on the consequences of the ICC’s role there. For a summary of some of these debates, see A de Waal, ‘Sudan and the International Criminal Court: A Guide to the Controversy’ (*Open Security*, 14 July 2008) <<http://www.opendemocracy.net/article/sudan-and-the-international-criminal-court-a-guide-to-the-controversy>> accessed 7 August 2014. Another example of the type of debate that has surrounded the ICC is contained in N Waddell and P Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society 2008).

international justice became an instrument that was evaluated in terms of its impact on efforts to negotiate peace with Serbia. Indeed, much of the immediate controversy centred on whether the indictment would impede or facilitate peace negotiations rather than whether it fulfilled a legal duty or satisfied a moral imperative. As one commentator argued, '[t]he tribunal has always said it wants to stay clear of politics, but charging a current head of state with war crimes will take it right to the center of the diplomatic and political arena'.²⁴

Pursuing justice 'in real time' increased the visibility of the tribunals and generated heightened expectations of what they could accomplish. Practitioners often fell into a trap of trying to oversell the tribunal's activities, pursuing an overly ambitious agenda in their efforts to secure the strategic goods of peace, deterrence, and democracy. Just a few days after the indictment of Milošević, ICTY Chief Prosecutor Louise Arbour argued, 'I have been stressing... our commitment to functioning as a real time law enforcement operation'.²⁵ The need to consolidate a public role and secure public support may inadvertently bias tribunals against deferring justice until conflicts are resolved. Proponents argue that the arrest warrant issued for Sudanese President al-Bashir may bolster moderates and weaken his base of support domestically, thereby paving the way for the selection of a new leader in forthcoming elections. This tendency to oversell criminal law's contribution to stopping ongoing conflict has been intensified by concern that international justice will be marginalized or obstructed by mediators and political leaders with conflicting priorities. The concern is not unwarranted. Historically, the formal incorporation of provisions for justice into peace agreements has been exceedingly limited. Even over the past decade there have been several peace agreements that have remained silent on the issue of accountability.²⁶

2.4 Four Dilemmas

The pursuit of international justice during ongoing conflict has produced four dilemmas for the future of accountability in general and international justice in particular.

2.4.1 Sequencing justice

Judicial interventions in ongoing conflict have generated intense debate about the optimal sequencing of policies designed to deliver justice and peace. But little consensus has emerged and the prospect of an ideal standard for the role that justice should play during conflict remains elusive. Three prominent rationales that underscore contemporary debate recognize that peace should be given some measure of priority when accountability measures are pursued during violent conflict. First, a 'do no

²⁴ G Sharp (National Public Radio, 27 May 1999), quoted in 'Will Indictment Derail the Peace Process?' (*UN Wire*, 27 May 1999) <http://www.unwire.org/unwire/19990527/2855_story.asp> accessed 3 June 2014. This publication reviews the range of views that surfaced in response to this controversial indictment.

²⁵ 'Statement by Justice Louise Arbour, Prosecutor ICTY' (*ICTY Press Release*, 27 May 1999) <<http://www.icty.org/sid/7764>> accessed 7 August 2014.

²⁶ See C Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford: Oxford University Press 2008).

harm' rationale suggests that the standard for pursuing justice during conflict should be that such an intervention will not impede the prospects for achieving peace. A second set of arguments sets a higher bar by suggesting that support of justice in ongoing conflicts should follow a 'positive effects' standard. That is, justice should only be pursued when there is clear evidence that it would be possible to achieve some measure of justice, and also to help the cause of peace.²⁷ This view has shaped arguments against international justice as well as those on its behalf. In a powerful op-ed to *The New York Times*, South Africa's former president Mbeki and Columbia University scholar Mahmood Mamdani argued that 'courts can not do justice'.²⁸ A third rationale suggests that justice should be pursued during conflict only as a 'last resort'. If all other instruments of statecraft, short of military intervention, have been tried and failed, then it is okay to pursue international justice.

In the debate over a possible Security Council referral of Syria to the ICC, each of these three standards informed the arguments made by different audiences. Some suggested that diplomacy had failed at Geneva II as had other soft measures, and so 'why not' try a referral, thus implicitly adopting a 'last resort' rationale. Others argued on the basis of 'positive effects' that unless the ICC could help increase the prospects for peace, it should not open a case.²⁹ Still others implicitly applied a 'do no harm' standard, suggesting that the ICC was unlikely to have an impact on Assad's behaviour, so why not refer Syria to the ICC?³⁰

Ultimately, though, these differing standards and rationales were confronted by the reality of an increasingly diminished flexibility to argue critically in the public sphere about justice. By establishing a powerful precedent, judicial interventions in the former Yugoslavia galvanized moral sentiment around an uncritical support of justice and cast a shadow over debates about sequencing.

The debate about sequencing re-emerged in the context of Libya's 2011 war when the Security Council referred Libya to the ICC. The rapidity with which an arrest warrant was issued for Muammar Gaddafi and the move by NATO to defeat him sparked a new openness to debate and a scepticism about the pursuit of ICC justice during ongoing conflict. Some feared that the arrest warrant against Gaddafi would inhibit efforts to negotiate a settlement that could bring the violence to an end. Many justice proponents felt that the Security Council referral undermined the independence of justice by linking it too closely to the Security Council and especially to its peace and security mandate. Louise Arbour, a long-time proponent of justice, argued for separate, or parallel, tracks. Ultimately, though, recognizing the difficulties of achieving such a separation, Arbour recommended that although both justice

²⁷ R Letschert and M Groenhujsen, 'Not Everyone Thinks the ICC in Syria is a Good Idea' (*Justice in Conflict*, 12 June 2014) <<http://justiceinconflict.org/2014/06/12/not-everyone-thinks-the-icc-in-syria-is-a-good-idea/>> accessed 7 August 2014; L Vinjamuri, 'Syria and the International Criminal Court' (*Political Violence @ a Glance*, 25 April 2014) <<http://politicalviolenceataglance.org/2014/04/25/syria-and-the-international-criminal-court/>> accessed 7 August 2014.

²⁸ T Mbeki and M Mamdani, 'Courts Can't End Civil Wars', *The New York Times*, 5 February 2014.

²⁹ Vinjamuri, 'Syria and the International Criminal Court' (n 27).

³⁰ K Cronin-Furman, 'Would an ICC Referral Have Helped Syria?' (*Monkey Cage*, *The Washington Post*, 22 May 2014) <<http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/05/22/would-an-icc-referral-have-helped-syria/>> accessed 7 August 2014.

and peace should be pursued independently, proponents of each must be willing to make some compromises to make a just peace possible. In the case of Colombia, for example, she argued that uncompromising justice would not be possible, but neither would impunity.³¹ Former Chief Prosecutor of the ICC Luis Moreno Ocampo surprised many justice advocates by taking a very different position, arguing for a complete integration of the instruments of justice and diplomacy through the Security Council.³²

Three years later, a Security Council vote on a resolution that would refer Syria to the ICC pitted 13 members of the Security Council against Russia and China. This division made it easy to portray the vote as divided between those who supported justice, human rights, and liberalism, and those who sought to block it, rather than one that evaluated the specific impacts of a referral on the conflict, or the attainability of justice. But some analysts expressed concern that referring situations to the ICC that the Court would find difficult to execute would ultimately weaken the Court.³³

Scholars have tried to evaluate debates about sequencing by drawing on careful social science research. Snyder and Vinjamuri argue that when spoilers are powerful, well-designed amnesties can be crucial devices for bargaining with spoilers and securing their removal, thereby making a peace settlement possible.³⁴ Others have argued that amnesties should be used to secure peace agreements, but then accountability measures can be pursued, possibly even reversing these amnesties over time.³⁵ In one discussion, Aryeh Neier, former president of the Open Society Foundations, argued that ‘deals’ could be made to secure the exit of leaders like Gaddafi, but that impunity must never be formalized.³⁶ Others have been more adamantly opposed to placing peace before justice and argued that in fact justice has helped to make peace possible in many cases, or that even if justice preceded peace in the past, there is no reason to assume that this sequence must be continually observed.³⁷

Ultimately, an outcomes-based approach should evaluate the effects of sequencing on the short-term goal of peace not only because peace is a core value but also because it is essential for minimizing human rights abuses. It should also evaluate the impact of different sequencing strategies on the long-term goal of justice. Often, justice delayed may mean more and better justice. Trials of the major Nazi war criminals were pursued in the aftermath of military victory and facilitated by occupying powers that sought to stabilize and democratize Germany. Recent pursuits of justice in Chile

³¹ Opening speech by Louise Arbour, ‘Doctrines Derailed?: Internationalism’s Uncertain Future’, Global Briefing 2013, International Crisis Group (28 October 2013).

³² LMoreno Ocamp, ‘Between Bombing or Doing Nothing’ (*Huffington Post*, 4 September 2013) <http://www.huffingtonpost.com/luis-moreno-ocampo/between-bombing-or-doing-_b_3869088.html> accessed 7 August 2014.

³³ A Dworkin, ‘Europe Turns to the ICC on Syria—A Sign of Hopelessness?’ (*European Council on Foreign Relations*, 23 April 2014) <http://www.ecfr.eu/content/entry/commentary_europe_turns_to_the_icc_on_syria_a_sign_of_hopelessness251> accessed 7 August 2014.

³⁴ Snyder and Vinjamuri (n 6).

³⁵ T Olsen et al., *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington D.C.: United States Institute of Peace Press 2010).

³⁶ A Neier on the Arab Revolutions (*European Council on Foreign Relations*, 9 March 2011) <http://www.ecfr.eu/content/entry/europe_and_the_arab_revolution> accessed 7 August 2014.

³⁷ Human Rights Watch, ‘Selling Justice Short’ (n 2); K Sikkink, *Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: W.W. Norton & Company, Inc 2011).

and Argentina build on a platform of stable democratic institutions and run little risk of destabilizing the state. Quite the opposite, the arrest of Augusto Pinochet spurred additional efforts to deal with the past and has helped entrench a culture of democracy and accountability in Chile. Acknowledging past crimes may strengthen prior institutional reforms by setting the historical record straight.

Judicial interventions in ongoing atrocities present a challenge to the fundamental principle that law should be independent of politics. Advocates of the ICC and of international criminal tribunals generally reject the idea that justice can be coordinated with other international policy instruments, such as negotiations, sanctions, or military force, or that it can be sequenced based on domestic factors. But the assumption that justice can be pursued neutrally during conflict is inconsistent with the claim that justice can independently affect the prospects for peace by marginalizing some actors and empowering others.

History suggests that those judicial interventions with the greatest capacity to contribute to peace have depended for their success on prior political and military efforts. In Bosnia, Kosovo, Sierra Leone and elsewhere, diplomatic and military interventions have been highly coordinated. The successful creation of international tribunals has depended on the creation or imposition of a stable domestic balance of power. British military intervention in Sierra Leone helped to defeat the Revolutionary United Front (RUF) and thereby paved the way for the creation of the Special Court for Sierra Leone. Similarly, the ICTY only really made progress once the Serbs began to lose capacity on the ground and NATO intervention, combined with intensive diplomatic efforts, succeeded in producing a political settlement.³⁸ The indictment of Milošević was built on the back of a prior decision by NATO, highlighted by the bombing of Serbia, that Milošević was on the wrong side of politics. In Uganda, the failure to compel the LRA to capitulate despite the ICC indictments suggests that in the absence of superior military force or a stable negotiated settlement, judicial instruments have little effect.

2.4.2 Displacing the local

Indicting alleged perpetrators during conflict threatens to undermine the complementarity principle central to the ICC that posits that national legal systems are the preferred locus for establishing accountability. In states where institutions are weak, politics are decentralized, and a high degree of instability persists, the prospects for domestic justice are low. Under such conditions, not only is securing arrests and convictions difficult but basic issues concerning who has the legitimacy, as well as the capacity, to govern may not yet have been resolved and admissibility challenges are more likely to fail than succeed.

Even where states have sufficient local capacity, the ability of local actors that are party to conflict to pursue a neutral justice, or to be seen to pursue a neutral justice, will be heavily compromised and is unlikely to be an immediate priority. The international pursuit of justice in this phase may therefore have the unintended consequence

³⁸ L Vinjamuri, 'Justice, Peace and Deterrence in the Former Yugoslavia' (*European Council on Foreign Relations*) <http://www.ecfr.eu/ijp/case/bosnia_herzegovina> accessed 7 August 2014.

of creating a situation in which justice is routinely outsourced, thereby disenfranchising national actors and inhibiting efforts to embed accountability norms locally.

The pursuit of international justice during ongoing conflict may be deleterious for post-conflict state building as well. National leaders will be far better placed to make the case for domestic ownership of justice processes once conflict has been resolved. The pre-emptive pursuit of justice by external actors may restrict and inhibit the trans-national and international linkages that can facilitate local autonomy, authority, and ownership of justice in post-conflict states. Outsourcing justice and removing options that are deemed to fall short of the gold standard of international justice together risk alienation of the *local* from the *international* project of accountability. Over time, this may contribute to a bifurcated system of global justice, with weak states subject to international authority and stronger democratic states answerable only to themselves. Paradoxically, efforts to institutionalize international justice through the ICC may mean abandoning the goal of decentralized justice. Absent this decentralization, the long-term prospects for the globalization of an accountability norm may suffer.

2.4.3 Impairing neutrality and undermining legitimacy

The prospect that international justice will be viewed as taking sides is great during ongoing conflict. In Uganda, the ICC has issued arrest warrants for rebels in the LRA, but has been criticized for failing to investigate government crimes. In Libya, the ICC was seen by many as an instrument that supported an American and European policy of regime change. The tribunal in Iraq was viewed as a means of legitimizing the American intervention that toppled Saddam Hussein's Sunni regime. And in the former Yugoslavia, Serbs continued to view the Yugoslav Tribunal as anti-Serb.³⁹

Former or sitting heads of state indicted by international courts have challenged the legitimacy and authority of the courts that have indicted them. Milošević argued that the ICTY was both partial and illegitimate. Charles Taylor lodged similar claims against the Special Court for Sierra Leone upon his arrival at The Hague. Saddam Hussein blasted the Iraqi Special Tribunal for being the handmaiden of US imperialism; and al-Bashir and his cohort have accused the ICC of being illegitimate and having no proper authority on which to indict or prosecute them.⁴⁰

The perception that international justice is neither neutral nor legitimate extends beyond cases where conflict is ongoing. The most sophisticated anti-ICC campaign emerged in Kenya, where Uhuru Kenyatta and William Ruto, both accused before the

³⁹ 'Warrant Issued for Sudan's Leader', *BBC News*, 4 March 2009; al-Bashir also argued, 'You will find in all the world's countries that militants who take up arms against a government are classified as terrorists. Even those who resist occupation in Iraq, Afghanistan and Palestine are classified today as terrorists, except in Sudan. When some people take up arms, it's the government that's guilty'; quoted in 'ICC Prosecutor Makes Case against Sudan's President', *PBS Newshour*, 8 September 2009; on bias in favour of the government of Uganda, see T Raby, 'Advocacy, the International Criminal Court, and the Conflict in Northern Uganda' (*Humanitarian Exchange Magazine, Humanitarian Practice Network*, December 2006) <<http://www.odihpn.org/humanitarian-exchange-magazine/issue-36/advocacy-the-international-criminal-court-and-the-conflict-in-northern-uganda>> accessed 7 August 2014.

⁴⁰ For one example of the types of claims being made in response to the ICC's issuing of an arrest warrant against president Omar al-Bashir of Sudan, see 'Bashir Attacks West over Warrant', *Al Jazeera*, 5 March 2009.

ICC, forged the Jubilee Alliance to capitalize on their different ethnically defined voter bases and maximize their prospects for electoral success in the 2013 general elections. Anti-ICC rhetoric was central to their platform. The ICC was framed as an imperialist institution that constituted a threat to Kenya's sovereignty.

But the problem of neutrality has been exacerbated by the ICC's interventions in ongoing conflict. And the Court's dependence on states has increased its reluctance to alienate state officials.⁴¹ This fact, combined with the reality that during ongoing hostilities local elites have been tempted to press for judicial intervention as a mechanism to undermine or discredit their opponents, increases the difficulties that international criminal tribunals face in maintaining their neutrality.

2.4.4 Raising the stakes for justice

Finally, emphasizing the capacity of justice to deter crimes in situations of ongoing conflict sets a very high bar for success. Sceptics will continue to find failed deterrence an easy basis for attack because, as scholars have long recognized, successful deterrence is notoriously hard to identify. International justice institutions lack the enforcement capabilities that are essential to delivering credible threats.⁴² Justifications that stress outcomes also undermine the basic claim that justice is inherently valuable. International criminal justice instead is treated as one among many interchangeable policy tools used to manage conflict, alongside negotiations, economic sanctions, and military force.⁴³ If justice cannot bring peace and reduce violence as effectively as these other instruments, then logically it follows that it should be replaced.

The new trend towards results-based assessments and effects-based advocacy has not been supported by conclusive evidence.⁴⁴ A study by Human Rights Watch claims that the potential of justice to contribute to peace has been 'sold short', and that in many cases international justice has helped establish the rule of law, deter further atrocities, and prevent future cycles of violence.⁴⁵ In contrast, a study of the ICTY's effectiveness argues that the evidence 'did not provide an adequate basis for even provisional conclusions' to assess the ICTY's deterrent effect.⁴⁶ The report instead pointed to the Tribunal's role in contributing to the removal of criminals from the former Yugoslavia and its role in promoting local justice. Some recent research identifies the positive effects of international justice on democracy and deterrence.⁴⁷ But other

⁴¹ D Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (New York: Oxford University Press 2014).

⁴² K Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7 *International Journal of Transitional Justice* 434.

⁴³ Orentlicher, 'Shrinking the Space for Denial' (n 2).

⁴⁴ For an excellent review of much of the research that attempts to evaluate the effects of transitional justice, see Thoms et al. (n 6). For a recent study of the factors associated with transitional justice, see L Fletcher et al., 'Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective' (2009) 31 *Human Rights Quarterly* 163.

⁴⁵ Human Rights Watch, 'Selling Justice Short' (n 2).

⁴⁶ Orentlicher, 'Shrinking the Space for Denial' (n 2) 16.

⁴⁷ Sikkink and Walling (n 19); Kim and Sikkink (n 19); Olsen et al., *Transitional Justice in Balance* (n 35); T Olsen et al., 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy' (2010) 32 *Human Rights Quarterly* 980; H Binningsbø et al., 'Civil War and Transitional Justice, 1946–2003: A Dataset' (paper presented to the workshop 'Transitional Justice in the Settlement

studies suggest justice has had little independent effect on peace or democracy, or has even catalysed negative unintended consequences.⁴⁸ A review of the research on the effects of transitional justice argues that there was little evidence of the positive impact of trials on peace, and no sustained support for the claim that justice is necessary for peace or that it brings about peace faster.⁴⁹

Careful qualitative empirical research may force advocates to qualify their claims and introduce statements that set out the conditions under which international trials will be successful. The claim that pursuing criminal trials is absolutely necessary for lasting peace is undermined by a number of significant and well-researched cases. Negotiated settlements in Mozambique and El Salvador were built on the back of amnesties and more recently, peace negotiators have sometimes simply deferred considerations of accountability, opting instead for a strategic ‘silence’.⁵⁰ Factors entirely unrelated to international justice appear to be far more significant in explaining the sustainability of peace. For example, some studies of international justice have argued that military factors, especially one-sided victories, are a greater predictor of peace than any effort to bring war criminals to justice.⁵¹

Similarly, claims that justice can and should be a central component of democracy promotion may be undermined by empirical research. Successful transitions in Spain, Brazil, and Portugal were built on a buried past. The potential destabilizing effect of recent efforts in Spain to uncover the abuses of the Franco era was cushioned by a consolidated democratic state with robust institutions capable of ensuring respect for rights and the rule of law. Amnesties in Chile and Argentina helped to contain powerful spoilers who might otherwise have obstructed democratic transitions. Challenges to these amnesties in the past decade have been mounted with the support of democratic systems with strong civilian controls over the military. In each of these cases, if justice for the perpetrators of mass atrocities is now being served, it is the handmaiden of peace and not its usher.

Despite the publicity that international justice continues to receive, the uncertainty that surrounds recent indictments is likely to lead to a protracted debate about the effects of ICC arrest warrants in conflict situations. Mediators and local political elites have continued to use amnesties; and as amnesties for certain categories of crimes have been abandoned, those in power have opted for silence on the question of accountability. Writing justice into peace agreements and negotiations continues to

of Conflicts and Kidnapping’, Bogotá, Colombia, 18–19 October 2005); and T Lie et al., ‘Post-Conflict Justice and Sustainable Peace’ (2007) Post-conflict Transitions Working Paper No. 5, World Bank Policy Research Working Paper 4191 <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2007/04/09/000016406_20070409111614/Rendered/PDF/wps4191.pdf> accessed 7 August 2014.

⁴⁸ S Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press 2013).

⁴⁹ Thoms et al. (n 6). Others note that since 1945, wars that have been followed by sustained peace have more often than not achieved these results in the absence of accountability.

⁵⁰ H Cobban, *Amnesty after Atrocity: Healing Nations after Genocide and War Crimes* (Boulder: Paradigm Publishers 2007). The absence of any reference to accountability has characterized many wars that were followed by sustained periods of peace. Since 1990, international justice has more often been associated with sustained peace when it was pursued at least two years after a war ended.

⁵¹ Thoms et al. (n 6).

be rare.⁵² In Zimbabwe the costs and benefits of an amnesty programme are debated internally, but the plausibility for international recognition of such a strategy is low. Progress in Uganda has been stalled in part due to the indictment of LRA leaders. Recent efforts to end conflict in Afghanistan have focused on strategies designed to negotiate and reconcile with the Taliban. The continued use of amnesty since the end of the Cold War, and more broadly between 1970 and 2007, suggests that justice may still be considered a luxury good by those actively engaged in fighting and ending wars.⁵³ Especially in ongoing conflicts, amnesty remains a very popular tool. Of all armed conflicts resolved through a bargained solution, 45% contained amnesty provisions during the period 1946–2006. Indeed only 17% of civil wars during this period (1946–2006) resulted in trials.⁵⁴ This underscores a gap between the solutions proffered by the international community and those sought in states emerging from conflict.

What is at stake when the expectations outlined for international justice are set so high that justice is expected not only to spread the rule of law but also to deter crimes and bring peace? Indicting powerful nationals or rebels who are pivotal to the success of peace negotiations places international mediators in a very challenging position, except where they have a viable alternative negotiating partner. In these challenging cases, negotiators face a hard choice. They can ignore an indictment and accept the international moral opprobrium that attends negotiating with an indicted war criminal. Moral opprobrium is a sanction that penalizes not only its targets, but also third parties who fail to respect the spirit of justice. And so, arrest warrants may have the unintended consequence of increasing pressure on the international community to take more singular positions, using harder language and sometimes harder policy instruments, even military force, to force perpetrators to stand down. The prospect of a neutral intervention designed simply to stop atrocities becomes more difficult. In Libya, the perception that the ICC was one part of a broader Western strategy of regime change was intensified when the ICC issued an arrest warrant against Gaddafi.

The potential for a backlash against international justice even from its most likely supporters is stronger in cases where the ICC is set up to fail rather than to succeed. Early judicial interventions are risky because they can provoke humanitarian back-sliding (as in Sudan), stall peace talks (as in Uganda), and intensify violent conflict (as in Libya). In this respect, early judicial intervention raises the stakes for the entire project of international justice.⁵⁵

⁵² L Vinjamuri and A Boesenecker, *Peace Agreements and Accountability: Mapping Trends from 1980 to 2006* (Geneva: Centre for Humanitarian Dialogue 2007).

⁵³ T Olsen et al., ‘Transitional Justice in the World, 1970–2007: Insights from a New Dataset’ (2010) 47 *Journal of Peace Research* 803. On trends in amnesties, see L Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Portland: Hart Publishing 2008). See also M Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press 2009).

⁵⁴ H Binningsbø et al., ‘Armed Conflict and Post-Conflict Justice, 1946–2006: A Dataset’ (2012) 49 *Journal of Peace Research* 731.

⁵⁵ For an example of this type of argument by sceptics, see A Natsios, ‘A Disaster in the Making’ (*African Arguments*, 12 July 2008) <<http://africanarguments.org/2008/07/12/a-disaster-in-the-making/>> accessed 7 August 2014.

2.5 Rewriting Justice

International justice has moved squarely into situations where conflict is ongoing. If it is to remain in this treacherous space, it will be politically impracticable not to investigate the effects it is having on events on the ground. This requires some real sense of the actual impact of pursuing justice in different types of states, and at different stages of conflict and peacebuilding. Despite the dilemmas these justice initiatives pose, the emphasis on outcomes has encouraged rigorous research and evaluation.

Does a lack of systematic evidence for the proclaimed effects of international justice mean that there are no grounds on which to defend its centrality in state building? Clearly not, and much important research is in process, or is only now being released, but it does raise a red flag.⁵⁶ Arguments on behalf of justice will benefit from modesty. Grandiose statements that attribute to international justice a single-handed ability to deliver peace stand a high chance of backfiring. Nor can the caution of sceptics be ignored by those engaged in post-conflict reconstruction and state building.⁵⁷ The lessons of history are often misread. There is reason for a healthy dose of scepticism among sceptics and advocates, if only to encourage debate and to displace dogmatism.

The pursuit of justice as an absolute and non-negotiable value in international politics may sometimes mean that other important goals are jeopardized. Selectively promoting justice in contexts where it is likely to deliver both more peace and more justice offers a more pragmatic and principled way of deploying a highly valuable, but also very limited resource. This also places a premium on systematic and rigorous empirical research, rather than faith, as the basis for promoting justice strategies. International justice is a limited resource that should be deployed both where it can be realized and where it can have the greatest positive effect on other values we hold in great stead, especially saving lives, ending conflicts, and building stable institutions.

As it is, mediators now face increasing pressure to introduce mechanisms for guaranteeing accountability into peace negotiations; their flexibility has been greatly limited.⁵⁸ Initiatives designed to bring accountability for mass atrocities have been integrated into the work of foreign aid and development agencies, and those NGOs whose main goal is monitoring human rights violations, negotiating peace, and rebuilding post-conflict states.⁵⁹ The claim that these initiatives are necessary for sustained peace and can play a critical role in deterring conflict has been widely articulated, and also broadly embedded as a practice in the mandates and operating guidelines of many

⁵⁶ For example, see work by Binningsbø et al., ‘Armed Conflict and Post-Conflict Justice, 1946–2006: A Dataset’ (n 54).

⁵⁷ B Lebow, ‘The Irreconcilable Goals of Transitional Justice’ (2008) 30 *Human Rights Quarterly* 95.

⁵⁸ Vinjamuri and Boesenecker (n 52).

⁵⁹ See M Avello, ‘European Efforts in Transitional Justice’ (2008) 58 Working Paper, Fundación para las Relaciones Internacionales y el Diálogo Exterior (FRIDE) <http://www.fride.org/download/WP58_Transitional_justice_ENG_sep08.pdf> accessed 7 August 2014. For an example of efforts by NGOs to ensure that development agencies embrace transitional justice, see International Center for Transitional Justice, ‘Donor Strategies for Transitional Justice: Taking Stock and Moving Forward’ (October 2007).

international organizations.⁶⁰ Even if this new research eventually produces a sustained evidence-based consensus, it is likely to generate debate for a considerable time to come. Evaluating the pursuit of justice during ongoing conflict is crucial. What we may discover is that contrary to the mantra that justice delayed is justice denied, the most promising way to promote justice may be to postpone it.

⁶⁰ On the normalization of accountability, see Teitel (n 1).

3

The Relationship between the ICC and the United Nations Security Council

*Deborah Ruiz Verduzco**

3.1 Introduction

The relationship between the ICC (or Court) and the United Nations Security Council (Council)¹ was one of the stumbling blocks in the negotiations on the establishment of the Court. Negotiators devised this relationship based on two pillars, a ‘positive one’, i.e. the power of the Council to refer situations to the Court, and a ‘negative one’, i.e. the power of the Council to defer or suspend investigations or prosecutions.² These two pillars are reflected in the Rome Statute³ in Articles 13(b) and 16. The ‘negative pillar’ was invoked a few days before the Statute entered into force in 2002 in SC Resolution 1422 (2002),⁴ thereby inaugurating what has become ongoing practice on the part of the Council in relation to both pillars.⁵

This chapter analyses practice underlying the relationship between the Court and the Council. The emerging picture is characterized by friction. The Court has benefited from Council practice. The Court has become a central institution in the international legal arena, partly due to interaction with the Council. But this relationship

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¹ See generally P Gargiulo, ‘The Relationship between the ICC and the Security Council’ in F Lattanzi and W Schabas (eds), *The International Criminal Court: Comments on the Draft Statute* (Napoli: Il Sirente 1998), 95–119; L Yee, ‘The International Criminal Court and the Security Council Articles 13(b) and 16’ in R Lee, *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results*, ed. Roy Lee (The Hague: Kluwer Law International 1999), 143–52; J Trahan, ‘The Relationship between the International Criminal Court and the UN Security Council’ (2013) 24 *Criminal Law Forum* 417–73.

² On ‘positive’ and ‘negative pillars’, see F Berman, ‘The Relationship between the International Criminal Court and the Security Council’ in H von Hebel et al. (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague 1999) 173–80.

³ Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (‘Rome Statute’).

⁴ UNSC Res 1422 (17 July 2002) UN Doc S/RES/1422. See also renewal of deferral in UNSC Res 1487 (12 June 2003) UN Doc S/RES/187.

⁵ A third type of interaction relates to the Court’s jurisdiction over the crime of aggression as defined by Resolution 6, Review Conference of the Rome Statute, RC/Res 6, 11 June 2010. See generally C McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press 2013); R Clark, Chapter 31 in this volume.

and, in particular, approaches of the Council relating to the ‘positive pillar’ have posed considerable challenges for the Court.⁶

This contribution examines these dilemmas. It argues that the interplay between the two institutions can be understood through three general lenses: a ‘functionalist’ logic, portraying the ICC as a ‘tool’ of the Council⁷; a contrasting vision, stressing judicial independence and the need for institutional autonomy; and one purporting the Council as executive enforcement organ for the ICC, thereby supporting the functionality of the Rome Statute. All three dimensions have become evident in different areas of practice. This chapter first treats developments and challenges in relation to the ‘positive pillar’, i.e. (i) referrals, (ii) funding, (iii) cooperation and enforcement, and (iv) other Council support for ICC action. It then examines (v) deferral practice. It concludes with some targeted recommendations to improve the status quo.

3.2 The Relationship between the Court and the Council: Three Theories

The relationship between the ICC and the Council can be theorized in terms of three different models: Council-related functionality, institutional autonomy, and Rome Statute-centred functionality.

3.2.1 The ICC as an instrument of international peace and security

It is typically argued that the ICC serves as an entity to strengthen international peace and security. The Court was established within the tradition of peace maintenance. This is reflected in the preamble of the Statute and the relationship to the Council, which is the primary organ tasked with the responsibility to address threats to international peace and security, and empowered to do so under Chapter VII of the UN Charter.⁸

⁶ H Mistry and D Ruiz Verduzco (rapporteurs), ‘The UN Security Council and the International Criminal Court’, Chatham House and Parliamentarians for Global Action (March 2012) (‘Chatham House, SC and the ICC’); B Stagno Ugarte, ‘Strengthening the Rule of Law through the United Nations Security Council’, Australian National University (September 2012) (‘Stagno, Strengthening the Rule of Law 2012’); Concept Note of the Open Debate of the Security Council on ‘peace and justice’ with a special focus on the ICC, 17 October 2012, in Letter dated 1 October 2012 from the Permanent Representative of Guatemala to the United Nations addressed to the Secretary General UN Doc S/2012/731 (17 October 2012) (‘Concept Note 2012 Open Debate on Peace and Justice’); UNSC 6849th meeting (17 October 2012) UN Docs S/PV6849 and S/PV6849 Resumption 1 (‘UNSC 6849th meeting’) (‘2012 Open Debate on Peace and Justice UNSC 6849th meeting’); The Rule of Law: The Security Council and Accountability, Security Council Report (January 2013) (‘Security Council Report, 2013 Rule of Law Report’); The Relationship Between the ICC and the Security Council: Challenges and Opportunities, International Peace Institute (March 2013) (‘IPI, ICC and Security Council 2013’); D Kaye et al., The Council and the Court: Improving Security Council Support to the Court, School of Law University of California Irvine (May 2013); Report of the Court on the Status of Ongoing Cooperation between the International Criminal Court and the United Nations, including in the field, ICC Doc ICC-ASP/12/42 (14 October 2013) (‘Report of the Court on ICC-UN Cooperation’).

⁷ On ICC-UN relations, see Negotiated Relationship Agreement between the International Criminal Court and the United Nations (adopted by the Assembly of States Parties ICC-ASP/3/Res 1 on 7 September 2004, by the UN General Assembly UNGA Res 58/318 on 13 September 2004 UN Doc A/RES/58/318, entered into force 4 October 2004) (‘UN-ICC Relationship Agreement’).

⁸ Charter of the United Nations, 24 October 1945, 1 UNTS XVI (‘UN Charter’).

The power of the Council to refer situations to the ICC is partly grounded in the precedent of the establishment of ad hoc tribunals, which were established as subsidiary organs of the Council.⁹ These tribunals were created as judicial mechanisms under Chapter VII of the UN Charter to adjudicate crimes under international law. This mode of establishment avoided delays and helped materialize the idea of a permanent tribunal.¹⁰

This vision of the link between criminal justice, peace, and security was ultimately retained in the Rome Statute. It is reflected in the preamble which recognizes grave crimes as threatening the peace, security, and well-being of the world, and in the activation of the ‘positive’ and ‘negative’ pillars under the Statute, which require a decision by the Council under Chapter VII of the UN Charter.

The idea that the ICC serves as an instrument of the Council is reaffirmed by contemporary practice. In its referrals to the Court, the Council has routinely acknowledged that the referred situations ‘constitute a threat to international peace and security’. In its declarations, the Council has highlighted the ‘contribution of the International Criminal Court... in the fight against impunity for the most serious crimes of concern to the international community’.¹¹ This thinking is expressly reflected in Council’s rhetoric. In the first ever open debate on the ICC, the discussion sought to, among others, ‘explore how the ICC, as a tool of preventive diplomacy, can assist the UNSC in carrying out its mandate...’¹² The Russian delegate conceded that ‘[t]he Council has a serious new tool with which to achieve [the] goal of bringing persons guilty of particularly serious crimes under international law’.¹³ The idea of the ICC as a tool is also reflected in United States discourse.¹⁴

This approach has attraction for some, but may entail dangerous consequences when taken to the extreme. The leverage of international justice is weakened if it is used as a tool by the Council to promote specific political agendas. In its most evil version, ICC intervention may be perceived as a ‘tool’ to promote regime change, or as a corollary to military intervention.

The use of the ICC at the service of the Council has come at a price. It places a considerable burden on those States Parties that participate in Council decision-making. Entrenched positions about the Court held by certain permanent members, especially China, the Russian Federation, and the United States (which are not Parties to the

⁹ Statute of the International Tribunal for the Former Yugoslavia, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, Annex (‘ICTY Statute’).

¹⁰ Art 25 and commentary, Draft Statute of an International Criminal Tribunal, Report of the Working Group on a Draft Statute for an ICC, ILC UN Doc A/CN.4/L.490 and Add.1 (March 1993), Annex, ILC Yearbook 45th sess UN Doc A/CN.4/SER.A/1993/Add.1 (Part 2, 1993), 109, reads: ‘The Working Group felt that a provision such as this one was necessary in order to enable the Security Council to make use of the Court, as an alternative to establishing tribunals ad hoc.’

¹¹ SC Presidential Statement 2012/1 (19 January 2012) UN Doc S/PRST/2012/1; SC Press Statement (5 July 2012) UN Doc SC/10700. For a variant, see SC Presidential Statement 2013/8 (17 June 2013) UN Doc S/PRST/2013/8.

¹² Concept Note 2012 Open Debate on Peace and Justice (n 6), para. 6.

¹³ Statement of Ambassador Churkin, 2012 Open Debate on Peace and Justice UNSC 6849th meeting (n 6), 19.

¹⁴ Statement of Ambassador Rice, 2012 Open Debate on Peace and Justice UNSC 6849th meeting (n 6), 8.

Statute), and other non-permanent members, often make it necessary to make concessions or compromises that weaken the Court. The decision to trigger ICC action in delicate political contexts creates a ‘catch 22’. If the Court faces problems in tackling violence, it is perceived as a weak actor that is irrelevant and powerless in the face of extremely complex human catastrophes. Conversely, when the Court is effective, political actors worry about the ‘serious political and legal consequences [that] sometimes follow Court engagement’.¹⁵ Alternative ad hoc or regional solutions for accountability are put forward, or worse, accountability is neglected.

3.2.2 Institutional autonomy

The idea of the ICC as an ‘enforcement tool of the Council’ stands in conflict with concerns of judicial independence and with the necessary separation between the ‘judicial’ and the ‘political’ space. The plea for institutional autonomy has a long tradition. The vision of ‘separate mandates and separate operation’ dominated the Cold War era early negotiations for an international criminal jurisdiction. The Draft Statute prepared in 1991 by the ILC provided a modest role to the Security Council. For the ILC, maintaining security or peace was incompatible with the institution of criminal proceedings.¹⁶ Keeping both organs separated, it was argued, would avoid damaging the credibility of the international court by lowering the risk of a political organ preventing genuine cases from reaching it.¹⁷ This vision endured until 1993, which saw the naissance of the ad hoc tribunals.

In the negotiations of the Rome Statute, voices remained divided in relation to prerogatives of the Council, in light of the need to preserve judicial independence. Calls for greater institutional autonomy have gained new attention with contemporary criticisms of the interplay between the Court and the Council. In contemporary practice, the Council has ‘not convincingly demonstrate[d] an exemplary commitment to the Court and its pursuit of international accountability’.¹⁸ Former ICTY Prosecutor Louise Arbour has famously argued that the linkage to the Council ‘has in fact underscore[d] the Court’s impotence rather than enhance[d] its alleged deterrent effect’.¹⁹ For this

¹⁵ Statement of Ambassador Churkin, 2012 Open Debate on Peace and Justice UNSC 6849th meeting (n 6), 19; Kaye, The Council and the Court (n 6), 12–13.

¹⁶ Ninth Report on the Draft Code of Crimes against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur UN Doc A/CN.4/435 (8 February) and UN Doc A/CN.4/435.Add.1 (15 March 1991), Section C, Criminal Proceedings, paras 56 and 58, in ILC Ybook 43rd Sess UN Doc A/CN.4/SER.A/1991/Add.1 (Part 1) (1991). A role for the Council was only necessary in relation to aggression, given that this crime, contrary to the other crimes, entails ‘significant violation[s] of international peace’.

¹⁷ Eighth Report on the Draft Code of Crimes against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur (8 March 1990) UN Doc A/CN.4/430 and(6 April 1990) UN Doc A/CN.4/430 Add.1 in ILC Ybook 42nd Sess UN Doc A/CN.4/SER.A/1990/Add.1 (Part 2) (1990). See also ILC Meeting 2155th, Mr McCaffrey, para. 39 and Meeting 2156th, Mr Njenga, para. 63; Arts 5 and 2, Eleventh Report on the Draft Code of Crimes against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur (25 March 1993) UN Doc A/CN.4/449 and Corr 1 in ILC Ybook 45th Sess UN Doc A/CN.4/SER.A/1993/ and Add.1 (1993).

¹⁸ Chatham House, SC and the ICC (n 6), 9.

¹⁹ L Arbour, ‘Doctrine Derailed: Internationalism’s Uncertain Future’ (*International Crisis Group Global Briefing*, 28 October 2013) <<http://www.crisisgroup.org/en/publication-type/speeches/2013/arbour-doctrines-derailed-internationalism-s-uncertain-future.aspx>> accessed 1 November 2013.

reason, there are calls ‘to be more strategic about the convergence of justice with the resolution of armed conflict’²⁰ and also certain regrets about past choices.²¹

3.2.3 The Council as executive enforcement organ

A third way to theorize the relationship between the Council and the Court is to view the Council as an organ for the enforcement of the ICC statutory regime. The Council may to some extent be regarded as an ‘executive arm’ of the ICC system. This approach was reflected in the very first proposal for an international criminal tribunal, put forward in 1818 by Alexander I of Russia to create a supranational mechanism to prosecute individuals engaged in the slave trade. The proposal recognized expressly that additional executive authority was necessary to enforce the decisions of such mechanism.²² It stated that the international tribunal should have a naval force at its disposal to search and detain slave-trade vessels. A supreme council was charged with the mandate to coordinate the operations of the naval force, execute the orders of the tribunal, and report back to the organization’s member states.²³

A newer version of this model was proposed by Hans Kelsen in his 1944 treatise *Peace through Law*, written as a reaction to the failure of the League of Nations. Kelsen incorporated the idea of executive enforcement of judicial acts in his proposal for the ‘Organisation for the Maintenance of Peace’. In his design, judicial adjudication, including over individuals, was a central function of the organization. He recognized that this type of activity required an executive arm. He suggested the creation of a permanent Council (to be composed of the United Kingdom, the United States, the USSR, and China) to enforce judicial activity (e.g. to adopt binding decisions, execute the decisions of the Court, and sanction those who failed to abide by its decisions).²⁴

The Rome Statute incorporates traces of this vision.²⁵ The Court derives its jurisdiction from the jurisdiction of states. By ratifying the Rome Statute, states recognized pre-existing obligations over individuals in international law,²⁶ and established an additional jurisdiction to prosecute them.²⁷ A similar premise underlies the

²⁰ Ibid.

²¹ Y Boisvert, ‘Accuser le Président du Soudan a été une erreur, croit Louise Arbour’, *La Presse* 15 June 2013 <http://plus.lapresse.ca/screens/4609-bec8-51bb361c-aec5-0582ac1c6068%7C_0> accessed 3 March 2015.

²² See Opinion du Cabinet de Russie sur la Traite des Nègres, (Aix-la-Chapelle, 7 November 1818), enclosure 1 of ‘Letter from Viscount Castlereagh to Earl Bathurst’ in *British State Foreign Papers* 6 (1818–19), 68–9 (author’s translation from French).

²³ Ibid.

²⁴ Covenant of a Permanent League for the Maintenance of Peace, Treaty Stipulations Establishing Individual Responsibility for Violations of International Law, Annex II in Hans Kelsen, *Peace through Law* (New York and Chapel Hill: UNC Press, 1944). For similar models of proposed tribunals with executive organs at their service, see also International Law Association, Draft Statute of the International Penal Court, 34th Report (1927), reproduced in ILC, *Historical Survey of the Question of International Criminal Jurisdiction* (1949) UN Doc A/CN.4/7/Rev.1, 67 (‘Historical Survey’); Association du droit pénale internationale, Draft Statute for the Creation of a Criminal Chamber of the International Court of Justice (revised 1946), reproduced in Historical Survey, 75, art 36.

²⁵ It recognizes that the Court deals with ‘the most serious crimes of concern to the international community’. See Preamble, Rome Statute.

²⁶ L Sadat, ‘The International Criminal Court and Universal International Jurisdiction: A Return to First Principles’ in T Biersteker et al. (eds), *Law and International Relations: Bridging Theory and Practice* (London–New York: Routledge, 2006) 187.

²⁷ Report of the Secretary General pursuant to para. 2 of UNSC Res 808 UN Doc S/25704 (3 May 1993), paras 22, 25–7.

jurisdiction of the ad hoc tribunals. Their jurisdiction was founded on crimes that were ‘a part of international customary law’,²⁸ or that had been ratified by treaty by the state over whose individuals the tribunals were exercising jurisdiction. Without this precondition, the Council would have been effectively legislating and therefore acting *ultra vires*.²⁹

In relation to the ICC, the same principles must apply. Given its limitations to legislate, the Council is in principle bound to frame accountability based on pre-existing obligations when referring a situation to the Court. Legally, a Council referral does create a new jurisdiction, but also activates a pre-existing one. In such circumstances, the ICC is thus not a ‘tool’ in the legal sense. Rather, the Council acts as executive organ, i.e. the police that enforce the rules guarded by a judicial organ. This vision of the Council as enforcer of statutory obligations emerged throughout the negotiations of the Rome Statute. It is in particular reflected in the power of the Council to extend ICC jurisdiction and obligations of cooperation to States not Parties, and in the expected role of the Council to address instances of non-cooperation (see 3.5).

In practice, all three models are used on a case-by-case basis. Positions and assessments of participants in the system (mainly states) often drift from one vision to the other, with sometimes contradictory outcomes. This is partly rooted in the nature of the Council. The Council is, above all, a political body. Its decisions often have a rhetorical and symbolic value; they ‘send signals’ and position its members.³⁰ This institutional setting differs from that of the Court. The Court relies on fact-based decision-making. It needs to interpret language judicially. This has created tensions in interaction in various areas: the triggering of ICC jurisdiction, funding, cooperation, enforcement, and deferrals.

3.3 The Framing of Referrals

Security Council referrals have given rise to significant controversies. Article 13(b) allows the Council to refer a situation to the Court, activating its jurisdiction regardless of the consent of the state of territory or nationality, which is otherwise constrained to the territories and the nationals of States Parties.³¹ The Council has referred two situations to the Court concerning acts committed in the territory of two States not Parties: Sudan (Darfur)³² and Libya.³³

A referral is typically considered ‘positive’ because it empowers the Court, by granting it jurisdiction that it might otherwise not have. The two referrals from the Council

²⁸ Ibid.

²⁹ But see M Milanovic, ‘Is the Rome Statute Binding on Individuals? (And Why We Should Care),’ (2011) 9 *Journal of International Criminal Justice* 27; R Bartels ‘Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials’ (2013) 46 *Israel Law Review* 2, 311–12.

³⁰ I Johnstone, ‘Security Council Deliberations: The Power of the Better Argument’ (2003) 14 *European Journal of International Law* 3, 439.

³¹ Art 13(b) of the Statute.

³² UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593 (‘SC Res 1593’).

³³ UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970 (‘SC Res 1970’).

to the Court have enjoyed sufficient, even considerable, support within the Council.³⁴ They have been based on concrete evidence regarding the commission of crimes under international law.³⁵ These features have led to the endorsement of ICC referrals as a potential response mechanism in the UN system.

But referrals have also created problems. They have been accompanied by a questionable delimitation of jurisdiction *ratione personae* which exempts certain nationals from the scope of ICC jurisdiction. Security Council Resolutions 1593 (2005) and 1970 (2011) provide that:

[N]ationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the [African Union], unless such exclusive jurisdiction has been expressly waived by that contributing State.³⁶

This limitation has been a cause of concern. Referrals are mainly intended to activate jurisdiction. Particular steps were taken to prevent selectivity and protect ICC independence. Safeguards were introduced to ensure that the prosecutor would maintain its discretion regarding whether or not to commence an investigation.³⁷ The power of referral was restricted to ‘situations’ rather than ‘cases’ in order to preserve the integrity of ICC proceedings and prevent the ‘singling out’ of specific individuals.³⁸

The exemption language in Security Council Resolutions 1593 (2005) and 1970 (2011) goes against the Rome Statute. The exemption made in Security Council Resolution 1593 (Darfur) was promoted by the United States in line with its domestic legislation which precludes contributions to UN peace operations unless the UN SC Resolution establishing or authorizing the operation exempts US soldiers from ICC jurisdiction.³⁹ This legislation seeks to reverse the effects of Article 12 of the Rome Statute, which grants the Court jurisdiction over any acts committed in the territory of States Parties. Through Resolutions 1422 (2002) and 1487 (2003), adopted as

³⁴ SC Res 1593 was adopted with 11 votes to 4 abstentions (Algeria, Brazil, China, and the United States). SC Res 1970 was adopted with 15 votes.

³⁵ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, UN Doc S/2005/60 (1 February 2005), esp. para. 568. In the case of Libya, the extent of crimes was corroborated a few months after the referral; see Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya established pursuant to UN Human Rights Council, Resolution S-15/2 of 25 February 2011, UN Doc A/HRC/17/44 (1 June 2011), esp. 7.

³⁶ SC Res 1593, para. 6. A quasi-identical provision, not mentioning operations by the AU, is contained in para. 6 of SC Resolution 1970 (2011).

³⁷ Among provisions that safeguard the judicial independence of the Court is the chapeau of Art 13, which provides: ‘[T]he Court may exercise its jurisdiction... in accordance with the provisions of this Statute.’

³⁸ See, *inter alia*, Berman (n 2) 174; C Bassiouni, *International Criminal Law* (Irvington-on-Hudson: Transnational 1997) 515. This interpretation of the Statute was the basis for the Prosecutor’s refusal to limit the situation of Uganda to acts committed by the LRA, despite the wording of the original referral. See Letter of the Prosecutor to the Presidency dated 17 June 2004 contained in ‘Decision Assigning the Situation in Uganda to Pre-Trial Chamber II’ ICC-02/04-1, Presidency, ICC, 5 July 2005.

³⁹ US American Service Members Protection Act of 2002 HR 4775 Public Law 107–206, Title II (2 August 2002), Sec 2005.

preconditions to the renewal of the peacekeeping operation in Bosnia (UNPROFOR), the Council seemingly deferred any prosecution or investigation involving nationals of States not Parties, thus providing a concrete precedent for a peacekeeping exemption clause in Resolution 1593 (2005).

Within the Council, only Brazil abstained, as it considered it ‘unwarranted and unhelpful’ to grant immunities from the jurisdiction of the Court.⁴⁰ In joining the consensus for Resolution 1970 (2011) on Libya⁴¹, Brazil reiterated its ‘strong reservation concerning paragraph 6’ which exempted nationals of States not Parties from the jurisdiction of the Court. It expressed the ‘conviction that initiatives aimed at establishing exemptions of certain categories of individuals from the jurisdiction of the ICC are not helpful to advancing the cause of justice and accountability and will not contribute to strengthening the role of the Court’.⁴²

These exemptions were difficult to justify in rational terms. When the resolutions were adopted, there was no threat of prosecution of US peacekeepers.⁴³ In 2005 there was only an African Union (AU) peacekeeping force in place. The African Union–United Nations Hybrid Operation in Darfur (UNAMID), to which the US contributes through a regular UN budget, was only established in 2007.⁴⁴ These safeguards were thus mainly a means to control the Court *pro futuro*.

The exemption clause has created problems of perception. It highlights the application of double standards by the Council and powerful states. It suggests that the Court can be used to attack some while protecting others.⁴⁵ Ironically, many of the detractors of the Court and of the referral of the situation in Darfur benefit from the exemption clause. Both, the African Union Mission in Sudan (AMIS) and UNAMID drew mainly on nationals of States not Parties, including China, Egypt, Iran, Rwanda, the Russian Federation, and Zimbabwe.⁴⁶ In Libya several States not Parties, such as Turkey, Qatar, the United Arab Emirates, and the United States undertook military operations along with

⁴⁰ Statement of Ambassador Sardenberg, UNSC 5158th meeting (31 March 2005) UN Doc S/PV/5158, 11. See also Statement of Ambassador Baja (Philippines), 6. But see statements by Ambassador Majoral (Argentina) and Ambassador de la Sablière (France) acquiescing to the limitation imposed by SC Res 1593, *ibid.*, 7 and 8.

⁴¹ In its SC Res 1970, the 12th preambular paragraph makes reference to Art 16.

⁴² Statement of Ambassador Viotti, UNSC 6491st meeting (26 February 2011) UN Doc S/PV/6491, 7.

⁴³ Citing data from the Coalition for the International Criminal Court, C Stahn, ‘The Ambiguities of Security Council Resolution 1422 (2002)’ (2003) 14 *European Journal International Law* 1, 87 and n 9. In August 2003, however, the United States identified a concrete threat to prosecution when the Council authorized the establishment of a peacekeeping mission in Liberia through Resolution 1497 (2003). Therefore, it secured a clause to uphold the exclusive jurisdiction of sending States not Parties over their officials or personnel. UNSC Resolution 1497 (1 August 2003) UN Doc S/RES/1497, para. 7.

⁴⁴ The United States contributes to UNAMID through the regular budget of the United Nations. Consent from the host state is necessary to send troops. It is unlikely that Sudan would approve US troop contribution to UNAMID.

⁴⁵ Kaye (n 6), 22.

⁴⁶ Contributors to AMIS (African Union Mission in Sudan, 2004–7) included mainly Rwanda, a State not Party, and Nigeria. Eventually, Egypt and India, as well other States Parties, contributed to AMIS. UNAMID has military personnel from the following States not Parties to the Rome Statute: Cameroon, China, Egypt, Ethiopia, Indonesia, Iran, Kyrgyzstan, Malaysia, Nepal, Pakistan, Palau, Rwanda, Thailand, Togo, Turkey, Yemen, and Zimbabwe. See UNAMID, UN Mission’s Contributions by Country, 30 September 2013 <www.un.org/en/peacekeeping/missions/unamid/facts.shtml> accessed 9 October 2013.

States Parties.⁴⁷ These operations fall under the exemption of paragraph 6 of Resolution 1970 (2011), to the extent that they are authorized by the United Nations under Resolution 1973 (2011).⁴⁸

The practical effect of the clauses on the Court has been limited. In practice, the Office of the Prosecutor has not treated the clause as an obstacle to analysis or investigation. For instance, in his second report to the Council in relation to Libya, the prosecutor acknowledged the existence of allegations of war crimes by all those engaging in armed confrontation, including NATO forces.⁴⁹ Similarly, the Pre-Trial Chamber has reaffirmed the full applicability of the Rome Statute to referrals by the Council. For example, when analysing the request for a warrant of arrest against the President of Sudan the Chamber recalled its view that the Council had accepted the statutory framework established in the Statute by referring the situation to the Court.⁵⁰ This might be read as an indication of the applicability of the entire Statute, irrespective of any contrary limitations contained in the resolution.

The Court had only limited opportunity to assess the impact of such exemptions on its own jurisdiction. Legally, the Court might challenge the binding force of these clauses under the Statute, and argue that they are incompatible with Article 12(2) and Article 27, thereby severing this provision from the overall referral.⁵¹ But thus far, the respective exemptions did not play a meaningful role in practice. They might be considered ‘incidents of bad practice, devoid of any precedential value’.⁵² Unless this language becomes the norm in future decisions of the Council⁵³, its negative effect lies mostly in its dangerous erosion of the principle of equality before the law and the judicial independence of the Court.

3.4 The Funding of Referrals

The approach towards costs incurred by Council referrals has been a second major challenge in the relationship between the two entities. Although the Rome Statute

⁴⁷ NATO operation Unified Protector Fact sheet (October 2011) <http://www.nato.int/nato_static_1fl2014/assets/pdf/pdf_2011_10/2011005_111005-factsheet_protection_civilians.pdf> accessed 1 September 2013.

⁴⁸ The United States has considered their operations in Libya as authorized by Resolution 1973 (2011), see H Koh, Statement regarding the use of force in Libya (26 March 2011) <www.state.gov/s/l/releases/remarks/159201.htm> accessed 1 September 2013. See also ‘Authority to Use Military Force in Libya: Memorandum Opinion for the Attorney General’ (2011) 35 *Opinions of the Office of Legal Counsel*. Contra, ‘Transcript of Interview to Russian Foreign Minister Sergey Lvrov’, *TV Tsentr Channel Post Scriptum*, 1 May 2011 <<http://www.russianembassy.org.za/IA/Brics3.html>> accessed 15 January 2012; ‘Libya: Russia Decries French Arms Drop to Libya Rebels’ *BBC News*, 30 June 2011.

⁴⁹ Second Report of the Prosecutor of the ICC to the UN Security Council pursuant to UNSCR 1970 (2011) (2 November 2011), paras 44, 53, 57, and 58. See Statement by the Russian Federation, UNSC Meeting 6620th (16 September 2011) UN Doc S/PV.6620, 3.

⁵⁰ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, *Prosecutor v Omar Hassan Al Bashir, Situation in Darfur*, ICC-02/05-01/09-3, PTC I, ICC, 4 March 2009, para. 45.

⁵¹ Supporting the possibility of judicial review of Security Council resolutions for the purpose of the Rome Statute see, *inter alia*, Stahn (n 43), 102; Trahan (n 1), at n 72 and 472.

⁵² C Kress, ‘The International Criminal Court and the United States. Reflections on Resolution 1422 of the UN Security Council’ (2003) 77 *Fikrun Wa Fann Art & Thought*, 70.

⁵³ But see Draft Resolution on the Referral of Syria, UN Doc S/2014/348 (22 May 2014), para. 7.

provides for the possibility of funding from the United Nations, the regular budget of the Court—including the costs associated with the investigation and prosecution of the two situations referred by the Council—has been solely funded by the States Parties.

The Council has been a vehicle for implementing the position of the United States towards the ICC. This has had an impact on the funds available to the Court. The US Consolidated Appropriations Public Law of 2000, amended in 2002, prohibits any funds from being ‘obligated for use by, or for support of, the International Criminal Court’.⁵⁴ With this, the United States successfully conditioned their support or ‘lack of opposition’⁵⁵ for, *inter alia*, the adoption of Resolutions 1593 (2005) and 1970 (2011), to the inclusion of an operative paragraph, identical in both resolutions whereby it is

[r]ecognize[d] that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily.⁵⁶

The decision of the Council regarding referrals implied that States Parties had to cover the costs of these measures. Between 2005 and 2013, the Court budgeted approximately €31.9 million for direct costs, i.e. those that can be identified as devoted to a specific situation associated with the referrals of the Council.⁵⁷ These estimated costs do not consider unquantifiable indirect costs, which amount to an average of €20 million per year for all situations.⁵⁸

The language in the referrals is contrary to the common purpose of both organizations. It runs contrary to the policy justification for referrals by the Council, which is to fulfil demands for accountability while eliminating the high costs of ad hoc tribunals. The Rome Statute articulates this purpose and policy decision in Article 115, which provides two main sources to cover the expenses of the Court and the Assembly of States Parties (ASP): (a) assessed contributions made by States Parties, and (b) funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.⁵⁹

⁵⁴ Consolidated Appropriations FY2000, Public Law 106–13, Sec 705 (29 November 1999) and amended by Hyde Amendment (US House Amendment, 10 January 2002).

⁵⁵ The policy of the United States was clearly articulated upon the adoption of SC Res 1593, when Ambassador Patterson stated that the ‘principle [of no funding] is extremely important and we want to be perfectly clear that any effort to retrench on that principle by this or other organisations to which we contribute could result in our withholding funding or taking other action in response’. UNSC 5158th Meeting (n 40) 4.

⁵⁶ SC Res 1593, para. 7; SC Res 1970, para. 8.

⁵⁷ The Court does not produce reports on consolidated and integral costs associated with referrals from the UN Security Council. But the structure of the proposed budget allows it to identify direct costs per year per situation. The total calculated request for 2014 is €31,912,800.00, see 2014 Proposed Programme Budget of the ICC, ICC-ASP/12/10, 29 July 2013 (Twelfth Session of the Assembly of States Parties), data from Table 1.

⁵⁸ See *ibid.*, ‘operational costs’ column, which constitute indirect costs for all the situations under the Court’s jurisdiction.

⁵⁹ See Art 115 of the Statute. In addition, the Rome Statute allows for voluntary contributions from varied entities, such as governments, international organizations, individuals, or corporations, Rome Statute, Art 116. The Financial Rules and Regulations, adopted by the ASP, recognize that the Court may be entitled to other funds. Financial Regulation 5, adopted 9 September 2002, ICC-ASP/1/3 (Part. II-D),

Although both sources of funding are considered in equal terms in the Rome Statute, and both are governed by the term ‘shall’ (thus reflecting the obligation of States Parties to contribute to the budget of the Court), Article 115 is not and could not constitute an instruction to the United Nations to provide funding to the Court. In fact, Article 115(b) illustrates the very early opposition to providing the ICC with fully fledged financial support. Article 115(b) was the compromise between those states that feared that a slow ratification rate, coupled with an absence of UN funding, would render the Court *de facto* inoperative, and the main contributing states to the UN, that opposed the obligatory funding of the ICC.⁶⁰

The limits to UN funding of the Court were institutionalized by the General Assembly before the March 2005 Security Council referral of the situation in Darfur. The possibility of financial contributions by the UN, approved by a decision of the General Assembly but subject to separate agreements, is recognized in Article 13(1) of the 2004 UN–ICC Relationship Agreement.⁶¹ No such agreements exist and the referring resolutions of the Council could simply be seen as reflections of the status quo.

While the Council cannot effectively bar funding for the Court, it cannot guarantee it either, as the General Assembly is the ultimate arbiter of the budgetary structure of the UN,⁶² and the UN–ICC relationship does not, at least yet, foresee funding to the Court. Nevertheless, according to UN procedures, the Security Council could decide to request a programme budget to cover the costs of the referrals to the Court, to be submitted by the UN Secretariat to the Fifth Committee (Administrative and Budgetary Committee) of the UN General Assembly.⁶³

Six years after the Darfur referral, the ASP took it upon itself to discuss the costs arising from Security Council referrals, especially since unexpected costs related to the Libya referral forced the Court to request access to a considerable amount from the contingency fund.⁶⁴ Recognizing the financial situation of the ICC, the ASP Committee on Budget and Finance suggested in its June 2011 report that the Court’s international relevance might merit UN funding. The Committee noted that the central role played by the Court in international criminal justice brought benefits to the entire international community and suggested that the Assembly may wish to consider engaging with the United Nations General Assembly to explore options to cover the financial burden of future referrals.⁶⁵ The Assembly

last amended, ICC-ASP/7/5 (Part II-D), 21 November 2008 <<http://icc-cpi.int/NR/rdonlyres/D4B6E16A-BD66-46AF-BB43-8D4C3F069786/281202/FRRENG0705.pdf>> accessed 3 March 2015.

⁶⁰ M Halff and D Tolbert, ‘Article 115’ in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court Observers’ Notes, Article by Article*, 2nd edn (Baden-Baden: Nomos 2008), (‘Triffterer, Commentary 20.08’) 1712.

⁶¹ UN–ICC Relationship Agreement (n 7), Art 13.

⁶² Art 17(1) UN Charter.

⁶³ The General Assembly cannot approve any expenditure before the Committee considers a proposed programme budget. See UN General Assembly Rules of Procedure, Rule 153, UN Doc A/520/Rev.15, last amended September 2007, p. 33.

⁶⁴ Contingency Fund request for extra resources for the Libya situation for May to December 2011, Letter from Mr Marc Dubuisson, Director of Court Services, on behalf of the Registrar to H E Mr Santiago Wins, Chair of the CBF (2011/09/1A, 27 April 2011), referred to in Proposed Programme Budget 2012, ICC/ASP/10/10, 21 July 2011 (Tenth Session of the Assembly of States Parties) Table 1.

⁶⁵ Report of the Committee on Budget and Finance on the Work of its Sixteenth Session, ICC-ASP/10/15, 17 June 2011 (Tenth Session of the Assembly of States Parties), para. 23.

has delegated such responsibility to the ICC by mandating the Court to engage in dialogue on the legal framework with the United Nations, to ensure funds are forthcoming.⁶⁶ Ironically, the Court has been placed in a position to seek its own funding, something that the Rome Statute may not have intended, as Article 115 suggests. The Court has engaged with the UN Secretariat on this matter, but with little reported progress.

Admittedly, the issue lies with UN Member States. The only dialogue with respect to funding at the level of the UN takes place in the context of the negotiation of the annual General Assembly resolution on the ICC. This forum offers limited opportunity. For instance, UNGA Resolution 67/295 (2013) simply notes in a preambular paragraph ‘the need for funding of expenses related to investigations or prosecutions of the International Criminal Court, including in connection with situations referred to the Court by the Security Council’,⁶⁷ while referring to the reimbursable nature of the cooperation in an operative paragraph.⁶⁸

Tackling the issue of Court financing through the UN Security Council may not solve the issue entirely. Ultimately, the decision lies with the UN General Assembly. In both organs, objections to financial support to the Court may come from SC Permanent Members other than the United States, or from States Parties who were wary of UN funding to the Court from the outset. In fact, many top contributors of the UN (except the United States, China, and the Russian Federation) are also States Parties to the Statute. These States Parties carry a considerable share of whatever funds the UN may decide to allocate to the Court.⁶⁹ Certain African states might seek to block support by the General Assembly for political, rather than financial reasons.

The existing funding scheme has repercussions for prosecutorial independence. For instance, in 2011 the prosecutor alerted that further investigations in Libya were subject to the availability of funds:

It is not yet determined whether the Office’s investigation into allegations of war crimes will move forward in this or the coming period, depending on the funds available to the Office to conduct the Libya investigation.⁷⁰

⁶⁶ Budget Resolution, ICC-ASP/11/Res.1, 21 November 2012 (Eleventh Session of the Assembly of States Parties), sec J. See also Budget Resolution, ASP/10/Res.4, 21 December 2011 (Tenth Session of the Assembly of States Parties), sec G.

⁶⁷ UNGA Resolution 67/295 (22 August 2013) UN Doc A/RES/67/295, preamble.

⁶⁸ Ibid., para. 17.

⁶⁹ From the top 15 contributors to the UN regular budget, only three (the United States, the Russian Federation, and China) are not Parties to the Statute. Should UN funding to the Court be approved, 15 States Parties (Japan, Germany, France, United Kingdom, Italy, Canada, Spain, Brazil, Australia, Republic of Korea, Mexico, Netherlands, Switzerland, Belgium, and Sweden) would have to provide a considerable portion of funding to the Court, the UN budget, and the regular budget of the Court. Data from Table III, Contributions by Member States to the United Nations’ regular budget for the year 2013, (24 December 2012) UN Doc ST/Adm/Ser.B/866. The ICC applies the same scale of assessment as the United Nations. See Art 117 of the Statute.

⁷⁰ Second Report of the Prosecutor of the ICC to the UN Security Council pursuant to UNSCR 1970 (2011), Office of the Prosecutor, 2 November 2011, para. 53.

This statement highlights the interrelation between budgetary and political control over the Court.

Similar concerns arise in relation to the possibility of voluntary contributions, which is mentioned in the funding-related paragraphs of the referral resolutions.⁷¹ There seems to be little appetite for such contributions among States Parties or States not Parties. Following the adoption of SC Resolution 1970 (2011), the Court set up a special trust fund to receive contributions for expenses related to the Libya situation.⁷² But the Court has not received any such contributions. While allowed by the Rome Statute, such contributions also have undesirable effects. They leave the Court in a position of vulnerability and may not be sustained. Tying ICC action under SC resolutions to voluntary contributions or fundraising may ultimately present a threat to the independence of the Court, and undermine the purposes of the financing-related language in this resolution.

3.5 Obligations to Cooperate with the Court

Referrals are an enforcement measure of the Council under Chapter VII. They are in principle addressed to all UN members, and might encompass corresponding duties of cooperation. But existing resolutions have embraced a more limited approach. The scope of duties of cooperation following a Security Council referral has been subject to dispute. The Council has been vague in its articulation of obligations. Obligations to cooperate cannot be inferred from the referral alone.⁷³ The Council must be explicit in its decision that states ‘shall cooperate’ with the Court.

In its current practice under Article 13(b), the Council has adopted a narrow approach in relation to the creation of obligations to cooperate with the Court. In the situation in Darfur, the Security Council has limited the obligation of cooperation to the Government of Sudan and other parties to the conflict through Resolution 1593 (2005). Other states were only urged to cooperate fully. The Libyan referral has been phrased in similar terms. Obligations to cooperate have been focused on Libyan authorities. This has left uncertainties in relation to the obligations of States not Parties to the Statute, other than the territorial state.

This limitation stands in contrast to the treatment of the ad hoc tribunals, which benefit from a broader system of cooperation. In these cases, the Council specified that all Member States have ‘an obligation to cooperate with the tribunal’, and are required to ‘take any measures necessary under domestic law to implement the obligations on cooperation and other measures that were part of the establishment of the tribunals’.⁷⁴ It is

⁷¹ SC Res 1593, para. 7, and SC Res 1970 (2011), para. 8.

⁷² Note verbale from the Registrar of the ICC to the President of the UN General Assembly, (30 June 2011) NV/2011/1150/GB/SA (in file). The letter should be public but it is not available in the record of correspondence of the President of the General Assembly. It might not have been transmitted to UN Member States as requested by the Court. See <<http://www.un.org/en/ga/president/65/letters/index.shtml>> accessed 30 September 2013.

⁷³ It has been suggested that the obligation of cooperation does not need to be literal, but could be implicit in the referral. See Gargiulo (n 1), at 101.

⁷⁴ ICTY Statute (n 9), para. 4; Statute of the International Tribunal for Rwanda, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Annex ('ICTR Statute'), para. 2.

difficult to understand why the ICC, when it is activated under Chapter VII, should benefit from lesser authority than the ad hoc tribunals.

The limits set by the Council have ‘significantly diluted the potential effectiveness of the referral’.⁷⁵ The absence of a cooperation obligation has meant that fugitives sought by the Court have been able to travel freely to States not Parties.⁷⁶ The prosecutor has been left without recourse to ensure cooperation, since the Court has only been able to encourage it.⁷⁷

It has been argued that the binding nature of cooperation duties determined by the Security Council has not been decisive for the success of the ad hoc tribunals. Arrests were facilitated by other factors such as domestic legislation, financial and political incentives to states and individuals, and socio-economic and geo-strategic incentives.⁷⁸ But the comparison with the ad hoc tribunals may be unfair to the Court. First, these instruments and incentives were developed on the basis of an absolute and universal obligation of cooperation imposed by the Council. Also, in the case of the ICC, these instruments and incentives are less developed. Further, the reluctance of the Council to extend obligations of cooperation has affected Court action. The Court has affirmed that States not Parties have no obligations vis-à-vis the Court directly arising from the Statute in the absence of an ad hoc arrangement or agreement, or a decision of the Security Council,⁷⁹ and that there is no legal basis for the Court to demand the execution of warrants of arrest from States not Parties. Therefore, Chambers have been reluctant to accept the Prosecutor’s filings to inform the Council of travels of fugitives, although the Council has ‘urged’ States not Parties to cooperate with the Court.⁸⁰

The legal minimalism of the Council has weakened the position of the Court in relation to defiant states. In 2009 the AU adopted a resolution in which it stated that AU Member States should not cooperate with the court in relation to the arrest of Omar Al-Bashir.⁸¹ Backing from the Council might not have changed the course of the

⁷⁵ Chatham House, SC and the ICC (n 6), 8.

⁷⁶ President Al-Bashir has travelled to at least the following States not Parties since the issuance of the first arrest warrant against him: China (28 June 2011); Egypt (16 September 2012); Eritrea (March 2009 and on 13–16 June 2013); Ethiopia (*inter alia* 20–1 April 2013, 30 June 2013); Iran (August 2012); Libya (25 March 2009, 7 January 2012, 16–17 February 2013); Qatar (30 March 2009, 10 October 2011, August 2012, 5 March 2012, 26 March 2013, 27 June 2013); Saudi Arabia (April 2009, 29 December 2009, 6 November 2012, 7 March 2013); South Sudan (9 July 2011, 12 April 2013); Turkey (December 2009). See <<http://bashirwatch.org>> accessed 30 September 2013.

⁷⁷ The Court has reminded the United States of the existence of warrants of arrest, Decision Regarding Omar Al-Bashir’s Potential Travel to the United States of America, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-162, PTC II, ICC, 18 September 2013, 6; and Saudi Arabia, Decision Regarding Omar Al-Bashir’s Potential Travel to the Federal Republic of Ethiopia and the Kingdom of Saudi Arabia, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-164 PTC II, ICC, 10 October 2013, 6.

⁷⁸ Chatham House, SC and the ICC (n 6), 8.

⁷⁹ Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council, *Gaddafi and Al Senussi, Situation in Libya*, ICC-01/11-01/11-420, PTC I, ICC, 28 August 2013, paras 13–14 (notes omitted); Decision Regarding Omar Al-Bashir’s Potential Travel to the United States of America (n 77), para. 11; Decision Regarding Omar Al-Bashir’s Potential Travel to the Federal Republic of Ethiopia and the Kingdom of Saudi Arabia (n 77), para. 8.

⁸⁰ See (n 77).

⁸¹ African Union Assembly Decision, Thirteenth Session (Doc Assembly/AU-/245(XIII) Rev 1, 3 July 2009), para. 10.

debate about Africa and the ICC,⁸² but it would have added legal authority to support the position of the Court.

The failure of the Council to create obligations on cooperation runs against the very *raison d'être* of the system of referrals. The ability of the Council to impose obligations of cooperation with the ICC on states, including States not Parties to the Rome Statute, is one of the primary justifications for why referral powers were granted to the Council and not any other UN organ. Technically, the option to make a referral might be extended to the UN General Assembly, which has competencies in matters of international peace and security on the basis of the UN Charter and the *Uniting for Peace* mechanism.⁸³ But granting the Assembly powers of referral would not necessarily enhance the reach of the Court in terms of cooperation. Neither the Assembly nor any other organ in the international system may oblige states to cooperate with the Court, except the Council. The fact that the Council can compel states to cooperate with the Court was one of the main reasons why the drafters accepted its referral power.⁸⁴

3.6 Non-Cooperation and Enforcement

The role of the Council in the enforcement of the Court's decisions is another area that has given rise to concerns. Court requests are executed mainly through state action, on the basis of an international obligation or voluntarily. The Court has judicial powers to determine that a state has failed to abide by its obligation.⁸⁵ This is reflected in Article 87 (7), which provides that 'where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'.⁸⁶ While the Court can make such determinations, it has no authority to decide on remedies or consequences arising from a failure to cooperate.⁸⁷ The Statute delegates this function to two executive arms, the ASP, and in cases arising from situations referred to by the Council, the Security Council. The Council and the Assembly

⁸² See, on the AU, OA Maunganidze and A Du Plessis, Chapter 4 this volume; on cooperation and immunities, D Jacobs, Chapter 12 this volume.

⁸³ In *Certain Expenses of the United Nations*, Advisory Opinion (ICJ Reports: 1962), 151.

⁸⁴ Discussions relating to Art 25 (1) of the 1994 ILC Draft Statute suggest that a referral from the Council would override the need for state consent. But it is not clear from the discussions whether this would apply to the exercise of jurisdiction or in relation to obligations to cooperate (see in particular, ILC 1994 Session, 2332nd Meeting, paras 1 and 49). During deliberations at the Rome Conference on the role of the Council [draft Arts 10(1) and 10(3)] delegations which supported the Council's power to initiate proceedings were of the view that the enforcement powers of the Council bind 'all members of the United Nations'. See Yee (n 1), at 147. But the intended effects of a referral were ambiguously explained. In his presentation to the Rome Conference, intervening on behalf of the ILC, James Crawford was of the view that a referral by the Council would serve as a 'substitute of consent' (Rome Conference, Official Records, Vol II, 2nd Plenary Meeting, para. 106).

⁸⁵ Art 87(5) and 87(7). ⁸⁶ See Art 87 (7).

⁸⁷ These consequences may fall under the remedies applicable under general law. See B Simma and D Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 *European Journal of International Law* 3, 492.

are expected to react, within the purview of their own powers, to address the instances of non-cooperation.

The provisions on non-cooperation are the sole manner in which the Court can formally and judicially denounce lack of compliance. The prosecutor has the opportunity to denounce lack of cooperation from states when the prosecutor's report is presented to the Security Council. However, these findings or notifications of non-cooperation are a measure of last resort.⁸⁸

Decisions by the Council to refer a situation to the Court are mostly made without the consent of the territorial state involved.⁸⁹ Thus, it is very likely that cases arising from such situations will be contentious. For this reason, action by the Council is fundamental to ensure effective investigations and prosecutions. In practice, the Council action has been deficient in its acknowledgements, responses, or reactions to the situations denounced by the Court. Such silence on the part of the Council has challenged the relevance of the Court's warrants and has put into question the Council's commitment towards seeing them being enforced.

Since the issuance of their warrants of arrest, at least 67 travels or attempted travels have been undertaken by individuals sought by the ICC in connection with the Darfur situation: 65 by Omar Al-Bashir and two by Abdel Hussein.⁹⁰ When information has been available in a timely manner, many travels have been curtailed through political and diplomatic means. There is ample evidence indicating the fruitful outcomes of adequate information collection and dissemination.⁹¹ The Council, however, has played no role in these diplomatic efforts.

The Court has not been seized about all instances of travel by persons under warrants of arrest. As of 10 October 2013, there has been judicial involvement of the Court in 21 incidents. Bringing the incidents to the judicial sphere has had positive outcomes. Filings from the prosecutor or the Registrar have had a concrete effect in addressing instances of non-cooperation. For instance, in December 2010, in light of an intended visit by Al-Bashir to the Central African Republic (CAR) reported by the media, the Court requested the host state to take all necessary measures to arrest and surrender

⁸⁸ The Assembly has interpreted that non-cooperation refers to specific instances and not to measures which may lead in the medium or long term to non-cooperation such as the failure to adopt domestic legislation to ensure cooperation. Resolution ASP-ICC/10/Res 5, 21 December 2011 (Tenth Session of the Assembly of States Parties), Annex, para. 7.

⁸⁹ This is the case in the context of Darfur, where the Sudanese authorities have not consented to the decision by the Council. See UNSC 5158th meeting (n 40) 12. In the case of Libya, some dissenting representatives of Libya were favourable to the referral, and in fact called for it (UNSC 6491st meeting (n 42) 7).

⁹⁰ Calculation made on the basis of data by Bashir Watch, 'Bashir Travel Map' <<http://bashirwatch.org/>> accessed 30 October 2013; Arrest Bashir <<http://www.arrestbashir.org/bashir-s-travels/>> accessed 30 October 2013; the Southern African Litigation Center <<http://www.southernaficalitigationcentre.org/>> accessed 30 October 2013; and the website of the ICC provides further information that needs to be extracted from the filings made by the Prosecutor or Registrar to the Court in relation to each of the relevant cases (*Prosecutor v Al Bashir*, *Prosecutor v Ali Kushayb and Ahmed Harun*, and *Prosecutor v Abdel Hussain*).

⁹¹ Botswana warned that it would arrest Al-Bashir should he enter the country. See Bashir Watch (n 90). Similarly, his invitation to the Africa-South America Summit in Venezuela was revoked in September 2009. It has also been reported that Al-Bashir cancelled his participation to political summits in States Parties such as Uganda, Zambia, Nigeria, and Malawi.

Al-Bashir to the ICC, and to immediately inform the Chamber of any obstacles for arrest or surrender.⁹² Although the CAR did not submit any response to the Court, the visit was cancelled. Similar requests from the Chambers to States Parties (Senegal and Zambia in December of 2010⁹³ and to Chad in January of 2011⁹⁴) seem to have contributed to the cancelling of travel by Al-Bashir.

In other instances, where travel of fugitives has not been successfully impeded, procedures of non-cooperation and judicial action of the Court had some positive effects. In July 2013 the Pre-Trial Chamber requested information about the presence of Al-Bashir in Nigeria. Reinforced by political demarches,⁹⁵ the Court's reminder led to the early departure of Al-Bashir. In its response to the Court, Nigeria explained that Al-Bashir had arrived without the knowledge of Nigeria and that Nigerian authorities were considering possible actions in accordance with international obligations at the time of his early departure.⁹⁶

The Court has only involved the Council in these incidents through either communications or judicial findings on non-cooperation. The responses by the Council to this information have been deficient, thus weakening the role that the Council is expected to play as an executive arm of the Court.

3.6.1 Communications to the Council

In addition to four findings on non-cooperation discussed below, the Council has received other four communications from the Court. These communications were transmitted to the Council by the Registrar, and not by the President of the Court.⁹⁷ They were thus not findings on non-cooperation in the meaning of Article 87(7), but simply notifications of information to the Council. The first of these communications concerns Sudan and focuses on failure to arrest. In 2010 the Pre-Trial Chamber decided to inform the Council of the lack of cooperation with respect to the cases of Ahmed Harun and Ali Kushayb.⁹⁸ Further, on 31 August 2010 the Court informed the Council and the Assembly of States

⁹² Demande de coopération et d'informations adressée à la République Centrafricaine, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-121, PTC I, ICC, 1 December 2010, 4.

⁹³ Prosecution notification of possible travel in the case of *The Prosecutor v Omar Al Bashir*, pursuant to Art 97 of the Rome Statute, *Al-Bashir, Situation in Darfur*, 02/05-01/09-122, PTC I, ICC, 8 December 2010, para. 9.

⁹⁴ Prosecution notification of possible travel in the case of *The Prosecutor v Omar Al Bashir*, pursuant to Art 97 of the Rome Statute, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-125, PTC I, ICC, 10 January 2011.

⁹⁵ See ASP Press Release, 'President of the Assembly Calls upon the Government of Nigeria to Respect its Obligations under the Rome Statute', 16 July 2013.

⁹⁶ Report of the Registry on the Decision regarding Omar Al-Bashir's Visit to the Federal Republic of Nigeria, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-158 Ann 4, Registry, ICC, 14 August 2013. The Court decided it was not necessary to inform the Security Council or the Assembly. See Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-159, PTC II, ICC, 5 September 2013.

⁹⁷ Regulation 109(4), Regulations of the Court, ICC-BD/01-03-11 adopted 26 May 2004, amended 2 November 2011, provided that the findings on non-cooperation are transmitted to the President of the Court who in turn notifies the Assembly and, if appropriate, the Council.

⁹⁸ Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan, *Harun and Kushayb, Situation in Darfur*, ICC-02/05-01/07-57, PTC I, ICC, 25 May 2010; UN Doc S/2010/265 (1 June 2010).

Parties about two recent visits of Al-Bashir to Chad⁹⁹ and Kenya¹⁰⁰ so these bodies would take any measure they deemed appropriate. A similar communication on Djibouti was made on 12 May 2011.¹⁰¹

These communications were based on the obligations of the respective states to cooperate with the Court under the decisions of the Council.¹⁰² Although the underlying obligations were uncontested, the Council did not react to the Court's communications. It had the opportunity to support the Court, possibly through a declaration reaffirming the importance of continued cooperation with the Court, but did not seize occasion.

However, the threat of informing the Council, and the judicial activism of the Court's organs had a positive impact on preventing the States Parties from breaching their obligations under the Rome Statute and SC Resolution 1593 (2005). For instance, a notification of travel filed by the prosecutor that was made public,¹⁰³ and the 25 October 2010 Decision of the Chamber to remind Kenya of its obligations and request information on the alleged visit may have contributed to the cancellation of a second visit of Al-Bashir to Kenya for the IGAD summit on 30 October 2010.¹⁰⁴ In this case, Kenya interacted positively with the Court, informing it that the Summit would not take place in Kenya and that Al-Bashir would not enter its territory.¹⁰⁵

Later, the Court limited the practice of informing the Council via the Chambers of the travels of Al-Bashir, although it has been seized of numerous other travels.¹⁰⁶

⁹⁹ Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-109, PTC I, ICC, 27 August 2010; UN Doc S/2010/456 (31 August 2010).

¹⁰⁰ Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-107, PTC I, ICC, 27 August 2010; UN Doc S/2010/456 (31 August 2010).

¹⁰¹ Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-129, PTC I, ICC, 12 May 2011; UN Doc S/2011/318 (19 May 2011).

¹⁰² The Court considered that Sudan had the obligation to cooperate with it, an obligation directly derived from the Charter of the UN and Resolution 1593 (2005). Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan, 25 May 2010 (n 98), 6. Chad, Kenya, and Djibouti, being States Parties, had an obligation to cooperate with the Court in relation to the enforcement of warrants of arrest on the basis of Resolution 1593 (2005) and Art 87 of the Statute. Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, *Al-Bashir, Situation in Darfur*, 27 August 2010 (n 99) 3; Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, 27 August 2010 (n 100) 3; Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, 12 May 2011 (n 101) 3.

¹⁰³ Prosecution notification of possible travel to a State Party in the case of *The Prosecutor v Omar Al Bashir, Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-116, Office of the Prosecutor, ICC, 22 October 2010.

¹⁰⁴ Decision requesting observations from the Republic of Kenya, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-117, PTC I, ICC, 31 October 2010.

¹⁰⁵ Transmission of the Reply from the Republic of Kenya, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-119, Registry, ICC, 25 October 2010, 3.

¹⁰⁶ See, *inter alia*, travel of Al-Bashir to Chad, 7–8 August 2011, 18 March 2013, 5 May 2013, to Nigeria on 16 July 2013; travel of Abdel Hussain to Chad on 25–6 April 2013, and to CAR on 19 August 2013. See also Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-195, PTC II, ICC, 9 April 2014.

The prosecutor occasionally made reference to travels in its reports to the Council, while Chambers liaised with the Council in relation to proper judicial findings on non-cooperation.

3.6.2 Findings on non-cooperation

On 13 December 2011 the Council issued the first two judicial findings on non-cooperation under Article 87(7) of the Rome Statute, which concern Malawi and Chad. They were transmitted to the Council and the Assembly of States Parties by the President of the Court.¹⁰⁷ Other findings on non-cooperation were issued by the Court on 26 March 2013 (Chad) and on 8 April 2014 (Malawi).¹⁰⁸

The first findings on non-cooperation were issued by the Court when the two states denied their obligation to execute the warrants of arrest. Malawi was contacted by the Court after the visit of Al-Bashir. Malawi confirmed the visit and stated that it ‘accorded [Al-Bashir] all the immunities and privileges guaranteed to every visiting Head of State and Government; these privileges and immunities include freedom from arrest and prosecution within the territories of Malawi’. Malawi argued that Article 27 of the Rome Statute was not applicable to Al-Bashir. It confirmed the position of the AU with respect to the indictment of sitting heads of state and government of countries that are not parties to the Rome Statute.¹⁰⁹

Chad adopted a similar position. It claimed it could not agree to the request of the prosecutor against Al-Bashir in light of the decision of the AU.¹¹⁰ It reiterated its position in February 2013. It noted that in light of its desire to normalize relations with Sudan, ‘the imperatives of peace prevail over those of justice’.¹¹¹

The Chamber found that Malawi and Chad were unwilling to cooperate with the Court, and had failed to comply with their obligations to consult with the Chamber on issues that may impede the fulfilment of their obligations and to cooperate with

¹⁰⁷ Corrigendum to the Decision Pursuant to Art 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, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-139-Corr, PTC I, ICC, 13 December 2011; UN Doc S/2012/9 (9 January 2012) ('Non-cooperation decision on Malawi, December 2011'); Decision pursuant to Art 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al-Bashir, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-140-tENG, 13 December 2011; UN Doc S/2012/8 (9 January 2012) ('Non-cooperation decision on Chad, December 2011').

¹⁰⁸ Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-151, PTC II, ICC, 26 March 2013; UN Doc S/2013/229 (15 April 2013) ('Non-cooperation decision on Chad, March 2013').

¹⁰⁹ Report of the Registrar with the observations from Malawi, including two confidential annexes, referred to in ICC-02/05-01/09-139, 12-12-2011, para. 8. See also AU Assembly Decision, Thirteenth Session (3 July 2009) (n 81). See also, on the AU decision, OA Maunganidze and A Du Plessis, Chapter 4 this volume; on cooperation and immunities, D Jacobs, Chapter 12 this volume.

¹¹⁰ Rapport du Greffe relatif aux observations de la République du Tchad, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-135, Registry, ICC, 30 September, Annex I, 3.

¹¹¹ Report of the Registry on the observations submitted by the Republic of Chad on Omar Al-Bashir's visit to the Republic of Chad, *Al-Bashir, Situation in Darfur*, ICC-02/05-01/09-150-Anx1, Registry, ICC, 6 May 2013.

the Court by not arresting and surrendering Al-Bashir.¹¹² The Court transmitted these findings via the President to the Security Council and to the Assembly.

3.6.3 Responses to non-cooperation findings

The Rome Statute provides no guidance regarding how the Council or the Assembly should respond before, during, or after an instance of non-cooperation. The Assembly of States Parties has adopted procedures to address instances of non-cooperation. They are reflected in the mechanism for non-cooperation established by Resolution 5, adopted on 21 December 2011. The procedures mandate the involvement of the President of the Assembly, the Bureau, and the plenary of the Assembly in the acknowledgement, discussion, and resolution of failures to cooperate.¹¹³ The procedure includes the holding of an emergency meeting of the Bureau of the Assembly; an open letter from the President of the Assembly to the state concerned requesting a written response; consultations with the state concerned at the ambassadorial level; a public meeting at the Assembly; the issuing of recommendations as a result of the dialogue with the state concerned; and the adoption of a resolution by the Assembly with the concrete recommendations.¹¹⁴

The President of the Assembly has further issued press releases in relation to the travels of persons sought by the Court, in order to increase public pressure. As a reaction, some states have condemned these visits.¹¹⁵ This type of pressure makes it more difficult to defy requests by the Court.

In cases of a finding on non-cooperation, the President of the Assembly has followed up on Court requests through meetings with the President of the Council. These meetings are designed to clarify how the Council might properly react to communications by the Court.¹¹⁶ Regrettably, there is no public record of the treatment of such matters. States Parties in the Council continue to hold informal discussions on this issue.

The Council has no established procedures to deal with this matter. Possible reactions include (i) the issuing of a Press Statement or a Presidential Statement, or (ii) the adoption of a resolution calling for cooperation, condemning failure to arrest, or calling states to arrest ICC fugitives. The Council can also take note of the communication of the Court in a relevant related resolution. States Parties in the Council have not yet found a common line. Some consider that a mere acknowledgement of receipt would be insufficient and might be counter-productive, since it would terminate the discussion. Others believe that it is more helpful to use formal instruments and to increase the

¹¹² Non-cooperation decision on Malawi, December 2011 (n 107) 21; Non-cooperation decision on Chad, December 2011 *ibid.*, 8; Non-cooperation decision on Chad, March 2013 (n 108) 11.

¹¹³ Annex to ASP Resolution, Strengthening the International Criminal Court and the Assembly of States Parties (ICC-ASP/10/Res 5, 21 December 2011) (n 88). The procedure also encourages cooperation and diplomatic dialogue in absence of judicial findings on non-cooperation.

¹¹⁴ *Ibid.*, para. 14.

¹¹⁵ Reactions come mainly by the European Union, by members of the Inter-Ministerial network on the ICC coordinated by Liechtenstein and by Costa Rica.

¹¹⁶ Report of the Bureau on Non-Cooperation, ICC-ASP/11/29, 1 November 2012 (Eleventh Session of the Assembly of States Parties), para. 3.

political costs of states receiving ICC fugitives in their territory. Curiously, some of the States Parties who are blamed for non-cooperation may have a seat in the Council.¹¹⁷

The failure of the Council to use these techniques sends an ambivalent message. It suggests that the Council uses the ICC whenever it is convenient for Council members, while turning a blind eye on the Court when its mandate needs to be operationalized. This contradiction raises doubts as to what extent the Council usefully serves as an executive arm for the Court.

3.7 Political and Operational Support for Situations Not Referred by the Council

Since 2007, the Court has recommended that States Parties that are members of the Security Council ‘ensure that the Court’s interests, needs for assistance and mandate are taken into account when relevant matters, such as sanctions, peacekeeping mandates, Security Council missions and peace initiatives are being discussed and decided on, while respecting the independence of both’.¹¹⁸ This recommendation was guided by the insight that the Council could support the work of the Court in its general decision-making practice, i.e. through acknowledgement of the Court or the Rome Statute in thematic resolutions, references encouraging cooperation with the Court, or strengthening of peace operations.

References of the Council to the Court’s work have taken various forms. They have been included in thematic and country-specific work. For the most part, Council practice has been selective. The first ICC-related references are found in thematic decisions of the Council, in specific in the preamble of Resolution 1261 (1999) on children and armed conflict. The Council noted that the Rome Statute considered the conscription or enlisting of children under the age of 15 into the national armed forces or their active participation in hostilities as a war crime, in an effort to bring an end to the use of children as soldiers.¹¹⁹ This reference was upgraded in 2000 in an additional operative paragraph which urged all parties to conflicts ‘to bear in mind the relevant provisions of the Rome Statute of the International Criminal Court’.¹²⁰ References to the Statute were introduced in the resolutions on children in armed conflict in 2003¹²¹ and 2004,¹²² and in resolutions or presidential statements on children and armed conflict as of 2011.¹²³ The role of the Statute in combatting sexual violence has been recognized in the work of the Council on women, peace, and security¹²⁴

¹¹⁷ For instance, Chad and Nigeria will have a seat on the Council in 2014 and 2015.

¹¹⁸ 66 Recommendations on Cooperation from the Court to the Assembly, Resolution ICC-ASP/6/Res 2 Annex II 14 December 2007 (Sixth Session of the Assembly), recommendation 51.

¹¹⁹ UNSC Res 1261 (25 August 1999) UN Doc S/RES/1261. SC Res 1261 was also the first ever resolution adopted as a result of a thematic issue. It was also the first time the Council debated the issue of children and armed conflict.

¹²⁰ UNSC Res 1314 (11 August 2000) UN Doc S/RES/1314, para. 3.

¹²¹ UNSC Res 1460 (30 January 2003) UN Doc S/RES/1460, preamble.

¹²² UNSC Res 1539 (22 April 2004) UN Doc S/RES/1539, preamble.

¹²³ See UNSC Res 1998 (12 July 2011) UN Doc S/RES/1998; UNSC Res 2068 (19 September 2012) UN Doc S/RES/2068; UNSC Presidential Statement 2013/8 (17 June 2013) UN Doc S/PRST/2013/8.

¹²⁴ In UNSC Press Statement (8 March 2000) UN Doc SC/6816, the Council ‘welcomes the inclusion as a war crime, in the Rome Statute of all forms of sexual violence and notes the role the Court could play to ending impunity for perpetrators of such crimes’.

and the landmark Resolution 1323 (2000).¹²⁵ But there has not been full consistency.¹²⁶ Debates on the protection of civilians in armed conflict, which started in 1998, have only included references to the Court or the framework of the Rome Statute in 2009, 2010, and 2013.¹²⁷

Concerning country-specific work, the practice has focused on States Parties, CAR, Côte d'Ivoire, the Democratic Republic of the Congo, Mali, the activities of the Lord's Resistance Army, and Burundi (a State Party where the Court has no ongoing investigation). Statements include acknowledgements that a country is a State Party,¹²⁸ characterizations of certain acts as crimes under the Rome Statute,¹²⁹ references to ongoing investigations, prosecutions, or warrants of arrest,¹³⁰ and recognition of the importance of cooperation with the Court.¹³¹

In addition to these hortative references, the Council has established an important link between its peace operations and cooperation with the Court. Paradigm examples are the situations in the Democratic Republic of the Congo and Mali. In 2011 the Security Council called the United Nations Mission in the DRC (MONUSCO) to use its authority and assist the Congolese government seeking to hold those responsible for

¹²⁵ In UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325, the Council recalls the provisions of the Rome Statute and calls upon all parties to armed conflict to bear in mind the relevant provisions of the Rome Statute.

¹²⁶ No ICC-related references can be found in UNSC Presidential Statement 2001/31 (31 October 2001) UN Doc S/PRST/2001/31; UNSC Presidential Statement 2002/32 (31 October 2002) UN Doc S/PRST/2002/32; UNSC Presidential Statement 2004/40 (2 November 2004) UN Doc S/PRST/2004/40; UNSC Presidential Statement 2005/52 (27 October 2005) UN Doc S/PRST/2005/52; UNSC Presidential Statement 2006/42 (26 October 2006) UN Doc S/PRST/2006/42; UNSC Presidential Statement 2007/5 (7 March 2007) UN Doc S/PRST/2007/5; UNSC Presidential Statement 2007/40 (23 October 2007) UN Doc S/PRST/2007/40; UNSC Presidential Statement 2008/39 (29 October 2008) UN Doc S/PRST/2008/39; UNSC Res 1889 (5 October 2009) UN Doc S/RES/1889; UNSC Presidential Statement 2010/8 UN Doc S/PRST/2010/8.

¹²⁷ References recognize the contribution of the Court to accountability for the most serious crimes or recall the inclusion of certain crimes in the Rome Statute, UNSC Presidential Statement 2009/1 (14 January 2009) UN Doc S/PRST/2009/1; UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894 (2009); UNSC Presidential Statement 2010/25 (22 November 2010) UN Doc S/RES/2010/25; UNSC Presidential Statement 2013/2 (12 February 2013) UN Doc S/PRST/2013/2.

¹²⁸ UNSC Res 2056 (5 July 2012) S/RES/2056 on Mali; UNSC Press Statement (25 March 2013) UN Doc S/10960 on the Central African Republic; UNSC Res 2090 (13 February 2013) UN Doc S/RES/2090 on Burundi.

¹²⁹ For example, UNSC Res 1975 (30 March 2011) on Côte d'Ivoire; UNSC Res 2056 (5 July 2012) UN Doc S/RES/2056 on Mali; UNSC Res 2121 (10 October 2013) UN Doc S/RES/2121 on the Central African Republic.

¹³⁰ Recalling the warrants of arrest against members of the LRA see UNSC Presidential Statements 2008/38 (21 October 2008) UN Doc S/PRST/2008/38; UNSC Presidential Statement 2008/48 (22 December 2009) UN Doc S/PRST/2008/48; UNSC Press Statement (21 July 2011) UN Doc S/10335; UNSC Presidential Statement 2011/21 (14 November 2011) UN Doc PRST/2011/21; UNSC Presidential Statement 2012/18 (29 June 2012) UN Doc 2012/18; UNSC Presidential Statement 2012/28 (19 December 2012) UN Doc S/PRST/2012/28. With respect to the verdict on the Thomas Lubanga Case, see UNSC Press Statement (16 March 2012) UN Doc SC/10580. The Council calls for the arrest of Bosco Ntaganda, against whom the Court has issued warrants of arrest, UNSC Press Statement (16 July 2012) UN Doc SC/10709. The Council expressed appreciation for the voluntary surrender of Ntaganda in UNSC Press Statement (22 March 2013) UN Doc SC/10956.

¹³¹ Most recently in 2013, UNSC Res 2095 (14 March 2013) UN Doc S/RES/2095 on Mali; UNSC Res 2098 (23 March 2013) UN Doc S/RES/2098 on the Democratic Republic of the Congo; UNSC Res 2101 (25 April 2013) UN Doc S/RES/2101, and UNSC Res 2112 (30 July 2013) UN Doc S/RES/2112 on Côte d'Ivoire.

war crimes and crimes against humanity accountable, including through cooperation with the ICC.¹³² In March 2013 the Council granted MONUSCO an unprecedented broad mandate on the security and protection of civilians, including authorization to use force via an ‘intervention brigade’ (Resolution 2098 (2013)). This included authorization to ‘support and work with the Government of the DRC to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country, including through cooperation with States of the region and the ICC’.¹³³

A similar approach was adopted in relation to Mali. On 20 December 2012 Security Council Resolution 2085 (2012) called the African-led Support Mission in Mali (AFISMA) ‘to support national and international efforts, including those of the International Criminal Court, to bring to justice perpetrators of serious human rights abuses and violations of international humanitarian law in Mali’.¹³⁴ In April 2013 the Council expressly mandated MINUSMA, a stabilization mission in Mali, ‘to support, as feasible and appropriate, the efforts of the transitional authorities of Mali... to bring to justice those responsible for war crimes and crimes against humanity in Mali, taking into account the referral by the transitional authorities of Mali of the situation in their country since January 2012 to the International Criminal Court’.

In its decision, the Council called on the transitional authorities of Mali ‘to continue to cooperate with the International Criminal Court, in accordance with Mali’s obligations under the Rome Statute’.¹³⁵ As a result of this mandate, MINUSMA provided ad hoc support to the Court, including access to UN Humanitarian Air Service (UNHAS) flights in areas of ICC operations.¹³⁶

This practice illustrates concrete measures that the Council can take, especially when the direct interests of Council members do not block effective action.

3.8 Deferrals

Article 16 of the Statute, titled ‘Deferral of investigation or prosecution’, governs potential conflicts of interest between the maintenance of international peace and security and the pursuit of international criminal justice. It reads:

[N]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, if a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

¹³² UNSC Res 1991 (28 June 2011) UN Doc S/RES/1991, para. 19: the Council ‘further stresses the importance of the Congolese Government actively seeking to hold accountable those responsible for war crimes and crimes against humanity in the country and of regional cooperation to this end, including through cooperation with the International Criminal Court and calls upon MONUSCO to use its existing authority to assist the Government in this regard’. This paragraph was further extended to also ‘[encourage] MONUSCO to use its existing authority to assist the Congolese Government in this regard’. See UNSC Res 2012 (29 November 2011) S/RES/2012, para. 15. See also UNSC Res 2053 (27 June 2012) UN Doc S/RES/2053 (2012), para. 13; UNSC Res 2078 (28 November 2012) UN Doc S/RES/2078, para. 19.

¹³³ UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098, para. 12(d).

¹³⁴ UNSC Res 2085 (20 December 2012) UN Doc S/RES/2085 (2012), para. 19.

¹³⁵ UNSC Res 2100 (25 April 2013) UN Doc S/RES/2011, para. 16(g), and para. 27.

¹³⁶ Report of the Court on ICC-UN Cooperation (n 6) para. 21.

This provision is the most powerful tool for the Council to directly influence investigations and prosecution of the ICC. It came into existence as a result of political considerations being ‘given more weight than legal arguments in the determination of the appropriate role for the Security Council in ICC proceedings’.¹³⁷ Originally, the ILC considered the Council as a gatekeeper to the activities of the Court.¹³⁸ The power of deferral was adopted as a compromise in the negotiation of the Statute¹³⁹ in an attempt to balance the responsibilities of the Council with the mandate of the Court.

Requests of deferrals by the Council have become a reality before the entry into force of the Rome Statute, and continue to be invoked to resolve political tensions arising from the activities of the Court.

In 2002, and later in 2003, the United States successfully promoted the adoption of Security Council Resolutions 1422 (2002) and 1487 (2003) to purportedly impede commencement of investigation or prosecution by the Court of personnel or officials of states not parties to the Rome Statute on the basis of Article 16.¹⁴⁰ The United States threatened withdrawal of funds and contributions to the peacekeeping operation in Bosnia-Herzegovina should the deferral resolutions not be adopted. The resolutions did not emphasize a specific investigation or prosecution by the Court, nor identify the existence of a threat to international peace and security.

Later, references to Article 16 were inserted in preambular paragraphs of the referral resolutions for the situation of Darfur and the situation of Libya.¹⁴¹ Article 16 was expressly invoked on 14 July 2008 in response to the application made by the ICC prosecutor for a warrant of arrest against the Sudanese President, Omar Al-Bashir. The Peace and Security Council of the AU adopted a communiqué, transmitted to the Security Council, in which it requested the application of Article 16 on the grounds that:

[T]he approval by the Pre-Trial Chamber of the application by the ICC Prosecutor could seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur and the promotion of long-lasting peace and reconciliation in the Sudan as a whole and, as a result, may lead to further suffering for the

¹³⁷ M Bergsmo and J Pejić, ‘Article 16’ in Triffterer, *Commentary* 2008 (n 60) 598.

¹³⁸ Art 23(3), 1994 ILC Draft Statute.

¹³⁹ The debate in Rome centred on the Singapore proposal, a modified version of it, or its deletion. Vocal ‘and persistent’ opponents to any control by the Council formed a minority at the Rome Conference. Most delegates, including the United Kingdom, supported the Singapore proposal. Two amendment proposals introduced by India and Mexico were quashed in the final days of the Conference. They suggested deleting this provision or to extend power under Art 16 to the General Assembly. Mexico proposal, *Rome Conference Records*, 15 July 1998, UN Doc A/CONF.183/C.1/L.81; Amendment Proposal by India, *Rome Conference Records*, 17 July 1998, UN Doc A/CONF.183/C.1/L.95. See also P Kirsch and J T Holmes, ‘The Rome Conference on an International Criminal Court: The Negotiating Process’ (1999) 93 *American Journal of International Law* 2, 8; Bergsmo and Pejić, ‘Article 16’ (n 13) 598.

¹⁴⁰ SC Resolution 1422 (2002), para. 1 and Resolution 1487 (2003), para. 1 (n 4): ‘Requests, consistent with the provisions of Article 16 of the Rome Statute... not to commence or proceed with investigation or prosecution...’.

¹⁴¹ The identical preambular paragraphs in Resolutions 1593 (2005) and 1970 (2011) read: ‘Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect...’

people of the Sudan and greater destabilization with far-reaching consequences for the country and the region.¹⁴²

The application by the prosecutor and the subsequent AU communiqué were issued amidst negotiations between the Security Council and Sudan concerning the full deployment of a 10,000-troop UN mission in Darfur (established a year earlier) and of consolidating the renewal of the Council's mandate. In an attempt to replicate the blackmailing of the peacekeeping operation in 2002 and 2003 by the United States, Libya, as proxy of the interests of Sudan and the AU, pursued the invocation of Article 16 as a condition of its support for the resolution concerning UNAMID, against the interests of the permanent members of the Council in deploying UNAMID.

In justifying the request from the AU for a deferral, Libya contended that 'the international community [w]as close... to a political resolution of the crisis'¹⁴³ through the deployment of UNAMID, the current involvement of the Sudanese authorities, and the fact that the new Joint African Union–United Nations chief mediator was to take office. The main opposition to a deferral came from a group of states that sought to use the UNAMID resolution to remind the Sudanese government of its obligations towards the ICC.¹⁴⁴

Neither group succeeded because the United Kingdom and France refused to conflate the debate about the justice component of the Darfur situation with the imperatives of a renewal of the UNAMID mandate, which required the consent of the Sudanese government. States supporting the deferral managed to secure a passage in the preamble by which the Security Council took note of the communiqué from the African Union and expressed the commitment 'to consider these matters further'.¹⁴⁵ Pro-ICC states pushed for language in paragraph 16, in which the Council '[d]emands that the parties to the conflict in Darfur fulfil their international obligations and their commitments under relevant agreements, this resolution and other relevant Council resolutions'. On the pro-deferral side, the Council justified its approach by the fact that the transmission of the AU communiqué did not constitute a formal request to the United Nations Security Council (UNSC).¹⁴⁶ Several Council members argued that the use of Article 16 'must be exceptional'¹⁴⁷ and the situation at hand did not meet such threshold.

A third request for deferral was made in 2008, regarding the situation in the CAR.¹⁴⁸ On 1 August 2008, the president of the CAR invoked Article 16 in a correspondence

¹⁴² AU, Communiqué of the 142nd Meeting of the Peace and Security Council (21 July 2008), annexed to UN Doc S/2008/481 (23 July 2008), para. 9.

¹⁴³ UNSC 5947th Meeting, 31 July 2008, UN Doc S/PV.5947, 6.

¹⁴⁴ UNSC Presidential Statement 2008/21 (16 June 2008) UN Doc S/PRST/2008/21.

¹⁴⁵ UNSC Res 1828 (31 July 2008) UN Doc S/RES/1828, 9th preambular paragraph.

¹⁴⁶ In response to a question from the media, the President of the Security Council (UK) acknowledged that there had been indications that the AU and the Arab League intended to present a formal request to the Council regarding Art 16 but that no request had been made and that the Council remained willing to listen to these concerns. Under the Rules of Procedure of the Council, access to request an item be placed in the agenda is restricted to States and UN organs. Informal Comments by Representative from the United Kingdom upon adoption of UNSC Res 1881, from 'UN Webcast, 30 July 2009' <<http://webcast.un.org/ramgen/-ondemand/stakeout/2009/so090730am2.rm>> accessed 30 September 2013.

¹⁴⁷ Statement from a delegate from a State Party sitting in the Council at a Meeting of the Group of Friends of the ICC, New York (29 July 2008).

¹⁴⁸ 'Prosecutor Opens Investigation in the Central African Republic', *ICC Press Release*, 22 May 2007.

with the Secretary General of the United Nations. Bozizé requested him to ‘intercede with the Security Council [on the basis of Article 16] to obtain the adoption of a resolution that would ensure that the authorities of the Central African Republic remain competent over the acts covering the periods comprised by the amnesty laws’ that had been adopted on the basis of Article 2 of the Comprehensive Peace Agreement signed between the government of the CAR and three rebel groups on 21 June 2008.

According to Bozizé’s correspondence, the request was prompted by a communication from the prosecutor of the ICC informing him that the Office of the prosecutor was focusing special attention on ongoing acts of violence taking place in the north of the CAR. Even though Article 2 of the *Accord Global* excludes amnesty for crimes under the jurisdiction of the ICC,¹⁴⁹ the CAR government claimed that an eventual implementation of the prosecutor’s letter would endanger the respect for and implementation of the peace agreement.¹⁵⁰ The CAR government explained lack of domestic action by factors such as ‘the lack of access to such areas under control of the rebel groups’ and ‘support from the international community to a general amnesty law for persons implicated in such crimes’. It considered that ICC activities constituted a threat to its discretion in prosecuting individuals for Rome Statute crimes. There is no official record of the transmission of this letter by the Secretary General to the Security Council or of the consideration by the Council of this request.

A fourth request for deferral was brought forward by the government of Kenya in relation to ICC investigations concerning the post-election violence in 2007 and 2008. Following the prosecutor’s request to issue summonses to appear for six individuals,¹⁵¹ various branches of the Kenyan government invoked the need for a deferral. The Kenyan Parliament adopted a motion urging the government to withdraw from the Rome Statute. It decided ‘that any criminal investigations or prosecutions arising out of the post-election violence of 2007–2008 be undertaken under the framework of the new Constitution’.¹⁵² This motion prompted government officials to seek support from the AU to request a deferral from the Security Council. At the XVI Summit of Heads of States held in January 2011, the AU called on the Security Council to grant Kenya’s request.

¹⁴⁹ ‘Accord de Paix Global entre le Gouvernement de la République Centrafricaine et l’APRD, FDPC, et UFDR, Libreville (21 Juin 2008)’ <<http://www.ucdp.uu.se/gpdatabase/peace/CAR%2020080621fr.pdf>> accessed 1 September 2013. Art 2 specifically excludes crimes within the jurisdiction of the Court.

¹⁵⁰ ‘Une éventuelle mise en application des termes de la lettre du Procureur de la Cour Pénale Internationale risquerait de mettre en péril l’Accord Global au cas où, un quelconque combattant était mis en état d’arrestation de ces chefs d’accusation’, Letter of President Bozizé, reproduced in ‘Quand François Bozizé veut s’assurer à lui-même et à ses abires une impunité totale,’ *L’Indépendant*, 23 October 2008 <http://www.lindependant-cf.com/Quand-Francois-Bozize-veut-s-assurer-a-lui-meme-et-a-ses-sbires-une-impunite-totale_a414.html> accessed 24 September 2013. The letter is confirmed to be valid in ‘Report on the Central African Republic’, *Human Rights Watch, Rapport mondial*, 2009.

¹⁵¹ Prosecutor’s Application Pursuant to Art 58 as to William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang, *Situation in Kenya*, ICC-01/09-30-RED1, PTC II, ICC, 15 December 2010; Prosecutor’s Application Pursuant to Art 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali, *Situation in Kenya*, ICC-01/09-31-RED2, PTC II, ICC, 15 December 2010.

¹⁵² Parliament of Kenya, Motion No. 144 (adopted 22 December 2010). See also ‘AU Chairman Backs Kenya Move on the ICC’, *Capital FM*, 20 January 2011 <<http://www.capitalfm.co.ke/news/2011/01/au-chairman-backs-kenya-move-on-icc/>> accessed 1 September 2013.

The AU grounded its request in the primacy of Kenyan jurisdiction¹⁵³ and the attempt to give Kenya time to establish a special tribunal for domestic trials and a mechanism to prosecute individuals related to the post-electoral violence.¹⁵⁴

On 18 March 2011 an interactive dialogue was held between the Council, the permanent representative of Kenya, and AU officials to consider the deferral of the investigations and prosecutions at the ICC on the basis of Article 16 of the Rome Statute. This dialogue reportedly led to a finding that ‘the conditions of the implementation of Article 16 [were] not fulfilled’.¹⁵⁵ A key concern of the Council was that the Kenyan request for deferral ‘did not seem to enjoy the support of both sides of the coalition Government’.¹⁵⁶ Within days the Government of Kenya then sought to obtain national consensus and informed the Council that the Orange Democratic Movement (ODM) supported the creation of a national mechanism to handle the cases.¹⁵⁷ The Council held an information consultation on 8 April 2011, but as the President of the Security Council announced, ‘after full consideration the members of the Security Council did not agree on the matter’.¹⁵⁸ The President of the Council provided no further clarification as to whether the discussion meant that the members did not agree amongst themselves on the matter, or whether they collectively did not agree with Kenya’s request. The Court moved on with the proceedings and eventually confirmed charges only against three of the original suspects, Uhuru Kenyatta, William Ruto, and Joshua Arap Sang. It also confirmed the admissibility of the case after evaluating the ability and willingness of Kenya to prosecute them.

The issue came back to the table in March 2013 when Uhuru Kenyatta and William Ruto won the elections and became President and Deputy President respectively. The Council was seized with the issue on 8 May. A letter was sent to the Council on 13 May and mobilization by Kenya at the level of the AU and of the United Nations led to a request for another interactive dialogue, which took place on 23 May 2013, on the basis of a series of letters requesting a deferral under Article 16 and dialogue at the Council. Kenya requested the Council use its enforcement powers to terminate the proceedings. Although it was clear that there was no support from the Council to move forward with the request, it was agreed that a format was necessary to hear Kenya out and the

¹⁵³ AU Assembly Decision, 16th Sess., Decision on the Implementation of the Decision on the International Criminal Court (31 January 2011) Assembly/AU/Dec.334 [XVI], para. 6.

¹⁵⁴ Government of Kenya, State House, Press Statement on the Occasion of the visit of the President of the Assembly of States Parties to the ICC (28 January 2011) <http://www.icc-cpi.int/iccdocs/asp_docs/MediaCoverage/2011/Pres-Kenya-Statement-PASP-28Jan2011-ENG.pdf> accessed 1 September 2013.

¹⁵⁵ Quote of French Ambassador to the United Nations Amb. Gerard Araud in M Mutiga, ‘UN Council Rejects Kenya’s Deferral Bid’ Saturday Nation Kenya, 19 March 2011 <<http://www.nation.co.ke/News/politics/UN+council+rejects+Kenya+deferral+bid/-/1064/1128944/-/alisyrz/-/index.html>> accessed on 21 March 2013.

¹⁵⁶ Ibid.

¹⁵⁷ Letter to the Security Council, Request of Kenya for deferral under Art 16 of the Rome Statute (29 March 2011) UN Doc S/2011/201.

¹⁵⁸ Press Statement by the President of the Council, Ambassador Nestor Osorio (Colombia) on the request of Kenya for deferral under Art 16 of the Rome Statute, UN Media Stakeout, 5:05 (8 April 2011) <<http://www.unmultimedia.org/tv/webcast/2011/04/sc-president-nestor-osorio-colombia-on-dr-congo-security-council-media-stakeout-2.html>> accessed 15 April 2013.

session took place¹⁵⁹ without leading to any decision by the Council. In October 2013 demarches continued to pursue a deferral of the cases against Mr Kenyatta and Mr Ruto.¹⁶⁰ The request of Kenya was seconded by the AU through a letter to the UNSC.¹⁶¹ Rwanda, Morocco, and Togo tabled a resolution of deferral of the situation of Kenya. But the resolution did not receive enough votes to be adopted.¹⁶²

These four cases of requests for deferrals illustrate the challenges brought by Article 16: (i) a lack of common understanding or clarity as to the functions and conditions of a deferral; (ii) a lack of procedures dealing with tensions following the rejection of a request for deferral (e.g. transparency, techniques to temper unmet expectations); (iii) and the absence of checks and balances, ensuring that deferrals are framed in line with the Rome Statute or contained in their impact.

3.8.1 Conditions and criteria for invoking Article 16

Article 16 has been contested since its inception.¹⁶³ States opposing the provision invoked concerns relating to the judicial independence of the ICC and the right to a fair trial. In the end, it was decided that the ‘onus lies with the Security Council to decide from case to case (with full application of the veto).¹⁶⁴

The reasons invoked to justify Article 16 in practice have differed across situations. In several instances, Council interests were placed above those of the Court. The ICC was considered a threat to the peace in the context of Resolution 1422 (2002), and in the context of the request of the AU which was meant to introduce an additional ‘layer of control of the Prosecutor’.¹⁶⁵

This approach contrasts with another school of thought which regards Article 16 as a mechanism to facilitate peace processes and transitional justice mechanisms. This line of reasoning was, *inter alia*, used by the Conseil d’État of Belgium. In its analysis of the constitutionality of the Rome Statute, the Conseil expressed the view that Article 16 pursues a higher political objective in the realm of conflict resolution, namely to facilitate peace

¹⁵⁹ ‘What’s in Blue: Informal Interactive Dialogue with Kenya on ICC Issue’, *Security Council Report*, 22 May 2013 <<http://www.whatsinblue.org/2013/05/informal-interactive-dialogue-with-kenya-on-icc-issue.php>> accessed 15 September 2013.

¹⁶⁰ Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary General and the President of the Security Council, 21 October 2013, UN Doc S/2013/624.

¹⁶¹ Letter 1 November 2013, UN Doc S/2013/639.

¹⁶² In favour, States not Parties: Azerbaijan, China, Morocco, Pakistan, Russian Federation, Rwanda, and Togo. Abstention, States Parties: Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom; and States not Party: the United States. UN Doc S/2013/660; UNSC 7060th Meeting (15 November 2013) UN Doc S/PV.7060.

¹⁶³ The unrecorded voting procedure makes it difficult to identify states that abstained. But a reconstruction of statements suggests that the following five states abstained, partly based on opposition to Art 16: Cuba, India, Mexico, Pakistan, and Sudan on behalf of the Group of Arab States. Ironically, some of these states later supported the invocation of Art 16. The United States voted against the Statute. In its statement, it expressed opposition to Art 16, but not because of the functions of the provision; rather, due to the procedural limitations to the deferral. See Rome Conference, Official Records (n 140), 9th Plenary Meeting.

¹⁶⁴ Berman (n 2) 177–8.

¹⁶⁵ African Union, Communiqué 2008 (n 142), para. 9.

operations.¹⁶⁶ Other commentators have interpreted Article 16 in a similar manner. For Robert Cryer, Hakan Friman, Darryl Robinson, and Elizabeth Wilmshurst:

[T]he purpose of [Article 16] was to allow the Council, under its primary responsibility for the maintenance of peace and security, to set aside the demands of justice at a time when it considered the demands of peace to be overridden; if the suspension of legal proceedings against a leader will allow a peace treaty to be concluded, precedence should be given to peace. The suspension of the proceedings would be only temporary.¹⁶⁷

Some proponents of this approach argue that Article 16 mitigates the inability to offer guarantees of impunity regarding the most serious crimes in peace negotiations¹⁶⁸ by offering additional space for sequencing or timing of justice interventions.¹⁶⁹ Others claim that negotiators require instruments to handle the impact of warrants of arrest. These arguments have been made in the Darfur crisis,¹⁷⁰ where officials argued that action by the ICC is ‘counterproductive and will complicate the ongoing efforts [and] will also increase the risk of instability in Sudan, the IGAD region and in the whole continent’.¹⁷¹ Again, others stress that the possibilities of reaching a peace agreement are curtailed when an indictment targets ‘those key leaders who are best able to deliver peace’,¹⁷² or that an indictment at the wrong time may polarize competing factions. It is more difficult to argue that Article 16 serves as a mechanism to facilitate complementarity, i.e. to ensure the implementation of domestic decisions to prosecute at the national level or ‘to pursue alternative means of justice’.¹⁷³

¹⁶⁶ Avis du Conseil d’Etat du 21 avril 1999 (Belgium), Parliamentary Document 2-239, 1999/2000, 94 at (B)(1)(1). For the Conseil d’Etat, the regime of deferral: Sans doute [...] se justifie par le souci des rédacteurs du Statut d’éviter que des accords de paix péniblement élaborés ou en voie d’élaboration puissent être remis en cause par des poursuites devant la Cour pénale internationale.

¹⁶⁷ R Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press 2014) 170. Similar interpretation by Bergsmo and Pejić, ‘Article 16’ (n 137), 599, marginal note 10.

¹⁶⁸ P Hayner, ‘Managing the Challenges of Integrating Justice Efforts and Peace Processes’, Review Conference of the Rome Statute, Kampala 31 May–11 June 2010, Stocktaking on Peace and Justice (30 May 2010), ICC Doc RC/ST/PJ/INF.4, 2 (‘Hayner, Managing Challenges’).

¹⁶⁹ See, for instance, Report of the UN Secretary General, The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies (3 August 2004) UN Doc S/2004/616, para. 64(k); Remarks by Juan Méndez at Second Expert Public Hearing, Office of the Prosecutor, ICC (18 October 2006); T Murithi, ‘Sequencing the Administration of Justice to Enable the Pursuit of Peace’, *Institute for Justice and Reconciliation* Policy Brief 1 (June 2010) 5.

¹⁷⁰ At a briefing to the Security Council, Mr Rodolphe Adada, Joint African Union–United Nations Special Representative for Darfur and head of the African Union–United Nations Hybrid Operation in Darfur, told the Council:

The ICC issue has dominated and polarized Sudanese political life. It has weakened the position of those in the Sudan who have been working for compromise and consensus and has encouraged militant sentiment.

UNSC 6112nd Meeting (27 April 2009) UN Doc S/PV.6112, 18. See similarly, Organisation of the Islamic Conference, *Press Release*, 15 March 2009.

¹⁷¹ Statement from the Executive Secretary of the IGAD, 3 August 2010 <http://igad.int/index.php?option=com_content&view=article&id=234:es-statement-on-chamber-of-the-international-criminal-court&catid=61:statements&Itemid=150> accessed 1 September 2013.

¹⁷² African Union, Concept Note for the Preparatory Meeting of Ministers on the Rome Statute of the International Criminal Court (3–6 November 2009) AU Doc No MinICC/Legal/2 (II), para. 13.

¹⁷³ AU Concept Note (n 172), para. 13; African Union Assembly Decision, 16th Sess. (n 187), para. 6.

A third strand of opinion considers Article 16 as a safeguard for the international community to address exceptional security threats, i.e. a threat to the peace, breach of the peace, or act of aggression that requires the Council to declare a temporary halt to the operations of the Court. This approach is more in line with the protection of judicial independence, and reflects some of the discussions on Article 16 in negotiations. Observers recount how, in an unrecorded discussion on Article 16, a leading negotiator described a scenario in which an unyielding prosecutor was ready to proceed with an arrest warrant against a rogue leader from a nuclear power plant who had left instructions to his subordinates to activate a nuclear bomb in case he was indicted by the ICC.¹⁷⁴ Without this ‘extreme scenario’, some like-minded states that defended ‘commitment to an independent and effective International Criminal Court that would not be subjected to the Security Council’¹⁷⁵ would not have been able to agree to Article 16. According to this reading, Article 16 is considered as an emergency clause to facilitate the restoration of security in cases of extreme threat. Admittedly, this approach has not been thoroughly or effectively pursued or discussed in practice. But two potential uses come to mind: the invocation of Article 16 to mitigate the humanitarian crisis arising from the backlash of President Al-Bashir to his indictment,¹⁷⁶ and as a hypothetical offer to Libyan President Muammar Gaddafi in 2011 in order to stop the reported massacres against civilians. In these scenarios, assurance would still be needed that the deferral would decisively and directly contribute to achieving the ‘higher goal’.¹⁷⁷

Finally, the use of Article 16 has been associated with claims of legitimacy in decision-making processes. This argument situates Article 16 in the broader political and democracy-oriented system in which it operates, in particular the conflict over majoritarian rule in the UN system. It is illustrated by the statement of Libyan Ambassador Mubarak, who criticized the lack of action by the Council on the deferral for Al-Bashir:¹⁷⁸

I wonder if, at the request of more than two thirds of the membership of the international community, the Security Council does not invoke article 16 of the Rome Statute, when will it do so?

It is further reflected in proposals by the AU to grant the General Assembly powers of deferral,¹⁷⁹ and in the proposal for amendment to Article 16 of the Rome Statute

¹⁷⁴ Interview with participant to the Rome Conference, The Hague, 1 September 2009.

¹⁷⁵ J Yañez-Barneuve, ‘El Papel Del Grupo De Estados afines en La Elaboración y el Desarrollo del Estatuto de Roma de la Corte Penal Internacional’ in S Corcuera Cabezut and J A Guevara Bermudez (eds), *Justicia Penal Internacional* (Mexico City: Universidad Iberoamericana 2001) 69.

¹⁷⁶ In March 2009 the Sudanese government expelled 13 international aid agencies operating in Darfur. The government of Sudan indicated that the expulsion was due to violations of conditions and rules for operation of aid agencies. Sudan also indicated that the concern about the expulsion of aid agencies was the excuse to justify intervention by the ICC. UNSC 6096th meeting (20 March 2009) UN Doc S/PV/6096, 4.

¹⁷⁷ Human Rights Watch has documented extensively how the hoped-for end of violence or threat has been elusive even when justice has been postponed. See ‘Selling Justice Short: Why Accountability Matters’, *Human Rights Watch*, July 2009.

¹⁷⁸ UNSC 5947th Meeting (n 143), 7.

¹⁷⁹ Proposed Amendment to the Rome Statute of the International Criminal Court, Report of the Working Group on the Review Conference, Appendix VI, Official Records of the Assembly of States

circulated by South Africa in November 2009, and currently still under consideration by the Working Group on Amendments. This approach sits uneasily with the function of Article 16. The provision was not created to weigh opinion or judge the necessity of action by ‘democratic’ methods. It was tied to factual criteria, namely the existence of a threat to international peace, and crisis response schemes which require executive action.

3.8.2 Explaining a deferral decision

Although Article 16 is a fundamental norm in the relationship between the Council and the Court, its operationalization has received little institutional attention in the UN system. Existing weaknesses are illustrated by the lack of response of the Council to the request for deferral by the Assembly of the AU with respect to President Al-Bashir. The silence of the Council has been condemned by a number of international organizations.¹⁸⁰ In the case of Kenya, the lack of public debate or record of Council discussions during the closed informal consultations in 2011 and May 2013 had counterproductive effects. It increased tensions and raised the suspicion that the Council does not give due consideration to AU concerns. These shortcomings reflect negatively on the Court. In May 2013 Kenya turned to the Assembly of States Parties to hold an emergency special session in order to address the concerns that were left unsettled by the Council.¹⁸¹

3.8.3 Containing deferrals

It is expected that requests for deferrals will continue to be brought forward by affected parties. Although deferrals can be blocked by France and the United Kingdom as permanent members, or through concerted abstention of States Parties sitting in the Council,¹⁸² they remain an option for those affected by the Court’s investigations and prosecutions. One of the challenges is to limit their detrimental effects on the Court. Some implications require further attention. For instance, suspending a trial may compete with the rights of the accused to an expeditious trial. It limits the option of victims to participate in proceedings, or might endanger their protection, if states refuse to cooperate with the Court. In cross-border situations, a deferral might adversely affect another State Party. It might also entail additional costs through delays caused. Neither the Council nor the Court nor States Parties currently possess the tools to assess the impact of deferrals or to ensure that the Council may limit its impact to ‘acceptable’ terms should a deferral be approved in the future.

Parties, (November 2009) ICC-ASP/8/20 Annex II, November 2009 (Eighth Session of the Assembly of States Parties).

¹⁸⁰ Arab League, Council of Ministers, Emergency Session, Resolution on the decision of the Pre-Trial Chamber I to the International Criminal Court against the President of the Republic of Sudan, Hassan Ahmad Al-Bashir, 4 March 2009, para. 3: ‘Expresses regret that the Security Council was not able to invoke Article 16 of the Rome Statute to delay the action taken by the International Criminal Court’ (unofficial translation from Arabic by the CICC).

¹⁸¹ Oral submission of the Permanent Representative of Kenya to the United Nations to the Bureau of the Assembly of States Parties on 17 June 2013, Decisions of the Bureau, 6th Meeting. See also discussion of the Bureau on its 7th Meeting (8 July 2013), and decision of the Bureau to decline the request of Kenya at the 8th Meeting (19 July 2013).

¹⁸² Art 27(2), UN Charter.

3.9 Conclusions

The relationship between the Court and the Council is marked by tensions between law, politics, and judicial diplomacy. The promotion of accountability requires fresh initiatives to address the challenges in the interaction between the two bodies. At present, the Court is predominantly seen and treated as an instrument of the Council. This approach has overshadowed the two other methods of interaction that are inherent in the relationship: institutional autonomy, and the use of collective security for enforcement of international justice. The instrumentalization of the Court has pushed critics to argue for greater separation of ‘justice’ and ‘collective security’. An improvement of the status quo requires a better balancing of interests. Interaction needs to take into account judicial independence and the virtues and necessity of the Council as agent for the Court.

While it may be impossible for States Parties to reach agreement on fundamental divisions in the near future, certain steps can be taken to mitigate criticism of Council action (e.g. selectivity, lack of transparency) to enhance cooperation with the Court (including funding) and to secure follow-up to the decisions of the Council, while building on mutual synergies between the institutions.

The conditions of discourse in the Council are a first port of entry for potential changes in practice. If the ICC is used as an accountability mechanism for maintenance of peace and security, the Council should ‘lead by example’ and apply greater vigilance in its own action.¹⁸³ This applies in particular to referrals. Mechanisms of follow-up¹⁸⁴ must be coherent with the commitment to address the magnitude of victimization arising from the crimes under the jurisdiction of the Court. The declarations of the Council should reflect this commitment and leave no doubt as to the support enjoyed by the Court internationally.

In practical terms, the Council might support ICC action against perpetrators through sanctions and asset freezing.¹⁸⁵ For instance, UN sanction committees might use their power to list individuals that are subject to arrest warrants issued by the Pre-Trial Chambers of the ICC. Listing could be extended to all situations in which the Court is acting, and not only those referred by the Council.

There are also various ways in which interaction between the Council and the Court may be improved after a referral. It has, in particular, been suggested that the Council Working Group on Tribunals could serve as a forum for dialogue on follow-up.¹⁸⁶ This would require greater flexibility by states not parties to allow the Court to participate in informal or formal mechanisms.¹⁸⁷

¹⁸³ Chatham House, SC and the ICC (n 6) 5; IPI, ICC, and Security Council 2013 (n 6) 1 and 6.

¹⁸⁴ Several states supported this idea at the UNSC 6849th Meeting: Argentina, Botswana, Brazil, Chile, Costa Rica, Estonia, Guatemala, Lesotho, Mexico, New Zealand, Peru, Portugal, Slovakia, Slovenia, Switzerland, Uruguay, and New Zealand.

¹⁸⁵ See generally, Stagno, Strengthening the Rule of Law 2012 (n 6); Report of the Court on ICC–UN Cooperation (n 6), paras 49–50.

¹⁸⁶ IPI, ICC, and Security Council 2013 (n 6), 6; Statements of Estonia, France, and New Zealand, Togo 2012 Open Debate on Peace and Justice UNSC 6849th meeting resumption 1 (n 6).

¹⁸⁷ In early 2013 an invitation to brief the Security Council’s Working Group on International Tribunals was extended to the Prosecution. It was abandoned as some Council members considered that the mandate of the Working Group (focusing on ad hoc tribunals) left the ICC out of its scope. See

Most prospects for tangible results are in the areas of cooperation and implementation. This point was expressly made by the President of the Court, who told the Council,

if the ICC is to effectively deal with situations referred by the Council under Chapter VII, it needs to be able to count on the full and continuing cooperation of all UN members, whether they are parties to the Rome Statute or not [and] it would be very helpful if the Security Council could underline this obligation of full cooperation, without which it is very difficult for the ICC to discharge the mandate the Council has given it.¹⁸⁸

In these areas, the relationship is reversed. The ICC is the agent, and the Council serves a mechanism to support the work of the Court. Many suggestions have been made to improve the status quo. States have affirmed the need for more precise drafting in future referrals to identify obligations regarding cooperation and full protection of ICC staff with respect to immunities and privileges.¹⁸⁹

There are also ways to mitigate funding dilemmas for the ICC, especially in the area of cooperation between the ICC and the UN. The ICC Registry and the Office of the Prosecutor rely on UN cooperation in the field, including services, communications, travel, evacuation, and logistics.¹⁹⁰ The UN–ICC Relationship Agreement specifies that costs arising from cooperation and any other support rendered by the UN to the Court are fully reimbursable.¹⁹¹ These costs are substantial for the Court, but relatively small for the United Nations. For example, between 1 July 2012 and 30 June 2013 the Court paid 671,568.00 USD to the UN as reimbursement for services and cooperation provided by the UN mainly from the field in the Democratic Republic of the Congo, CAR, Côte d'Ivoire, Mali, and Kenya.¹⁹² This amount represents approximately 0.4% of the annual budget of the Court (€120 million), and 0.02% annually of the biennial budget of the UN (USD 5,152 million).¹⁹³ Reopening dialogue on this reimbursement scheme might be a way to counter discrepancies caused by the lack of funding of Council referrals.

¹⁸⁸ 'What is in Blue Briefing: Interactive Dialogue with the ICC Prosecutor', *Security Council Report*, 6 May 2013 <<http://www.whatsinblue.org/2013/05/interactive-dialogue-with-the-icc-prosecutor.php>> accessed 30 September 2013.

¹⁸⁹ Statement of President Song, 2012 Open Debate on Peace and Justice UNSC 6849th meeting resumption 1 (n 6), 5.

¹⁹⁰ Statement of Australia, 2012 Open Debate on Peace and Justice UNSC 6849th meeting resumption 1 (n 6), 6.

¹⁹¹ See, Report of the UN Secretary General on information relevant to the implementation of Art 3 of the Relationship Agreement between the United Nations and the International Criminal Court (4 September 2013) UN Doc A/68/364, para. 3 and Report of the Court on ICC-UN Cooperation (n 6), paras 13–23.

¹⁹² UN General Assembly Resolution 58/318 (13 September 2004), UN Doc A/Res/58/318, para. 3.

¹⁹³ Report of the UN Secretary General, Expenses incurred and reimbursements received by the United Nations in connection with assistance provided to the International Criminal Court (5 September 2013), UN Doc A/68/366. The reimbursed services provided by the UN in 2011–12 were slightly higher, 806 955.00 USD. See UN Doc A/67/378, 19 September 2012.

¹⁹⁴ UN Regular Budget 2012–13, fact sheet, February 2012 <<http://www.un.org/en/hq/dm/pdfs/oppba/Regular%20Budget.pdf>> accessed 15 August 2013.

If future referrals are contemplated, the underlying conditions and controversial provisions must be subject to greater discourse and transparency, e.g. through clearer explanation of votes. More coordination and consultation may be necessary to avoid inherent contradictions and legal concerns from the perspective of the Rome Statute. In some cases, the cost of concessions might be so high that it may not be in the ICC's interests for it to be triggered.

Similar action is necessary in relation to deferrals under Article 16, and their conditions. Transparency of the decision-making in the Council plays a key role in gaining acceptance for decisions.¹⁹⁴ Existing practice has shown that due explanations may be necessary to avoid political backlash, misunderstandings, and accusations of bias, even in cases where Council members are not willing to support a request.

It is a given that decision-making in the Council is 'political' in nature. In this sense, Council action does not differ fundamentally from State referrals, which are mostly triggered by government action. But the collective nature of the UN system provides better opportunities for consultation and coordination that should mitigate concerns of selectivity and negative implications of Council decisions on the ICC. Several constructive recommendations have been made to this effect. For instance, France has proposed the idea of a code of conduct among the permanent members of the Council by which they would agree not to use their veto power in situations where massive crimes have been committed.¹⁹⁵ Other states have suggested indicative checklists to guide the engagement of the Council with the Court on potential Article 13(b) referrals.¹⁹⁶ Interaction could be strengthened through adoption of a protocol,¹⁹⁷ or the identification of general parameters,¹⁹⁸ which would guide Council's actions in cases in which there are strong indications that the crimes under the Rome Statute are being committed and no domestic action is taken. They would signal a greater commitment to a policy of accountability, which is necessary to maintain the authority and integrity of Council decision-making relating to the ICC.

Some positive signals in this direction may be detected in the growing references to the ICC in thematic or country-specific UN resolutions. The ICC and Rome Statute crimes are increasingly used as a frame of reference in relation to peace operations or the protection of civilians. One key aspect lies in the identification and strengthening of positive synergies between both institutions. Interaction between the Court and the Council may be strengthened through debate on thematic issues,¹⁹⁹ interactive

¹⁹⁴ See for instance, statement of the United Republic of Tanzania, UNSC 6849th meeting resumption.

¹⁹⁵ Statement of France, 2012 Open Debate on Peace and Justice UNSC 6849th meeting (n 6) 22–3; Statement of New Zealand, 2012 Open Debate on Peace and Justice UNSC 6849th meeting resumption 1 (n 6), 5.

¹⁹⁶ Statement of Portugal, 2012 Open Debate on Peace and Justice UNSC 6849th meeting (n 6) 13–14.

¹⁹⁷ Statement of Costa Rica, 2012 Open Debate on Peace and Justice UNSC 6849th meeting resumption 1 (n 6) 2–3.

¹⁹⁸ Statement of Lesotho, 2012 Open Debate on Peace and Justice UNSC 6849th meeting resumption 1 (n 6), 17–18.

¹⁹⁹ Statement of Lithuania, 2012 Open Debate on Peace and Justice UNSC 6849th meeting resumption 1 (n 6), 1, 14.

dialogues, and open sessions,²⁰⁰ where the President and prosecutor of the ICC may brief the Council.²⁰¹

Pursuing these specific actions will require resolve and political creativity. But they would open up prospects for a new era in the relationship between the Council and the Court, one based on a clearer strategy and greater coherence in the fight against impunity for the most serious crimes under international law.

²⁰⁰ Statement of Slovenia, 2012 Open Debate on Peace and Justice UNSC 6849th meeting resumption 1 (n 6), 10.

²⁰¹ Statement of The Netherlands, 2012 Open Debate on Peace and Justice UNSC 6849th meeting resumption 1 (n 6), 33.

4

The ICC and the AU

*Ottilia Anna Maunganidze** and *Anton du Plessis***

4.1 Introduction

The relationship between the ICC and the AU can be characterized as troubled at present. The primary bone of contention relates to accusations by the AU that the ICC is a neo-imperialistic tool that illegitimately targets Africa. The impact of this troubled relationship is primarily political. However, it has also had a significant impact on the practice of the ICC.

This chapter analyses the legal and political background of the relationship between the ICC and the AU, including the origin and foundation of divergent positions, for instance on head of state immunity and cooperation duties. The AU, following the indictment of Sudanese President Omar Hassan Al Bashir, and later Uhuru Muigai Kenyatta of Kenya,¹ has consistently defended the immunity of heads of state as central to state sovereignty. Their primary criticism of the ICC in the indictment of heads of state has been aimed at the Office of the Prosecutor. In respect of cooperation, the AU contends that non-State Parties should not be ‘forced’ to cooperate, even where a situation has been referred by the UNSC. Further, it has been suggested that all African states should withhold cooperation where the ICC has indicted heads of state.²

The chapter, nevertheless, cautions against an oversimplification of ‘African’ views as homogeneous and highlights the progress made by some African countries in investigating, prosecuting, and adjudicating international crimes. It posits that these efforts, albeit riddled with challenges, are in line with the principle of complementarity that is at the heart of the Rome Statute system. It goes further, however, to suggest that these domestic initiatives go beyond merely complementing the ICC and are in effect an effort to promote international criminal justice in general. This is so because under the Rome Statute the traditional notion of complementarity relates to an invocation of the ICC’s jurisdiction when domestic jurisdictions are unwilling or unable

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¹ Kenyatta, together with his deputy William Samoei Ruto, was indicted before being elected as President.

² AU (Assembly), Decision on the Meeting of African States Parties to the Rome Statute of the ICC, Thirteenth Ordinary Session, 3 July 2009 (Sirte, Great Socialist People’s Libyan Arab Jamahiriya), Doc Assembly/AU/13(XIII), para. 10.

to prosecute individuals alleged to have committed international crimes.³ However, these African efforts suggest that nations are working with the ICC towards achieving a common goal of international criminal justice, thereby reducing any possible impunity gaps.⁴ This shall be illustrated by instances where efforts have been made to deal with crimes committed in states that are not party to the Rome Statute or by their nationals, and where the UNSC has not referred the situation therein to the ICC.

The chapter also examines the proposal to expand the jurisdiction of the African Court of Justice and Human and Peoples' Rights to deal with serious crimes, including international crimes and the implications thereof.

4.2 The Conflation of Politics and Law: Africa and International Criminal Justice

From the trials at Nuremberg⁵ to date, international criminal law has sometimes been accused of 'providing victors in a conflict with an opportunity to demonise their opponents, sanitise their crimes and perpetuate injustice'.⁶ Inherent in this accusation is the claim that international criminal law is a political tool of the victors over the vanquished. It suggests an intrinsic uneven landscape. It is this uneven landscape (perceived or otherwise) of international criminal law that the AU argues the ICC perpetuates through its focus on prosecuting situations in Africa while neglecting similar violations of the Rome Statute on other continents.⁷ It is worth noting that the criticisms are manifold and relate to, but are not limited to, referrals made by the UNSC, the indictment of sitting heads of states (and the related arguments around immunities of heads of state), and the absence of situations outside of Africa on the ICC's roll. These concerns are captured in statements to the effect that the ICC is a 'hegemonic tool of western powers which is targeting or discriminating against Africans'.⁸

Following the AU's 21st Summit of the Assembly of African Heads of State and Government (AU Summit) in May 2013, the then chairperson of the AU Assembly,

³ Art 17(1) of the Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute').

⁴ M du Plessis et al., 'African Efforts to Close the Impunity Gap: Lessons for Complementarity from National and Regional Actions', *ISS Africa* (2012), 1.

⁵ International Military Tribunal at Nuremberg. See The London Declaration of 8 August 1945 on the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis. Annexed to this agreement was the Charter of the International Military Tribunal; B Ferencz, 'The Experience of Nuremberg' in D Shelton (ed.), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (Ardsley: Transnational Publishers 2009); R Overy, 'The Nuremberg Trials: International Law in the Making' in P Sands (ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press 2003).

⁶ W Schabas, *An Introduction to the International Criminal Court* 2nd edn (Cambridge: Cambridge University Press 2004) 1.

⁷ C Igwe, 'The ICC's Favourite Customer: Africa and International Criminal Law' (2008) 40 *Comparative and International Law Journal of Southern Africa* 40, 294. However, other situations were under preliminary examination by the Office of Prosecutor in Afghanistan, Colombia, Chad, Georgia, and Guinea; in this regard see M Ssenyonjo, 'The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan' (2010) 59 *International and Comparative Law Quarterly* 205.

⁸ M du Plessis, 'Recent Cases and Developments: South Africa and the International Criminal Court' (2009) 3 *South African Journal of Criminal Justice* 442, 443.

Ethiopia's Prime Minister Hailemariam Desalegn, stated that the decision of the AU to lambast the ICC was born from the fact that 'African leaders came to a consensus that the ICC process conducted in Africa has a flaw... [T]he process has degenerated to some kind of race-hunting rather than the fight against impunity.'⁹ Some African statesmen have made similar statements in the past and after the 21st AU Summit. However, these statements should be taken as individual concerns and not as the concerns of all Africans.

Criticisms of the ICC as a neo-imperialistic tool that targets Africans emerged following the initiation of investigations into Sudanese President Omar Hassan Al Bashir's alleged role in the commission of international crimes in Darfur.¹⁰ Following the issuance of a warrant for Al Bashir's arrest by the ICC in March 2009,¹¹ the AU called on the UNSC to defer the ICC's investigation into Al Bashir for a period of 12 months by invoking Article 16 of the Rome Statute.¹² In July 2009 the AU heads of state called on its members not to cooperate with the ICC in effecting the arrest of Al Bashir.¹³ For African States Parties to the Rome Statute, this decision placed them in the 'unenviable position of having to choose between their obligations as member states of the AU on the one hand, and their obligations as states party to the Rome Statute, on the other'.¹⁴

To date, despite the ICC arrest warrant, Al Bashir has been invited to visit, and received by, African States Parties—including Chad, Djibouti, Kenya, and Malawi. It is worth noting that when Al Bashir was received in Kenya in August 2010, the country had already enacted implementing legislation of the Rome Statute that entailed an obligation to cooperate with the ICC and, where relevant, to effect the arrest of known fugitives.¹⁵ Kenya, however, relied on the AU decision not to cooperate with the ICC in respect of Al Bashir as justification. Nevertheless, the Kenyan government's action in hosting Al Bashir resulted in the first ever decision of the ICC on non-cooperation.¹⁶ Further, through an application by Kenyan civil society, a Kenyan High Court issued

⁹ S Dersso, 'The International Criminal Court's Africa problem', *Al Jazeera*, 11 June 2013 <<http://www.aljazeera.com/indepth/opinion/2013/06/201369851918549.html>> accessed 5 March 2015.

¹⁰ Du Plessis et al. (n 4).

¹¹ Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-1, PTC I, ICC, 4 March 2009.

¹² AU (Assembly), Decision on the Application by the ICC Prosecutor for the Indictment of the President of the Republic of the Sudan, Twelfth Ordinary Session, 1–3 February 2009 (Addis Ababa, Ethiopia), Doc Assembly/AU/Dec.221(XII), 1 at para. 3. Art 16 ICC Statute empowers the UN Security Council to defer an investigation or prosecution for one year if it is necessary for the maintenance of international peace and security under Chapter VII of the UN Charter. The UN Security Council would need to make a determination that the continued involvement of the ICC is a greater threat to international peace and security than suspending the ICC's work.

¹³ AU Assembly Decision (n 2). On the other hand, human rights organizations welcomed the ICC arrest warrant. See also 'ICC: Bashir Warrant Is Warning to Abusive Leaders', Human Rights Watch, 4 March 2009; 'ICC Issues Arrest Warrant for Sudanese President Al Bashir', Amnesty International, 4 March 2009.

¹⁴ D Tladi, 'The African Union and the International Criminal Court: The Battle for the Soul of International Law' (2009) 34 *South African Yearbook of International Law* 57.

¹⁵ See Kenya's *International Crimes Act* 2008, which came into operation on 1 January 2009. The others include South Africa and Uganda.

¹⁶ Decision requesting observations from the Republic of Kenya, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09, PTC I, ICC, 25 October 2010, 4.

a domestic arrest warrant for Al Bashir, thereby preventing future visits for fear of arrest.¹⁷

It should be noted that while some African countries have in the past relied on AU decisions on the ICC to justify non-cooperation, one should not conclude that all African states share a common negative position towards the ICC. As shall be illustrated, many African states continue to cooperate with the ICC on various matters, including requests for assistance, and several have publicly confirmed their support for the Court.

The aforementioned notwithstanding, it should be noted that at the time of writing, 34 African states are party to the Rome Statute and none has withdrawn from the treaty. Further, some African countries have put in place mechanisms to investigate and prosecute allegations of international crimes. Also of significance is the fact that four out of eight of the African situations before the ICC were self-referrals, most recently from Mali;¹⁸ and that over 70 per cent of the requests for cooperation made by the ICC to African states (some of which are not party to the Rome Statute) are met with a positive response.¹⁹

4.3 African Efforts to Close the Impunity Gap

In Africa there is a great need to promote democracy and good governance, and to strengthen the rule of law, which are all threatened by the existence of impunity and a general lack of criminal justice capacity to respond effectively to international crimes. If the international criminal justice initiative is to succeed, it is imperative to seek means through which to address these issues. Furthermore, it should be noted that in addressing these issues, there should be a buy-in from African governments and civil society. It cannot be denied that without this buy-in the practical implementation of any work aimed at destroying the impunity gap will remain a pipe-dream. This is not to suggest that efforts have not been made across the African continent to end impunity, and indeed some states have recognized the need to address these challenges.

One of the cornerstones of international criminal justice is the principle of complementarity.²⁰ Complementarity's aim is to ensure that national criminal justice systems become legitimate and credible means through which justice for the commission of international crimes is sought. As stated by the Office of the Prosecutor during the early years of the Court in 2003:

The [ICC's] strategy of focusing on those who bear the greatest responsibility for crimes within the jurisdiction of the Court will leave an impunity gap unless national

¹⁷ Du Plessis et al. (n 4).

¹⁸ O Maunganidze and A Louw, 'Mali: Implications of Another African Case As Mali Self-Refers to the ICC', *ISS Today*, 24 July 2012.

¹⁹ F Bensouda, 'ISS Seminar: Setting the Record Straight: the ICC's New Prosecutor Responds to African Concerns, Pretoria', ISS Seminar Media Release, 10 October 2012.

²⁰ The Preamble to the Rome Statute emphasizes that 'the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'. See also Art 17(1) ICC Statute.

authorities, the international community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used.²¹

It is clear, therefore, that the prosecutorial strategy has, since the beginning, been to ensure that domestic courts are used as a complementary measure to the ICC to ensure justice.

This principle is important in that it allows countries to retain their independence in dealing with internal matters, but also provides victims with an additional course to take when seeking justice if their national courts cannot do so. It should be noted that complementarity is not a principle limited solely to situation countries before the Court, but rather extends to all countries that have ratified the Rome Statute. It is through a thorough appreciation of this that the international criminal justice system can be strengthened.

In order to give effect to complementarity and ultimately to promote international criminal justice, States Parties to the Rome Statute must adhere to their implementation obligations as outlined in the Statute.²² This is so because the ICC's jurisdiction is not universal. The jurisdiction of the ICC *must* be triggered first, either by a State Party referral,²³ the prosecutor initiating independent investigations in a State Party,²⁴ or through a UNSC referral of a situation in a non-State Party.²⁵ Thus in the absence of referrals, the onus rests on states.

Without the requisite legislative framework to investigate and prosecute international crimes, states parties may be rendered 'unable' to prosecute, thereby leaving the ICC as the only avenue through which justice for international crimes may be sought. State parties should therefore ensure that they adapt their legal and justice system in order for them to enjoy a fully complementary relationship with the ICC. This means they must criminalize genocide, crimes against humanity, and war crimes, as contained in the Rome Statute. Even in countries that have not ratified the Rome Statute, international crimes can (and should) be prosecuted. Indeed, the ICC in the case *The Prosecutor v Saif al-Islam Gaddafi and Abdullah al-Senussi*, in its decision on the admissibility of the case against Abdullah Al-Senussi, applied a two-step test to determine whether Libya should have jurisdiction over al-Senussi's case.²⁶ First, the ICC sought to determine whether at the time of the proceedings in respect of the admissibility challenge there was an ongoing investigation of the same case at national level. Second, if the answer to the first question was in the affirmative, whether the state was

²¹ Paper on some policy issues before the Office of the Prosecutor, Office of the Prosecutor, September 2003, 3.

²² See generally W Schabas, *An Introduction to the International Criminal Court* 4th edn (Cambridge: Cambridge University Press 2011); B Brandon and M du Plessis (eds), *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States* (London: Commonwealth Secretariat 2005).

²³ Art 12 ICC Statute: A state accepts jurisdiction by becoming a State Party, or can do so by declaration if it is a non-State Party. See also Arts 13(a) and 14.

²⁴ Arts 13(c) and 15 ICC Statute. These investigations must be authorized by the Pre-Trial Chamber.

²⁵ Art 13(b) ICC Statute. The UN Security Council must exercise its Chapter VII powers when making any such referral.

²⁶ Decision on the admissibility of the case against Abdullah Al-Senussi, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-466-Red, PTC 1, ICC, 11 October 2013, Section III.

willing and able to genuinely carry out such investigation and prosecution. Despite objections from the Defence, the ICC ruled in favour of the Libyan government, as it was both satisfied that the case they intended to pursue against Al-Senussi was the same as that before the ICC and that there was willingness and ability to genuinely proceed. Al-Senussi's counsel has since appealed.²⁷

In addition to criminalizing international crimes, States Parties must be able to arrest and surrender suspects to the ICC, where requested.²⁸ In addition, States Parties must cooperate with the ICC in relation to an investigation and/or prosecution with which the ICC might be seized.²⁹

In order to be able to fully cooperate with the ICC, a State Party is obliged to have a range of powers, facilities, and procedures in place, including the promulgation of laws and regulations. The legal framework for requests for arrest and surrender, and all other forms of cooperation, is set out in Part 9 of the Rome Statute. First, there is a general duty on states to cooperate fully with the ICC in the investigation and prosecution of crimes.³⁰ Second, there is provision for requests of cooperation from the ICC.³¹ Failure to cooperate with the ICC following a request can, amongst other things, lead to a referral of the state to the UNSC.³² Article 88 obliges states to ensure that national procedures are in place to enable all forms of cooperation contemplated in the Statute. Unlike inter-state cooperation in criminal matters, the Rome Statute prescribes that for States Parties there are no grounds for refusing ICC requests for arrest and surrender.³³ States are therefore obliged, under the relevant arrest and surrender processes provided in their own national laws, to effect arrests and to surrender persons, where an ICC arrest warrant has been issued. It should be borne in mind that the AU has, since its 2009 Decision on the ICC,³⁴ reiterated its position on non-cooperation in respect of the arrest and surrender heads of state and that Al Bashir has, as a result, remained at large. Despite pronouncements of support by various African countries, none has actually arrested Al Bashir. Further, in the absence of a warrant for the arrest of Kenyatta, several African countries have come out in support of the Kenyan President. Interestingly, the ICC in its decisions has considered the views of African heads of state, whether in agreement or otherwise. In his *obiter dicta* on the relationship between the ICC and African states, Nigerian Judge Eboe-Osuji noted that the ICC should give more credence to the views of African leaders.³⁵ This

²⁷ See Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi', and Request for Suspensive Effect, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-468-Red, Defence, ICC, 17 October 2013.

²⁸ While this is a duty for States Parties, non-States Parties can and are encouraged to cooperate with the ICC. In March 2013 the United States transferred Bosco Ntaganda to the ICC after he surrendered himself to their embassy in Rwanda.

²⁹ The extent of cooperation required of States Parties is evident from the fact that the Office of the Prosecutor has a very wide mandate to 'extend the investigation to cover all facts' and investigate circumstances generally 'in order to discover the truth': Art 54(1)(a) ICC Statute.

³⁰ Art 86 ICC Statute.

³¹ Art 87(1)(a) ICC Statute.

³² Art 87(7) ICC Statute.

³³ See Art 89 ICC Statute. Note that Art 97 provides for consultation where there are certain practical difficulties.

³⁴ AU Assembly Decision (n 2).

³⁵ Concurring separate opinion of Judge Eboe-Osuji, Order vacating trial date of 5 February 2014, convening a status conference, and addressing other procedure matters, *Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-886-Anx, TC V(B), ICC, 23 January 2014, para. 4

view, however controversial, cannot be entirely dismissed, as it goes to the heart of the ongoing friction that could have an adverse effect on the work of the ICC.

4.4 Complementarity in Action

There is a broader understanding of complementarity emerging in Africa. This broader understanding somewhat falls within the notion of 'positive complementarity', i.e. that the ICC and states should actively encourage genuine national proceedings where possible, and that national and international networks should be relied upon as part of a system of international cooperation.³⁶ At the heart of positive complementarity is a strong view that the ICC and domestic jurisdictions share a common responsibility.³⁷ Thus positive complementarity can be seen as the opposite of 'passive' complementarity in that it 'welcome[s] and encourage[s] efforts by States to investigate and prosecute international crimes and recognize[s] that such national proceedings may be an effective and efficient means of ending impunity'.³⁸

Some individual African states have shown their commitment to ending impunity for international crimes despite the impression to the contrary created by the AU's negative position towards the ICC and statements by some statesmen. The obvious illustration of this is the fact that 34 African countries are party to the Rome Statute, at the time of writing eight had already adopted domestic implementing legislation,³⁹ a further 16 have some form of draft legislation,⁴⁰ four have referred situations to the ICC, and most comply with the Court's requests for cooperation.

Across the continent, there are many examples of international criminal justice in practice. For example, in the DRC, South Africa and Uganda there is evidence of (broad) complementarity in practice. It should be noted that there are other countries that are investigating and prosecuting international crimes in Africa and that the three countries covered below are simply used to illustrate African complementarity.

³⁶ Report on Prosecutorial Strategy, Office of the Prosecutor, 14 September 2006, para. 2. See also Report on the activities performed during the first three years (June 2003–June 2006), Office of the Prosecutor, 12 September 2006, para. 58. See also C Stahn, 'Complementarity: A Tale of Two Notions' (2008) 19 *Criminal Law Forum* 87.

³⁷ Stahn (n 36) 101.

³⁸ W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice', University of Pennsylvania Law School, Public Law and Legal Theory Research Paper No. 07-08; and see also W Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19 *Criminal Law Forum* 59.

³⁹ The eight countries that have passed implementation legislation are Burkina Faso, the Central African Republic, the Comoros, Kenya, Mauritius, Senegal, South Africa, and Uganda. There are other countries that do not have implementing legislation but have incorporated some (or all) of the Rome Statute crimes into their penal codes, for example the Democratic Republic of Congo, Malawi, and Lesotho.

⁴⁰ The Coalition for the International Criminal Court (CICC) estimates are that 16 of the 34 African States Parties have drafts of domestic ICC legislation that are in various states of completion; see CICC database on Sub-Saharan Africa, available at <<http://www.iccnow.org/?mod=region&idureg=1>> accessed 11 September 2014.

4.4.1 DRC

The DRC is a monist state, thus international treaties carry the same weight as constitutional law and can be directly applied.⁴¹ The DRC ratified the Rome Statute in March 2002, and theoretically the Rome Statute has been applicable domestically since then. In April 2004 the government of the DRC referred the situation in the eastern provinces of the country, alleging that crimes within the jurisdiction of the ICC were being committed.⁴² The ICC's Office of the Prosecutor (OTP) launched investigations and as of April 2014, these have resulted in six arrest warrants being issued, half of which were related to the conflicts in Ituri and the other half to the provinces of North and South Kivu. Thus far, the ICC has conducted trials against three of the accused. The first convictions were secured against Thomas Lubanga Dyilo in March 2012, for the recruitment of child soldiers to actively participate in hostilities in Ituri, and Germain Katanga in March 2014, as an accessory to one count of crimes against humanity and four counts of war crimes committed during the attack on the village of Bogoro, Ituri.⁴³ Mathieu Ngudjolo Chui was acquitted in December 2012 and released from custody, while the charges against Callixte Mbarushimana were not confirmed.⁴⁴ The case against Bosco Ntaganda is ongoing, whereas Sylvestre Mudacumura is still at large.⁴⁵

The DRC, in complementing the jurisdiction of the ICC and in an effort to ensure that justice is done not only for those indicted by the ICC but for all perpetrators, adopted a new military code—the *Military Penal Code Law 024/2602*—that criminalizes war crimes, crimes against humanity, and genocide, and provides for their investigation and prosecution. Pursuant to this law, the military in the eastern provinces of South and North Kivu have undertaken domestic prosecutions of international crimes and continue to pursue additional cases. In addition, in 2006 the government passed a national law on sexual violence, which clearly defines rape and other forms of sexual and gender-based violence, and provides for expedited judicial proceedings and greater protection for victims.⁴⁶

⁴¹ Arts 153 and 215 of the 2005 Constitution of the Democratic Republic of Congo provide that civilian and military courts may apply ratified treaties, even in the absence of implementing legislation, so long as they are ‘consistent with law and custom’.

⁴² ‘Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo’, *ICC Press Release*, 19 April 2004.

⁴³ Judgment pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012; Jugement rendu en application de l'article 74 du Statut, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436, TC II, ICC, 7 March 2014.

⁴⁴ Decision on the confirmation of charges, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-465-Red, PTC I, ICC, 16 December 2011; Judgment pursuant to Art 74 of the Statute, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-3-tENG, TC II, ICC, 18 December 2012.

⁴⁵ Warrant of arrest, *Ntaganda, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-2-Anx-tENG, PTC I, ICC, 22 August 2006; Decision on the Prosecutor’s Application under Art 58, *Mudacumura, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/12-1-Red, PTC II, ICC, 13 July 2012.

⁴⁶ DRC Law on Sexual Violence (2006) as contained in Laws 06/018 and 06/019, amendments to the Penal Code. See also D Zongwe, ‘The New Sexual Violence Legislation in the Congo: Dressing Indelible Scars on Human Dignity’ (2012) 55 *African Studies Review* 37.

The establishment of mobile gender courts in South Kivu has contributed to the domestic efforts to prosecute international crimes in the DRC. These courts were set up to prosecute rape and other serious crimes and 'have prosecuted hundreds of mostly direct physical perpetrators of sexual violence'.⁴⁷ The work of the mobile gender courts has been described as 'a promising indication of what can be achieved with targeted national support when domestic courts are both able and willing to prosecute very grave crimes'.⁴⁸ Notably, on 21 February 2011 Lieutenant Colonel Mutuare Kibibi became the most senior commander in the Congolese army to be found guilty of crimes against humanity, for ordering the mass rape of at least 49 women in the town of Fizi on New Year's Day 2011.⁴⁹ Eight soldiers under his command were also convicted.

While other international crimes are committed in the DRC, trials conducted to date have focused primarily on sexual and gender-based violence by armed groups and to a lesser extent by civilians. This owes in large part to the fact that the use of sexual violence as a weapon of war has been prevalent in the DRC.⁵⁰ However, it is important that the DRC also prosecutes other international crimes.

The DRC government has demonstrated its commitment to international criminal justice both through cooperation with the ICC and instituting proceedings in its domestic courts. This has not been without difficulty.⁵¹ First, the DRC has been embroiled in conflict for over a decade and the areas in which international crimes are being committed are largely out of government control. Second, the prosecution of international crimes in the DRC has been done in the absence of domestic implementing legislation that provides a procedure to enable domestic prosecutions within the civilian justice system. Consequently, the majority of those prosecuted have come from army ranks. Third, amongst other challenges facing the criminal justice system, there is a lack of qualified investigators, lawyers, and judges with the requisite knowledge of international criminal law.

Despite these challenges, the DRC's efforts manifest a working example of complementarity on the continent through the various domestic prosecutions completed or under way.⁵² The case of the military tribunals in the DRC highlights the challenges and opportunities for home-grown initiatives aimed at responding to international crimes.

⁴⁷ A Cole, 'Making the Perpetrators of Mass Sexual Violence Pay: International Justice for Gender-related Crimes', *Openspace*, 6 March 2012 <<http://www.osisa.org/openspace/global/making-perpetrators-mass-sexual-violence-pay-alison-cole>> accessed 11 September 2014.

⁴⁸ Ibid., 62–3. ⁴⁹ 'Congo Colonel Gets 20 Years after Rape Trial', *Fox News*, 21 February 2011.

⁵⁰ C Brown, 'Rape as a Weapon in the Democratic Republic of Congo' (2012) 22 *Torture* 24; J Kippenberg et al., 'Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo', *Human Rights Watch* (2009); M Pratt and L Werchick, 'Sexual Terrorism: Rape as a Weapon of War in Eastern Democratic Republic of Congo, Assessment Report', USAID/DCHA (2004) 6–7.

⁵¹ E Witte et al., 'Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya', Open Society Foundations (2011).

⁵² L Olivier, 'Complementarity in Action', *Openspace*, 6 March 2012 <<http://www.osisa.org/openspace/regional/complementarity-action-louise-olivier>> accessed 11 September 2014.

4.4.2 South Africa

South Africa incorporated the Rome Statute into its domestic law by means of the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002* ('South Africa ICC Act'). Prior to the ICC Act, the core international crimes of war crimes, crimes against humanity, and genocide had not been criminalized in South African law. The ICC Act, like the Rome Statute, has limited temporal jurisdiction in that no action may be brought against a person for crimes committed before 1 July 2002.⁵³ Further, South Africa has implemented the Geneva Conventions and provides for the prosecution of grave breaches in domestic courts.⁵⁴

The ICC Act provides for a structure for national investigation and prosecution of international crimes in line with the principle of complementarity. Section 3 of the ICC Act provides that one of the objectives is to enable 'the National Prosecuting Authority to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances'.⁵⁵ This provision clearly provides South Africa with extra-territorial jurisdiction. In addition to having jurisdiction over people who are South African and/or commit crimes against South Africans, section 4(3) of the ICC Act provides for the prosecution of individuals that are not South African (nor ordinarily resident in South Africa), who after the commission of the crime are present in the territory of South Africa.⁵⁶

In 2003 South Africa established a Priority Crimes Litigation Unit (PCLU) within the National Prosecution Authority (NPA) tasked with the 'prosecution of crimes contemplated in the Implementation of the Rome Statute of the International Criminal Court Act', amongst other serious offences.⁵⁷ A Special Director of Public Prosecutions (DPP) who manages and directs any such prosecution heads the PCLU. It is important to note that the PCLU's mandate is extensive, with the unit being responsible for directing investigations and prosecutions relating not only to crimes under the Rome Statute, but also to national and international terrorism, weapons of mass destruction, mercenaries, matters emanating from the post-apartheid Truth and Reconciliation Commission process, and any other priorities as determined by the National DPP. To carry out this broad mandate, the PCLU has just five advocates and one administrator.

The PCLU depends on the cooperation of the South African Police Services (SAPS) when it comes to the investigation of crimes within its mandate. In 2009 a Directorate for Priority Crimes Investigation (DPCI) was established with a mandate to investigate, *inter alia*, international crimes as contained in the Rome Statute.⁵⁸ Within the DPCI, a 26-member unit—the Crimes Against the State (CATS) unit⁵⁹—is responsible

⁵³ Section 5(2) of the South Africa ICC Act.

⁵⁴ Implementation of the Geneva Conventions Act 8 of 2010 (South Africa).

⁵⁵ Section 3 of the South Africa ICC Act. ⁵⁶ Section 4(3)(c) of the South Africa ICC Act.

⁵⁷ For more information on the Priority Crimes Litigation Unit, see <<http://www.npa.gov.za/UploadedFiles/About%20PCLU%20signedoff.pdf>> accessed 12 June 2013.

⁵⁸ Section 17C of the Police Service Act 1995 (South Africa) as amended by the Police Service Amendment Act 57 of 2008 (South Africa).

⁵⁹ The CATS unit was established in 2005 and pre-dates the establishment of DPCI, but has since been subsumed into the DPCI framework.

for the actual investigation of international crimes. Like the PCLU, the CATS unit is tasked with investigating a range of other serious offences such as acts of terror, offences related to the unlawful use or transfer of firearms and other deadly weapons, organized crime, and acts which may pose a serious threat to the security of the state such as treason and sedition.

The broad mandates of the PCLU and CATS units have important implications for their ability to devote specific attention to Rome Statute crimes. Nevertheless, the PCLU and CATS units have dealt with a number of cases, most of which were brought to their attention by civil society or advocacy groups. Most notably, the PCLU was approached by the Southern African Litigation Centre and Zimbabwe Exiles Forum to open a case in respect of alleged acts of torture committed by Zimbabwean police against anti-government activists in the run-up to the 2008 presidential election.⁶⁰

Further, in 2011 the Media Review Network (MRN) and the Palestinian Solidarity Alliance (PSA) compiled and submitted a lengthy dossier to the PCLU in which they detailed international crimes allegedly committed in the Gaza Strip by Israeli authorities.⁶¹ The dossier implicated, amongst others, the then Israeli Foreign Minister Tzipi Livni, and sought arrest warrants.⁶² The DPCI decided not to investigate further, contending that there was insufficient evidence to proceed.⁶³ Nevertheless, Livni publicly announced that her planned visit to South Africa would not proceed.

In 2012 the PCLU was called upon to seek a warrant for the arrest of the late Prime Minister of Ethiopia Meles Zenawi, ahead of his visit to South Africa, for alleged crimes against humanity and genocide against the Ogadeni people.⁶⁴ A similar request was made by civil society for former British Prime Minister Tony Blair in August 2012 in respect of crimes committed by British soldiers in Iraq and Afghanistan.⁶⁵ Both requests were declined. The first international crime case that the NPA has decided to proceed with is that in respect of abuses committed in Madagascar in 2009, with a view to prosecuting the country's ousted former President Marc Ravalomanana.

Through the domestication of the Rome Statute and the establishment of specialized units tasked with the investigation and prosecution of international crimes, South Africa is taking steps to meet its complementarity obligations. Moreover—to the extent that the ICC Act and the Geneva Conventions Act provide for universal jurisdiction—South African authorities can investigate and prosecute crimes that fall outside the Rome Statute system's net: namely, those occurring in states that are not ICC members, or by nationals of such states, as in the Ethiopia, Israel–Gaza, and Zimbabwe cases mentioned earlier.

⁶⁰ *Southern African Litigation Centre and another v National Director of Public Prosecutions and others* 2012 (10) BCLR 1089 (GNP). It should be noted that after a refusal to initiate investigations, the NPA and others were taken to court. In May 2012 the North Gauteng High Court ruled that there was an obligation on justice authorities to investigate the alleged crimes against humanity.

⁶¹ MRN and PSA, 'The Gaza Docket and Operation Cast Lead', *Joint Press Release* <<http://www.medireviewnet.com/2013/01/joint-press-release-10/>>.

⁶² Ibid. ⁶³ 'South Africa Rejects Livni Arrest Call', *Al Jazeera*, 19 January 2011.

⁶⁴ M Osman, 'Meles Zenawi Enjoys SA Hospitality while Ogadeni Somalis Await Justice', *Jubbaland News*, 25 June 2012.

⁶⁵ R Davis, 'Call to Arrest Tony Blair during SA Visit Gains Momentum', *Daily Maverick*, 27 August 2012.

It should be noted that the NPA or the police initiated none of the above South African examples. However, this is not necessarily an indication of a lack of commitment to international justice on the part of the authorities. One sign that the South African authorities are committed to the principles of the Rome Statute is the ongoing efforts to build capacity among the prosecutors and investigators who work on international crimes. Since 2008 the Institute for Security Studies has provided training to the NPA (and more recently, also the CATS unit in the police) on international criminal justice, the Rome Statute, and the ICC Act. This training has been provided within the context of broader programmes that cover other crimes falling within the mandates of these units as well as technical aspects of international cooperation in criminal matters such as mutual legal assistance and extradition.

In addition to the work of the specialized units, the South African government has been compelled to take a position on international criminal justice by civil society in various instances. The first example is the action taken by civil society in South Africa to seek a court order for the arrest of Al Bashir if he attended President Zuma's inauguration in Pretoria.⁶⁶ After the press reported in early May 2009 that the South African government had invited Al Bashir to attend Jacob Zuma's inauguration as South Africa's new President on 9 May 2009, civil society responded swiftly. A number of influential civil society organizations issued a media statement on 7 May 2009 which called on South Africa to take heed of its international and domestic obligations (stemming from the ICC Act) and not welcome Al Bashir. Civil society also threatened court action against the South African government were it to renege on its obligations.⁶⁷ In the end, Al Bashir did not attend, and the threatened court application was not necessary.

The second example comes from the mobilization by civil society to lobby for the South African government to reconsider its endorsement of the AU's 2009 Decision not to cooperate with the ICC in the arrest and surrender of Al Bashir. On 15 July 2009, 17 South African civil society organizations and many concerned individuals issued a statement in which they called upon President Zuma to honour South Africa's treaty obligations by cooperating with the ICC in relation to the warrant of arrest issued for Al Bashir.⁶⁸ The statement included signatures from high-profile South

⁶⁶ Du Plessis et al. (n 4).

⁶⁷ During this time a Pretoria Magistrate issued a domestic warrant for the arrest of Al Bashir.

⁶⁸ The South African-based organizations that endorsed the statement are: Aids Consortium, Centre for Applied Legal Studies (CALS), Centre for Human Rights, Faculty of Law, Pretoria University, Centre for Justice and Crime Prevention Centre for the Study of Violence and Reconciliation (CSVR), Human Rights Institute of South Africa (HURISA), International Centre for Transitional Justice (ICTJ), International Crime in Africa Programme, Institute for Security Studies (ISS), Khulumani Support Group, Legal Resources Centre (LRC), Lawyers for Human Rights (LHR), Open Society Foundation of SA (OSF-SA), Open Society Initiative of Southern Africa (OSISA), Sonke Gender Justice Network, South African History Archive (SAHA), South African Human Rights Commission (SAHRC), and Southern African Litigation Centre (SALC). Prominent South Africans who endorsed the statement include: The Most Reverend Desmond Mpilo Tutu, Richard Goldstone, Advocate Dumisa Buhle Ntsebeza SC, Professor Kader Asmal, Professor Hugh Corder, Yasmin Sooka, Professor John Dugard, Jody Kollapen, and Professor Karthy Govender. The statement itself is available at <<http://www.legalbrief.co.za/article.php?story=20090715141303542>> accessed 11 September 2014.

African personalities including Judge Richard Goldstone and Archbishop Emeritus Desmond Tutu.

The South African government subsequently clarified South Africa's position and reiterated its support for international criminal justice. Through a statement by the Department of International Relations and Cooperation, the South African government publicly stated that it was committed to the Rome Statute and would arrest Al Bashir if he arrived in the country.⁶⁹ The statement also disclosed that an arrest warrant had been issued for Al Bashir by a senior magistrate.⁷⁰

This conduct by civil society and the government in South Africa—in support of the arrest warrant issued by the ICC for Al Bashir—is a meaningful example of domestic initiatives taken to complement the work of the ICC. It is worth noting that the civil society process in South Africa provided the impetus for a similar Africa-wide initiative that resulted in 165 civil society organizations from across the continent releasing a statement on 30 July 2009 urging all African States Parties to reaffirm their commitment to the ICC, especially with regard to the arrest of Al Bashir.⁷¹ Several ad hoc statements have been issued since.

4.4.3 Uganda

Uganda has domestic implementing legislation for the Rome Statute, namely *The International Criminal Court Act, 2010* ('Uganda ICC Act'). Consequently, Uganda can investigate and prosecute the international crimes enunciated in the Rome Statute. The legislation allows for limited universal jurisdiction,⁷² which is indicative of its commitment to dealing with international crimes beyond its borders. It should be borne in mind that Uganda was the first country to refer crimes committed within its borders to the ICC.⁷³ The government referred the situation in northern Uganda and investigations were initiated in July 2004.⁷⁴ Consequently, the ICC has established a field office in Kampala to support its operation in Uganda.

In 2008, further to the Juba Peace Agreement between the Government of Uganda and the LRA, the government established a War Crimes Division to try perpetrators of international crimes. The division, later rebranded as the International Crimes Division (ICD), is a specialized division of the High Court with the jurisdiction to

⁶⁹ Department of International Relations and Cooperation, 'Notes following the Briefing of Department International Relations and Cooperation's Director-General, Ayanda Ntsaluba', (South Africa 2009) available at <<http://www.dfa.gov.za/docs/speeches/2009/ntsa0731.html>> accessed 12 June 2013.

⁷⁰ Ibid.

⁷¹ For the statement released on 30 July 2009, see <<http://www.issafrica.org/pgcontent.php?UID=18893>> accessed 11 September 2014. Both these initiatives subsequently contributed to the formation of an African network of civil society concerned with ending impunity that works actively across the continent on international justice issues. One of the products of this network is the web portal for the African Network on International Criminal Justice operated by the ISS. See <<http://www.issafrica.org/anicj/>> accessed 11 September 2014.

⁷² Section 18(d) ICC Act (Uganda).

⁷³ 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC', *ICC Press Release*, 29 January 2004.

⁷⁴ 'Prosecutor of the International Criminal Court opens an investigation into Northern Uganda', *ICC Press Release*, 29 July 2004. See also Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, *Kony, Situation in Uganda*, ICC-02/04-01/05-53, PTC II, ICC, 27 September 2005.

try not only cases relating to war crimes, genocide, and crimes against humanity, but also other serious transnational crimes including terrorism, human trafficking, piracy, and any other international and transnational crimes as provided by the Penal Code Act (Uganda), the Geneva Conventions Act, and any other applicable laws.⁷⁵ Thus, the mandate of the ICD, like that of the specialized units in South Africa previously outlined, is much broader than just the Rome Statute crimes.

The ICD has a small staff complement with five judges and a registrar, along with a team of 6 prosecutors and five police investigators attached to it. Nevertheless, the designation of officers from the judiciary, prosecution, and police has led to the development of competence and speciality to handle international and transnational crime cases. The ICD has benefited from tailored capacity-building offered by various stakeholders.⁷⁶ For example, since March 2011 the ISS has provided the ICD with intensive training workshops on international criminal justice, counter-terrorism, and mechanisms for international cooperation. The judges and the registrar of the ICD have also benefited from exchange programmes or study tours to the ICC and the ICTR. The judiciary and various local and international NGOs have facilitated these different projects aimed at building the capacity of the ICD. Similar training has been provided for prosecutors and selected investigators and magistrates through the office of the DPP.

The ICD began its operations in 2011 with the war crimes case against Thomas Kwoyelo, a former commander of the LRA,⁷⁷ who was charged under Uganda's Geneva Conventions Act for grave breaches of the Geneva Conventions. Kwoyelo was also charged with 65 counts of war crimes. However, his case was halted after a referral by his defence team to the Constitutional Court.⁷⁸ The referral relates to the refusal by the Office of the DPP to facilitate the granting of amnesty to Kwoyelo by the Amnesty Commission under the Amnesty Act 2000 (Uganda). The Constitutional Court ruled that Kwoyelo qualified for amnesty.⁷⁹ In addition to the Kwoyelo case, the ICD has been involved in investigations into crimes committed in Northern Uganda and is currently dealing with a matter against a top commander of the Allied Defence Force whose group burnt 80 students to death in 1998.

Uganda is attempting to address international crimes at the domestic level, but the Amnesty Act has hindered prosecution efforts.⁸⁰ Part 11 of the Amnesty Act gave a blanket amnesty to all those who renounced the LRA rebellion. According to the head of prosecution at the ICD, Joan Kagezi, many cases were investigated and presented in court only for the accused persons to seek amnesty and subsequently evade justice.⁸¹ It

⁷⁵ The ICD is a special division established under the Constitution 1995 (Uganda).

⁷⁶ E Keppler et al., *Justice for Serious Crimes before National Courts: Uganda's International Crimes Division*, *Human Rights Watch* (2012) 26.

⁷⁷ *Kwoyelo alias Latoni v Uganda* Constitutional Petition. No. 036 of 2011, [2011] UGCC 10.

⁷⁸ Ibid.

⁷⁹ After the Constitutional Court ruling, the ICD deferred Kwoyelo's release to the DPP of Uganda and the Amnesty Commission. Since then, a legal battle has ensued relating to the process of issuing Kwoyelo with an amnesty certificate. Kwoyelo remains in prison and has still not received his amnesty certificate from the authorities.

⁸⁰ E Keppler, *Amnesty: 'An Olive Branch' In Justice?*, *Avocats Sans Frontières* (2012).

⁸¹ Presentation by J Kagezi, entitled 'Practical Aspects of Prosecuting and Adjudicating International and Transnational Crimes—The East African Perspective', during the 7th Annual Conference of the Africa Prosecutors' Association (9 October 2012).

is worth noting, however, that Part 11 of the Amnesty Act lapsed in 2011 and amnesty certificates can no longer be issued. This, then, presents important opportunities for Uganda in terms of its future complementarity obligations as well as broader efforts to close the impunity gap in cases where the ICC does not have jurisdiction.

As the ICD pursues these opportunities, the challenges encountered thus far in investigating, prosecuting, and adjudicating international crimes will need to be confronted.⁸² These include, first, that because the LRA has since migrated out of Uganda, gathering evidence outside the country has proved challenging especially when cooperation from neighbouring states is not forthcoming. Second, the ICD is under-staffed and under-resourced, which makes its work difficult. Third, similar to South Africa's specialized investigation and prosecution units, the ICD has an expansive mandate that is not limited to international crimes and this requires that all staff develop specialized expertise on a wide range of crimes.

4.5 Expanding the Jurisdiction of the African Court

In 2009 the AU resolved to seek the expansion of the proposed African Court on Justice and Human Rights' mandate to include jurisdiction over specific criminal matters, including international crimes. The AU Commission began a process in February 2010 to amend the Protocol on the Statute of the African Court to include provisions in this regard. The resulting draft Protocol adds criminal jurisdiction over the international crimes of genocide, war crimes, and crimes against humanity, as well as several transnational crimes such as terrorism, piracy, and corruption.⁸³ By June 2013 the African government legal experts, Ministers of Justice, and Attorneys General had considered and adopted the draft Protocol.⁸⁴ In June 2014, the AU Assembly adopted the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights at the 23rd AU Summit in Equatorial Guinea. It is now open to ratification.

It has been argued that vesting the African Court with international criminal jurisdiction is a worthy development to end impunity.⁸⁵ In principle, such expanded jurisdiction would be beneficial, but it remains to be seen whether it is likely in practice. It should be noted that the draft, in its current form, still contains some problematic provisions. This is arguably due to the fact that in coming up with the draft Protocol, the AU Commission gave civil society and external legal experts little opportunity to comment. Further, the draft Protocol was never made available on the AU's website, or publicly posted for comment in other media.⁸⁶ The AU would have benefited from

⁸² Ibid.

⁸³ AU (Meeting of Government Experts and Ministers of Justice/Attorneys), Draft Protocol on Amendments to the Protocol of the Statute of the African Court of Justice and Human Rights, 7–11 and 14–15 May 2012 (Addis Ababa, Ethiopia), Doc Exp/Min/IV/Rev.7.

⁸⁴ With the exception of Art 28E relating to the crime of unconstitutional change of government, which presents definitional problems that require more attention. See du Plessis et al. (n 4) for an in-depth discussion. See also M du Plessis, 'Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes', *ISS Africa* (2012).

⁸⁵ D Deya, 'Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes', *Openspace*, 6 March 2012 <<http://www.osisa.org/openspace/regional/african-court-worth-wait>> accessed 11 September 2014.

⁸⁶ African Court Roundtable Report, Institute for Security Studies (24 April 2012) (on file with the authors).

a broader process of consultation relating to jurisdiction, the definition of crimes, immunities, institutional design, the practicalities of administration and enforcement, and the impact on domestic laws and obligations, considering that all of these require careful examination.⁸⁷

According to the AU Commission, the proposed expansion of the African Court is not motivated by the noted anti-ICC sentiment in decisions of the AU Summit since 2009. The process of expanding the African Court's jurisdiction originates in the AU's requirement to deal with three issues. First, the AU alleges that there has been a misuse of the principle of universal jurisdiction by countries. Second, the AU sought to address the challenges brought about by the process of Senegal prosecuting the former President of Chad, Hissène Habré. Last, the need to give effect to Article 25(5) of the African Charter on Democracy, Elections, and Governance that requires that the AU formulate a new international crime to deal with unconstitutional changes of government.⁸⁸ However, it cannot be ignored that the impetus to expand the jurisdiction of the African Court came in the aftermath of the ICC arrest warrant for Al Bashir. It is thus likely that the recent tension between the AU and the ICC in this regard (and more recently in relation to the Kenyan situation before the ICC) influenced the process.

Another concern relates to the African Court's extensive jurisdictional reach. The proposed expanded material jurisdiction of the Court means that the criminal chamber would be expected to try the established international crimes, and a host of other crimes. The implications of this expansive jurisdiction on the Court's capacity to fulfil its obligations cannot be overstated. Indeed, the African Court would still be expected to deal with general and human rights cases.

Further, ensuring that justice can be done to the Court's wide jurisdiction will be an expensive exercise. Financial resources are necessary to ensure that the African Court is staffed with the right people with the relevant expertise and technical capacity to handle international criminal trials. By way of example, the ICC's budget—currently for investigating just three crimes, and not the range of offences the African Court is expected to tackle—is more than 14 times that of the African Court without a criminal component; and is just about double the entire budget of the AU.⁸⁹

Finally, given that the African Court would deal with crimes currently under the jurisdiction of the ICC, it is necessary to consider whether there will be a relationship between these two courts. It must be recalled that 34 of the 54 African states are party to the Rome Statute. With this in mind, it is imperative that the relationship between the ICC and the African Court be addressed.⁹⁰ First, the issue of which court will have primacy should be dealt with. Given that the draft Protocol makes no reference to the

⁸⁷ Du Plessis, 'Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes' (n 84)

⁸⁸ Deya (n 85).

⁸⁹ Du Plessis, 'Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes' (n 84).

⁹⁰ Joint Letter to the Justice Ministers and Attorneys General of the African States Parties to the International Criminal Court Regarding the Proposed Expansion of the Jurisdiction of the African Court of Justice and Human Rights (3 May 2012) <<http://www.hrw.org/news/2012/05/03/joint-letter-justice-ministers-and-attorneys-general-african-states-parties-internat>> accessed 3 March 2015.

ICC, and membership to the ICC is reserved to states, countries that are already party to the Rome Statute might need to enact domestic legislation to enable a relationship with the expanded African Court that does not undermine the ICC. By contrast, the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, which similarly would establish a new system for the prosecution of such crimes, envisages a complementary relationship to the ICC's Rome Statute.⁹¹

The mentioned challenges notwithstanding, it must be noted that pending the establishment of a criminal chamber, there is positive potential for the existing African Court to strengthen or complement the international criminal justice project. Of significance is the evolving work of the African Court (with the support of the African Commission). For example, in 2011 the African Court on Human and Peoples' Rights made a unanimous Order for Provisional Measures in respect of the crisis that was unfolding in Libya.⁹² The Order, issued on 25 March 2011, demanded that Libya 'immediately refrain from any action that would result in loss of life or violation of physical integrity of persons' and report back to the African Court within 15 days on the 'measures taken to implement this Order'.⁹³ It was made *proprio motu* by the Court in the course of its consideration of an application brought urgently against Libya by the African Commission on Human and Peoples' Rights on 16 March 2011 alleging 'serious and massive violations of human rights guaranteed under the African Charter on Human and Peoples' Rights'.⁹⁴ The Court chose to take up the matter, having made a *prima facie* determination that it has jurisdiction to hear the case—and it ordered Libya to respond to the application within 60 days.⁹⁵

The African Court's actions in response to the Commission's application were both timely and bold. The African Court appreciated the urgency of the matter and made its order without eliciting the views of the parties to the matter, on the basis of the imminent risk to human life and the difficulty in scheduling an appropriate hearing involving Libya.⁹⁶ The Court relied on the information contained in the Commission's application. Specifically, the African Court referred to statements of the AU, the Arab League, and UNSC Resolution 1970⁹⁷ in support of its finding that the situation was of extreme gravity and urgency and that such measures were necessary to avoid irreparable harm to persons.

⁹¹ L Sadat, A Comprehensive History of the *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, Whitney R. Harris World Law Institute Crimes Against Humanity Initiative (2010).

⁹² Order for Provisional Measures, *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*, 25 March 2011, App No 004/2011.

⁹³ Ibid., para. 25 (2).

⁹⁴ The African Commission submitted the application pursuant to Art 5(1)(a) of the African Court Protocol. It also submitted the petition in accordance with Rule 118(3), which provides that the Commission may submit a matter to the Court in a situation that in its view constitutes serious and massive human rights violations as provided for under Art 58 of the African Charter.

⁹⁵ The Libyan government never responded and there was no follow-through.

⁹⁶ J Oder, 'The African Court on Human and Peoples' Rights' Order in Respect of the Situation in Libya: a Watershed in the Regional Protection of Human Rights?' (2011) 11 *African Human Rights Law Journal* 495.

⁹⁷ See UNSC Resolution 1970 (26 February 2011) UN Doc S/RES/1970 in which the situation in Libya was referred to the ICC.

The intervention of the Commission first, and then the African Court, signalled that it is wrong to think of a common African position that homogeneously defines the continent's position on human rights and impunity. The African Court's decision confirmed that Gaddafi's violent actions against his people continued in the face of international condemnation. Further, the African Court's response fits within a deeper understanding of complementarity—that a regional court, cognizant of the role of the ICC in the Libyan context, could act as a complement to the ICC by insisting that Libya stop the ongoing atrocities.

The developments around the African Court and the African Commission should also be viewed within the wider global context of a move towards 'quasi' criminal jurisdiction for regional human rights courts and commissions.⁹⁸ Further, and by way of emphasis, the prosecution of former Chadian President Hissène Habré in Senegal under the auspices of the AU and with the support of the Economic Community of West African States (ECOWAS) shows some commitment on the part of African states towards promoting international criminal justice.⁹⁹

4.6 Conclusion

Domestic justice is particularly relevant for Africa because of the scale of the atrocities committed on the continent and the need to effectively and efficiently address these. While the ICC provides some form of symbolic justice for the victims of grave crimes, this is limited, and for justice to be figuratively and literally 'brought home', domestic action is essential. Countries like the DRC, South Africa, and Uganda have taken this mantle and it is hoped that more efforts to close the impunity gap will emerge across the African continent.

The chapter notes that there is a vital role for civil society to play in this regard, either by bringing cases to the courts or through other forms of advocacy and activism aimed at ensuring governments promote international criminal justice. Further, civil society can serve as an intermediary on behalf of the victims of grave crimes, and can collaborate with governments to help build capacity in requesting African states, whether in the form of training, legal opinions, or expert legal assistance, to prepare and prosecute cases.

Furthermore, there is a role for the African Court to play—even without the proposed expanded jurisdiction. This too, though not contemplated under the Rome Statute system, can be viewed as a form of positive complementarity in the broadest sense. This broad understanding of complementarity emerging in Africa is key to the success of international criminal justice on the continent and beyond.

In conclusion, the words of Judge Goldstone¹⁰⁰ in his memoir resonate:

⁹⁸ A Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 *American Journal of International Law* 1.

⁹⁹ "The case against Hissène Habré, an "African Pinochet", Human Rights Watch (2013) <<http://www.hrw.org/habre-case>> accessed 3 December 2013.

¹⁰⁰ Goldstone is the former chief prosecutor of the ICTY and ICTR, and a respected champion of international criminal justice.

[T]he international community is no longer prepared to allow serious war crimes to be committed without the threat of retribution ... If [the trend of wars, war crimes, misery and hardship is to end] then the international community will have to take positive steps to arrest it. One effective deterrent would be an international criminal justice system, sufficiently empowered to cause would-be war criminals to reconsider their ambitions, knowing that they might otherwise be hunted for the rest of their days and eventually be brought to justice.¹⁰¹

For Africa, this should not be the remit of the ICC alone. Indeed, there is an important role to be played by domestic justice systems, not least because of the primacy given to them by the Rome Statute. Already, some African states have important experience with domestic efforts. This experience not only aligns itself with the Rome Statute, but significantly with the Constitutive Act of the AU, and the push for 'African solutions to African problems'. Positive developments are welcomed and should be fostered.

¹⁰¹ R Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven: Yale University Press 2000) 126.

5

How Much Money Does the ICC Need?

*Stuart Ford**

5.1 Introduction

At a high level, the process by which the ICC is funded is quite similar to how the United Nations is funded.¹ The states who are parties to the Rome Statute collectively make up the ASP.² In the analogy with the United Nations budget process, the ASP occupies the same role as the General Assembly: the budget of the Court is set by the ASP³ and funded by dues paid by the States Parties.⁴ The money is collected by the Court and distributed to the various organs according to the budget.⁵

The process of deciding the budget for any given year begins with a proposed budget offered by the Court.⁶ A body of independent finance experts created by the ASP called the Committee on Budget and Finance (CBF)⁷ then reviews the proposed budget and compiles a report for the ASP that contains recommended changes to the Court's proposed budget. The ASP considers the proposed budget and the CBF report and then decides on the budget for the upcoming year during its annual meeting. The ASP has tended to follow the recommendations in the CBF report, but it is not required to do so.⁸ While there is much more that could be said about the budget process, this chapter

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¹ Indeed, the distribution of dues is expressly based on the scale of assessments used by the United Nations. Art 117 Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 ('Rome Statute').

² Art 112 Rome Statute.

³ Art 112(2)(d) Rome Statute.

⁴ Art 115 Rome Statute. The Rome Statute envisioned the United Nations paying for costs associated with situations that were referred to the Court by the Security Council, see *ibid.*, Art 115(b), but this has not happened yet. The Court can also receive voluntary contributions, see *ibid.*, Art 116, but these have not been a significant source of funding so far.

⁵ There is also a contingency fund that exists outside of the regular budget to cover unexpected events, like the opening of a new investigation. See Regulation 6.6 Financial Rules and Regulations of the ICC ICC-ASP/1/3, 3–10 September 2002 (First Session of the Assembly of States Parties) 284.

⁶ In reality, it is a little more complicated than this. Any given year's budget is influenced by decisions made about prior years' budgets, and there are debates between the Court and the ASP that take place over multiple years. For example, the ASP and Court have been engaged for several years in a dialogue about the use of consultants and temporary assistance to handle work that probably should be done by permanent staff members.

⁷ The CBF was established by Resolution ICC-ASP/1/Res.4. Their independence was affirmed in Resolution ICC-ASP/2/Res.7. In practice, however, most of the CBF members work for the governments of members of the ASP, so their independence may be more theoretical than actual.

⁸ See J O'Donohue, 'Financing the International Criminal Court' (2013) 13 *International Criminal Law Review* 269, 276. On budget decisions of the ASP, see also J O'Donohue, Chapter 6, in this volume.

does not provide an exhaustive description of it because Jonathan O'Donohue has already done so in a series of articles about the ICC's budgets.⁹

This chapter will focus on the question of whether the ICC is adequately funded. The global financial crisis of 2008 and its continuing fallout have had a noticeable effect on ICC budget discussions in recent years. A number of developed states have pushed to freeze the ICC's budget in response to their ongoing fiscal problems, which would result in a so-called 'zero growth' budget. The Court, some states, and many civil society organizations have opposed a freeze. In recent years, this issue has been the central one affecting the budget process, and it has created tension between the Court, the members of the ASP, and various civil society organizations. At its heart, it is a dispute about how much money the ICC needs and whether the ICC spends the money it has efficiently.

This chapter will look at how much the Court has spent over its lifetime and how that money has been spent on different functions. It will also take a closer look at the constituencies that have tried to affect the budget process and the debates that have surrounded the budget, including calls for a budget freeze. Most importantly, it will try to determine whether the Court's current budget is sufficient for it to accomplish its goals. It does this primarily by comparing the ICC's budget and workload to the budget and workload of another similar court: the ICTY.

The results are somewhat ambiguous. The ICTY does appear to have been more efficient than the ICC, but that conclusion is tempered by the fact that the main difference between the two—the cost of staff—is not directly within the control of the ICC. In addition, there are ways in which the ICC and ICTY are different that may partially explain the remaining difference, like the emphasis on victim participation and the existence of admissibility challenges at the ICC. Nevertheless, it does appear that the ICTY conducted trials more efficiently than the ICC, which suggests that there may still be room for further improvements at the ICC.

5.2 How Much Does the ICC Cost and How is that Money Spent?

Between 2002 and 2013 the ICC spent slightly more than €1 billion.¹⁰ While spending growth was rapid in the early years, there has been relatively little growth in recent years. In fact, once adjusted for inflation, there have been two years (2008 and

⁹ See *ibid.*; J O'Donohue, 'The 2005 Budget of the International Criminal Court: Contingency, Insufficient Funding in Key Areas and the Recurring Question of the Independence of the Prosecutor' (2005) 18 *Leiden Journal of International Law* 591; J O'Donohue, 'Towards a Fully Functional International Criminal Court: The Adoption of the 2004 Budget' (2004) 17 *Leiden Journal of International Law* 579.

¹⁰ The exact figure, taken from the ICC's budgets, is €942,802,000. Once this number is adjusted to account for inflation, it becomes €1,028,360,000 in 2013 euros. The ASP resolutions that contain the annual budgets appropriations are available from the ICC website at <http://www.icc-cpi.int/en_menus/asp/resolutions/Pages/resolutions.aspx> accessed 12 April 2014. The figures were adjusted for inflation using Eurostat's Harmonised Indices of Consumer Prices for the 17 state euro areas, available at <<http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/>> accessed 12 April 2014. Inflation figures for 2013 were based on the midpoint of the European Central Bank's prediction of 2013 euro-area inflation. See European Central Bank, ECB Staff Macroeconomic Projections for the Euro Area (September 2012) <<http://www.ecb.int/pub/pdf/other/ecbstaffprojections201209en.pdf>> accessed 12 April 2014.

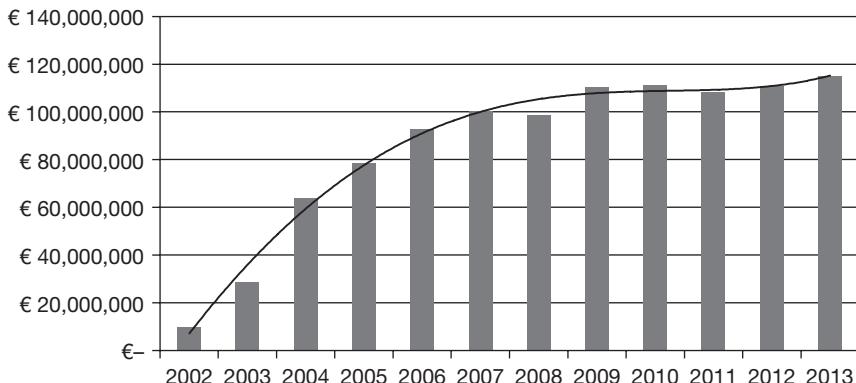


Figure 5.1 ICC's Inflation-Adjusted Spending

2011) when the ICC's budget shrank in real terms. The ICC's inflation-adjusted spending is shown in Figure 5.1.

One thing that is immediately clear is that the ICC's spending trajectory does not look like that of the other international criminal tribunals that have been created in recent decades.¹¹ At the ICTY, the ICTR, the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Court for Sierra Leone (SCSL), spending increases sharply in the early years, peaks, and then begins to slowly fall in the later years. This pattern is a result of the temporary and geographically limited nature of those courts. They were created in response to atrocities committed in a particular location at a particular time and do not have jurisdiction over crimes committed in other locations or at other times. As a result, these courts tend to grow quickly, but they eventually hit a peak and then begin to wind down as they complete their investigations and trials.

The ICC, on the other hand, is a permanent court, and there is no reason to believe that spending on the ICC will fall towards zero in the foreseeable future. Indeed, given that its membership continues to grow and atrocities regrettably continue to be committed, it is unlikely that the number of situations¹² under investigation will shrink. As a result, the long-term spending pattern of the ICC is more likely to look like that of other permanent international organizations, like the United Nations, with gradual growth over time.

Figure 5.1 shows that ICC budgets have remained essentially flat since 2009, despite the fact that the Court's caseload has been increasing steadily over the same period. For example, the Court budgeted for nine cases in 2009, 11 in 2010, 13 in 2011, 17 in 2012,

¹¹ Compare, for example, Figure 5.1 with the spending at the ICTY, ICTR, ECCC, and SCSL as shown in S Ford, 'How Leadership in International Criminal Law is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts' (2011) 55 *Saint Louis University Law Journal* 953.

¹² The Rome Statute distinguishes between situations, cases, and crimes. A situation is a group of connected acts that appear to constitute one or more crimes within the jurisdiction of the Court. Art 13 Rome Statute. Situations are usually defined geographically. A case is comprised of one or more crimes alleged to have been committed by one or more accused that are intended to be prosecuted together. A single situation can and often does result in more than one case. Cases can and often do allege the commission of more than one crime.

and 18 in 2013.¹³ In other words, the Court's caseload doubled between 2009 and 2013, even though the Court's funding remained basically unchanged.¹⁴ This disparity led the Registry to argue to the ASP that 'the Court has reached the point when the expectations on the type and level of activities and on the level of resources are diverging'.¹⁵ This is a diplomatic way of saying that the Court's budget is insufficient for the level of activities its members expect it to undertake. While the ASP has been continually pushing the ICC to achieve greater efficiencies so as to do more with the same amount of money, the Court has argued that years of focusing on efficiency have captured most of the available savings and that additional cuts would have diminishing or even negative returns. For example, in its most recent proposed budget, the Registry cautioned the ASP that:

[I]t has become increasingly difficult for the Court to achieve efficiency gains as a result of the current budgetary constraints. It needs to be borne in mind that excessive reductions in resources can themselves create inefficiencies and impair performance.¹⁶

The issue of whether the ICC's funding is sufficient for its mandate will be addressed in more detail in sections 5.5 and 5.6.

Within the Court, the money is divided among the principal organs: the Presidency and Chambers, the OTP, and the Registry.¹⁷ Together, these three organs regularly receive more than 90% of the ICC's budget. The remaining funds are split between the secretariat of the ASP, the secretariat of the Trust Fund for Victims (Trust Fund), the Independent Oversight Mechanism (IOM), and planning for the ICC's permanent premises.¹⁸ See Figure 5.2.

According to the Court, investigations, analysis, and trials take up slightly more than 50% of the ICC's funding today. The rest is divided between support functions, spending on victims and witnesses, the costs of the Court's interim premises, and interpretation/translation. See Table 5.1.¹⁹ Unfortunately, the Court does not explain how it calculated these figures, and my own analysis of the Court's budget produced different figures.²⁰ See Table 5.5.

¹³ See Proposed Programme Budget for 2013 of the International Criminal Court, ICC-ASP/11/20 (vol II) 14–22 November 2012 (Eleventh Session of the Assembly of States Parties) 4, Table 3 ('Proposed Programme Budget for 2013').

¹⁴ See also Table 5.3 *infra*.

¹⁵ Proposed Programme Budget for 2013 (n 13) 11. Here, it was repeating something the CBF had first said in 2011. *Ibid.*

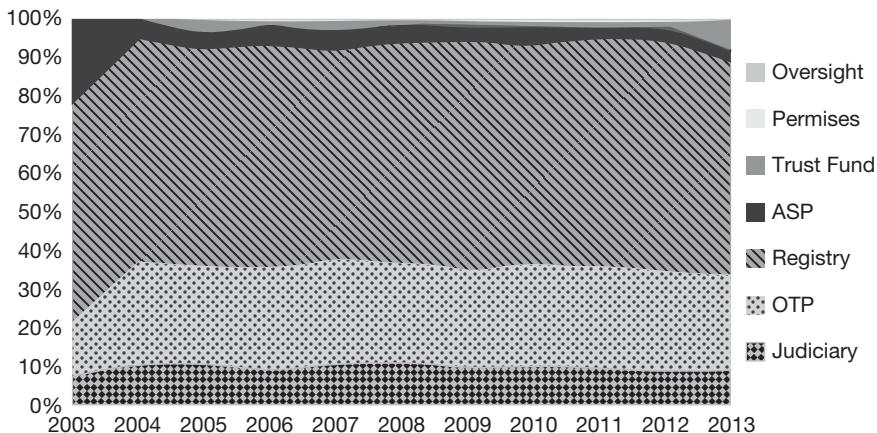
¹⁶ *Ibid.*, 18.

¹⁷ The Rome Statute treats the Presidency as a principal organ that is separate from the Chambers. See Art 34 Rome Statute. But for budgeting purposes, the Presidency (Programme 1100) is considered a part of the overall judiciary budget (Major Programme I). See Proposed Programme Budget for 2013 (n 13) para. 22.

¹⁸ The ICC is currently housed in temporary premises and is awaiting construction of a purpose-built permanent facility. This is expected to be ready in 2015 or 2016. Construction of the permanent facility is being funded by a loan from the Netherlands, and the costs of the loan will not appear as part of the Court's budget until it takes possession of the building.

¹⁹ The data for Table 5.1 comes from the Proposed Programme Budget for 2013 (n 13) Table 2, at 13.

²⁰ There is something odd about the ICC's allocation. The Court appears to allocate the OTP's entire budget to analysis and investigations, even though a main function of the OTP is preparing for and conducting trials. The cost of the OTP's Prosecution Division, for example, should probably be allocated to trials rather than to analysis and investigations. It is not clear how the rest of the figures were calculated.

**Figure 5.2** Allocation of Funds by Organ of the Court**Table 5.1** Allocation of Funds by Activity (2013)

Activity	Percentage
Trials	28%
Analysis & Investigations	24%
Support	23%
Premises	12%
Victims & Witnesses	8%
Languages	5%

Table 5.2 Staff vs Non-Staff Costs (2012)

Source	Percentage
Staff	71.8%
General operating expenses	11.5%
Legal aid	5.7%
Travel	4.2%
Contractual services	4.0%
Supplies	1.0%
Equipment	1.0%
Training	0.7%

Finally, it is also possible to look at how spending is broken down by the sources of those costs. In 2012 personnel costs²¹ were 71.8% of the ICC's overall budget. The next largest expense was general operating expenses at 11.5%, followed by legal aid at 5.7%. See Table 5.2.²² In other words, the Court is correct when it says that '[d]ue to the nature of the court's operations, its main investments are linked to its human

²¹ This includes costs for the judges, professional staff, general staff, temporary assistance, overtime, and consultants.

²² The data for this table comes from the Proposed Programme Budget for 2013 (n 13), Annex VI, 180.

resources'.²³ Staff costs are more than six times as high as the next largest cost, and more than two and a half times as much as all the other costs of the ICC combined.

5.3 The Constituencies

There are three main constituencies that take part in shaping the ICC's budget. First is the Court itself, which prepares a proposed budget for the upcoming year and obviously has an interest in how much money it will be allocated. Of course, there is the possibility of infighting between different organs within the Court over how to allocate the budget, but there is little public evidence that this has happened.²⁴ The organs of the Court have maintained a largely unified front in their dealings with the other constituencies. To the extent that officers of the Court have criticized the budgeting process, that criticism has been directed at the States Parties rather than other organs of the Court.

For example, the former prosecutor, Luis Moreno Ocampo, criticized Britain, France, and Germany for supporting the referral of the situation in Libya to the ICC by the Security Council while simultaneously calling for a cap on the ICC's budget. In effect, these countries were voting to increase the Court's workload and spending²⁵ while simultaneously refusing to increase its budget. 'State parties referred Libya to us and now they say they can't pay,' he said.²⁶ The current prosecutor, Fatou Bensouda, has said that the States Parties should not be 'blinded by short-term apparent savings that result in long-term losses and greater inefficiencies',²⁷ and suggested that the ASP should increase the Court's budget.²⁸ The President of the ICC has said that imposing a zero growth budget would be 'profoundly damaging to the Court's ability to deliver fair and expeditious justice'.²⁹ The Registrar has publicly 'expressed disappointment

²³ Reports of the CBF, ICC-ASP/11/20 (vol II) 14–22 November 2012 (Eleventh Session of the Assembly of States Parties) Annex III, 258 ('Report of the CBF').

²⁴ It seems likely that some amount of jockeying for funding occurs behind the scenes between the organs of the Court. During the drafting of the proposed budget the various organs of the Court must decide how much funding to request and (more importantly) how to propose allocating that funding between the organs. This process is probably not quite a zero sum game, but it seems geared to produce tensions between the organs as they negotiate internally over the proposed allocation of relatively scarce resources. At the same time, the organs have an incentive to present a united front to the ASP so that they do not become involved in publicly negotiating against each other for funding, which might result in an overall decrease in the Court's budget.

²⁵ The Libya referral has resulted in situation-specific spending of more than 8 million euros over the period 2011–13. See Proposed Programme Budget for 2013 (n 13) Table 3, at 13. Undoubtedly there will be additional costs in future years. The ultimate cost of the Security Council's referral of the situation in Libya is likely to be measured in tens of millions of euros.

²⁶ R Hamilton, 'Member Countries Fight Over International Court's Budget', *Reuters*, 20 December 2012 <http://newsandinsight.thomsonreuters.com/Legal/News/2011/12_-_December/Member_countries_fight_over_international_court_s_budget/> accessed 29 May 2013.

²⁷ M Corder, 'ICC Official: Don't Impose Short-sighted Fund Cuts', *The Cortez Journal*, 14 November 2012 <<http://www.cortezjournal.com/article/20121114/API/1211140777/ICC-official:-Don%27t-impose-short-sighted-fund-cuts>> accessed 29 May 2013.

²⁸ M Knigge, 'ICC Prosecutor Lauds Cooperation with the US', *Deutsche Welle*, 7 February 2013 <<http://www.dw.de/icc-prosecutor-lauds-cooperation-with-the-us/a-16583948>> accessed 13 April 2014 (stating that 'there is a need for the state parties to look into the resources that the ICC has').

²⁹ Remarks by Judge Sang-Hyun Song, President of the ICC, during the 10th Session of the Assembly of States Parties (12 December 2011) <http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/Statements/ASP10-ST-Pres-Song-Remarks-ENG.pdf> accessed 18 June 2013.

that the adopted budget [for 2012] did not reflect the needs and work of the Court'.³⁰ In short, the representatives of the organs of the Court have been consistent in calling for more funding for the Court as a whole without blaming other organs for overspending.

The second obvious constituency is the states who have become parties to the Rome Statute. They act together as the ASP to decide upon and pay for the Court's budget. However, States Parties have not always agreed amongst themselves about how much funding the Court needs.³¹ A zero growth policy, where the Court's funding would not change from year to year, has been championed by some of the ICC's largest funders, including Japan, Germany, Britain, France, and Italy.³² These countries assert that the Court's budget must reflect the 'budgetary constraints' of the members who pay the most.³³ This appears to be a reference to fiscal pressures caused by the slow recovery from the 2008 global financial crisis.³⁴ At the same time, some African states have indicated that they would be willing to pay more to increase the ICC's budgets so that the Court can initiate investigations outside of Africa.³⁵ This appears to be motivated by a belief that the ICC has focused unfairly on events that have occurred in Africa.³⁶ Of course, given that African states pay for a very small percentage of the ICC's budget, any proposal to increase ICC funding would be paid for largely by the states that are currently arguing for a zero growth policy.³⁷ Thus, proposing additional ICC funding is virtually costless for most African states.

Finally, the third constituency is NGOs. NGOs have no formal role in the budget process, but many NGOs attend the annual meetings of the ASP where they can interact with and lobby the members of the ASP and officials from the Court.³⁸ In addition, many NGOs have offered written advice to the ASP, usually in the form of position papers that are issued in the run-up to or during the annual meeting. There are some noticeable trends in NGO attitudes towards the budget.

In the ICC's early years, NGOs often raised concerns that the Court was not spending the entire budget allocated to it³⁹ or that the budget failed to coordinate duplicative

³⁰ See CICC, Report on the Tenth Session of the Assembly of State Parties to Rome Statue (12–21 December 2011) 14 <http://www.coalitionfortheicc.org/documents/ASP10_report_final.pdf> accessed 13 April 2014 ('Report on the Tenth Session of the Assembly').

³¹ See *ibid.* (noting disagreement among states about how much money the Court needed).

³² Hamilton (n 26); R Corey-Boulet, 'Concern over ICC Funding', *Inter Press Service*, 28 September 2011 <<http://www.ipsnews.net/2011/09/concern-over-icc-funding/>> accessed 17 July 2013.

³³ Hamilton (n 26).

³⁴ See generally International Monetary Fund, *World Economic Outlook (WEO): Coping with High Debt and Sluggish Growth* (Washington, D.C.: International Monetary Fund 2012) <<http://www.imf.org/external/pubs/ft/weo/2012/02/pdf/text.pdf>> accessed 13 April 2014 (noting that recovery from the global financial crisis of 2008 has been slow and that growth is likely to remain low while unemployment is likely to remain high in many advanced economies).

³⁵ Hamilton (n 26).

³⁶ See e.g. C Jalloh, 'Regionalizing International Criminal Law?' (2009) 9 *International Criminal Law Review* 445, 462–5.

³⁷ See Ford (n 11) 969–71.

³⁸ More than 150 NGOs attended the Tenth Session in 2011. See Report on the Tenth Session of the Assembly (n 30) 4.

³⁹ See Amnesty International, ICC: Recommendations for developing an effective budget process (2007) <http://www.iccn.org/documents/AI_Budget_07apr26_eng.pdf> accessed 30 May 2013.

activities undertaken by different organs of the Court.⁴⁰ Those concerns have largely disappeared in recent years, and the main concern among NGOs now is that the budget is insufficient to fulfil the Court's mandate. For example, the International Federation for Human Rights (FIDH) has argued that 'the zero growth principle cannot be established as the governing standard to measure the budget of the Court'.⁴¹ FIDH has two principal concerns, both of which relate to the participation of victims at the Court: (i) that the Victims Participation and Reparations Section is under-staffed and has not been able to process all of the victims' applications to participate; and (ii) that cuts to legal aid for victims will make it hard for victims to obtain representation and communicate effectively with their representatives.⁴² Redress has raised similar concerns.⁴³

Few individual NGOs make direct statements about the budget, however. Most seem to participate through an umbrella organization called the CICC. The CICC represents the views of more than 2,500 different civil society organizations that have an interest in the Court,⁴⁴ and a number of prominent human rights NGOs, including Amnesty International and Human Rights Watch, sit on its steering committee.⁴⁵ Within the CICC, advocacy about the budget is handled through the Budget and Finance Team, which is composed of members from NGOs that have the most interest in budget issues. For the last several years, the CICC's Budget and Finance Team has consistently opposed efforts to institute a 'zero growth' budget on the grounds that such a budgeting system is inconsistent with the goals and mandates of the Rome Statute.⁴⁶ In particular, at various times, it has argued that the budget does not provide sufficient resources for: (i) outreach and public information;⁴⁷ (ii) legal aid for victims and accused;⁴⁸ (iii) trial preparation within the OTP;⁴⁹ (iv) the Trust Fund for Victims;⁵⁰ and (v) field offices.⁵¹ To

⁴⁰ Human Rights Watch, Human Rights Watch Memorandum to States Members of the Assembly of States Parties (2004) <<http://www.iccnow.org/documents/HRW%20Memorandum%20to%20ASP%20members%20090204.pdf>> accessed 13 April 2014.

⁴¹ FIDH, Cutting the Weakest Link: Budget Discussions and their Impact on Victims' Rights to Participate in the Proceedings (Position Paper written for the 11th Session of the ASP, Montserrat Carbone, October 2012) 20.

⁴² Ibid.

⁴³ Redress, Hundreds of Victims Prevented from Participating in Crucial Hearings Due to Lack of Resources at the International Criminal Court (15 July 2011) <<http://www.redress.org/downloads/StatementVictimParticipation15July2011.pdf>> accessed 30 May 2013.

⁴⁴ See Coalition for the International Criminal Court, 'About the Coalition' <<http://www.iccnow.org/?mod=coalition>> accessed 30 May 2013.

⁴⁵ See Coalition for the International Criminal Court, 'Steering Committee' <<http://www.iccnow.org/?mod=steering>> accessed 30 May 2013.

⁴⁶ See CICC, Comments and Recommendations on the 2013 Budget to the 11th Session of the Assembly of States Parties (6 November 2012) <http://iccnow.org/documents/CICC_Budget_and_Finance_Team_Paper_ASP11_6_Nov_2012.pdf> accessed 14 April 2014; 'Global Coalition Calls on States to Maintain Financial Commitment to the ICC', *Coalition for the International Criminal Court Press Release*, 8 July 2011 <[http://www.iccnow.org/documents/CICC_PR_Budget_FINAL_08072011_\(1\).pdf](http://www.iccnow.org/documents/CICC_PR_Budget_FINAL_08072011_(1).pdf)> accessed 14 April 2014; CICC, Comments and Recommendations on the 2011 Budget to the Ninth Session of the Assembly of State Parties (25 November 2010) <http://www.iccnow.org/documents/CICC_Budget_and_Finance_Team_Paper__30Nov2010.pdf> accessed 14 April 2014.

⁴⁷ CICC, Comments and Recommendations on the 2013 Budget (n 46) 1.

⁴⁸ Ibid., 2.

⁴⁹ Ibid., 5. ⁵⁰ Ibid., 7.

⁵¹ CICC, Submission to the Committee on Budget and Finance at its Nineteenth Session on 24 September to 3 October 2012 (20 September 2012) 3 <http://www.iccnow.org/documents/BF_Commentary_on_2013_Budget_FINAL.pdf> accessed 14 April 2014.

the extent that NGO opinion can be discerned from publicly available documents, the majority of NGOs that participate in the process seem to support increasing the ICC's budget. In this sense, the NGO community can be thought of as generally aligned with the Court during the budgeting process, as opposed to some of the Court's largest funders, who are calling for 'zero growth'.⁵²

Academics have been a vocal constituency with regard to many aspects of the ICC's work,⁵³ but there has been relatively little academic work done on the budget. There have been several law review articles that deal principally with the ICC's budget that were written by a legal adviser working for Amnesty International,⁵⁴ and several other articles have touched on the ICC's funding,⁵⁵ but academics have not generally played a visible role in the budget process.⁵⁶ For this reason, I do not classify them as a separate constituency.

There is also an argument that the CBF should be treated as a constituency separate from the ASP. While appointed by the ASP, the members of the CBF are supposed to be independent in their recommendations.⁵⁷ However, they are mostly officials of the governments of the States Parties, which probably limits their real independence. In practice, most of the time they seem to represent the views of the ASP.⁵⁸ For this reason, I do not treat them as a separate constituency.

5.4 The 2013 Budget Process

The Court's 2013 proposed budget is a defensive document. For example, the Registry spends a lot of time trying to demonstrate that it has done all that it can to rein in costs, and that the increases it is asking for are largely due to things that are out of its control, including increasing legal aid costs for defence counsel and a surprise decision to start hearings in the two Kenya cases in 2013.⁵⁹ The OTP, for its part, argues that it has made significant efficiency gains over the years. However, it explicitly notes that it is budgeting for an 'acceptable level of output' rather than a 'maximum possible output' because achieving the maximum output would cost an additional €3.4 million per year.⁶⁰ It says

⁵² Of course, the interests of the NGO community are not perfectly aligned with the Court, even if one only considers budget issues, and NGOs also criticize the Court on budget matters. For example, CICC has criticized the Court for failing to provide sufficient justification for its budgets even as it generally opposes a zero growth budget. See CICC, *Comments and Recommendations to the Tenth Session of the Assembly of State Parties* (29 November 2011). See also *infra* n 107 (NGOs criticizing the Court for allocating insufficient funding to investigations).

⁵³ For example, a search in Westlaw for academic articles with 'International Criminal Court' in the title returned more than 600 results. The exact search, which was carried out on 15 March 2013, was for TI ('International Criminal Court') in the database JLR (Journals and Law Reviews).

⁵⁴ See O'Donohue, 'Financing the International Criminal Court' (n 8); O'Donohue, 'The 2005 Budget of the International Criminal Court' (n 9); O'Donohue, 'Towards a Fully Functional International Criminal Court' (n 9). Mr O'Donohue is also the leader of the CICC's Budget and Finance Team.

⁵⁵ See Ford (n 11) 968–71; C Romano, 'The Price of International Justice' (2005) 4 *Law & Practice of International Courts and Tribunals* 281, 302–3.

⁵⁶ They may play a less visible role as advisers to the members of the ASP and various NGOs, but this is hard to quantify.

⁵⁷ See *supra* n 7.

⁵⁸ See *infra* nn 63–4. See also O'Donohue, 'Financing the International Criminal Court' (n 8) 276–7.

⁵⁹ Proposed Programme Budget for 2013 (n 13) 62–4. See also *ibid.*, 84. ⁶⁰ *Ibid.*, 39.

that previous reductions in the OTP's budget have already led to a slowdown in investigations and prosecutions,⁶¹ and any further reductions would 'greatly impact' the OTP's ability to produce an acceptable level of output.⁶² Throughout the proposed budget, one gets the feeling that the Court is desperately trying to convince the ASP that all that could be cut has been cut.

The CBF's response was largely to reiterate that more cuts could be expected. For example, the CBF stressed that 'any proposed increase of the budget for 2013 would need to be compensated by reductions elsewhere, in order to bring the budget into line with the level of the approved budget for 2012'.⁶³ This effectively told the Court to expect a zero growth budget. The CBF also urged the Court to 'reconsider its budgeting process to ensure that the fiscal context was well understood'.⁶⁴ Yet ultimately the ASP approved an increase in the budget of approximately €6.3 million. Why did the CBF and the ASP back down?

The answer may lie in a document the CBF asked the Court to produce—an estimate of the effect of instituting a zero growth budget in 2013.⁶⁵ The Court first noted that freezing salaries would violate staff members' rights under the United Nations' common system of salaries. The result would almost certainly be expensive and risky litigation before the Administrative Tribunal of the International Labour Organization.⁶⁶ With that off the table, the Court considered other options. Keeping the judiciary's budget flat would result in a 25% reduction in staffing of the Chambers with resulting delays and disruptions of judicial proceedings.⁶⁷

The only thing the OTP could do that would save enough money would be to delay one investigation for a year, but the Court noted that this cost would not go away, it would still have to be paid in future years, and the delay would contribute to impunity.⁶⁸ The Registry would be able to keep funding flat by eliminating almost all training and by suspending efforts to upgrade the Registry's computer systems, but again the Court noted that this would just push the cost of these expenses into future years.⁶⁹ Finally, the Court noted that if it had to also absorb the increasing cost of the rent for its temporary facilities,⁷⁰ this would result in the equivalent of 'suspending activities in relation to the situation in Uganda, Darfur (Sudan), and Libya as well as postponing trial hearings in the Kenya cases beyond 2013'.⁷¹

Finally, the Court stressed that '[w]ere any ongoing proceedings at the Court to be substantially delayed to accommodate budgetary requirements, the Court would... be in violation of fundamental individual rights of persons before the Court'.⁷² The Court probably had an incentive to dramatize the effect of freezing its budget, but it appears to have been effective. The ASP increased funding for 2013 by 3.8% in real terms.

⁶¹ Ibid.

⁶² Ibid.

⁶³ See Report of the Committee on Budget and Finance (n 23) 201. See also ibid., 226.

⁶⁴ Ibid. This is apparently a reference to the fiscal constraints faced by the developed countries that fund the majority of the ICC's budget.

⁶⁵ See Report of the Committee on Budget and Finance (n 23) Annex III.

⁶⁶ Ibid., 258.

⁶⁷ Ibid., 260.

⁶⁸ Ibid., 261.

⁶⁹ Ibid., 262.

⁷⁰ Previously the rent on the Court's temporary facilities had been subsidized by the host nation (the Netherlands), but starting in 2013 the Court now has to pay the rent itself, at a cost of almost €6 million per year.

⁷¹ Report of the Committee on Budget and Finance (n 23) 265.

⁷² Ibid.

The 2013 budget debate highlights the tension between two different funding philosophies. On the one hand, you have a number of advanced countries who pay a majority of the ICC's budget and are still suffering the after-effects of the 2008 financial crisis. These states have argued that the appropriate funding level for the ICC should be determined by what these states can afford. The Court should then do as much as it can with whatever money it is given. This might be thought of as a 'willingness to pay' budget philosophy. The other philosophy, championed by the Court and most NGOs, has been that the appropriate funding level for the Court should be determined by evaluating the Court's mandate. These groups argue that if an action is required by the Rome Statute, then the ASP has an obligation to provide enough funding for the Court to comply with its mandate.

The increase in funding for 2013 can be seen as a partial victory for the mandate-driven funding philosophy. Ultimately, the members of the ASP were unwilling to significantly limit the Court's ability to comply with its mandate to save €2 million a year. Nevertheless, the Court is still not budgeting for maximum output,⁷³ so it cannot be viewed as a complete victory for the mandate-driven philosophy. Perhaps it is best viewed as a compromise between the two positions.

5.5 How Efficient is the ICC?

At the same time and parallel to the debate between a mandate-driven versus willingness-to-pay budget, there is also a debate about the efficiency of the Court. So, for example, certain members of the ASP have pushed the Court to 'pay for' any new costs by finding efficiencies elsewhere. These states argue that there is room to increase the Court's workload without increasing its budget by focusing on improving efficiency.⁷⁴ This is often used as an alternative to the willingness-to-pay argument as a justification for a zero growth budget. Implicit in this argument is the assumption that the Court is currently operating inefficiently.

On the other hand, those who believe the Court is underfunded either explicitly or implicitly make the claim that the ICC is operating efficiently and that there is little scope for further improvements in efficiency.⁷⁵ Any increase in workload must therefore be accompanied by an increase in the budget. Thus debates about the budget are also partly rooted in a debate about the efficiency of the Court. A similar debate has been occurring in the academic literature about whether international criminal trials are too slow, cost too much, and are inefficient.⁷⁶ But which side is right?

Supporters of increased funding have pointed out that the Court's workload has increased dramatically in recent years while the budget has been more or less flat since 2009. The 2009 budget was based on the assumption that the ICC would be engaged in judicial proceedings in four situations,⁷⁷ and that these situations would result in five

⁷³ See text accompanying nn 52–3.

⁷⁴ See, for example, text accompanying n 63.

⁷⁵ See text accompanying n 16 and 27.

⁷⁶ See Ford (n 11) 954.

⁷⁷ See Proposed Programme Budget for 2009 of the ICC, ICC-ASP/7/9, 14–22 November 2008 (Seventh Session of the Assembly of States Parties) 7.

Table 5.3 ICC Workload Comparison

	2009	2013	Change
Situations	4	8	+100%
Ongoing investigations	5	7	+40%
Cases ⁷⁸	10	18	+80%
Accused	15	22	+47%
Trials	2	4	+100%
Appeals	0	2	n/a
Budget (2013 euros)	€110M	€115M	+4.3%

investigations.⁷⁹ The Court assumed that two trials would take place.⁸⁰ At the time, the OTP had initiated ten cases against 15 accused. By early 2013 the OTP had eight situations before it, with 14 open cases against a total of 22 accused.⁸¹ Moreover, the Court assumes for budget purposes that it will have 18 cases, seven ongoing investigations, four cases at trial, and two cases on appeal during 2013.⁸² These figures are summarized in Table 5.3.

The Court's workload was significantly greater in 2013 than it was in 2009, yet the Court's resources were almost the same. This does not, however, lead automatically to the conclusion that the ICC is underfunded. Whether the Court needs new resources depends on how efficiently the Court was using its resources in 2009. If it was efficiently using them in 2009, then one would expect that significantly increasing the workload would leave the Court dramatically underfunded. On the other hand, if the Court had significant spare capacity in 2009 (i.e. it was operating inefficiently), then increasing the workload would not necessarily leave the Court overburdened. Or the reality may be somewhere in between, where the ICC had some spare capacity in 2009 but not enough to absorb the dramatic increase in workload that has occurred since then, and it is now somewhat underfunded. But how does one determine whether the Court is operating efficiently?

One way is to compare the ICC to another similar court. This chapter will focus on a comparison between the ICC and the ICTY. The ICTY was chosen because it resembles the ICC in many ways. It was a large court that employed hundreds of staff members, was organized similarly to the ICC, had jurisdiction over essentially the same subject matter, conducted a relatively large number of trials, and had a lifecycle that lasted decades.⁸³ There are differences between the ICC and the ICTY that may affect the comparison,⁸⁴ but the ICTY looks enough like the ICC to make a comparison between them potentially useful.

⁷⁸ Here I use the ICC's prediction of the number of cases it will have open in 2013 rather than the number that were open at the beginning of 2013.

⁷⁹ Ibid., 8.

⁸⁰ Ibid.

⁸¹ This information was collected from the ICC's website on 18 March 2013, specifically the page on Cases and Situations.

⁸² Proposed Programme Budget for 2013 (n 13) Annex III, at 175. See also ibid., Table 3, at 13.

⁸³ A comparison with the ICTR, the other ad hoc court, would also probably make sense, but will have to wait for another occasion.

⁸⁴ See section 5.6 for a discussion of the differences between the two courts.

It does not make sense, however, to compare the current ICC budget to the current ICTY budget because the ICTY is in the process of shutting down. It is no longer conducting investigations, most of the trials are completed, and most of the work that is currently going on is related to appeals. In short, the workload of the ICTY today does not look much like the current ICC workload, which is focused on investigations and trials. A better comparison would be between the ICC as it is now and the ICTY as it was during the middle of its lifecycle when it was actively conducting investigations and trials. The year 2003 was such a year for the ICTY. After a slow first couple of years (much like the ICC), by 2003 the ICTY had hit its stride. It had a large number of open cases, several trials ongoing, and more waiting to start.⁸⁵ In addition, the ICTY was about ten years old in 2003, roughly the same age the ICC is today. Thus, they were at a similar stage in their lifecycles. In many ways, the ICTY of 2003 looks quite a bit like the ICC of today. For this reason, this section will compare the ICTY in 2003 to the ICC in 2012.⁸⁶

Three comparisons will be made. First, we will compare how the two different courts allocated their budgets between staff costs and other operating expenses. The second comparison will focus on how the courts allocated their budgets to core activities (investigations, trials, and appeals) versus support functions (human resources, procurement, information technology, etc.). The final comparison will be between the workload and cost of the courts. Together, these comparisons should shed some light on the comparative efficiency of the ICC and ICTY.

The sources of spending were broadly similar across these two tribunals. See Table 5.4.⁸⁷ There are some differences, however. The ICC spends a higher percentage of its budget on its personnel and a slightly smaller percentage of its budget on things like travel, supplies, equipment, and contractual services. This is broadly consistent with the ICC's claim that it has already cut all the non-essential spending it can in order to focus on its most important asset—its personnel. In particular, the difference in travel spending is somewhat surprising given that the ICC is much further away from most of its situations than the ICTY was, and thus one would probably have expected the ICC to have a larger travel budget than the ICTY. Table 5.4 represents some evidence in favour of the ICC being slightly more efficient than the ICTY, but it is far from definitive.

Another way to think about the Court's efficiency is to look at how much money is spent on core activities versus support functions. International criminal tribunals are created primarily to try people for committing serious violations of international law.⁸⁸ Of course, they also have other objectives, but the investigations, trials, and

⁸⁵ See text accompanying n 104.

⁸⁶ The year 2012 was chosen for the ICC rather than 2013 because complete information about 2013 was not available at the time this chapter was written.

⁸⁷ The information on the ICC comes from Table 5.2. The information for the ICTY was derived from UN Secretary General, Budget for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 for the biennium 2002–3, UN Doc A/56/495 (23 October 2001), Table 3 ('ICTY Budget 2002–3'). The ICTY included defence counsel costs in the contractual services category, but they have been split out in the table. Data on defence costs comes from *ibid.*, para. 43.

⁸⁸ S Dana, 'Turning Point for International Justice?' in A Klip and G Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals*, vol. 11 (Antwerp: Intersentia 2007) 962, 972 ('The primary

Table 5.4 Spending by Sources (ICTY vs ICC)

Source	ICTY (2003)	ICC (2012)	% Change
Staff	62.4%	71.8%	+9.4%
General operating expenses	8.3%	11.5%	+3.2%
Legal aid	13.2%	5.7%	-7.5%
Travel	5.2%	4.2%	-1.0%
Contractual services	6.3%	4.0%	-2.3%
Supplies	1.2%	1.0%	-.2%
Equipment	3.1%	1.0%	-2.1%
Training	0% ⁸⁹	.7%	+.7%

appeals can be thought of as the Court's core activities. Support functions include spending on things like information technology, human resources management, and procurement. Spending on support functions is necessary because the trials cannot occur without support, but most people would probably agree that a court that spent more of its budget on core activities and less on support services was a more 'efficient' court. So, how much of the ICC's budget was spent on core activities versus support functions? And how does that compare to the ICTY?

Unfortunately, comparing the ICC and ICTY on this basis is quite difficult. The ICC's budgets contain sufficient information to calculate the cost of individual components within the principal organs. The ICTY, on the other hand, does not provide information on how money was allocated between the various components within the principal organs. This makes a comparison difficult, because many of the costs directly associated with the trials, like courtroom management services, are contained within the budget of the Registry. To make an accurate comparison of the cost of the Tribunal's functions, it is necessary to break down the spending by individual components within the principal organs. Fortunately, there are detailed organizational charts for the principal organs that indicate how many personnel were located in each component.⁹⁰ The cost of an individual component within one of the principal organs was determined by calculating the percentage of its personnel and attributing that percentage of the organ's budget to the component.⁹¹ This is not an ideal way to determine the cost of the individual components within the principal organs, but it is the only practical way given the available information.

function of the international criminal tribunal is to determine the criminal responsibility and punishment of those individuals found guilty of the crimes under its jurisdiction.'); A Fulford, 'The Reflections of a Trial Judge' (2011) 22 *Criminal Law Forum* 215, 216 ('We are first, foremost and last a criminal court: our core business is to process criminal trials.').

⁸⁹ It is likely that the ICTY did have a training budget, but that it was not recorded as a separate line item in the budget.

⁹⁰ UN Secretary General, Budget for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 for the biennium 2002–3, UN Doc A/56/495/Add.1 (23 October 2001) 4–7.

⁹¹ Using the number of personnel in the components as a proxy for that component's portion of the organ's budget appears to be a reasonable way to estimate component costs given that personnel costs are such a large part of the ICTY's overall budget. See Table 5.4.

Table 5.5 Spending by Functions (ICTY vs ICC)

Function	ICTY (2003)	ICC (2012)	% Change
Investigation and Analysis	18%	15%	-3%
Trials and Appeals	51%	46%	-5%
Support Functions	31%	39%	+8%

The next step is to attribute the cost of the different components to the functions of the court. While one could break down the data in lots of different ways,⁹² costs were categorized as relating to: (i) investigation and analysis; (ii) trials and appeals; or (iii) support functions.⁹³ So, for example, at the ICC the OTP's Investigation Division was categorized as investigation and analysis, while the Prosecution Division was categorized as trials and appeals. Within the Registry, the Court Management Section was categorized as trials and appeals, while the Common Administrative Services Division was categorized as support. Services related to victims and witnesses were categorized as trial costs. Detention costs were categorized as support costs for both courts, even though the ICTY seemed to consider them a trial cost.⁹⁴ To the extent possible, each court's functions were categorized in the same way.⁹⁵ The goal was to create, as much as possible, an apples to apples comparison of how money was spent at these two courts. The results can be seen in Table 5.5.

This analysis suggests that the ICC is spending its money less efficiently than the ICTY did in 2003. The ICC spends a greater portion of its budget on support functions and less on investigations, analysis, trials, and appeals.⁹⁶ All other things being equal, one would probably conclude that a court that spends a greater percentage of its funds on its core activities is operating more efficiently than a court that spends more of its money on support functions. Moreover, this suggests that the ICC could cut its support spending further. After all, the ICTY was able to operate with nearly 10% less of its budget going to support functions.

A final way to look at the ICC's efficiency is to compare the two courts' workload and cost. Efficiency is often defined as '[t]he ratio of useful work performed to the total energy expended'.⁹⁷ This suggests that one way to calculate the efficiency of a court is to measure its workload or output and divide by its cost. This ratio can be calculated for different

⁹² For example, the Court's own breakdown treats language services and victims and witnesses services as separate categories. See Table 5.1.

⁹³ Costs that were unique to each court were excluded from the analysis so as to make the comparison, as much as possible, between the types of costs that both courts incurred. So, for example, the costs of the Secretariat of the ASP were excluded from the ICC calculation, while the costs of assistance to the ICTR were excluded from the ICTY calculation.

⁹⁴ In the ICTY's organizational chart, the Detention Unit is located within the Judicial Support Division. Nonetheless, it was categorized as a support function.

⁹⁵ A spreadsheet showing how these figures (and all the figures in this chapter) were calculated is available upon request from the author.

⁹⁶ Indeed, this may partly explain why the ICTY was able to try cases more efficiently than the ICC. See Table 5.6 and the accompanying discussion.

⁹⁷ *Oxford English Dictionary* 2nd edn (Oxford: Clarendon Press 1989).

Table 5.6 Workloads and Costs (ICTY vs ICC)

Activity	ICTY (2003)	ICC (2012)	% Difference
Open Cases	42	17	-60%
Total Accused	74	27	-64%
Pre-trial Proceedings	12	4	-67%
Trials	6	3	-50%
Accused at Trial	9	4	-56%
Cost	€125M	€109M	-13%

courts and the results compared. The court with a higher ratio of work performed to money spent would be the more efficient court.

Cost is easy to calculate. The General Assembly approved a budget of \$128,551,900 for the ICTY in 2003.⁹⁸ Once adjusted for inflation and converted to euros,⁹⁹ this translated into €124,815,000 in 2012. The ICC's budget in 2012 was €108,800,000.¹⁰⁰ This means that the ICTY received more funding in 2003, in real terms, than the ICC did in 2012.

Workloads are harder to compare. The best source for information is each court's annual report to the United Nations General Assembly.¹⁰¹ By the end of 2012, the ICC had jurisdiction over investigations into eight situations.¹⁰² This had resulted in the initiation of 17 cases by the OTP that covered the alleged crimes of 27 accused. During 2012, three cases involving four accused were being tried at the ICC. At the same time, four cases were in the midst of pre-trial preparations. The Court held confirmation of charges hearings in three cases and heard admissibility challenges in three cases. In contrast, during 2003, the ICTY had 42 open cases against a total of 74 accused.¹⁰³ Accused from 13 of those cases made their initial appearances, while 12 cases were in the midst of pre-trial preparations. Six cases were tried during 2003 involving nine accused. The results are presented in Table 5.6.

⁹⁸ UN General Assembly, Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc A/RES/57/288 (12 February 2003).

⁹⁹ The US dollar figure for 2003 was first converted to 2012 US dollars using the Consumer Price Index maintained by the U.S. Bureau of Labor Statistics. It was then converted to 2012 euros using the average euro to dollar exchange rate for 2012 (1\$ = .7781€).

¹⁰⁰ Programme budget for 2012, the Working Capital Fund for 2012, scale of assessments for the appointment of expenses of the ICC, financing appropriations for 2012 and the Contingency Fund, ICC-ASP/10/Res.4, 21 December 2011 (Tenth Session of the Assembly of States Parties) 1 (adopted by consensus).

¹⁰¹ The ICTY Report is UN Security Council, Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc A/58/297—S/2003/829 (20 August 2003) ('ICTY Report 2003') and covers the work of the Tribunal in the period August 2002 to July 2003. The ICC Report is UN Secretary General, Report of the International Criminal Court, UN Doc A/67/308 (14 August 2012) and covers the work of the Court during the period August 2011 to July 2012.

¹⁰² It was also conducting preliminary examinations in nine places.

¹⁰³ ICTY Report 2003 (n 101) Annex I.

Several things are notable about Table 5.6. First, the ICC has fewer open cases and accused than the ICTY had at a similar stage in its lifecycle. The ICTY had a larger number of cases and accused because it charged many lower-ranking individuals during its early years.¹⁰⁴ The ICC has consciously chosen to focus on a much narrower group of accused.¹⁰⁵ Part of the reason for having a smaller number of cases was a desire to increase efficiency by trying only those most responsible for crimes within the jurisdiction of the Court. Thus, by opening fewer cases the Court might be operating more efficiently than the ICTY.

On the other hand, the ICTY was holding pre-trial proceedings in three times as many cases, and actually tried twice as many cases, covering more than twice as many accused as the ICC did during a similar time period. Of course, the ICTY had slightly more funding (in real terms) than the ICC, but the difference in funding is too small to explain the dramatic differences in the number of cases in pre-trial proceedings and at trial. By each of these three measures (number of cases in pre-trial preparations, number of accused at trial, and number of trials), the ICTY was able to produce at least twice as much output in 2003 as the ICC did in 2012 for only slightly more money. The simplest way to interpret this data is that the ICTY was significantly more efficient than the ICC.

Ultimately, these comparisons suggest that the ICC is less efficient than the ICTY was in 2003. It spends a greater percentage of its budget on support functions than the ICTY did, and its trial output is roughly half that of the ICTY. There are some factors that point in the other direction. For example, the lower total number of cases and accused represents an attempt to increase efficiency by focusing only on those most responsible for crimes, and the Court spends a smaller percentage of its money on things like travel, contractual services, and equipment than the ICTY did. But on the whole, the distribution of costs between core functions and support services and the trial output of the court seem to be more direct indicators of efficiency. And by these indicators, the ICTY was more efficient than the ICC. As we shall see in section 5.6, however, things may not be that simple.

5.6 Possible Explanations for the Comparative Inefficiency of the ICC

It seems hard to reconcile the conclusion in the previous section with the ICC's claim that it is as efficient as possible and that further attempts to improve efficiency would actually have negative returns.¹⁰⁶ This section will look at possible explanations for the apparent contradiction. One problem might be that the ICTY and ICC are different in some way that makes comparing them misleading. Section 5.5 assumed the ICC and

¹⁰⁴ See D Raab, 'Evaluating the ICTY and its Completion Strategy' (2005) 3 *Journal of International Criminal Justice* 82, 84–8.

¹⁰⁵ See Prosecutorial Strategy 2009–12, OTP, ICC, 1 February 2010, paras 18–21 (noting the OTP will only 'prosecute those who bear the greatest responsibility for the most serious crimes').

¹⁰⁶ See section 5.4.

ICTY are comparable courts. If they are not, then the comparison between them may not tell us anything meaningful about their relative efficiency. There are several ways in which the ICC is different from the ICTY that might invalidate the comparison.

First, the ICTY had jurisdiction only over crimes that took place in the former Yugoslavia. The ICC has eight open situations at the moment and each one is in a different country. Thus one possibility is that the necessity of investigating situations in different locations drives up the cost of the ICC. It sounds plausible, but the data does not support this hypothesis. If this were true, one would expect the result to be higher investigation and analysis costs at the ICC than at the ICTY, but in reality the ICC spends a smaller percentage of its budget on investigations and analysis than the ICTY did.¹⁰⁷

Another possibility is that the indicators used (number of cases at trial and number of accused at trial) are not appropriate for measuring efficiency. Not all trials or accused are the same. The trial of Slobodan Milošević was obviously very different from the trial of Anto Furundžija. The Milošević trial was one of the most complex cases ever taken to trial. It involved hundreds of witnesses and lasted years. The trial of Furundžija was the simplest trial the ICTY conducted. It lasted only ten days and involved only 14 witnesses. Thus comparing courts simply based on the number of cases or accused at trial is potentially misleading. In the absence of a way of accurately comparing the complexity of individual cases, it is difficult to know whether the comparison of cases and accused tried is useful.¹⁰⁸

Another difference between the ICC and the ICTY is that the ICC permits victims to participate in the cases.¹⁰⁹ The ICTY did not. One possibility is that victim participation at the ICC increases the cost of trying cases by slowing down the proceedings.¹¹⁰ This is hard to quantify, but my experience at the ECCC, another court that permits victim participation, was that the participation of the victims and their representatives did slow down the trial. This might be a price we are willing to pay to permit victim participation, but it may skew the comparison with the ICTY.

Another possibility is that there are additional procedural steps at the ICC that had no analogy at the ICTY, which makes a direct comparison between the two courts misleading. For example, much time has been spent at the ICC arguing over whether cases are admissible. This has turned out to be a complex matter that has come up repeatedly. In 2012 the ICC was dealing with admissibility challenges in three cases. There is no direct analogy to the admissibility challenge at the ICTY because the ICTY had primacy over national courts¹¹¹ while the ICC's jurisdiction is subject to

¹⁰⁷ NGOs have criticized the ICC for failing to allocate sufficient resources to investigations. See B Evans-Pritchard and S Jennings, 'ICC's Funders Seek Greater Efficiency', Institute for War and Peace Reporting (18 June 2013) (noting concerns by NGOs that the prosecutor has insufficient resources to conduct investigations).

¹⁰⁸ The author is working on a solution to this problem and hopes eventually to be able to compare cases of different complexity accurately across courts.

¹⁰⁹ See Art 68 Rome Statute.

¹¹⁰ See generally C Van den Wyngaert, 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 *Case Western Reserve Journal of International Law* 475 (describing ways in which the participation of victims affects trials at the ICC).

¹¹¹ Art 9(2) Statute of the ICTY, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, Annex ('The International Tribunal shall have primacy over national courts').

the principle of complementarity.¹¹² Perhaps this difference accounts for some of the apparent inefficiency of the ICC.

Related to the concern about admissibility challenges is the question of state cooperation. While the ICTY initially had difficulty getting cooperation from some of the states in the former Yugoslavia, the members of the European Union and NATO eventually applied sufficient pressure to ensure cooperation. The ICC has not had equivalent success in getting cooperation from countries like Sudan and Libya, partly because there is no state or bloc of states willing to exert sufficient pressure on those countries to ensure cooperation. In the absence of cooperation it is harder to investigate and to obtain custody over those accused of committing crimes. This may also make the ICC less efficient than the ICTY.

Another possibility is that the ICTY benefited from greater institutional experience and economies of scale. It was by far the largest of the international criminal tribunals that were created in the 1990s and it tried the largest number of accused. This probably resulted in economies of scale that made the average ICTY trial cheaper than it would have been at a tribunal that tried fewer cases. The ICTY also benefited from hard-won institutional experience. For example, incremental changes were made over time to its procedural rules that were designed to streamline the trials. These changes were the result of lessons learned from the early trials. Thus one might expect that as tribunals try more cases their efficiency might slowly improve. At the moment, the ICC has had a relatively small number of trials and probably has not developed the same institutional experience or economies of scale as the ICTY.

This is a non-exhaustive list of the ways in which the ICC might be different enough from the ICTY to affect the comparison of their workloads. Unfortunately, it is hard to quantify most of these potential differences. There is, however, one quantifiable way in which the ICC in 2012 was different from the ICTY in 2013—average staff costs. Even though both courts cost roughly the same amount in real terms, the ICTY had 1,118 posts, while the ICC had only 766 posts. As a result, the ICTY's average cost per post (in 2012 euros) was €47,589, while the ICC's average cost per post was €77,897—64% higher even after taking into account inflation!

This difference does not seem to be the result of a change in the seniority structure of the court staff. If one compares the numbers of staff members at the different salary levels,¹¹³ the average staff seniority was very similar across the two courts.¹¹⁴ It is not clear why the ICC's per post cost is so much higher than ICTY's per post cost. The numbers suggest that the cost of staff has been growing faster than the rate of inflation over the last 20 years. But a comparison of the UN salary scales¹¹⁵ from 2003 and 2012¹¹⁶ indicates that this is not the case for salaries. This suggests that the difference has to do with non-salary costs.

¹¹² Art 17 Rome Statute.

¹¹³ Data for the ICTY's staff structure was taken from ICTY Budget 2002–3 (n 87) Table 4. Data for the ICC's staff structure was taken from ASP, Programme budget for 2012 (n 100) para. 2.

¹¹⁴ In both courts, the median staff member was serving in a General Services post, while the average staff member was serving in a Professional Grade 1 or Professional Grade 2 post.

¹¹⁵ Salary scales at the ICC and ICTY are both based upon the UN's official salary scales.

¹¹⁶ Available from the website of the United Nations International Civil Service Commission <<http://icsc.un.org/secretariat/sad.asp?include=ss>> accessed 15 April 2014.

Nevertheless, if one recalculates the cost of the ICC assuming that average staff costs were the same as at the ICTY in 2003 (adjusted for inflation),¹¹⁷ then the ICC would have cost only €79M in 2012. In this alternate scenario, the ICC would have cost 37% less in 2012 than the ICTY did in 2003. This still leaves the ICC looking slightly less efficient than the ICTY—its outputs are still something like 50% to 60% less than the ICTY—but alleviates a large part of the discrepancy. In short, it appears that the differences in real staff costs account for a large part of the apparent inefficiency of the ICC.

It is not clear, however, that much can be done about this without making some very significant changes at the ICC. The ICC is part of the UN's common system for personnel, which means that staff costs are largely out of its hands. The Court has already warned the ASP that any attempt to deviate from the common system would result in expensive and very risky litigation with its staff members.¹¹⁸ Moreover, even if the Court were to break away from the UN common system and institute a significant reduction in salaries or benefits, it seems likely that there would be attrition among its personnel, particularly those with the most valuable skills. This could be extremely detrimental for an institution that depends so heavily on its personnel.¹¹⁹ Finally, decreasing wages is extremely difficult for any organization.¹²⁰

5.7 Conclusion

In recent years the process of funding the ICC has been dominated by a debate about how much money the ICC needs. Many of the ICC's largest contributors, including Japan, Germany, France, Britain, and Italy, have been calling for 'zero growth' budgets as a response to fiscal constraints brought on by the aftermath of the 2008 global financial crisis. These countries make two alternative arguments in favour of this position. First, they argue that they simply cannot afford to pay more. Second, they argue that the ICC is inefficient and that it can do more with the same amount of money if it becomes more efficient.

The Court, on the other hand, has been calling for additional funding. It argues that it is underfunded and that it cannot carry out its mandate without additional funding. In support of this position, it notes that the ICC's workload has increased dramatically since 2009 even though its budget has remained about the same. In effect, it is arguing that the ICC is efficient. NGOs, while calling for more funding and opposing a zero growth budget, have simultaneously highlighted areas where they believe the ICC is operating inefficiently.¹²¹

¹¹⁷ This was done by taking overall staff costs at the ICC and reducing them so that the average per post cost was €47,589 (the same as at the ICTY in 2003 once adjusted for inflation). All of the other components of the ICC's budget were left unchanged.

¹¹⁸ See Report of the Committee on Budget and Finance (n 23) 258.

¹¹⁹ See *ibid.*, Annex III, at 258.

¹²⁰ The existence of downward nominal wage rigidity (the idea that it is difficult to decrease nominal wages) is well established in the economic literature. See C Knoppik and T Beissinger, 'Downward Nominal Wage Rigidity in Europe: An Analysis of European Micro Data from the ECHP 1994–2001' (2009) 36 *Empirical Economics* 321.

¹²¹ See (nn 52 and 107).

This chapter has attempted to shed light on the question of whether the ICC is efficient by comparing the ICC to the ICTY. The results are somewhat ambiguous. At first glance, the ICC does seem to be less efficient than the ICTY at conducting trials. It conducts significantly fewer trials than the ICTY did for only slightly less money. In addition, a comparison of how the two courts allocated their money between core activities and support activities indicates that the ICC spends almost 10% more of its budget on support functions than the ICTY did. As a result, it spends less on investigations, trials, and appeals than the ICTY.

This finding is tempered by the fact that the largest contributor to the difference in efficiency between the ICC and the ICTY is staff costs. Staff costs, however, are largely out of the hands of the ICC, which is a member of the United Nations common systems for staff. It would be quite difficult for the ICC to leave the common system and could have serious adverse consequences for the Court because it might well result in the departure of the Court's most skilled personnel.

In addition, there are ways in which the ICC is different from the ICTY that might affect the comparison between the two. For example, the ICC permits victims to participate in the process, and the ICC's cases have been marked by a large number of lengthy admissibility challenges, both of which might slow down the process and neither of which was really a factor in the ICTY's cases. As a result, it may not be fair to expect the ICC to be as efficient at conducting trials as the ICTY. Finally, the ICC has tried relatively few cases so far. It is possible, perhaps even likely, that the ICC will become more efficient as more cases are tried. This appears to have been the case at the ICTY.

Ultimately, my conclusions are not definitive because the real differences between the ICTY and ICC make a naive mathematical comparison of the two courts potentially misleading. Having said that, even once the differences are accounted for, it does appear that the ICTY was more efficient than the ICC, which indicates that there is room for further improvement at the ICC. Specifically, the comparison to the ICTY suggests that the ICC may be able to rearrange its spending to devote a larger proportion of its budget to investigations, trials, and appeals and less of its budget to support functions.

6

The ICC and the ASP

*Jonathan O'Donohue**

6.1 Introduction

Article 112(1) of the Rome Statute established the ASP (Assembly) to perform a range of administrative oversight, legislative, and other functions which are essential to the effective functioning of the ICC. In its first 12 sessions the Assembly has made significant progress towards implementing these functions, as well as other efforts to support the work of the ICC and the realization of the Rome Statute system. Nevertheless, there are a number of aspects of the Assembly's approaches and decisions which threaten to undermine the work of the ICC, including the independence of the prosecutor and the judges. This chapter examines how, in discharging its functions, the Assembly has both positively and negatively affected the law and practice of the Court.

6.2 Overview of the ASP

The decision of the Rome Statute's drafters to establish the Assembly followed their agreement to establish the ICC outside the United Nations system.¹ The Assembly is required to perform a number of administrative oversight, legislative and other functions. However, with the emphasis at the time on defining the jurisdiction and judicial functions of the ICC, detailed discussions regarding the Assembly and its role did not begin until late in the drafting process.² Consequently, the Statute allocates the Assembly numerous functions, but does not comprehensively define the inter-governmental organization. Du Plessis and Grevers observe that 'the [Assembly's] role is defined functionally—by what it does—not conceptually—by what it is'.³

The Statute merely defines the Assembly as a body made up of representatives of each State Party with equal voting rights which shall meet once a year in either The Hague or

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¹ See A Marchesi, 'Article 2: Relationship of the Court with the United Nations' in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* 2nd edn (München/Oxford: C H Beck/Hart 2008) 63, 64–6; A Bos, 'Assembly of States Parties' in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court*, vol. 1 (Oxford: Oxford University Press 2002) 297, 297–302.

² S R Rao, 'Article 112' in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* 2nd edn (München/Oxford: C H Beck/Hart 2008) 1687, 1688: 'the first focussed discussion took place in the relevant Working Group of the Preparatory Committee in its penultimate session in 1998'; see also Bos (n 1) 300.

³ M du Plessis and C Grevers, 'The Independent Oversight Mechanism argument is not merely about administrative functions, but is situated within a broader debate over the role of the Assembly of States Parties' (*ICCForum.com*) <<http://iccforum.com/oversight>> accessed 20 January 2014.

New York, unless special sessions are required.⁴ It provides that a Bureau of the Assembly would be elected, including the President of the Assembly, to assist the Assembly ‘in the discharge of its responsibilities’.⁵ It was also foreseen that the Assembly would establish other subsidiary bodies, as may be necessary.⁶ Some provisions and the drafting history demonstrate that the drafters intended the Assembly to respect the judicial independence of the Court.⁷ But that is as far as the definition of the Assembly itself goes, except for a list of functions which can be categorized as follows:

- Administrative oversight—providing management oversight to the Presidency, the prosecutor, and the Registrar regarding the administration of the Court;⁸
- Legislative decisions—approving or entering into key framework documents and agreements;⁹ and amending the Statute,¹⁰ the Rules of Procedure and Evidence,¹¹ and the Elements of Crimes;¹²
- Considering and deciding the budget of the Court;¹³
- Electing senior ICC officials—the prosecutor,¹⁴ the deputy prosecutor(s),¹⁵ and the ICC judges,¹⁶ as well as making decisions on removal from office¹⁷ and deciding to alter the number of judges;¹⁸
- Responding to non-cooperation—considering any question relating to non-cooperation, including referrals of non-cooperation from the ICC pursuant to Article 87(5) and (7);¹⁹
- Dispute resolution—considering disputes between two or more States Parties relating to the interpretation or application of the Rome Statute.²⁰

The Assembly also has a broad discretion to perform any other function consistent with the Statute or the Rules of Procedure and Evidence.²¹

Twelve years after its establishment, the Assembly is a dynamic inter-governmental organization that is performing most of these functions,²² as well as other activities to promote and support the Rome Statute system and the work of the ICC.²³ Its sessions not only include the participation of States Parties,²⁴ but also a number of observer

⁴ Art 112(1), (6) and (7) Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 ('Rome Statute').

⁵ Art 112(3) Rome Statute. ⁶ Art 112(4) Rome Statute.

⁷ For example, Art 112(2)(b) Rome Statute deliberately limits management oversight to the ‘administration of the Court’; see also Rao (n 2) 1690–1; Bos (n 1) 301.

⁸ Art 112(2)(b) Rome Statute. ⁹ See section 6.5. ¹⁰ Arts 121 and 122 Rome Statute.

¹¹ Art 51(2) Rome Statute. ¹² Art 9(2) Rome Statute. ¹³ Art 112(2)(d) Rome Statute.

¹⁴ Art 42(4) Rome Statute. ¹⁵ Ibid.

¹⁶ Art 36(6)(a) Rome Statute. The Assembly may also provide recommendations on the election of the Registrar by the judges in accordance with Art 43(4) Rome Statute.

¹⁷ Art 46(2) Rome Statute. ¹⁸ Arts 36(2)(b) and 112(2)(e) Rome Statute.

¹⁹ Art 87(5) and (7) and Art 112(2)(f) Rome Statute. ²⁰ Art 119 Rome Statute.

²¹ Art 112(2)(g) Rome Statute.

²² Of the functions set out in the Rome Statute, the main tasks that the Assembly has yet to deal with are removing senior ICC officials from office; altering the number of judges; and dispute resolution.

²³ See section 6.8.

²⁴ Participation by States Parties in sessions in New York, where most states have representation, is generally higher than sessions in The Hague.

states, international organizations, and NGOs.²⁵ At present, its annual sessions have packed agendas.²⁶ The Bureau, including the President of the Assembly and its Working Groups of States Parties in The Hague and New York, conduct substantial preparations for each session and other inter-sessional tasks throughout the year.²⁷

Four subsidiary bodies have been established so far to assist the Assembly's work: a Committee on Budget and Finance (CBF) provides independent expert advice on the ICC's annual budget request and other financial and administrative matters;²⁸ an Oversight Committee provides strategic oversight of the project to construct the new Permanent Premises of the Court which the ICC is expected to move into in 2015;²⁹ an Advisory Committee on Nominations of Judges of the ICC assesses candidates in advance of elections;³⁰ and an Independent Oversight Mechanism (IOM) is mandated to conduct inspections, evaluations, and investigations of the Court to enhance its efficiency and economy.³¹ In addition, the Assembly established a temporary Study Group on Governance within the Hague Working Group in 2010 to conduct a structured dialogue between States Parties and the ICC towards strengthening the institutional framework of

²⁵ Rules 93–5 Rules of Procedure of the Assembly of States Parties, ICC-ASP/1/3 and Corr.1, 3–10 September 2002 (First Session of the Assembly of States Parties) part II.C. Most NGOs that participate in the Assembly are members of the Coalition for the ICC (CICC). The coordinating and facilitating role of the Coalition has been recognized by the Assembly, see Recognition of the coordinating and facilitating role of the NGO CICC, ICC-ASP/2/Res.8, 11 September 2003 (Second Session of the Assembly of States Parties). During each session, the Coalition and its members issue position papers addressing issues on the agenda of the Assembly, make statements to the general debate, organize side meetings, and lobby States Parties.

²⁶ Sessions are conducted in accordance with the Rules of Procedure of the ASP provided for in Art 112(9) Rome Statute. They currently include hearing reports on the activities of the ICC and the Trust Fund for Victims; holding a general debate to discuss key issues relating to the ICC and the Rome Statute system; conducting specific discussions on key issues, including complementarity, cooperation, and the impact of the Rome Statute system on victims and affected communities; adopting the budget for the following year; electing vacant positions for senior officials of the ICC, the Board of Directors of the Trust Fund, and subsidiary bodies of the Assembly; considering reports of the ICC, the Bureau, and subsidiary bodies; adopting resolutions on a range of issues relating to the operation of the ICC and the Assembly; and considering proposals for amendments to the Rome Statute and the Rules of Procedure and Evidence.

²⁷ Report of the Bureau: Evaluation and rationalization of the working methods of the subsidiary bodies of the Bureau, ICC-ASP/12/59, 20 November 2013 (Twelfth Session of the ASP) para. 8, 'institutional questions whose discussion benefit from close interaction with the Court, such as the Court's budget, governance, oversight and host-state related issues are designated to The Hague. On the other hand, questions relating to the United Nations or that require the fullest possible representation on the part of States Parties are designated to New York.' Facilitators and focal points are appointed to take forward these discussions.

²⁸ Establishment of the Committee on Budget and Finance, ICC-ASP/1/Res.4, 3 September 2002 (First Session of the Assembly of States Parties). The Committee is made up of 12 experts of recognized standing and experience in financial matters at the international level. It was established at the first session and currently meets twice a year.

²⁹ Permanent Premises, ICC-ASP/6/Res.1, 14 December 2007 (Sixth Session of the Assembly of States Parties) para. 5. The Oversight Committee was established in 2007.

³⁰ Strengthening the ICC and the ASP, ICC-ASP/10/Res.5, 21 December 2011 (Tenth Session of the ASP) para. 19. Made up of nine eminent persons with established competence and experience in criminal or international law, the Advisory Committee was established in 2012.

³¹ Establishment of an IOM, ICC-ASP/8/Res.1, 26 November 2009 (Eighth Session of the Assembly of States Parties). The IOM was established in 2009. However, a decision to make it operational was only taken in 2013, see IOM, ICC-ASP/12/Res.6, 27 November 2013 (Twelfth Session of the Assembly of States Parties) and section 6.3.2 of this chapter.

the Rome Statute system and enhancing the efficiency and effectiveness of the Court.³² A permanent Secretariat of the Assembly provides services, and administrative and technical assistance to the Assembly, the Bureau, and the subsidiary bodies.³³

Many aspects of the work of the Assembly and its bodies support the effective functioning of the ICC, including the development of its law and practice. However, the capacity of the current framework to conduct the Assembly's work effectively and devote sufficient political support to ensure the success of the new system of international justice must be questioned. On average the Assembly meets only eight to ten days each year.³⁴ It is increasingly evident that this is insufficient to ensure that all issues receive the attention they deserve.³⁵ While the Bureau seeks to support the Assembly through inter-sessional work, its workload is now considered to be overwhelming and efforts are now being taken to rationalize the working methods of its bodies.³⁶ Subsidiary bodies are playing an important role, but with the exception of the Committee on Budget and Finance, most of these bodies have only been established recently. In practice, the Committee is overburdened with requests to consider non-budgetary or financial matters that go beyond its expertise.³⁷

Political considerations are also having a significant impact on the performance of many aspects of the Assembly's functions which in some instances threaten the effective operation of the ICC and the independence of the prosecutor and the judges. In particular, initiatives by some African states, including some States Parties, through the African Union to undermine cooperation with the ICC's case against the President of Sudan and to amend the Rome Statute to preclude the ICC from prosecuting sitting heads of state, pose significant challenges for the Assembly.³⁸

The following sections examine each of the previously mentioned categories of the Assembly's functions, identifying the Assembly's positive and negative impact on the law and practice of the ICC to date and the challenges it faces.

³² Establishment of a study group on governance, ICC-ASP/9/Res.2, 10 December 2010 (Ninth Session of the Assembly of States Parties). Initially established for a period of one year, the Study Group's mandate continues to be extended. To date, it has considered the following issues: the relationship between the Court and the Assembly; strengthening the institutional framework within the Court; increasing the efficiency of the criminal process; and enhancing the transparency and predictability of the budgetary process, see Report of the Bureau on Study Group on Governance, ICC-ASP/12/37, 20–8 November 2013 (Twelfth Session of the Assembly of States Parties).

³³ Establishment of the Permanent Secretariat of the ASP to the International Criminal Court, ICC-ASP/2/Res.3, 12 September 2003 (Second Session of the ASP).

³⁴ Between 1995 and 2002, governments met between four and ten weeks each year to establish the ICC.

³⁵ For example, plenary discussions on complementarity, which is arguably the most important element of the Rome Statute system and requires continued discussion by the Assembly, were held at the eleventh but not the twelfth session.

³⁶ Strengthening the ICC and the ASP, ICC-ASP/12/Res.8, 27 November 2013 (Twelfth Session of the Assembly of States Parties) paras 40–2; Report of the Bureau: Evaluation and rationalization of the working methods of the subsidiary bodies of the Bureau (n 27).

³⁷ NGOs have criticized this approach and called for the Assembly to establish additional expert subsidiary bodies, see for example CICC, Comments and Recommendations of Coalition Teams to the Twelfth Session of the Assembly of States Parties, 20–8 November 2013, 16.

³⁸ For further information see Maunganidze and Du Plessis, Chapter 4 this volume.

6.3 Administrative Oversight

The drafting history of Article 112(2)(b) shows that the decision to limit management oversight to the ‘administration of the Court’ sought to preclude the Assembly from conducting oversight of judicial activities.³⁹ This is consistent with requirements in the Statute of the independence of both the prosecutor and the judges. However, the extent of the Assembly’s administrative oversight is not defined, except that Article 112(4) foresaw that the Assembly would establish an IOM to conduct inspections, evaluations, and investigations of the ICC. In practice, limiting ‘management oversight’ to the administration of the Court has proved easier said than done, as many aspects of the ICC’s administration have judicial implications or reflect prosecutorial discretion or judicial decisions. Problems have arisen regarding the Assembly’s oversight of the development and implementation of some policies and strategies. Disputes regarding the scope of the IOM’s powers have also resulted in delays in making it operational.

6.3.1 Policy-setting and strategic planning

To date, the Assembly has played a mostly constructive role in supporting transparent policy-setting and strategic planning. For example, it encouraged the ICC’s initiative to develop a Strategic Plan in 2005 and engaged in a dialogue with the Court over several years to discuss its further development and implementation.⁴⁰ Although some aspects of the Strategic Plan related to judicial activities, the Assembly did not seek to influence them.⁴¹ Instead it focused primarily on identifying gaps in the strategy and recommending they be filled,⁴² promoting greater links between the budget and the Strategic Plan and overseeing its implementation.⁴³ It was also careful to ‘welcome’ or ‘take note’ of the Strategic Plan rather than provide it with formal approval—which would have implied political sign-off.⁴⁴ The approach, which has been adopted

³⁹ Rao (n 2) 1691; Bos (n 1) 305.

⁴⁰ See e.g. Strategic planning process of the Court, ICC-ASP/5/Res.2, 1 December 2006 (Fifth Session of the ASP) para. 2 which invited the ICC to ‘further develop’ dialogue initiated with the Bureau on the Plan.

⁴¹ Report of the Bureau on the Strategic Planning Process of the Court, ICC-ASP/7/29, 14–22 November 2008 (Seventh Session of the ASP) para. 12, notes ‘[t]he underlying premise for the work undertaken was that the Strategic Plan and its components form an internal management tool for the Court. As such, the aim of the Working Group was not to embark on a redrafting exercise with regard to the Plan or to engage in “micro management” of the Court. Rather, the aim was to enter into a dialogue with the Court with a view to giving States Parties an opportunity to comment on the activities carried out by the Court and provide input to the Court on these issues, as well as enabling States Parties to stay abreast of developments in the strategic planning process.’

⁴² Strategic planning process of the Court (n 40) para. 3 recommended dialogue on the position of victims in the concrete implementation of the Strategic Plan. This led to the development of a separate Strategy in relation to victims, see Report of the Court on the strategy in relation to victims, ICC-ASP/8/45, 18–26 November 2009 (Eighth Session of the ASP).

⁴³ Report of the Bureau on the Strategic Planning Process of the Court (n 41) paras 1–7.

⁴⁴ Strengthening the ICC and the ASP, ICC-ASP/6/Res.2, 14 December 2007 (Sixth Session of the ASP) para. 21, ‘[w]elcome[d] the efforts of the Court to further develop the Strategic Plan...’. This approach has also been taken in relation to updates to the Strategic Plan, see Strengthening the ICC and the ASP (2013) (n 36) para. 47, ‘[t]akes note of the Court’s Strategic Plan for 2013–2017’.

towards most policies and strategies, falls clearly within the scope of administrative oversight foreseen in Article 112(2)(b) and respects the judicial independence of the ICC. However, the Assembly has not maintained this approach in relation to all policies and strategies. In some cases this has negatively impacted their implementation.

In one notable instance, a dispute emerged between States Parties and the ICC over the Court's obligations to fund family visits of indigent detainees. Consequently, the Assembly contradicted a judicial decision by the Presidency on the matter and took steps to ensure that the ICC's policy, which was in line with the decision, could not be implemented. Some States Parties had objected to the ICC's policy of funding family visits in 2007 when they discovered the practice had been established without prior consultation with the Assembly.⁴⁵ States Parties were particularly concerned not to recognize a legal obligation to fund such visits and decided that the legal and policy aspects, as well as the human rights dimension and budgetary impact, should be assessed.⁴⁶ While discussions were continuing between the Assembly and the ICC, in March 2009, the Presidency issued a judicial decision in response to a complaint raised by one detainee regarding the number of family visits that the Registry had stated it was willing to fund.⁴⁷ The decision found that, in order to give effect to the right to family visits, the ICC has a positive obligation to fund family visits of indigent persons, although it could not be unlimited.⁴⁸ Determined not to set a legal precedent that national authorities would be expected to follow,⁴⁹ the Assembly issued a resolution at its next session contradicting the Presidency's decision by reaffirming many States Parties' position 'that according to existing law and standards, the right to family visits does not comprise a co-relative legal right to have such visits paid for by the detaining authority or any other authority'.⁵⁰ Furthermore, the Assembly went on to establish a special fund for family visits to ensure that they are funded entirely through voluntary donations,⁵¹ even though only one state had committed to make a contribution.⁵² The fund has received little financial support and it remains to be seen what will happen if the money runs out.⁵³

⁴⁵ See ASP to the Rome Statute of the ICC, Official Records: Seventh Session, The Hague, 14–22 November 2008, vol. 1, 12.

⁴⁶ Strengthening the ICC and the ASP (2007) (n 44) para. 14.

⁴⁷ Decision on 'Mr Mathieu Ngudjolo's Complaint under Regulation 221(1) of the Regulations of the Registry against the Registrar's Decision of 19 November 2008', *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-RoR217-02/08-8, Presidency, ICC, 10 March 2009.

⁴⁸ Ibid. See also H Abtahi et al., 'The Judicial Review Powers of the Presidency of the International Criminal Court: Safeguards for the Protection of Human Rights' (2013) 12 *The Law and Practice of International Courts and Tribunals* 281, 293–7.

⁴⁹ See e.g. ASP, Official Records: Seventh Session (n 45) vol. 1, 12–13.

⁵⁰ Family visits for indigent persons, ICC-ASP/8/Res.4, 26 November 2009 (Eighth Session of the Assembly of States Parties) para. 2.

⁵¹ Programme budget for 2011, the Working Capital Fund for 2011, scale of assessments for the apportionment of expenses of the ICC, financing appropriations for 2011 and the Contingency Fund, ICC-ASP/9/Res.4, 10 December 2010 (Ninth Session of the Assembly of States Parties) Section X.

⁵² Financial Statements for the period 1 January to 31 December 2010, ICC-ASP/10/12, 12–21 December 2011 (Tenth Session of the Assembly of States Parties); Germany made a voluntary contribution of €85,000.

⁵³ Financial Statements for the period 1 January to 31 December 2011, ICC-ASP/11/12, 14–22 November 2012 (Eleventh Session of the Assembly of States Parties); Germany made one further contribution of €85,000. Since then no other state has done so.

The time the Assembly is taking to engage with the ICC on some policy and strategy issues, especially where they require additional resources, is also having a negative impact on their implementation. In particular, in August 2011 the ICC circulated to the Assembly Draft Guidelines Governing the Relations between the Court and Intermediaries, which seek to ensure the effectiveness of its work with such actors in the field. The CBF stated that their adoption would 'undoubtedly enhance the security of the Court's proceedings if intermediaries were utilized with prudence and in a way that was clearly understandable by the parties'.⁵⁴ However, as of the end of 2013, the Assembly had failed to give substantive consideration to the Guidelines beyond identifying numerous related issues for further discussion.⁵⁵ In the meantime, the ICC reports that it has been implementing the Guidelines to some extent within existing resources, but it is not able to fund all aspects of it.⁵⁶

Recent decisions by the Assembly regarding budget requests by the OTP to implement its Strategic Plan for June 2012–15⁵⁷ threaten to undermine its implementation and potentially the independence of the prosecutor. The Strategic Plan presents a significant revision of the OTP's working practices, including additional investment in investigations following numerous Court decisions that the Office had failed to meet evidentiary thresholds set out in the Statute.⁵⁸ The prosecutor requested an additional €7.47 million for 2014 towards implementing the strategy and indicated that it would ask for a further increase of €12 million phased over the following three years.⁵⁹ It also reduced the number of active investigations in 2014 from seven to five.⁶⁰ However, the prosecutor's plans to implement the Strategic Plan in 2014 have been affected by the Assembly's decision, acting on the recommendation of the CBF, to approve approximately two-thirds of the OTP's request for additional resources in the year.⁶¹

⁵⁴ Report of the CBF on the work of its 21st session, ICC-ASP/12/15, 20–8 November 2013 (Twelfth Session of the Assembly of States Parties) para. 168.

⁵⁵ Report of the Bureau on victims and affected communities and the Trust Fund for Victims, including reparations and intermediaries, ICC-ASP/12/38, 20–8 November 2013 (Twelfth Session of the Assembly of States Parties) para. 7, 'there may be a need for further discussions on the issue, taking into account any developments in the case law, the duty of overseeing the functions carried out by intermediaries, the possible liability of the Court if an intermediary suffers harm or damage as the Court discharges its mandate and, *inter alia*, the consequences its use could have for a fair and expeditious trial. Furthermore, after the experience gained in the Lubanga case, the use of intermediaries has become an issue that deserves attention to prevent and/or address, as appropriate, any alleged offence against the administration of justice under article 70 of the Rome Statute.'

⁵⁶ Report of the Court on the implementation in 2013 of the revised strategy in relation to victims, ICC-ASP/12/41, 20–8 November 2013 (Twelfth Session of the Assembly of States Parties) paras 44–5.

⁵⁷ Strategic plan—June 2012–15, OTP, ICC, 1 October 2013 <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf> accessed 17 March 2014.

⁵⁸ For example, Pre-Trial Chambers have decided that the Prosecutor had not provided sufficient evidence to confirm charges and proceed to trial in four cases: Callixte Mbarushimana, Bahar Idriss Abu Garda, Henry Kiproni Kosgey, and Mohammed Hussein Ali.

⁵⁹ Strategic plan—June 2012–15, OTP (n 57) paras 99–102.

⁶⁰ Proposed Programme Budget for 2014 of the ICC, ICC-ASP/12/10, 20–8 November 2013 (Twelfth Session of the Assembly of States Parties) para. 137.

⁶¹ Programme budget for 2014, the Working Capital Fund for 2014, scale of assessments for the apportionment of expenses of the ICC, financing appropriations for 2014 and the Contingency Fund, ICC-ASP/12/Res.1, 27 November 2013 (Twelfth Session of the Assembly of States Parties); the Assembly reduced the OTP's requested increase for 2014 by approximately €2.5 million.

In response, the OTP has stated that the resources provided are only sufficient to conduct four investigations in 2014.⁶² How the Assembly deals with these significant additional resource requests in the next years will inevitably determine whether the OTP's strategy can be implemented.

It would be wrong to argue that the Assembly should not provide input into strategies and policies which contain elements of prosecutorial discretion or judicial decisions or that the Assembly must write a blank cheque to implement new policies and strategies. It clearly has a mandate in Article 112 to both provide management oversight of the administration of the ICC and to decide the ICC's budget. However, the Assembly also has a responsibility in performing these functions to ensure that it does not undermine the ability of the ICC to function effectively or the independence of the Court.

6.3.2 Inspection, evaluation, and investigation

Despite its inclusion in the Rome Statute, the Assembly only took the decision to operationalize the IOM at its twelfth session. The Assembly gave little consideration to the mechanism in its first sessions, until a series of reports in 2004 of sexual exploitation and abuse by United Nations peacekeepers prompted States Parties to recognize that independent investigation mechanisms must be put in place to ensure that any allegations made against the ICC's officials and staff are dealt with effectively.⁶³ In part due to reluctance from the ICC,⁶⁴ it took four years to establish the IOM with a limited Terms of Reference to conduct only investigations into misconduct by ICC-elected officials, ICC staff, and contractors, while further consideration was given to expanding its mandate to include inspection and evaluation functions.⁶⁵ However, concerns raised by the OTP that the Terms of Reference infringed its independence would prevent it from becoming operational for a further four years.

The Office of the Prosecutor opposed the Assembly's decision to provide the IOM with *proprio motu* investigative powers over its staff, on the basis that it was inconsistent with the requirement in Article 42(2) that '[t]he Prosecutor shall have full authority over the management and administration of the Office, including the staff'.⁶⁶ It argued that the prosecutor must consent to any investigation of his staff by the IOM.⁶⁷ It also expressed concern that there was no requirement that the IOM consult with

⁶² Presentation by the OTP to the Hague Working Group on 10 April 2014.

⁶³ See A Khan, 'The real issue concerns delimitation of the Court's independence and the oversight role of the Assembly which can only be decided through a constructive dialogue between the Assembly, Court officials and civil society on the expectations of oversight' (*ICCForum.com*) <<http://iccforum.com/oversight>> accessed 4 August 2014.

⁶⁴ Report of the Bureau on the IOM, ICC-ASP/7/28, 14–22 November 2008 (Seventh Session of the Assembly of States Parties); the Registrar initially opposed the need for an IOM on the basis that the ICC had mechanisms to address misconduct. However, the Bureau disagreed strongly and underlined that 'it would be insufficient for the Court to only internally deal with misconduct if it is to convincingly address such cases'.

⁶⁵ Establishment of an IOM (n 31).

⁶⁶ Report of the Bureau on the IOM, ICC-ASP/9/31, 6–10 December 2010 (Ninth Session of the Assembly of States Parties) paras 43–5.

⁶⁷ *Ibid.*, para. 46.

the prosecutor before conducting such an investigation and that the system could be abused by opponents of the ICC to interfere in its work.⁶⁸ Some academics and one State Party supported the OTP's position.⁶⁹ However, while other States Parties recognized the legitimacy of the Office's concerns, they considered these could be addressed through procedural safeguards and wanted to push ahead with making the IOM operational.⁷⁰ The latter approach had merit. The Terms of Reference went too far in almost completely excluding the prosecutor's involvement. However, serious allegations against staff of the OTP have to be dealt with effectively and independently. The OTP could not investigate itself independently. Giving the prosecutor the ability to stop the IOM's investigations would have undermined the integrity of the process and opened the prosecutor and the IOM to attack. Better safeguards needed to be found. Efforts continued in the next years to find solutions, particularly in developing an Operational Mandate for the IOM, but, initially, agreement could not be found to take the IOM forward.⁷¹ The Assembly therefore turned its attention to developing the inspection and evaluation functions of the IOM.⁷²

The risks posed by the failure to operationalize the IOM became apparent in April 2013 when the ICC reported that a former staff member of the Victim and Witnesses Unit in the Registry had been accused of sexual abuse of protected witnesses in a safe house in Kinshasa.⁷³ As the IOM was not operational, the ICC could only respond to the disturbing allegations by conducting an internal inquiry.⁷⁴ In an effort to uphold the credibility of the inquiry, the Registrar commissioned an ad hoc independent external review panel.⁷⁵ But even with this safeguard, the lack of a fully independent investigation was far from desirable.

Fortunately, at the same time, the Bureau's Hague Working Group was increasingly engaged with the ICC on resolving the outstanding issues to operationalize the IOM and was successful in 2013 in reaching a consensus solution which was acceptable to the organs of the Court, including the OTP.⁷⁶ According to a new Operational

⁶⁸ Ibid., para. 47.

⁶⁹ Ibid., paras 52–63; see also comments by J Alvarez, 'The Proposed Independent Oversight Mechanism for the International Criminal Court'; N Cowdery, 'When dealing with alleged misconduct by staff in the Prosecutor's office, the Prosecutor and not the Independent Oversight Mechanism should retain and must exercise authority to investigate and decide'; and H van der Wilt, 'The demand of the Prosecutor of the International Criminal Court that any investigation by the Independent Oversight Mechanism into alleged misconduct of his staff members requires his prior authorization is not unreasonable or far-fetched' (*ICCForum.com*) <<http://iccforum.com/oversight>> accessed 4 August 2014.

⁷⁰ Report of the Bureau on the IOM (2010) (n 66) para. 52.

⁷¹ Report of the Bureau on the IOM, ICC-ASP/10/27, 12–21 December 2011 (Tenth Session of the Assembly of States Parties) paras 13–16.

⁷² Ibid., paras 17–19; Report of the Bureau on the IOM, ICC-ASP/11/27, 14–22 November 2012 (Eleventh Session of the Assembly of States Parties) para. 18.

⁷³ 'ICC Internally Inquires on Allegations of Sexual Abuse by Former ICC Staff Member', *ICC Press Release*, 12 April 2013.

⁷⁴ Ibid.

⁷⁵ 'ICC Commissions an Independent External Review of the Allegations of Sexual Assault', *ICC Press Release*, 20 June 2013. The Commission reported in December 2013 confirming the results of the ICC's internal inquiry, see 'The External Independent Review Submits its Report on Alleged Sexual Abuses in DRC', *ICC Press Release*, 20 December 2013.

⁷⁶ Report of the Bureau on the Independent Oversight Mechanism, ICC-ASP/12/27, 20–8 November 2013 (Twelfth Session of the Assembly of States Parties) para. 12.

Mandate adopted by the Assembly at its twelfth session, the IOM can proceed with an investigation without the prosecutor's consent, but it contains a number of important safeguards to ensure that it does not impede the authority or independence granted to the prosecutor.⁷⁷ In particular, the IOM must notify the prosecutor when it receives reports of misconduct that merit investigation.⁷⁸ This will be followed by five days of consultation with the prosecutor before the investigation is commenced.⁷⁹ The IOM is expressly required to 'use all appropriate diligence to address concerns of heads of organs in order to avoid any negative impact on on-going investigative, prosecutorial and judicial activities resulting from the proposed investigation'.⁸⁰ If the prosecutor believes the proposed investigation is outside the IOM's legal mandate, it may seek a determination on the matter by the Presidency of the ICC.⁸¹ Completing the vision of the drafters, the Operational Manual also includes the IOM's inspection and evaluation functions.⁸²

The compromise on investigations will not completely satisfy a literalist interpretation of the independence of the prosecutor, but it does address the majority of the OTP's concerns and establishes a series of safeguards that seek to ensure that the IOM does not undermine the work of the Office. Importantly, the prosecutor has endorsed the system.⁸³ The independence of the IOM is also protected in the compromise, which safeguards the OTP and the credibility of the ICC should such allegations arise. For the IOM to be effective, the Assembly will need to provide it with sufficient resources, including the ability to develop internal expertise in relevant areas of the ICC's work.

Operationalizing the IOM is a positive, although long overdue, step to ensure that the Assembly conducts effective management oversight of the administration of the ICC and that serious allegations against ICC officials and staff are dealt with effectively. The Assembly should be commended for persisting with the initiative and engaging with the OTP to address its concerns.

6.4 Budgetary Decisions

To date, the Assembly has approved 12 annual budgets for the ICC totalling more than €1 billion, including €121.6 million for 2014. On the face of it, this is a significant investment in the new system of international justice. Whether it is sufficient is an important question considered in the previous chapter.⁸⁴ The Assembly's budgetary decisions are essential to the effective functioning of the ICC and, as demonstrated by the example in section 2(a) of the 2014 budget of the OTP, have the potential to significantly impact on prosecutorial and judicial activities. The Assembly therefore needs to strike a balance between ensuring that the ICC is allocated the resources it needs to function effectively and independently and ensuring that its annual requests and working practices are scrutinized to ensure efficiency and effectiveness. Unfortunately,

⁷⁷ IOM (n 31) Annex: Operational mandate of the IOM. ⁷⁸ Ibid., para. 32.

⁷⁹ Ibid., para. 34. ⁸⁰ Ibid., para. 34. ⁸¹ Ibid., para. 35. ⁸² Ibid.

⁸³ The Prosecutor's Address to the Twelfth Session of the Assembly, 20 November 2013, stated, '[t]his agreement demonstrates the commendable ability of the Court and the Assembly of States Parties to work in concert to achieve results of mutual benefit'.

⁸⁴ See Ford, Chapter 5, this volume.

the Assembly's approach to the budget in recent years has failed to achieve such a balance, which has negatively impacted a number of areas of the ICC's work.⁸⁵

For a number of years culminating at the tenth session, five of the highest contributing states to the ICC budget⁸⁶ called for 'zero nominal growth', regardless of increases in the Court's workload or other established needs for more resources.⁸⁷ This met with strong opposition in the Assembly and long acrimonious negotiations on the budget dominating its sessions. The compromises reached included arbitrary cuts to the budget that, while never reaching zero nominal growth, went significantly below the budget requested by the Court and the amount recommended by the CBF.⁸⁸ Essentially, the Assembly based its decisions on what some states were willing to pay rather than the resource needs of the Court. This has threatened to turn the ICC into a resource- rather than impunity-driven court, which is inconsistent with the object and purpose of the Rome Statute to put an end to impunity.⁸⁹ If it continues, the practice will have a devastating impact on the work of the ICC and the independence of the ICC, especially if the prosecutor is forced to continue to choose between situations based on costs.⁹⁰ There is also a real risk that some States Parties could seek to influence the ICC's activities work through the budget.

Fortunately, following the tenth session, most calls for 'zero nominal growth' by these five States Parties have been dropped, indicating a change in their strategy in relation to the budget. There have been initiatives by other states to reignite the call, but so far they have been unsuccessful.⁹¹ Instead, the five have supported the Assembly's decisions to adopt the 2013 and 2014 budgets incorporating the full recommendations of the CBF. Those decisions have been reached by the Hague Working Group in advance of the Assembly's session and merely endorsed during the Assembly's sessions. This practice has won a lot of support because it has avoided the undesirable battles during the Assembly's sessions and created space for a number of other important issues like cooperation, complementarity, and victims to be added to the Assembly's agenda. It also bases budgetary decisions on the recommendations of the independent expert body rather than political discussions among states.

However, the current approach is still problematic. In particular, if the Assembly adopts the approach of rubber-stamping the Committee's recommendations as a package each year, with only minor consideration by the Hague Working Group, the Committee will effectively decide the ICC's budget. This is arguably inconsistent with the express requirement in Article 112(2)(d) that the Assembly consider and decide the budget. It also undermines the integrity of the budget process. The

⁸⁵ For example, the CICC's Budget Finance Team has argued that, as a result of the budgetary culture and practice in recent years, the Court is currently underfunded in key areas of its work, including OTP investigations; outreach and public information activities; victim representation; defence investigations; processing victims' applications for participation and reparation; and the Trust Fund for Victims, see CICC, Submission to the CBF at its Twentieth Session on 2 to 26 April 2013, 12 April 2013.

⁸⁶ France, Germany, Italy, Japan, and the United Kingdom.

⁸⁷ See J O'Donohue 'Financing the International Criminal Court' (2013) 13 *International Criminal Law Review* 269, 279–81.

⁸⁸ Ibid.

⁸⁹ Ibid., 285–9.

⁹⁰ Ibid.

⁹¹ Canada called for 'zero nominal growth' at the twelfth session but received no support from other States Parties. It indicated that it would continue to call for 'zero nominal growth' in the future.

Committee's recommendations should be given significant weight, but their review by the Assembly, taking into account the views of the ICC, is equally important to ensure that the consequences of implementing them are fully considered before decisions are taken whether to adopt them or not. The manner in which members of the Committee are elected (in most cases uncontested in clean slate elections), the Committee's practice of not making public reports it receives from the ICC,⁹² and the Committee's recent practice of meeting in private with some States Parties in The Hague in advance of its sessions,⁹³ further enforces the need to review its recommendations in a forum which is open to all States Parties.

The Assembly has taken a positive step away from its past practice of imposing arbitrary cuts on the ICC's budget. However, the new approach of simply adopting the Committee's recommendations fails to fully safeguard against the negative impact of some budgetary decisions, as demonstrated by the OTP's indications that it may not be able to conduct all five planned investigations in 2014 due to insufficient resources. A thorough and transparent review of the Committee's recommendations by the Assembly, in consultation with the ICC, is vital.

6.5 Legislative Decisions

Despite the rush to complete its work in July 2002 as the entry into force of the Statute approached much earlier than anticipated, the Preparatory Commission finished drafting a number of the core and other important supplementary texts required by the Rome Statute, including the Rules of Procedure and Evidence,⁹⁴ the Elements of Crimes,⁹⁵ the Financial Regulations and Rules,⁹⁶ and the Agreement on Privileges and Immunities.⁹⁷ These were adopted at the Assembly's first session two months later without any substantial review or amendments.⁹⁸ The Assembly went on to complete other agreements and texts required by the Rome Statute in its early sessions.⁹⁹ The prompt

⁹² See e.g. the CICC's Budget Finance Team, Comments on the Proposed Programme Budget for 2014 of the ICC and other matters, 5 September 2013.

⁹³ Report of the Committee on Budget and Finance on the work of its twentieth session, ICC-ASP/12/5/Rev.1, 20–8 November 2013 (Twelfth Session of the ASP) para. 118; see also the CICC's Budget Finance Team, Comments on the Proposed Programme Budget for 2014 of the ICC and other matters (n 92), 'closed and non-transparent meetings with only a limited number of states parties who are represented in The Hague, in advance of the Committee's sessions is not appropriate and risks undermining the perception of the Committee's independence'.

⁹⁴ Required by Art 51(1) Rome Statute.

⁹⁵ Required by Art 9(1) Rome Statute.

⁹⁶ Required by Art 113 Rome Statute.

⁹⁷ In accordance with Art 48 Rome Statute.

⁹⁸ See ASP to the Rome Statute of the ICC, 'Official Records: First session, New York, 3–10 September 2002'. It also adopted Relevant Criteria for voluntary contributions to the ICC, ICC-ASP/1/Res.11, 3 September 2002 (First Session of the ASP) required by Art 116.

⁹⁹ The Negotiated Draft Relationship Agreement between the Court and the United Nations, required by Art 2 Rome Statute, was approved at its third session, see ICC-ASP/3/Res.1, 7 September 2004 (Third Session of the ASP) para.2; the Host State Agreement, required by Art 3 Rome Statute, was adopted at the fifth session, see Strengthening the ICC and the ASP, ICC-ASP/5/Res.3, 1 December 2006 (Fifth Session of the ASP) para. 6; the Assembly set out some initial criteria for the management of the Trust Fund for Victims, required by Art 79(3) Rome Statute, which were supplemented by the Regulations of the Trust Fund adopted at its fourth session, see Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, ICC-ASP/1/Res.6, 9 September 2002 (First Session of the ASP) Annex, and Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3, 3 December 2005 (Fourth Session of the ASP); Staff Regulations, required by Art 44(3) Rome Statute, were

establishment of this legislative framework enabled the functioning of the ICC in its first decade. With the exception of the amendments relating to the crime of aggression and war crimes adopted at the 2010 Review Conference, there was no significant appetite for further legislative changes until recently.¹⁰⁰ Indeed, while the Rome Statute is commonly viewed as not perfect, a number of States Parties have urged caution in pursuing and considering amendments in order to ‘preserve the integrity of the Rome Statute in particular the delicate balance achieved in Rome in 1998’.¹⁰¹ This approach has merit, particularly in the early history of the ICC and at a time when the ICC is facing numerous political attacks against its work. There is potential for the Rome Statute system to unravel if many of its provisions are reopened. However, new initiatives have emerged since 2012 to amend the Rules of Procedure and Evidence and possibly the Statute to expedite criminal proceedings. Other proposals for amendments have emerged as a result of the escalation of some African states’ concerns about the ICC’s work.

6.5.1 Amendments at the Review Conference

Much has been written on the decisions of the 2010 Review Conference to adopt amendments to incorporate the crime of aggression, expand the definition of war crimes in non-international armed conflict, and to put off the deletion of transitional provision Article 124.¹⁰² The work of the Review Conference is beyond the scope of this chapter. It should be noted, though, that the Assembly played an important role in filtering down more than ten initial proposals for amendments.¹⁰³ Only those amendments which attained consensus or would carry very broad support were taken forward to the Review Conference. It was stressed that it would not be the last opportunity to amend the Rome Statute and that proposals not considered in

adopted at the second session, see Staff regulations for the ICC, ICC-ASP/2/Res.2, 12 September 2002 (Second Session on the ASP); Guidelines for the selection and engagement of gratis personnel at the ICC, required by Art 44(4) Rome Statute, were adopted at the fourth session, see Strengthening the ICC and the ASP, ICC-ASP/4/Res.4, 3 December 2005 (Fourth Session of the ASP) para. 33 and Annex II.

¹⁰⁰ Only one amendment to the Rules of Procedure and Evidence was made at the tenth session to Rule 4 tasking the Presidency, instead of the plenary of judges, with assigning judges to divisions, see Amendments to Rule 4 of the Rules of Procedure and Evidence, ICC-ASP/10/Res.1, 20 December 2011 (Tenth Session of the ASP).

¹⁰¹ Report of the Working Group on the Review Conference, ICC-ASP/8/20, 18–26 November 2009 (Eighth Session of the ASP) Annex II, 52.

¹⁰² See e.g. R Clark, ‘Amendments to the Rome Statute of the International Criminal Court considered at the first Review Conference on the Court, Kampala, 31 May–11 June 2010’ (2010) 22 *Goettingen Journal of International Law* 689; A Zimmerman, ‘Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties’ (2012) 10 *Journal of International Criminal Justice* 209; C McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (New York: Cambridge University Press 2013).

¹⁰³ See Report of the Working Group on the Review Conference (n 101) 50–70, the Assembly considered and decided not to take forward: two of the three proposals by Belgium to prohibit the use of certain weapons as war crimes; a proposal by Mexico to include threat or use of nuclear weapons as a war crime; a proposal by the Netherlands to include the crime of terrorism; a proposal by Trinidad and Tobago to include the crime of international drug trafficking; a proposal by Norway seeking to enable more States Parties to enforce ICC sentences; and a proposal by AU States Parties to amend Art 16 allowing the General Assembly to defer investigations and prosecutions, if the UN Security Council failed to decide on the issue within six months.

Kampala could be taken up at future sessions of the Assembly.¹⁰⁴ A Working Group of the Assembly on amendments was therefore established to consider proposals not taken forward to Kampala and other proposals to amend the Statute and the Rules of Procedure and Evidence.¹⁰⁵

Initially, at least, States Parties have been reluctant to push forward proposals that were not considered at the Review Conference, although the AU has recently decided that it will promote again the proposal by AU States Parties to amend Article 16 (see sub-section 6.5.3.2).¹⁰⁶ The Assembly is also tasked by the Review Conference with reviewing its decision to retain Article 124 at its 14th session. This opens the door once more to strike out probably the most disturbing compromise reached in Rome.¹⁰⁷

The Assembly's approach to the Review Conference proposals prevented the agenda of the first Review Conference from being overburdened and established mechanisms for the Assembly to consider the remaining and new proposals.

6.5.2 Expediting the ICC's proceedings

Although concerns relating to the slow progress of the ICC's cases had been raised in the course of the ICC's first trials,¹⁰⁸ the issue came to the fore following the completion of the first ICC trial of Thomas Lubanga Dyilo in March 2012.¹⁰⁹ Around the same time, the Study Group on Governance decided to focus on expediting the criminal process,¹¹⁰ and requested the ICC take stock of the lessons learnt in its ten years of operation and to reflect on measures that could be taken to expedite the

¹⁰⁴ Ibid., 53.

¹⁰⁵ Review Conference, ICC-ASP/8/Res.6, 26 November 2009 (Eighth Session of the ASP) para. 4. Although the Assembly can itself consider and adopt amendments, Art 123(2) Rome Statute also provides that a majority of States Parties may convene future review conferences.

¹⁰⁶ Decision on the progress report of the African Commission on the implementation of the decisions on the ICC Doc Assembly/AU/13(XXII), Assembly/AU/Dec.493(XXII), 30–1 January 2014 (Twenty-Second Ordinary Session of the Assembly of the AU), 'African States Parties should... continue to speak with one voice to ensure that the African proposals for amendments to Articles 16 and 27 of the Rome Statute of the ICC are considered by the ASP Working Group on Amendments as well as by the forthcoming sessions of the Assembly of States Parties (ASP) to the Rome Statute.'

¹⁰⁷ Art 124 Resolution RC/Res.4, 10 June 2010 (Eleventh Session of the ASP). Art 124 permits a state on becoming party to the Rome Statute to declare that it does not accept the jurisdiction of the ICC with respect to war crimes for a period of seven years after the Statute enters into force for it. Amnesty International labelled Art 124 the 'licence to kill' provision; see for example Amnesty International, 'International Criminal Court: Making the Right Choices at the Review Conference' (2010) IOR 40/008/2010, 10.

¹⁰⁸ See e.g. War Crimes Research Project, 'Expediting Proceedings at the International Criminal Court' June 2011 <<http://www.wcl.american.edu/warcrimes/icc/documents/1106report.pdf>> accessed 11 March 2014.

¹⁰⁹ A number of commentators have expressed the view that the period of six years to complete the trial following his surrender to the ICC in 2006 was too long; see for example International Bar Association, 'ICC's Landmark Lubanga Trial: 'Lessons to be Learnt' <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=e7480ace-66aa-4650-8573-2ad0b89be23c>> accessed 10 March 2014; S Horton 'Unimaginable Atrocities: Six Questions for Bill Schabas' (*Harpers Magazine*, 18 May 2012) <http://harpers.org/blog/2012/05/_unimaginable-atrocities_-_six-questions-for-william-schabas/> accessed 11 March 2014, '[n]obody should wait six years in jail for their trial to take place'.

¹¹⁰ Report of the Bureau on the Study Group on Governance, ICC-ASP/11/31, 14–22 November 2012 (Eleventh Session of the ASP) para. 5.

judicial proceedings and enhance their efficiency.¹¹¹ In response, the ICC adopted a roadmap identifying 23 issues related to the Rules that require examination¹¹² and established a Working Group on Lessons Learnt, which is open to all interested ICC judges, to determine whether amendments to the Rules of Procedure and Evidence are required.¹¹³ At least five judges must support an amendment before it can be taken forward.¹¹⁴ The initiative has been supported by the Assembly.¹¹⁵ So far, the Working Group has submitted three proposals which have been reviewed and adopted by the Assembly:

- Rule 132 was amended at the 11th session, providing that some functions of the Trial Chamber, in respect of trial preparation, may be exercised by a Single Judge.¹¹⁶
- Rule 68 was amended at the 12th session, expanding the ability of the Trial Chamber in some circumstances to introduce previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony.¹¹⁷
- Rule 100 was amended at the 12th session, tasking the Presidency, pursuant to a recommendation of a Chamber, to authorize hearings in a state other than the host state.¹¹⁸

Although the Assembly endorsed the roadmap and commended the Court on the proposals submitted to date,¹¹⁹ some States Parties are becoming impatient at the relatively slow pace of change. During the 12th session, the Netherlands, Sweden, and the United Kingdom circulated an ‘Action Plan for expediting the criminal process of the International Criminal Court’ which calls for the work to be accelerated and for the ICC and the Study Group on Governance to focus in 2014 on the ‘Pre-Trial and Trial relationship and common issues’.¹²⁰ It is likely that this initiative will seek to confront the long pre-trial process and, in particular, the length of time it has taken in the cases so far to proceed to trial following confirmation of charges decisions. It also indicates that States Parties may present concrete proposals for amendments to the Rules of Procedure and Evidence and does not exclude amendments to the Statute. It is a bold move which may seek to reopen the carefully crafted compromise reached in Rome between proponents of the different legal systems. How far the initiative advances

¹¹¹ Study Group on Governance: Lessons Learnt: First Report of the Court to the Assembly of States Parties, ICC-ASP/11/31/Add.1, 14–22 November 2012 (Eleventh Session of the ASP) para. 1.

¹¹² Ibid., Annex. ¹¹³ Ibid, para. 13. ¹¹⁴ Ibid., para. 15.

¹¹⁵ Strengthening the ICC and the ASP (2011) (n 30) para. 38.

¹¹⁶ Amendment to the Rules of Procedure and Evidence, ICC-ASP/11/Res.2, 21 November 2012 (Eleventh Session of the ASP).

¹¹⁷ Amendments to the Rules of Procedure and Evidence, ICC-ASP/12/Res.7, 27 November 2013 (Twelfth Session of the ASP) para. 2. The International Bar Association called on Trial Chambers to ‘exercise caution in its application of Rule 68’ recognizing fundamental fair trial guarantees, see ‘IBA ICC Programme briefing note, Rule 68 Amendment Proposal’, November 2013.

¹¹⁸ Amendments to the Rules of Procedure and Evidence (n 117) para. 1, previously, the plenary of judges made such decisions.

¹¹⁹ Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/11/Res.8, 21 November 2012 (Eleventh Session of the Assembly of States Parties) para. 41.

¹²⁰ Details of the proposal are available at <<http://www.diplomatmagazine.nl/2013/11/27/4958/>> accessed 28 January 2014.

depends on whether there is sufficient dissatisfaction with the current system amongst advocates from all legal traditions to consider changing it.

Although it could be argued that a number of the problems regarding the length of the ICC's proceedings arise from the Rules of Procedure and Evidence and could have been addressed by the Assembly much earlier, the Assembly has been relatively quick to respond to the delays that have arisen in the Court's first cases. The processes that they have prompted and the discussions that the Assembly is now engaged in with the ICC to expedite the process have the potential to positively impact the efficiency of the Court and safeguard the right of the accused to be tried without undue delay. Caution will need to be exercised, however, to ensure that the focus remains on improving the procedures and that the rights of the accused and victims are respected.

6.5.3 Amendments arising from some African states' concerns regarding the ICC's cases

In October 2013, the AU convened an extraordinary session to discuss concerns about the ICC's cases, including the then scheduled start of the ICC's case against Kenyan President Uhuru Kenyatta.¹²¹ It issued a decision that any serving AU head of state or government or anybody acting or entitled to act in such capacity must not be prosecuted by the ICC and that AU members should propose amendments to the Rome Statute.¹²²

6.5.3.1 Amendments to Rule 134 of the Rules of Procedure and Evidence

In an effort to address specific concerns raised in the AU Decision that the ICC's cases against the President and Deputy President of Kenya were distracting and preventing them from fulfilling their constitutional duties,¹²³ Botswana, Liechtenstein, and Jordan took the initiative to propose amendments to Rule 134 of the Rules of Procedure and Evidence, including to codify elements of a decision of the Appeals Chamber in October 2013 relating to the request of the Deputy President of Kenya to be excused from continuous presence at his trial.¹²⁴ That decision found the requirement in Article 63(1) that '[t]he accused shall be present during the trial' not to be an absolute bar to the continuation of trial proceedings in the absence of the accused,¹²⁵ and set out six criteria which, if fulfilled, could lead to an accused being excused from being physically present.¹²⁶ The proposal also introduced new rules providing

¹²¹ At the time the extraordinary session was held, the trial of Uhuru Kenyatta was scheduled to commence on 12 November 2013. That date was subsequently vacated.

¹²² Decision on Africa's Relationship with the International Criminal Court, Ext/Assembly/AU/Dec.1, 12 October 2013 (Extraordinary Session on the Assembly of the African Union) para. 10 ('African Union's October 2013 Decision').

¹²³ Ibid., paras 4–7.

¹²⁴ Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1066, AC, ICC, 25 October 2013.

¹²⁵ Ibid., para. 1.

¹²⁶ Ibid., para. 2

(i) the absence of the accused can only take place in exceptional circumstances and must not become the rule; (ii) the possibility of alternative measures must have been considered,

for the participation at trial through communication technology, such as a video link. It was generally a positive effort to engage with the AU's concerns without interfering in the ICC's cases. However, simply codifying existing jurisprudence, which had established such strict conditions for excusal, was not acceptable to the Kenyan government.

Driven by an apparent determination to offer something to appease the AU's concerns, the Assembly eventually adopted an additional provision, Rule 134 *quater*, which provides for the excusal from presence at trial of a person who is appearing by summons and mandated to fulfil extraordinary public duties at the highest national level.¹²⁷ Such persons can apply for an excusal and, if alternative measures are inadequate, the Chamber shall grant the request 'where it determines that it is in the interests of justice and the rights of the accused are fully ensured'.¹²⁸ The fact that Rule 134 *quater* has been adopted as a separate paragraph and without cross-reference to Rule 134 *ter* (which largely codifies the Appeals Chamber's Decision) demonstrates that the Assembly intended Rule 134 *quater* to exist as a distinct provision and to establish a special test for the excusal from presence at trial of a person who performs extraordinary public duties at the highest national level.¹²⁹ Although some elements of the Appeals Chamber's test are incorporated into Rule 134 *quater*, the Rule deviates from the jurisprudence in a number of ways. In particular, it omits the requirement that an accused who is mandated to fulfil extraordinary public duties at the highest national level must have 'exceptional circumstances' to request the excusal. Indeed, the reasons for the request are not mentioned—establishing status is sufficient. It also omits the requirement that '[a]ny absence must be limited to what is strictly necessary and must not become the rule'. Taken together, these omissions imply that requests may be granted based on status rather than reason and possibly for indefinite periods. Indeed, immediately following the Assembly's session, the Deputy President of Kenya applied for a broad excusal from attending his trial based on the new Rule.¹³⁰ That application was conditionally granted by the Trial Chamber.¹³¹ The Prosecution applied for leave to appeal the decision on the basis that the Rule is inconsistent with Article 63(1), Article 27(1), and Article 23(1) and according to Article 51(5), in the event of conflict

including, but not limited to, changes to the trial schedule or a short adjournment of the trial; (iii) any absence must be limited to that which is strictly necessary; (iv) the accused must have explicitly waived his or her right to be present at trial; (v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.

¹²⁷ Amendments to the Rules of Procedure and Evidence (n 117).

¹²⁸ Rule 134 *quater* (2).

¹²⁹ The Trial Chamber found that Rule 134 *quater* is distinct from Rule 134 *ter*; see Reasons for the Decision on Excusal from Presence at Trial under Rule 134 *quater*, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1186, TC V(A), ICC, 18 February 2014, paras 50–2.

¹³⁰ Defence request pursuant to Art 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, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1124, Defence of Mr Ruto, 16 December 2013.

¹³¹ The decision was delivered during a status conference on 15 January 2014. It requires that he must attend a number of hearings during the trial. The Trial Chamber's reasons are set out in: Reasons for the Decision on Excusal from Presence at Trial under Rule 134 *quater*, *Ruto and Sang* (n 129).

between the Statute and the Rules of Procedure and Evidence, the Statute must prevail.¹³² However, the application for leave was denied.¹³³

Debate on whether Rule 134 *quater* is consistent with the Statute will no doubt continue and the matter may also arise in the future in the ICC's cases. However, independent of the specific legal issue, the Assembly's approach to the amendment still raises significant questions. At the time the Assembly negotiated and adopted the Rule, it was clear that it went beyond the Appeals Chamber's general interpretation of Article 63(1) in its October 2013 Decision and the test it established for determining excusal requests. It is easy to understand how States Parties faced with strong regional concerns, including efforts to call for African states to withdraw from the Rome Statute,¹³⁴ have endeavoured to address those concerns and offer some compromise. Rule 134 *quater* is less problematic than other proposals discussed at the 12th session and does provide the judges with some discretion.¹³⁵ However, had the ICC decided that the Rule is inconsistent with Articles 63(1), 27(1), or 23(1), as some, including the prosecutor, have strongly argued, and refused to grant the request, it may have generated an even stronger political backlash from some African states, more efforts to undermine the ICC, and additional pressure for the Assembly to take further measures that undermine the integrity of the Statute and the effectiveness of the Court.

6.5.3.2 Kenyan and AU States Parties' proposals to amend the Rome Statute

On the back of the AU's October 2013 Decision,¹³⁶ Kenya submitted five new proposals to amend the Rome Statute shortly before the commencement of the 12th session. As they were not submitted three months in advance of the session, in accordance with Article 121(2), they were not formally considered by the Assembly but may be considered at either a special session of the Assembly¹³⁷ or at its 13th session in December 2014. Kenya has proposed to amend:

¹³² Prosecution's application for leave to appeal the decision on excusal from presence at trial under Rule 134 *quater*, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1189, OTP, ICC, 24 February 2014.

¹³³ Decision on 'Prosecution's application for leave to appeal the decision on excusal from presence at trial under Rule 134 *quater*', *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1246, TC VI(A), ICC, 2 April 2014, Judge Olga Herrera Carbuccia dissenting.

¹³⁴ See e.g. Amnesty International, 'African States Must Reject Calls to Withdraw from the ICC' (10 October 2013).

¹³⁵ For example, one proposal by Kenya during the negotiations stated: '[n]otwithstanding paragraphs 1 to 3 above, an accused person who is a sitting Head of State or Government, or a person entitled to act in such capacity, having received summons to appear and submitted to the jurisdiction of the Court, may appear throughout the trial by Counsel. Such a person, who elects to appear by Counsel, will by notice in writing inform the Trial Chamber.' This and other proposals sought to provide for excusals without a request being made or the Trial Chamber making a determination on the request. Rule 134 *quater* (2) adopted by the Assembly requires a request and provides that the Trial Chamber shall grant it 'where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured'.

¹³⁶ AU's October 2013 Decision (n 122) para. 10(vi) 'Now decides... that African States Parties propose relevant amendments to the Rome Statute, in accordance with Article 121 of the Statute.'

¹³⁷ Art 112(6) Rome Statute requires that special sessions 'shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties'.

- The Preamble to emphasize that the ICC is complementary to regional as well as national criminal courts;¹³⁸
- Article 27 to preclude the ICC from prosecuting sitting heads of state or government;¹³⁹
- Article 63 to reflect that a Trial Chamber may excuse an accused person in exceptional circumstances from being continuously present at their trial;¹⁴⁰
- Article 70 to clarify that offences against the administration of justice can be committed by ICC officials so that ‘either party to the proceedings can approach the Court when such offences are committed’;¹⁴¹
- Article 112 to operationalize the IOM.¹⁴²

How the Assembly deals with each of these proposals, including whether it convenes a special session, remains to be seen. Notably, the AU has only called on its members to support the proposed amendment to Article 27.¹⁴³ Its support for this proposal is unsurprising as it directly addresses the central assertion of its October 2013 Decision that sitting heads of state should have immunity from prosecution before the ICC. However, that political position contradicts the central principle of the Article that official capacity ‘shall in no case exempt a person from criminal responsibility under the Statute’. This is one of the cornerstones of the Rome Statute and vital to achieving its object and purpose is to ensure that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’ and ‘to put an end to impunity for the perpetrators of these crimes’.¹⁴⁴ To promote amendments to Article

¹³⁸ United Nations, Kenya: proposal for amendments, C.N.1026.2013.TREATIES-XVIII.10 (Depositary Institution), 14 March 2014 <<https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf>> accessed 17 March 2014. The proposal is to amend the Preamble to state ‘[e]mphasizing that the International Criminal Court established under this Statute shall be complementary to national *and regional* criminal jurisdictions’ (addition in italics).

¹³⁹ Ibid. The proposal is to insert a new paragraph 27(3) which states ‘[n]otwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions.’

¹⁴⁰ Ibid. The proposal is to amend Art 63(2) to state:

Notwithstanding article 63(1), an accused may be excused from continuous presence in the Court after the Chamber satisfies itself that exceptional circumstances exist, [and] alternative measures have been put in place and considered, including but not limited to changes to the trial schedule or temporary adjournment or attendance through the use of communications technology or through representation of Counsel.

(2) Any such absence shall be considered on a case-by-case basis and be limited to that which is strictly necessary.

(3) The Trial chamber shall only grant the request if it determines that such exceptional circumstances exist and if the rights of the accused are fully ensured in his or her absence, in particular through representation by counsel and that the accused has explicitly waived his right to be present at trial.

¹⁴¹ Ibid. The proposal is to amend Art 70(1) to state ‘[t]he Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally *by any person*’ (addition in italics).

¹⁴² Ibid., providing no amendments to the text of the Statute, the proposal only states ‘[i]t is proposed that IOM be operationalized and empowered to carry out inspection, evaluation and investigations of all the organs of the Court’.

¹⁴³ Decision on the progress report of the Commission on the implementation of its decisions on the ICC Doc Assembly/AU/13(XXII) (n 106) para. 12(1).

¹⁴⁴ Preamble.

27, the AU requested a Special Segment at the 12th session to discuss ‘Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation’, which was approved by the Bureau.¹⁴⁵ The moderator’s summary of the Special Segment states that the ‘debate seemed to indicate that any substantive change to the Rome Statute was unlikely to materialize in the near future’, particularly taking into account that it would require a two-thirds majority of the Assembly to be adopted and seven-eighths of the Assembly would need to ratify the amendment in order for it to enter into force.¹⁴⁶

In addition, the AU has also called for renewed support for its members’ previous proposal to the Review Conference to amend Article 16 to empower the United Nations General Assembly to defer ICC investigations and prosecutions, if the Security Council fails to decide on a request within six months.¹⁴⁷ The proposal, which seeks to expand the potential for political interference in the ICC’s investigations and prosecutions, met strong opposition when the Assembly considered it in advance of the Review Conference.¹⁴⁸ This is unlikely to change.

The AU’s Decision to promote amendments to Articles 16 and 27, despite the fact that both appear destined to fail, does not mean that they are harmless initiatives. If other States Parties do not reject the efforts convincingly, there is a danger that any future discussions or the outcomes of votes on the proposals could be used to exert political pressure on the prosecutor and the judges, justify non-cooperation, undermine the legitimacy of the ICC to prosecute sitting heads of state, and fuel efforts, including before other courts and bodies, to erode the principle agreed in Rome that no one can be above the law. Indeed, during the Special Segment, some states implied that the prosecutor should use her discretion to achieve the delicate balancing act to achieve the fight against impunity on the one hand, and peace and stability on the other.¹⁴⁹ Such statements risk being interpreted as inappropriate political pressure regarding the ICC’s current and future cases relating to heads of state. The proposals may also prompt efforts for further questionable rule changes.¹⁵⁰

¹⁴⁵ Bureau of the Assembly of States Parties, Agenda and Decisions, Twelfth meeting, 1 November 2013.

¹⁴⁶ Special segment as requested by the AU: ‘Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation’, Informal summary by the Moderator, ICC-ASP/12/61, 27 November 2013 (Twelfth Session of the Assembly of States Parties).

¹⁴⁷ See Report of the Working Group on the Review Conference (n 101) 70.

¹⁴⁸ Ibid., paras 60–1, ‘[c]oncern was expressed that the proposal broadened the scope for political interference with the activity of the Court.... Doubts were raised as to whether the provision would be compatible with the Charter of the United Nations... [t]he view was expressed that an expansion of that provision would not serve the interest of the Court and could not, therefore, be supported by States Parties.’

¹⁴⁹ Informal summary by the Moderator (n 146) para. 9; the Moderator summarizes the discussion as follows: ‘[t]here was a discussion regarding the delicate balancing act required to achieve the objectives of the fight against impunity on the one hand, and peace and stability on the other. It was recognized that this constituted a challenge in the exercise of prosecutorial discretion. The appropriate evidential threshold was an issue to be taken into consideration in this context. It was moreover emphasized that deciding whether it was opportune and timely to proceed with an indictment was a difficult question faced by prosecutors before any criminal judicial organ.’

¹⁵⁰ Informal summary by the Moderator (n 146) para. 8: ‘[o]ne such avenue was the possibility of amending the Rules of Procedure and Evidence in order to ensure the necessary degree of flexibility when dealing with specific circumstances which could not have been foreseen when the Statute was adopted’.

The other Kenyan proposals, which are potentially less controversial, raise broader questions about the Assembly's approach to amendments, including whether it should maintain its generally cautious approach. The proposal to amend Article 63(2) largely seeks to incorporate the Appeals Chamber's Decision on excusals.¹⁵¹ It raises the question as to whether and in what circumstances the Assembly should amend the Statute to reflect the Court's jurisprudence. This is a complex issue that needs to balance, on the one hand, the need in some circumstances to provide certainty on specific issues and, on the other, to allow the Court the space to further develop its jurisprudence and practice. The proposal also raises broader questions about the relationship between the Statute and the Rules of Procedure and Evidence and the order of amendments to both. As most aspects of the proposal are already reflected in Rule 134 *ter*, it is reasonable to ask whether an amendment to the Statute is necessary and, if so, whether, taking into account Article 51(5),¹⁵² the Assembly should have amended the Statute first and then the Rules.

The proposal to amend Article 70 seeks to clarify that ICC officials suspected of offences against the administration of justice are not currently excluded from the jurisdiction of the Court by the Statute. However, a plain reading of Article 70 does not exclude ICC officials and there do not appear to be any barriers that prevent the defence from bringing allegations of such offences to the attention of the Court. The proposal essentially seeks to introduce certainty and preclude alternative interpretations. The necessity of this proposed amendment is therefore questionable. There are many other more ambiguous provisions in the Rome Statute. Indeed, the drafters' use of 'constructive ambiguity' in many parts of the Rome Statute is regularly acknowledged. Some of these issues have been clarified in the drafting of the supplementary texts¹⁵³ and some have been deliberately left for the Court to address.¹⁵⁴ Of course, amendments can also possibly be a useful tool. The Assembly needs to consider though, in what circumstances such amendments are appropriate.

Another proposal relates to the amendment of Article 112, which seeks to operationalize the IOM. The exact proposal is not clearly articulated, but it nevertheless raises the question as to whether the IOM and other subsidiary bodies of the Assembly should be incorporated in the Statute. The IOM is of course already expressly recognized in Article 112(4). Moreover, the Assembly operationalized the IOM at its 12th session and it has established three other subsidiary bodies without amendments. These factors raise questions about the necessity of this proposed amendment. However, given the rocky road towards establishing and operationalizing the IOM

¹⁵¹ The proposal does not appear to incorporate Rule 134 *quater*.

¹⁵² Art 51(5) Rome Statute states, '[i]n the event of a conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail'.

¹⁵³ B Taylor III, 'Demystifying the Procedural Framework of the International Criminal Court: A Modest Proposal for Radical Revision' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers 2009).

¹⁵⁴ See L Sadat and R Carden, 'The New International Criminal Court: An Uneasy Revolution' (2000) 88 *Georgetown Law Journal* 381, 409 n 166; C Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' (2003) 1 *Journal of International Criminal Justice* 603, 605–6.

and the potential for disputes to recur,¹⁵⁵ it could be argued that there is a basis for the IOM's legal status, authority, capacity, and powers to be contained in the Statute.

The proposal to amend the Preamble to emphasize that the ICC is complementary to regional as well as national criminal courts (such as the proposed expanded mandate of the African Court on Human and Peoples' Rights) raises and fails to resolve complex questions regarding the relationship of any future regional criminal courts with the ICC and national justice systems. At present, other international and internationalized criminal courts are dealing with crimes that fall outside the jurisdiction of the ICC. The Assembly will need to consider whether it is necessary to define the relationship of the ICC with future international or regional criminal courts that may have jurisdiction over the same crimes as the ICC. If so, it will need to consider a number of issues, including admissibility, jurisdiction, competing requests, and cooperation.

Given that these proposals have been presented in the context of political efforts by the Kenyan government and the AU to stop the ICC's cases against the President and Deputy President of Kenya, the Assembly would be wise to continue adopting a cautious approach to amendments. The Assembly must continue to preserve the integrity of the Rome Statute by rejecting proposals like those to Articles 16 and 27 that seek to weaken the ICC's efforts to address impunity. To ensure that the Assembly is consistent and that it makes decisions focused on improving the Rome Statute, and that it is not merely responding to politicized demands, the Assembly should consider establishing general principles to guide its approach to amendments in considering the other Kenya proposals. It would be particularly important to establish when the Assembly will adopt amendments that seek to reflect the Court's jurisprudence and clarifications to provisions that are potentially ambiguous. Amendments should only be supported where it is demonstrated that they strengthen the Rome Statute system and the fight against impunity.

6.6 Elections

Electing the highest qualified senior officials to the ICC is among of the Assembly's most important responsibilities. Simply put, the quality of the leadership of the ICC (including the judges, the prosecutor, and deputy prosecutors elected by the Assembly) will decide whether the Court succeeds or fails. In its first 12 sessions, the Assembly conducted elections for 39 judicial vacancies and elected two successive prosecutors and three deputy prosecutors of the ICC.¹⁵⁶ It has also provided recommendations for the election of the Registrar by the plenary of judges.¹⁵⁷

¹⁵⁵ See section 6.3.2, this chapter.

¹⁵⁶ See the Assembly's elections webpage <http://www.icc-cpi.int/en_menus/asp/elections/judges/2013/Pages/2013.aspx> accessed 4 February 2014.

¹⁵⁷ To date this has been limited primarily to recommending criteria to be applied in the election rather than recommendations in relation to candidates, see Recommendation concerning the election of the Registrar of the International Criminal Court ICC-ASP/6/Rec.1 (Sixth Session of the Assembly of States Parties); Recommendation concerning the election of the Registrar of the International Criminal Court, ICC-ASP/11/Rec.1, 21 November 2012 (Eleventh Session of the Assembly of States Parties).

6.6.1 Elections of judges

In advance of the election of the first ICC judges in 2003, the Assembly developed an innovative minimum voting requirement system to achieve equitable geographical representation and a fair representation of female and male judges,¹⁵⁸ as well as judges with established competence in criminal law and procedure (list A) and international law (list B).¹⁵⁹ Instead of leaving it to States Parties to incorporate these criteria in their secret ballot choices, States Parties were required to vote for a minimum number of candidates from each region, list A and B, and a minimum number of women in the first four rounds of an election.¹⁶⁰ The requirements would be adjusted according to the overall composition of the elected and serving judges.¹⁶¹ However, the Assembly initially put off establishing an Advisory Committee on Nominations foreseen in Article 36(4)(c) to review the qualifications of the nominees.¹⁶²

The new system was considered to work relatively successfully in the first election. Seven women were elected, which was a significant improvement on elections for many other international courts,¹⁶³ but fell short of gender parity, which is arguably a logical interpretation of ‘fair representation’. Judges from all regions were elected; however, the Western Europe and Other Governments group still held seven of the positions, more than other regions.¹⁶⁴ Even greater balance has emerged over time, though. At the time of writing, women hold ten of the 18 judicial positions and states have been required in recent elections to vote for a minimum number of men.¹⁶⁵ All regions hold at least three judicial positions and the number of judges from Western Europe and Other Governments is five. The reasons for this adjustment are not immediately clear and further examination of States Parties’ motives is required. However, it is reasonable to assume that minimum voting requirements have contributed by ensuring that the criteria of gender and regional representation are given a high profile during

¹⁵⁸ Required by Art 36(8)(a)(ii) and (iii) Rome Statute.

¹⁵⁹ Art 36(5) Rome Statute requires that ‘[a]t the first election to the Court, at least nine judges shall be elected from list A and at least five from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified to the two lists.’

¹⁶⁰ Procedure for the election of the judges for the International Criminal Court, ICC-ASP/1/Res.3, 9 September 2002 (First Session of the Assembly of States Parties) paras 3 and 7.

¹⁶¹ Ibid., paras 6–7.

¹⁶² Project on International Courts and Tribunals, The International Criminal Court Nomination and Election of Judges: A Discussion paper by Thordis Ingadottir (June 2002) 5, ‘[a]t the last session of the Preparatory Commission, some delegations expressed skepticism about the establishment and use of an Advisory Committee. Some had doubts regarding the necessity, competence, and composition of such a committee, while others thought time constraints would preclude its establishment for the first elections of the Court.’

¹⁶³ ‘First 18 judges elected to the International Criminal Court’, *Coalition for the International Criminal Court Press Release*, 7 February 2003, quotes the Programme Director of the Women’s Caucus for Gender Justice stating: ‘[t]his is an unprecedented level of gender diversity in an international judicial institution’.

¹⁶⁴ The first 18 judges were made up of: three Africans; four Latin Americans; seven Western European and other governments; three Asians; and one Eastern European.

¹⁶⁵ Election of judges for the ICC: guide for fourth election, ICC-ASP/10/19, 12–21 December 2011 (Tenth Session of the Assembly of States Parties). Since the minimum voting requirements have swung to the advantage of males from 2011, only two women have been nominated compared to 19 males, although it should be noted that both female candidates were subsequently elected.

elections.¹⁶⁶ The minimum voting requirements have also contributed to ensuring that the requirements of Article 36(5) to elect at least nine judges from list A and at least five from list B are met. There are currently ten judges elected to the ICC from list A and five from list B.¹⁶⁷

The system, however, did not seek to introduce safeguards to ensure that the highest qualified candidates for judges are nominated and elected. On the contrary, despite the positive contribution of minimum voting requirements, they may also encourage regions to nominate only small numbers of candidates in order to benefit from the mandatory votes rather than encouraging more states to put forward their best candidates for the Assembly to choose from. Most States Parties have failed to establish transparent, structured, and independent national processes to identify highly qualified candidates.¹⁶⁸ As a result, most nominations are made in informal processes without consultation with civil society or the candidate being thoroughly vetted nationally to ensure they are the best available.¹⁶⁹ Furthermore, the practice of vote trading in international elections continues to be employed in ICC elections, indicating that many States Parties cannot be trusted to vet nominees and vote for the best candidates on their merits.¹⁷⁰

In 2011, largely prompted by the CICC's initiative to establish an Independent Panel of International Criminal Court Judicial Elections to evaluate candidates nominated for the election of six judicial vacancies at the tenth session,¹⁷¹ the Assembly finally established an Advisory Committee on Nominations. The Advisory Committee is an important addition to the framework that will examine the qualifications of nominees and make it more difficult for states to ignore them in deciding their votes. It conducted its first evaluation of candidates for the election of one judicial vacancy at the 12th session.¹⁷² However, it is not a complete solution.¹⁷³ The broader and more complex challenge remains to encourage more States Parties to search for and nominate the best candidates for elections in transparent national processes and to stigmatize the practice

¹⁶⁶ R MacKenzie et al., *A Study of States' Approaches to Elections in Selecting International Judges: Principle, Process and Politics* (Oxford: Oxford University Press 2012) 83, 'it is generally considered to be "an advantage" to be a female candidate in an [ICC] election'.

¹⁶⁷ The election of list B candidates who may not necessarily have courtroom experience has been questioned in recent years, see e.g. H Correll 'Foreword' in L Reydams et al. (eds), *International Prosecutors* (Oxford: Oxford University Press 2012).

¹⁶⁸ MacKenzie et al. (n 166) 93.

¹⁶⁹ Ibid., 84 '[i]n the absence of any obligation to declare which procedure is being used, and the option of using national judicial nomination procedures, many different procedures have been used, some of which may barely be said to amount to a "procedure" at all. In most states in the study, the nomination decision was made by just one or two government officials with no broader consultation.'

¹⁷⁰ Ibid., 122–7, 'the interview evidence suggests strongly that most states conclude mutual support arrangements for judicial candidatures on reciprocal political grounds that often do not take into account issues of qualifications'.

¹⁷¹ See Announcement to the Assembly of State Parties on the Independent Panel on International Criminal Court Judicial Elections, December 2010 <http://www.iccnow.org/documents/Judicial_Panel_Announcement.pdf> accessed 4 February 2014.

¹⁷² Report of the Advisory Committee on Nomination of Judges on the work of its second meeting, ICC-ASP/12/47, 20–8 November 2013 (Twelfth Session of the Assembly of States Parties) Annex 1.

¹⁷³ During the election of judges at the tenth session, two candidates who were assessed by the Independent Panel to be 'not qualified' received more than 30 votes in several rounds of ballots and one candidate received 51 votes in one round, although none of those identified as 'not qualified' were ultimately elected.

of vote trading. As the first President of the Assembly stated on behalf of the government of Jordan to the general debate at the tenth session: ‘[t]here is no humiliation quite like a successful election being succeeded by a wholly incompetent courtroom performance, resulting in possible appeals, and even ultimately a possible denial of justice for victims’.¹⁷⁴

Importantly, at its 11th session, the Assembly decided to continue to review the procedure for the nomination and election of ICC judges.¹⁷⁵ A number of proposals are already being considered to further improve the system.¹⁷⁶

6.6.2 Elections of the prosecutor and the deputy prosecutors

The Assembly Decision at its first session to make every effort to elect the ICC prosecutor by consensus has presented a number of difficult challenges in electing the first two prosecutors of the ICC.¹⁷⁷ In contrast, elections of deputy prosecutors which follow a clearly defined process whereby the prosecutor nominates three candidates who are presented to the Assembly for a contested election, without efforts to find consensus, have proved less controversial.

The first prosecutor was elected following a predominantly behind the scenes search process, which made it difficult to include all States Parties and for highly qualified candidates to put themselves forward. By the time it came to electing the second prosecutor in 2011, the Bureau endeavoured to establish a new process recognizing the unique importance of the position.¹⁷⁸ It established a Search Committee mandated to ‘facilitate the nomination and election, by consensus, of the next Prosecutor’.¹⁷⁹ It was specifically tasked with (i) receiving expressions of interest; (ii) actively identifying and informally approaching individuals who may satisfy the applicable criteria, in particular those contained in Article 42 of the Rome Statute, to see if they would express interest; (iii) reviewing the expressions of interest in light of the relevant criteria; and (iv) producing a shortlist of at least three suitable candidates for consideration by the Bureau.¹⁸⁰ The Committee identified 51 candidates, interviewed eight and presented a shortlist of four to the Assembly less than two months in advance of the tenth session.¹⁸¹

¹⁷⁴ Statement by Jordan to the General Debate of the tenth session, 14 December 2011.

¹⁷⁵ Strengthening the International Criminal Court and the Assembly of States Parties (2012) (n 119) para. 23.

¹⁷⁶ See Report to the Bureau on the review of the procedure for the nomination and election of judges, ICC-ASP/12/57, 20–8 November 2013 (Twelfth Session of the Assembly of States Parties).

¹⁷⁷ Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court, ICC-ASP/1/Res.2, 9 September 2002 (Third Session of the Assembly of States parties) para. 29.

¹⁷⁸ Fourteenth ICC-ASP Bureau Meeting, Agenda and Decisions, 5 October 2010, 3 ‘[t]he Bureau expressed its understanding that a consensus candidate should be found and that the unique nature and importance of the position would warrant a process that was different from the usual manner in which candidatures are presented in international organizations’.

¹⁷⁹ Bureau of the Assembly of States Parties: Search Committee for the position of the Prosecutor of the International Criminal Court: Terms of Reference, ICC-ASP/9/INF.2, 6–10 December 2010 (Ninth Session of the Assembly of States Parties) para. 5.

¹⁸⁰ Ibid., para. 6.

¹⁸¹ Assembly of States Parties to the Rome Statute of the International Criminal Court, ‘Official Records: Tenth Session, New York, 12–21 December 2011’, vol. I, 10–11.

At that point, informal consultations began to establish consensus which led to the formal nomination and election by consensus of Fatou Bensouda.

Despite the consensus within the Assembly and clear support for the new prosecutor,¹⁸² a number of states and some NGOs expressed dissatisfaction with the process.¹⁸³ Some of the criticism of the process has merit. First, the Search Committee was composed of only men. Second, it was arguably established too late and presented its shortlist too close to the tenth session. Third, it was unclear what capacity the members were serving in. Although the Search Committee's report states that they served in their personal capacities, not as state representatives,¹⁸⁴ its Terms of Reference expressly states that they are 'representatives' from regional groups.¹⁸⁵ Fourth, the process could arguably have been more transparent. Only the identities of the four short-listed candidates were made public.¹⁸⁶

Some States Parties also complained that the process was not consistent with the Rome Statute and that it is the responsibility of States Parties to identify and nominate candidates to be elected in a secret ballot, in accordance with Article 42(4).¹⁸⁷ Indeed, States Parties were urged to respect the Search Committee process and refrain from making nominations.¹⁸⁸ In June 2011 the AU approved the then Deputy Prosecutor Fatou Bensouda as the sole African candidate, which arguably undermined the search process.¹⁸⁹

A clear tension exists between the competitive secret ballot process set out in Article 42(4) and the subsequent political decision taken by the Assembly to try to elect the prosecutor by consensus. It is easy to understand why the Assembly wants to find a candidate for this most important position who enjoys universal support from States Parties. The election of candidates who enjoy such broad support from States Parties has the potential to positively impact on perceptions of and support for the ICC. Equally, a search process that considers candidates who may otherwise not be nominated by their own governments for political reasons is essential. However, unless the process to find consensus has the full support of States Parties, it can be counter-productive and susceptible to being undermined. An evaluation

¹⁸² Report of the Evaluation of the process on the election of the Prosecutor, ICC-ASP/12/58, 20–8 November 2013 (Twelfth Session of the Assembly of States Parties) para. 8 '[a]lthough not sharing the views regarding the work of the Search Committee, all States emphasized that the new Prosecutor is a highly competent person, with high moral character and extensive practical experience; and they extended their full support to her'.

¹⁸³ Ibid., paras 11–17; Amnesty International, 'International Criminal Court: Recommendations to the Assembly of States Parties at its tenth session (12 to 21 December 2011)' (December 2011) 4–5.

¹⁸⁴ Report of the Search Committee for the position of Prosecutor of the International Criminal Court (25 October 2011) para. 10.

¹⁸⁵ Bureau of the Assembly of States Parties: Search Committee for the position of the Prosecutor of the International Criminal Court (n 179) para. 4.

¹⁸⁶ Report of the Evaluation of the process on the election of the Prosecutor (n 182) para. 11, 'although it was agreed that some level of confidentiality of candidates was required, some argued that the confidentiality should have been lifted as some point earlier in the process'.

¹⁸⁷ Ibid., para. 12.

¹⁸⁸ See for example Twelfth ICC-ASP Bureau Meeting, Agenda and Decisions, 8 September 2011, 1.

¹⁸⁹ Decision on African Candidatures for posts within the international system Doc EX.CL/673(XIX), EX.CL/Dec.664(XIX), 23–8 June 2011 (Nineteenth Ordinary Session of the Executive Council of the African Union).

of the selection process reported in 2013 that States Parties remain divided on how to improve the process and efforts to find a way forward have been put off until the election of the next prosecutor.¹⁹⁰ This is unfortunate as there are potentially a number of areas where progress should be possible. In particular, changes could have been explored to build more trust and support for the work of possible future search mechanisms by developing better safeguards to ensure their independence, transparency, and competency. The timelines of the process could also have been considered to ensure that sufficient time is allocated for the Search Committee to conduct and complete its work and to present its shortlist well in advance of elections so that States Parties still have the opportunity to nominate other candidates, if they wish. Such solutions should be considered well in advance of the commencement of the next election process.

6.7 Responding to Non-Cooperation

Efforts by Sudanese President Omar Al Bashir to continue to travel after the ICC issued an arrest warrant against him in March 2009 resulted in a number of countries, including States Parties to the Rome Statute, hosting him without threat of arrest.¹⁹¹ His ability to evade justice has been supported by AU decisions that its members should not cooperate for his arrest.¹⁹²

The negative impact of the failure to execute the arrest warrant(s) prompted the Assembly to develop and adopt procedures relating to non-cooperation at its tenth session.¹⁹³ They provide for formal and informal diplomatic and political measures to respond to situations of non-cooperation referred to the Assembly by the ICC in accordance with Article 87(5) or (7).¹⁹⁴ They also provide that, exceptionally, the Assembly may act informally without a referral from the ICC where ‘there are reasons to believe that a specific and serious incident of non-cooperation in respect of a request for arrest and surrender of a person is about to occur or is currently on-going and urgent action by the Assembly may help bring about cooperation’.¹⁹⁵ The procedures provide that efforts will be led predominantly by the President of the Assembly working together with the Bureau.¹⁹⁶ In the case of referrals from the ICC, mechanisms may

¹⁹⁰ Report of the Evaluation of the process on the election of the Prosecutor (n 182) para. 20.

¹⁹¹ For details of Omar Al Bashir’s travel since the arrest warrant was issued see <<http://www.arrest-bashir.org/bashir-s-travels/>> accessed 9 February 2014.

¹⁹² Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII), Assembly/AU/Dec.245(XIII) Rev.1, 1–3 July 2009 (Thirteenth Ordinary Session of the Assembly of the African Union) para. 10 ‘the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan’. A similar decision was issued in July 2011 following the ICC’s decision to issue an arrest warrant against Muammar al-Gaddafi, see Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Doc EX.CL/670(XIX), Assembly/AU/Dec.366(XVII), 30 June–1 July 2011 (Seventeenth Ordinary Session of the Assembly of the African Union) para. 6.

¹⁹³ Strengthening the International Criminal Court and the Assembly of States Parties (2011) (n 30) Annex.

¹⁹⁴ Ibid., paras 7(a) and 10.

¹⁹⁵ Ibid., para. 7(b)

¹⁹⁶ Ibid., paras 14(a) and (b), 19 and 20.

also be established for the Bureau and States Parties to enter into open dialogue with the state in question.¹⁹⁷ The Assembly could also issue a draft resolution containing concrete recommendations on the matter.¹⁹⁸

In the two years after the procedures were established, formal responses were implemented following three referrals from the ICC to the Assembly and the United Nations Security Council finding that Malawi and Chad (on two separate occasions) had failed to cooperate with the arrest and surrender of Omar Al Bashir.¹⁹⁹ A fourth referral of non-cooperation was made following Omar Al Bashir's visit to the Democratic Republic of the Congo in February 2014.²⁰⁰

The President of the Assembly also responded to these and other incidents, including issuing a press release around Omar Al Bashir's visit to Nigeria in July 2013 and sending a letter calling upon the government to comply fully with its Rome Statute obligations.²⁰¹ These efforts have generated mixed results. Malawi, which was at the time in a period of political transition, reacted favourably to diplomatic approaches. With a new President, the government of Malawi declined to host the Sudanese President at the next AU summit scheduled to take place in the country and led to the venue being moved.²⁰² Nigeria provided explanations to the ICC about its failure to arrest Al Bashir, including that 'Nigeria was considering the necessary steps to be taken in line with its international obligations' when Omar Al Bashir departed suddenly.²⁰³ This convinced the Pre-Trial Chamber not to refer the matter to the Assembly or the Security Council.²⁰⁴ In contrast, however, Chad has largely rejected diplomatic pressure, insisting that Omar Al Bashir has immunity and that it had a duty arising from AU decisions requiring its members not to cooperate with the Court pursuant to the provisions of Article 98 relating to immunities.²⁰⁵ The Pre-Trial Chamber has rejected these arguments.²⁰⁶

¹⁹⁷ Ibid., para. 14(c) and (d).

¹⁹⁸ Ibid., para. 14(f).

¹⁹⁹ Decision Pursuant to Art 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, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-139, PTC I, ICC, 12 December 2011; Decision pursuant to Art 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-140, PTC I, ICC, 13 December 2011; Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09, PTC II, ICC, 26 March 2013.

²⁰⁰ Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-195, PTC II, ICC, 9 April 2014.

²⁰¹ Report of the Bureau on non-cooperation, ICC-ASP/12/34, 20–8 November 2013 (Twelfth Session of the Assembly of States Parties) paras 11–12.

²⁰² Report of the Bureau on non-cooperation, ICC-ASP/11/29, 14–22 November 2012 (Eleventh Session of the Assembly of States Parties) paras 5, 10, and 16.

²⁰³ Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-159, PTC II, ICC, 5 September 2013, para. 12.

²⁰⁴ Ibid., para. 13.

²⁰⁵ Report of the Bureau on non-cooperation, ICC-ASP/11/29 (n 202) para. 6.

²⁰⁶ Decision pursuant to Art 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir (n 199) paras 12–14.

The inconsistent outcomes are not surprising. The Assembly is largely limited to exerting diplomatic pressure which will inevitably yield results with some governments but not, at least in the short term, with others. The Assembly's efforts are particularly challenging given conflicting calls by the AU for its members not to cooperate with the ICC in some cases. The positive outcomes to date demonstrate that the procedures are definitely worth pursuing. But more needs to be done to increase pressure on governments who will hold out against the Assembly's measures. Unfortunately, politics within the Assembly threatens to limit further action. For example, as Chad has relied on the AU's decisions to justify its non-cooperation, it is likely that stronger measures, such as issuing a resolution on the matter, would be blocked by some African States Parties.

The ability of the Assembly to respond to non-cooperation by non-States Parties is particularly limited and requires further action by the Security Council in relation to situations it referred to the ICC. Regrettably, to date, the Security Council has only required governments of situations it has referred to cooperate with the ICC and merely urged other non-States Parties to do so.²⁰⁷ It has done nothing to respond to the ICC's referrals of non-cooperation in the Darfur situation.²⁰⁸

The current procedures are a good start and in some cases have already resulted in positive responses from governments that will hopefully ensure they are not repeated. However, as explained, the procedures also have their limitations and the Assembly should continue to build upon them in order to strengthen its advocacy. It is encouraging to note that other initiatives are being considered to approach the problem from different angles, including new efforts to develop arrest strategies.²⁰⁹ States Parties to the Rome Statute that are also members of the AU have an important responsibility to challenge further calls for non-cooperation. Similarly, States Parties on the Security Council have an important role to make sure that the Council responds effectively to ICC referrals of non-cooperation.

6.8 Other Initiatives to Support the ICC and the Rome Statute System

In addition to the functions mandated to the Assembly in the Rome Statute, in its first 12 years the Assembly has on its own initiative commenced a number of other initiatives aimed at supporting the work of the ICC and the realization of the Rome Statute system. In particular, the Assembly's Decision to include stocktaking of international criminal justice as a key agenda item on the Review Conference, including debates on complementarity, cooperation, the impact of the Rome Statute system on victims and

²⁰⁷ Resolutions 1593 (31 March 2005) UN Doc S/RES/1593(2005) '[d]ecides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully'. Resolution 1970 on Libya (26 February 2011) UN Doc S/RES/1970 (2011) contains almost the exact same wording.

²⁰⁸ Report of the Bureau on non-cooperation, ICC-ASP/11/29 (n 202) para. 11; see also Ruiz, Chapter 3, this volume.

²⁰⁹ Report of the Bureau on non-cooperation, ICC-ASP/12/34 (n 201) paras 26–7.

affected communities, and peace and justice, has prompted continued discussion on some of these issues in recent Assembly sessions.²¹⁰

6.8.1 Plan of Action for achieving universality and full implementation of the Rome Statute

At its fifth session, the Assembly established a Plan of Action for achieving universality and full implementation of the Rome Statute, asserting that both objectives are ‘imperative if we are to end impunity for the perpetrators of the most serious crimes of international concern, contribute to the prevention of such crimes, and guarantee lasting respect for and enforcement of international justice’.²¹¹ Recognizing that, since the adoption of the Rome Statute in 1998, a number of regional inter-governmental organizations, governments, and NGOs have been promoting both goals through advocacy, conferences, and technical and other assistance, the Plan seeks to promote better information sharing among those actors and to encourage more States Parties to join the effort.²¹²

Regrettably, seven years later, there is little evidence that the Plan of Action has had a significant positive impact in advancing the ongoing efforts. Most States Parties are not engaged in implementing of the Plan, as demonstrated by the low number of states reporting on their activities each year.²¹³ Progress continues, but remains slow. Seventeen states have ratified or acceded to the Rome Statute since the adoption of the Plan of Action.²¹⁴ But, at an average of just over two per year, universality remains a distant goal. Similarly, at least 34 states have enacted some form of legislation seeking to implement the Rome Statute into national law during this period.²¹⁵ Yet, at the end of 2013, 76 of the 122 States Parties had yet to enact legislation implementing both their complementarity and cooperation obligations.²¹⁶

There are two significant flaws in the Plan of Action. First, it relies on States Parties to take action on their own initiative, without establishing effective structures to promote initiatives or coordinate action. The Secretariat of the Assembly is tasked with the vague role of acting as a focal point for information exchange instead of a constructive mandate to promote the implementation of the Plan. Second, insufficient resources have been allocated for its implementation. For example, the Secretariat is

²¹⁰ Review Conference (n 105) para. 5. See also Review Conference Stocktaking of International Criminal Justice web page <http://www.icc-cpi.int/en_menus/asp/reviewconference/stocktaking/Pages/stocktaking.aspx> accessed 23 April 2014.

²¹¹ Plan of Action of the Assembly of States Parties for achieving universality and full implementation of the Rome Statute of the International Criminal Court, ICC-ASP/5/Res.3, Annex I, 1 December 2006 (Fifth Session of the Assembly of States Parties) para. 1.

²¹² Ibid., para. 6.

²¹³ Assembly of State Parties website <http://www.icc-cpi.int/en_menus/asp/sessions/plan%20of%20action/Pages/plan%20of%20action.aspx> accessed 11 February 2014, 23 States Parties replied to the Secretariat’s questionnaire in 2007; 12 in 2008; 23 in 2009; 18 in 2010; 13 in 2011; 20 in 2012; and 10 in 2013.

²¹⁴ Bangladesh, Cape Verde, Chile, Côte d'Ivoire, Czech Republic, Guatemala, Grenada, Japan, Madagascar, Maldives, Moldova, Philippines, Seychelles, St Lucia, Suriname, Tunisia, and Vanuatu.

²¹⁵ Based on the Coalition for the ICC ‘2013 Status of the Rome Statute around the world’ and updated information provided by the Coalition in April 2014.

²¹⁶ Ibid.

tasked to perform its role within existing resources and has not received any resources to implement the Plan since its adoption.²¹⁷ It is therefore largely limited to general tasks like sending annual letters to States Parties asking them to report on their activities. Unless ways are found to invigorate the Plan, it will become obsolete.

6.8.2 Promoting cooperation

To its credit, the Assembly committed early on to take additional steps to promote cooperation, beyond responding to incidents of non-cooperation, recognizing that ‘cooperation between the [ICC] and States Parties, international organisations and non-governmental organisations is an essential basis for the effective functioning of the Court’.²¹⁸ In particular, it has sought to promote national implementation;²¹⁹ cooperation by the United Nations, in accordance with the Relationship Agreement,²²⁰ and regional organizations entering into cooperation agreements.²²¹

Significantly, at its fifth session, based on a thorough study conducted by the Bureau’s Hague and New York Working Groups,²²² the Assembly adopted 66 recommendations on cooperation which cover a broad range of issues relating to national, regional, and international cooperation and provide a solid basis on which to develop the Assembly’s work.²²³ However, the large number of recommendations highlights the scope of the work ahead, which has proved difficult to organize.²²⁴ Furthermore, the fact that many States Parties have yet to ratify the Agreement on Privileges and

²¹⁷ Plan of Action of the Assembly of States Parties for achieving universality and full implementation of the Rome Statute of the International Criminal Court (n 211) para. 7.

²¹⁸ Report of the Bureau on cooperation, ICC-ASP/6/21, 30 November–14 December 2007 (Sixth Session of the Assembly of States Parties) para. 1.

²¹⁹ See e.g. Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/2/Res.7, 12 September 2003 (Second Session of the Assembly of States Parties) para. 3, ‘ratification must be matched by national implementation of the obligations emanating therefrom’.

²²⁰ Report of the Bureau on cooperation, ICC-ASP/6/21 (n 218) paras 60–3 provides an overview of the systems of cooperation that have been established between the ICC and the United Nations, which includes all principal organs of the UN, as well as peacekeeping operations and missions and the Funds and Programmes. At its sixth session, the ICC established, with the Assembly’s support, an ICC Liaison Office in New York to enable regular and efficient cooperation and exchange of information, see Strengthening the International Criminal Court and the Assembly of States Parties (2007) (n 44) para. 16.

²²¹ Ibid., para. 32. So far the European Union entered into an *Agreement between the International Criminal Court and the European Union on cooperation and assistance* in 2006. The Assembly has specifically encouraged the AU to enter into a cooperation agreement with the ICC and to establish an ICC-AU Liaison Office in Addis Ababa; see Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/8/Res.3, 26 November 2009 (Eighth Session of the Assembly of States Parties) para. 28. However, following the ICC’s arrest warrant against Omar Al Bashir, these initiatives have been blocked by members of the AU; see, in relation to the liaison office, Decision on the Progress Report of the Commission on the implementation of Decision Assembly/AU/Dec.270(XIV) on the second ministerial meeting on the Rome Statute of the International Criminal Court, Doc Assembly/AU/10(XV), Assembly/AU/Dec.296(XV), 25–7 July 2010 (Fifteenth Ordinary Session of the Assembly of the African Union) para. 8 ‘[d]ecides for now to reject the request by ICC to open a liaison officer to the AU in Addis Ababa’.

²²² Report of the Bureau on cooperation, ICC-ASP/6/21 (n 218).

²²³ Strengthening the International Criminal Court and the Assembly of States Parties (2007) (n 44) Annex II.

²²⁴ For example, at its fifth session, the Assembly identified 11 broad areas of priorities to be addressed by a new facilitator over a two-year period, Cooperation, ICC-ASP/8/Res.2, 26 November 2009 (Eighth Session of the Assembly of States Parties) para. 16.

Immunities,²²⁵ and most have yet to enact comprehensive implementing legislation or to enter into key cooperation agreements with the ICC on interim release,²²⁶ relocation of victims and witnesses,²²⁷ enforcement of sentences,²²⁸ and release of persons on acquittal or non-confirmation of charges,²²⁹ shows that the Assembly has its work cut out. Recently, the Assembly has sought to prioritize its work with mixed impact. For example, in 2011 and 2012 the Hague Working Group focused on the issue of interim release and worked with the ICC on developing a model agreement.²³⁰ But as of April 2014, only one state—Belgium—has entered into an agreement.²³¹ At the time of writing, no other states are reported to be in negotiations with the Court.²³² Efforts to encourage more states to enter into victim and witness relocation agreements have been more productive.²³³

The recent inclusion of discussions on cooperation to the agenda of the Assembly's sessions provides an important forum to promote cooperation, share experiences, and discuss common challenges.²³⁴ The Bureau is also considering other important issues, including non-essential contacts between States Parties and persons who are the subject of an ICC arrest warrant.²³⁵ However, much of the broad body of work currently rests with one facilitator, who has had to fundraise for initiatives like seminars to promote relocation agreements.²³⁶ It is reasonable to question whether the Assembly is investing sufficiently in its structures and activities to achieve progress at an effective rate.

6.8.3 Promoting complementarity

Following the stocktaking discussion on complementarity at the Review Conference, the Assembly began to focus on exploring further ways in which 'to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of

²²⁵ As of April 2014, 71 of the 122 States Parties to the Rome Statute and 1 non-State Party have ratified the Agreement.

²²⁶ Only Belgium has entered into an agreement to date, see 'Belgium and ICC Sign Agreement on Interim Release of Detainees', *ICC Press Release*, 10 April 2014.

²²⁷ Report of the Court on cooperation, ICC-ASP/12/35, 20–8 November 2013 (Twelfth Session of the Assembly of States Parties) para. 30, 13 as of October 2013.

²²⁸ *Ibid.*, para. 35, eight as of October 2013.

²²⁹ *Ibid.*, para. 40, none as of October 2013, although a model agreement was only distributed by the ICC to states in September 2013.

²³⁰ Report of the Bureau on cooperation, ICC-ASP/10/28, 12–21 December 2011 (Tenth Session of the Assembly of States Parties) para. 5.

²³¹ 'Belgium and ICC Sign Agreement on Interim Release of Detainees' (n 226).

²³² Report of the Court on cooperation (n 227) para. 39.

²³³ *Ibid.*, para. 30. Two seminars on witness protection organized by the Bureau's Facilitator for Cooperation in Africa are thought to have contributed to three African states entering into relocation agreements with the Court in 2013.

²³⁴ For example, the discussion on cooperation during the twelfth session focused on 'The protection of witnesses: strengthening States' support to the Court', see Assembly of States Parties to the Rome Statute of the International Criminal Court 'Official Records Twelfth Session, The Hague, 20–8 November 2013', vol. I, 11.

²³⁵ Cooperation, ICC-ASP/12/Res.3, 27 November 2013 (Twelfth Session of the Assembly of States Parties) para. 7.

²³⁶ Report of the Bureau on cooperation, ICC-ASP/12/36, 20–8 November 2013 (Twelfth Session of the Assembly of States Parties) para. 5.

international concern'.²³⁷ To date, it has focused on building the capacity of states that are unable to genuinely investigate and prosecute genocide, crimes against humanity, and war crimes. It has yet to tackle the politically complex issue of the Assembly's role in putting political pressure on unwilling states to fulfil their obligations.

Recognizing that the ICC itself has a limited role in capacity building and that there are already many established programmes being conducted by states, the United Nations, other international and regional organizations, as well as civil society to provide such support to states, including rule of law programmes, the Assembly has focused sensibly on engaging with these initiatives rather than seeking to reinvent the wheel. For example, officials of the Assembly and the ICC, as well as States Parties, have actively engaged with the International Centre for Transitional Justice's Greentree initiative to improve coordination between international justice, rule of law, and development actors in situations where capacity-building projects are being delivered.²³⁸ The Assembly has also been a key venue for side meetings on the recent initiative to establish the Justice Rapid Response—a new inter-governmental facility that manages the rapid deployment of criminal justice professionals to situations where crimes have been committed.²³⁹

The Secretariat of the Assembly has been given the role of facilitating the exchange of information between the Court, States Parties, and other stakeholders aimed at strengthening domestic jurisdictions. This has included setting up a complementarity website to 'provide information on events relating to complementarity, identify the main actors and their relevant activities, and facilitate contact between donors and recipients'.²⁴⁰ The website is innovative and has the potential to be a useful tool for both states requiring assistance and those ready to provide it. However, with limited resources allocated to the Secretariat to proactively seek information and engage with donors and recipients of technical and other assistance,²⁴¹ the website is currently far from fully realizing its aims.²⁴²

²³⁷ Complementarity, RC/Res.1, 8 June 2010 (Review Conference of the Rome Statute of the International Criminal Court) para. 8.

²³⁸ See e.g. International Center for Transitional Justice, 'Synthesis report on "supporting complementarity at the national level: from theory to practice" (Greentree III), 25–6 October 2012', 30 November 2012.

²³⁹ <<http://www.justicerapidresponse.org/>> accessed 17 March 2014.

²⁴⁰ Report of the Secretariat on complementarity, ICC-ASP/10/2, 12–21 December 2011 (Tenth Session of the Assembly of States Parties) para. 10.

²⁴¹ Complementarity, RC/Res.1 (n 237) para. 9 required the Secretariat to conduct this new mandate 'within existing resources'; some additional resources have, however, been made available through the Office of the President of the Assembly, see Report of the Secretariat on complementarity, ICC-ASP/12/33, 20–8 November 2013 (Twelfth Session of the Assembly of States Parties) para. 15 '[s]ince May 2013, the capacity of the Secretariat has benefited from the work of a consultant on complementarity within the office of the President, funded by extra budgetary resources, and it will continue to build on its work in collaboration with the consultant'.

²⁴² Report of the Secretariat on complementarity, ICC-ASP/12/33 (n 241) para. 16, '[a]s regards its mandate to facilitate the exchange of information, the Secretariat notes that it has received very limited responses to its notes verbales, making it more difficult to prepare an overview of either the needs for technical assistance or the complementarity-related activities of States and other stakeholders'.

6.9 Conclusions

The Assembly has had a positive impact on many aspects of the law and practice of the ICC in its first 12 years. In particular, it has: promoted the development of the Strategic Plan of the ICC and numerous other ICC policies and strategies; established and operationalized, albeit after considerable time and effort, an IOM to enhance the economy and efficiency of the ICC and ensure that any allegations of misconduct against Court officials and staff are dealt with effectively; allocated more than €1 billion to the work of the ICC; protected the integrity of the Rome Statute by taking a careful approach to amendments; prompted efforts to expedite ICC proceedings when delays occurred in the first cases; developed and implemented innovative systems to elect ICC officials; and established mechanisms to respond to non-cooperation. It has also gone beyond the functions expressly listed in the Rome Statute to promote universality, implementation, cooperation, and complementarity, recognizing that they are essential to the success of the ICC and the realization of the Rome Statute.

However, as identified in this chapter, there are a number of aspects of the Assembly's work which have either had, or threaten to have, a negative impact on the effectiveness of the ICC, including in some instances undermining the independence of the prosecutor and the judges. In some cases, the Assembly has frustrated the implementation of policies and strategies. It has failed to establish effective safeguards to ensure that the ICC is allocated sufficient resources to function effectively in all areas and in some years has imposed arbitrary cuts to the Court's budget requests. Poor nomination processes and votes trading threaten efforts to elect the highest qualified candidates for ICC judges. Efforts to learn important lessons for the election of the next ICC Prosecutor have stalled. Most efforts to promote universality, cooperation, and complementarity lack effective structures, resources, and time on the Assembly's agenda to drive them forward. These issues should be addressed as priorities. Where appropriate, the Assembly should consider investing further in its own framework to achieve this, including allocating more time to its sessions, focusing the work of the Bureau, establishing further subsidiary bodies, and expanding the role and capacity of the Secretariat.

At the same time, the Assembly faces serious challenges arising from efforts by some African states, including States Parties, to promote non-cooperation in some cases and seek amendments that threaten the effectiveness of the ICC. The Assembly should be the key forum for all States Parties to engage on these issues and consider the concerns raised, but discussions and any solutions explored must respect the independence of the prosecutor and the judiciary, the importance of the work of the ICC, and the integrity of the Statute.

States Parties have invested significantly in the establishment of the ICC and the Rome Statute system. Their commitment to ending impunity must not waver if international justice is to be fully realized.

PART II

THE RELATIONSHIP
TO DOMESTIC JURISDICTIONS

Jurisdiction

*Rod Rastan**

7.1 Introduction

The jurisdictional regime of the ICC frames the entire process within which the proceedings are conducted—it determines what is possible in terms of legal competence. These facets of the Court’s jurisdictional competence to proceed, whether at the stage of opening investigations,¹ in determining whether there is a sufficient basis for prosecution,² or reasonable grounds to believe a crime within the jurisdiction of the Court has been committed,³ may accordingly form the basis of challenge to the jurisdiction of the Court under Article 19 of the Statute.⁴ This chapter will briefly examine a number of jurisdictional issues arising from the early practice of the Court related to subject matter, personal, territorial, and temporal jurisdiction.

7.2 Jurisdictional Parameters

One of the key issues that played out during the negotiation of the Rome Statute was on what jurisdictional bases the Court should exercise its jurisdiction, namely which states must have accepted the jurisdiction of the Court in relation to the situation in question. At one end of the spectrum, some delegations argued for a strict state-centric regime whereby the Court would need to secure the consent of all interested states before it exercised any aspect of its jurisdiction. At the other end, other states sought to exclude additional preconditions subsequent to acceptance of the Statute in order to enable the Court to exercise as broad a base of jurisdiction as possible. Germany, in particular, had argued that since all states may exercise universal jurisdiction over genocide, crimes against humanity, and war crimes, the ICC should not

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¹ Art 53(1)(a) Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute'); Rule 48 Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, 3–10 September 2002 (First Session of the Assembly of States Parties) part II.A (adopted and entered into force 9 September 2002) ('ICC RPE').

² Art 53(2)(a) ICC Statute. ³ Art 58(1)(a) ICC Statute.

⁴ Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Art 19(2)(a) of the Statute of 3 October 2006, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-772, AC, ICC, 14 December 2006, para. 24.

enjoy a lesser right than domestic courts did.⁵ Although this proposal generated some sympathy during negotiations, it was ultimately dropped in favour of elaborating an explicit jurisdictional nexus. Significant differences persisted, however, as to the jurisdictional bases upon which such a nexus should rely. Several states, most notably the US, insisted on a regime which would require the consent of both the state of nationality of the accused as well as the state of territory where the offence occurred.⁶ This would have effectively excluded the jurisdiction of the Court over nationals of non-Party States without the prior consent of that state. In a proposal that gained widespread support and that would have enabled the Court to exercise jurisdiction in a manner resembling the German proposal, the Republic of Korea proposed that the Court's jurisdiction be linked to fulfilment of one among a disjunctive list of four jurisdictional bases: the state of nationality of the accused (active personality), the state of nationality of the victim (passive personality), the state on the territory of which the crime occurred, or the state with custody over the accused.⁷

The final wording of Article 12 as adopted in Rome reflects an attempt to bridge the majority preference for a broad approach and the narrow view adopted by a minority of states, resulting in the exercise of jurisdiction being based on traditional principles of territoriality and active personality.⁸ Thus, where ICC jurisdiction is asserted on the basis of the nationality of the accused, the Court will have jurisdiction regardless of the territory where the crime occurred; where ICC jurisdiction is asserted on the basis of territoriality, the Court will have jurisdiction regardless of whether the state of the nationality of the accused is a State Party or not. These preconditions do not apply to Security Council referrals, since in that instance the source of the obligations on UN Member States to cooperate with the Court will be the Chapter VII resolution itself. As described later, a number of these issues were reopened and revisited in Kampala with respect to the crime of aggression, creating an altogether separate regime that reverts back to the earlier proposals that consent be obtained for the exercise of jurisdiction from both the state of nationality of the accused as well as the state on the territory of which the alleged crime occurred.

In relation to subject matter jurisdiction, the first draft Statute for an ICC, submitted in 1951 by the Committee on International Criminal Jurisdiction,⁹ had neither an

⁵ Proposal made by Germany at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June–17 July 1998, UN Doc A/AC.249/1998/DP.2 (1998).

⁶ See e.g. Amendments proposed by the United States of America at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June–17 July 1998, UN Doc A/CONF.183/C.1/L.70 (1998).

⁷ Proposal made by the Republic of Korea at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June–17 July 1998, UN Doc A/CONF.183/C.1/L.6 (1998) Art 8.

⁸ This proposal was presented as part of the final package submitted by the Bureau; for more detailed discussion see E Wilmshurst, 'Jurisdiction of the Court' in R Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers 2001) 128.

⁹ The committee, composed of the representatives of 17 Member States, was established by the General Assembly under Resolution 489 (V) of 12 December 1950, for the purpose of preparing preliminary draft conventions and proposals relating to the establishment and the statute of an ICC.

enumeration of principles nor offences to be applied, but merely stipulated that '[t]he Court shall apply international law, including international criminal law, and where appropriate, national law' (Article 2).¹⁰ Earlier discussions in the ILC had focused around the necessity to define international crimes in order to avoid the criticisms of the Nuremberg Tribunal regarding *ex post facto* application of law and had framed debate in the context of the parallel project for the codification of criminal law under a draft Code of Crimes Against the Peace and Security of Mankind.¹¹ When discussions were taken up anew in 1989 it was again initially assumed that the Statute would be linked directly to the Code of Crimes,¹² until the ILC decided to separate the two projects in 1992, considering it more favourable to try cases at the ICC under existing international criminal provisions rather than by way of a unique Code. Accordingly, the ILC's 1993 Draft listed crimes in the Statute by reference to relevant conventions (*inter alia*, the Genocide Convention, the Geneva Conventions, and Additional Protocols), as well as extending jurisdiction to crimes under customary international law and certain crimes under national legislations giving effect to multilateral treaties (including those related to terrorism and drug trafficking).¹³ In its final 1994 text and commentary, faced with the uncertain definitions of international crimes under customary law on the one hand and the lack of progress with the draft Code on the other, the ILC moved for an enumeration of crimes in the Statute. Accordingly, Article 20 of the revised draft Statute, and which formed the basis of later negotiations, granted jurisdiction with respect to:

- a) the crime of genocide;
- b) the crime of aggression;
- c) serious violations of the laws and customs applicable in armed conflict;
- d) crimes against humanity;
- e) crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.¹⁴

During subsequent negotiations by states in the 1995 Ad Hoc Committee, the view was expressed that

a procedural instrument enumerating rather than defining the crimes would not meet the requirements of the principle of legality (*nullem crimen sine lege* and *nulla*

¹⁰ Report of the Committee on International Criminal Jurisdiction on its Session Held from 1 to 31 August 1951, Draft Statute for an International Criminal Court, UN Doc A/2136 (1952) 23.

¹¹ Report by Ricardo J Alfaro, Special Rapporteur, 'Question of International Criminal Jurisdiction', UN Doc A/CN.4/15 (3 March 1950), (1950) YILC, vol. II, 15.

¹² Ninth Report on the Draft Code of Crimes Against the Peace and Security of Mankind, UN Doc A/CN.4/435 and Add.1 (8 February and 15 March 1991), (1991) YILC, vol. II (part I) 41.

¹³ See Arts 22 and 26 Draft Statute for an International Criminal Court, Report of the International Law Commission on its forty-fifth session (3 May–23 July 1993), UN Doc A/48/10, (1993) YILC, vol. II (part II) 106–7, 109–11.

¹⁴ Report of the International Law Commission on its forty-sixth session (2 May–22 July 1994), UN Doc A/49/10, (1994) YILC, vol. II (part II) 38.

poena sine lege) and that the constituent elements of each crime should be specified in order to avoid ambiguity and to ensure full respect for the rights of the accused.¹⁵

Over the next three years, arguments between exhaustive or illustrative definitions of crimes attempted to balance the competing demands for certainty and predictability under the principle of legality, against the requirement of flexibility in the face of the continuing development of the law.¹⁶ The need to prioritize the already challenging exercise over the definition of the core crimes and the intractable difficulties with respect to other crimes explains the adoption in Rome of the listed crimes of genocide, crimes against humanity, and war crimes. The definition and operation of the crime of aggression, although formally included in Article 5, was deferred until finally resolved at the 2010 Review Conference in Kampala, and consideration of other treaty crimes, notably drug trafficking and terrorism, were indefinitely postponed.¹⁷

With respect to temporal jurisdiction, the 1994 ILC draft Statute only contained a provision on *nullum crimen sine lege* which was linked to the differentiated scheme described earlier for draft Article 20. The provision merely provided that an accused shall not be held guilty (a) in the case of genocide, aggression, war crimes, and crimes against humanity ‘unless the act or omission in question constituted a crime under international law’, and (b) in the case of treaty crimes, ‘unless the treaty in question was applicable to the conduct of the accused at the time the act or omission occurred’.¹⁸ Debates early on in the Ad Hoc Committee and Preparatory Committee concretized the need for an express provision on non-retroactivity that would establish a definite time bar for the historical exercise of ICC jurisdiction, leading to the adoption in Rome of Article 11 as well as in tandem Article 22 related to *nullem crimen sine lege* and Article 24 on non-retroactivity.

The opposing views that played out over an opt-in or opt-out regime for the exercise of jurisdiction during the negotiations leading to Rome and Kampala, as well as the distinction between core crimes over which the Court would enjoy inherent jurisdiction versus other crimes to be later added to the Statute, means that the actual exercise of jurisdiction on these bases is subject to a patchwork of conditions which may be summarized as follows:¹⁹

¹⁵ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc A/50/22 (6 September 1995) 12.

¹⁶ See e.g. Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc A/51/22 (13 September 1996) vol. II, para. 55.

¹⁷ See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Resolution E, A/CONF.183/10 (17 July 1998), whereby the Diplomatic Conference ‘Recommends that a Review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court’. Despite proposals to that effect, the crimes were not tabled for debate during the 2010 Review Conference; see (n 30).

¹⁸ Report of the International Law Commission on its forty-sixth session (n 14) 55–6.

¹⁹ In its 1993 Report, the Working Group of the ILC presented three alternatives for the exercise of ICC jurisdiction based on an ‘opting in’ regime, whereby the ICC only intervenes with the consent of states concerned; and two variants of an ‘opting out’ approach, whereby the competence of the Court’s jurisdiction would be presumed unless prospectively indicated otherwise by each State Party concerned; Report of the International Law Commission on its forty-fifth session (n 13) 107–8. At its 1994 session the ILC ultimately favoured the opt-in regime, requiring separate state consent for the exercise

- i. For States Parties, the exercise of jurisdiction by the Court over the core crimes of genocide, crimes against humanity, and war crimes is ‘inherent’ or ‘automatic’ once a state becomes a party to the Statute, meaning no separate consent is required for the Court to exercise its jurisdiction with respect to the alleged commission of such crimes on the territory or by the nationals of States Parties.²⁰
- ii. Nonetheless, a state may choose to opt out of war crimes for an initial seven-year period on becoming a party to the Statute.²¹
- iii. For declarations by non-Party States or referrals by the Security Council, the exercise of jurisdiction operates via an opt-in regime, meaning the declaring state or the Security Council consents to the exercise of jurisdiction by the Court with respect to the particular situation concerned.²² Jurisdiction may thereby extend to crimes committed on the territory or by the nationals of a state not party to the Statute, not otherwise subject to ICC jurisdiction.
- iv. With respect to the crime of aggression, the exercise of jurisdiction will be consent based, meaning that each State Party must accept the amendment in order to enable the exercise of jurisdiction with respect to the crime of aggression occurring on its territory or by its nationals. For States Parties that have not ratified the amendment, two readings are possible: (a) the Court will have jurisdiction over nationals of a non-ratifying aggressor State Party allegedly committing crimes on the territory of a ratifying State Party unless that State Party has lodged a declaration opting-out,²³ or (b) no exercise of jurisdiction with respect to the nationals of a non-ratifying aggressor State Party is possible according to the limitations to the amendment acceptance procedure under

of jurisdiction over each of the listed crimes, with the proviso that jurisdiction would be inherent over the crime of genocide given the express authority for the assertion of ICC jurisdiction on the basis of Art VI of the 1948 Genocide Convention; Report of the International Law Commission on its forty-sixth session (n 14) 41–3. In the later Preparatory Committee it appeared unsatisfactory and undesirable for many states to maintain a hierarchy of regimes given the proposed concentration of the Statute on the most egregious crimes. There was a fear also that failure to extend inherent jurisdiction to war crimes and crimes against humanity ran the risk of undermining the credibility and effectiveness of the Court, by creating an ICC ‘à la carte’ that would burden the Court with subtle determinations of jurisdictional claims. As a result, the overwhelming majority of states during negotiations leading up to Rome accepted inherent jurisdiction, rendering the opt-in regime of ILC draft Art 22 redundant; Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc A/51/22 (13 September 1996) vol. I, paras 117–19. These options re-emerged, nonetheless, in the context of the negotiations over the crime of aggression.

²⁰ Art 12 ICC Statute.

²¹ Art 124 ICC Statute.

²² See Art 12(3) ICC Statute read in conjunction with Rule 44 ICC RPE; Art 13(b) ICC Statute. In relation to the effects of declaration lodged pursuant to Art 12(3), the Appeals Chamber has observed: ‘Unless stipulated in the declaration under article 12 (3) of the Statute, acceptance of jurisdiction is not limited to specific events or a specific “situation” within the meaning of article 13 of the Statute. It may also cover crimes under article 5 of the Statute committed after the declaration has been lodged’; Judgment on jurisdiction and stay of the proceedings, *Gbagbo, Situation in Côte d'Ivoire*, ICC-02/11-01/11-321 OA 2, AC, ICC, 12 December 2012, para. 1; see also El Zeidy, Chapter 8, this volume.

²³ See Art 15bis(4) ICC Statute, which provides: ‘The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar.’

Article 121(5).²⁴ On either reading, this means that the previous disjunctive basis for jurisdiction based on either territorial or personal jurisdiction derived from State Party adherence to the Statute has been effectively made cumulative. This is most clearly expressed in the condition that the Court cannot exercise its jurisdiction with respect to the crime of aggression committed on the territory or by the nationals of a state not party to the Statute.²⁵

- v. As with other ICC crimes, the Security Council may opt in to the exercise of ICC jurisdiction over the crime of aggression committed anywhere, including on the territory or by the nationals of a state that has not accepted the exercise of the Court's jurisdiction in that regard (i.e. including with respect to a State Party that has not accepted the amendments and a state not party to the Statute).²⁶

The sections that follow examine briefly in turn each of the four facets of the Court's jurisdiction—jurisdiction *ratione materiae*, *ratione personae*, *ratione loci*, and *ratione temporis*—which the ICC Appeals Chamber has characterized as together denoting the Court's competence to deal with a criminal cause or matter under the Statute.²⁷ These facets constitute the jurisdictional preconditions contained in Articles 5–12 of the Statute, which provide the basis for the actual exercise of jurisdiction, which may be triggered or stayed pursuant to Articles 13–21. The temporal and subject matter parameters of the Court's jurisdiction may be described as absolute requirements that must always be satisfied, while, excepting the crime of aggression, personal and

²⁴ See Art 121(5) ICC Statute, which provides: 'Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.' See discussion in S Barriga and L Grover, 'A Historic Breakthrough on the Crime of Aggression' (2011) 105 *American Journal of International Law* 517, 532 at fn 38: 'both views coincide in that Article 15 *bis* is a consent-based regime, though opinions diverge as to whether active consent is required by the alleged aggressor state (that is, ratification) or passive consent only (that is, not to submit an opt-out declaration)'; see also *ibid.* 531 at fn 35.

²⁵ Art 15*bis*(5) ICC Statute.

²⁶ Art 15*ter* ICC Statute. See also Resolution RC/Res.6 'The Crime of Aggression', RC/11, 11 June 2010 (Review Conference of the Rome Statute of the International Criminal Court) Annex III: Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, para. 2: 'It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.' It is not clear from the amendments and accompanying resolution whether a non-Party State may nonetheless accept the exercise of jurisdiction by the Court with respect to the crime of aggression pursuant to Art 12(3). Given that the provisions of Art 12 apply unless disturbed by the amendments, it is reasonable to assume that Art 12(3) and Rule 44 remain applicable with respect to all crimes referred to in Art 5, including the crime of aggression, notwithstanding the language in Art 15*bis*(5) since its essential purpose is to ensure a consent-based regime.

²⁷ Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Art 19(2)(a) of the Statute of 3 October 2006, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-772, AC, ICC, 14 December 2006, para. 24.

territorial jurisdiction may be fulfilled in the alternative, meaning that one or the other must be present.

7.3 Subject Matter Jurisdiction

The subject matter jurisdiction of the Court is denoted by the crimes listed in Articles 5–8bis of the ICC Statute. The crimes within the Court’s jurisdiction are not set in stone and may be modified through amendment of the Statute, as occurred in Kampala with the adoption of three new offences related to the use of poisonous gases and bullets causing excessive suffering present in the international armed conflict provisions of Article 8, which were carried over to those dealing with non-international armed conflict,²⁸ and the adoption of a definition for the crime of aggression.²⁹ The consideration of other crimes, including the further extension of existing crimes or the adoption of new crimes, may be placed before the Assembly of States Parties at any time. Several such proposals have already been made.³⁰

Although contestation occurs frequently throughout the course of judicial proceedings as to the legal qualification of particular alleged acts or their evidentiary foundation, less frequently does it attach to the question of the Court’s jurisdictional competence to deal with a matter within the meaning of Article 19. Such questions may arise more typically at the stage of launching investigations or during earlier preliminary examinations.

The divergence within Pre-Trial Chamber II at the Article 15 stage in the Situation in Kenya on whether the alleged crimes constituted crimes against humanity, thereby granting competence to the Court to address the matter, is well known. In particular, the judges differed as to whether the alleged crimes that occurred in the context of the post-election violence were sufficiently organized, whether an inferable policy to commit such crimes could be attributed to an identifiable state or organization, and whether, in the context of the latter, any such organization had to have certain state-like features.³¹ Some disagreement also arose in Pre-Trial Chamber III’s treatment of

²⁸ Art 8(2)(e)(xiii)–(xv) ICC Statute. ²⁹ Art 8bis ICC Statute.

³⁰ Under Art 121(1) ICC Statute, proposed amendments are to be submitted to the United Nations Secretary General who shall promptly circulate them to States Parties. See the proposal of the Netherlands to add ‘the crime of terrorism’ as new Art 5(e) and new Art 5(3) on the conditions for the adoption and exercise of the crime of terrorism (mirrored in the wording of former Art 5(2) concerning aggression), UN Doc C.N.723.2009.TREATIES-5 (Depositary Notification); proposal of Mexico to amend to Art 8(2)(b) to include ‘Employing nuclear weapons or threatening to employ nuclear weapons’, UN Doc C.N.725.2009.TREATIES-5 (Depositary Notification); proposed amendments 2 and 3 by Belgium on behalf of Argentina, Belgium, Bolivia, Burundi, Cambodia, Cyprus, Ireland, Latvia, Luxembourg, Mauritius, Mexico, Romania, Samoa and Slovenia, to amend Arts 8(2)(b) and 8(2)(e) to include the use of biological and chemical weapons and anti-personnel mines, as well as the use of certain other weapons causing excessive harm, UN Doc C.N.733.2009.TREATIES-5 (Depositary Notification); proposal of Trinidad and Tobago to add ‘The Crime of International Drug Trafficking’ as new Art 5(e) together with a proposed definition as new Art 5(2) concerning ‘crimes involving the illicit trafficking in narcotic drugs and psychotropic substances mean any of the following acts, but only when they pose a threat to the peace, order and security of a State or region’, UN Doc C.N.737.2009.TREATIES-5 (Depositary Notification).

³¹ Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, with appended dissenting opinion of Judge Hans-Peter Kaul, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, ICC, 31 March 2010 (‘Kenya Article 15 Decision’).

the Article 15 application with respect to the situation in Côte d'Ivoire, occasioning a partial dissent not on whether the Court had subject matter jurisdiction *per se*, but over the nature of the Chamber's task in reviewing the allegations presented, namely whether its role was to supervise the correctness of the prosecutor's assertions on subject matter jurisdiction as part of its threshold-setting exercise for the opening investigations, or whether the Chamber could and should go beyond those assertions to enter its own findings in relation to other crimes based on its own perusal of the supporting materials.³² Less well treated and more frequently arising are decisions taken by the prosecutor during preliminary examinations not to proceed on the basis of subject matter jurisdiction. Unless these follow a referral, they cannot be subjected to judicial review, and as such, will not attract Chamber scrutiny.³³ Nonetheless, the task is similarly one of determining the scope of a statutory mandated competence, pursuant to the factors listed in Article 53(1)(a)–(c)³⁴ by the 'triggering force'³⁵ of judicial proceedings, and therefore merits some treatment.

In relation to the Republic of Korea (ROK or South Korea), under preliminary examination *proprio motu* pursuant to Article 15 of the Statute, for example, the prosecutor decided not to proceed with investigations due to the lack of subject matter jurisdiction. The situation concerned two incidents: the sinking of a South Korean warship, the *Cheonan*, on 26 March 2010 and the shelling of South Korea's Yeonpyeong Island on 23 November 2010, both allegedly committed by the armed forces of the Democratic People's Republic of Korea (DPRK or North Korea), not a State Party.³⁶

Examining the first incident, the prosecutor entered the straightforward assessment that the sinking of the naval vessel and the drowning of all its personnel did not constitute a war crime, since the attack was against a legitimate military objective,³⁷

³² Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14-Corr, PTC III, ICC, 15 November 2011 ('Côte d'Ivoire Article 15 Decision'); Judge Fernandez de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Art 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-15, 3 October 2011. For further discussion see R Rastan, 'The Jurisdictional Scope of Situations before the International Criminal Court' (2012) 23 *Criminal Law Forum* 1, 24–8.

³³ Art 53(3) ICC Statute provides that where a State Party or the Security Council refers a situation and the Prosecutor decides not to proceed, the referring state or Council may request the Pre-Trial Chamber to review the decision of the Prosecutor. By contrast, with respect to negative decisions taken pursuant to Art 15, there is no scope for judicial review; see Rules 49 and 105 ICC RPE and discussion in H Friman, 'Investigation and Prosecution' in Lee (n 8) 496–8.

³⁴ Pursuant to Rule 48 ICC RPE, the same factors are applicable when acting under Art 15 ICC Statute.

³⁵ Decision Requesting the Parties to Submit Information for the Confirmation of Charges Hearing, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-153, PTC II, ICC, 29 June 2011, para. 13.

³⁶ The Court has jurisdiction over crimes occurring on the territory (including vessels registered thereto) or by the nationals of South Korea since 13 November 2002. Thus the relevant acts would fall within the temporal and territorial jurisdiction of the ICC even though North Korea is not a State Party. See Situation in the Republic of Korea: Art 5 Report, OTP, ICC, June 2014 ('Korea Report').

³⁷ In relation to whether the incidents had a nexus with an armed conflict, the report noted two possible bases for the existence of an international armed conflict between the ROK and the DPRK: (i) that the two countries are technically still at war since the 1953 Armistice Agreement is only a ceasefire agreement; and (ii) the resort to armed force between the two states itself created an international armed conflict under customary international law; *ibid.*, para. 9.

bearing in mind also the current non-applicability of *jus ad bellum* rules attached to alleged acts of aggression.³⁸ Nonetheless, the report also went on to consider whether the attack might fall within the scope of the war crime of treacherously killing or wounding under Article 8(2)(b)(xi), traditionally conceived as the feigned waiving of the white flag to simulate surrender with the concealed intent to kill or injure the adversary.³⁹ In this regard, the Elements of Crimes require, *inter alia*, that the perpetrator invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict; that the perpetrator intended to betray that confidence or belief; and that the perpetrator made use of that confidence or belief in killing or injuring such person or persons.⁴⁰ Applied to the facts at hand, for the sinking of the *Cheonan* to have constituted a war crime, the DPRK must have concluded the armistice decades-old agreement *with the intention* of attacking by surprise the enemy who was relying on it.⁴¹ Since these requirements are cumulative, the report ultimately dismissed as unreasonable the proposition that the ‘DPRK entered into an armistice agreement in 1953—and recommitted itself to this agreement in 1991—with the specific intent to conduct surprise attacks, such as the alleged attack on the *Cheonan* committed in 2010’.⁴²

In relation to the second incident, involving the shelling by the DPRK of Yeonpyeong Island on South Korean territory, resulting in death, injury, or damage to both civilian and military objects and persons, the report determined that there was no reasonable basis to believe that the civilian impact resulted from intentional targeting (Article 8(2) (b)(i) or (ii)) or from excessive incidental death, injury, or damage (Article 8(2)(b)(iv)). Lack of intent to target civilians was based on examination of the factual pattern of the shelling, demonstrating that the majority of the attack was directed towards military objectives which also suffered the majority of the impact, as well as alternative explanations for the civilian impact suffered, including the targeting accuracy of artillery weapons used.⁴³ In relation to the alleged excessive incidental civilian death, injury, or damage, the report was unable to determine that the anticipated civilian impact was clearly excessive in relation to the anticipated military advantage of the

³⁸ Korea Report (n 36) paras 12 and 82.

³⁹ The prohibition derives from Art 23(b) of the Regulations annexed to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910). As the International Committee of the Red Cross ('ICRC') notes, state practice is consistent in prohibiting the act of concluding an agreement to suspect combat with the intention of attacking by surprise the enemy relying on that agreement; although this should be distinguished from 'ruses of war' which are not prohibited; see Rule 64 and associated commentary in J Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Vol. 1: Rules* (New York: Cambridge University Press 2009) 219–21; Korea Report (n 36) paras 49–53.

⁴⁰ Elements 1, 2, and 4 of Art 8(2)(b)(xi), Elements of Crimes, ICC-ASP/1/3(part II-B), 9 September 2002 (First Session of the Assembly of States Parties). In this respect, as the ICRC Customary International Humanitarian Law study notes, '[t]he essence of perfidy is thus the invitation to obtain and then breach the adversary's confidence, i.e., an abuse of good faith. This requirement of a specific intent to breach the adversary's confidence sets perfidy apart from an improper use, making perfidy a more serious violation of international humanitarian law. Some military manuals translate this rule as follows: it is prohibited to commit a hostile act under the cover of a legal protection'; Henckaerts and Doswald-Beck (n 39) 223.

⁴¹ Korea Report (n 36) para. 56.

⁴² Ibid., para. 56.

⁴³ Ibid., para. 20.

attack as required by Article 8(2)(b)(iv), considering the relative proximity of military and civilian objects, the small size and population of the island, and the fact that military targets appeared to be the primary objective of the attack.⁴⁴ The result of the assessment was to negate a basis for the opening of investigations.

Clearly, the subject matter threshold for the exercise of ICC jurisdiction will often be the central question at the preliminary examination stage. Do the government crimes allegedly committed in Honduras during the post-coup period of 2009, including allegations of death, torture, imprisonment, rape, deportation, and persecution, constitute crimes against humanity?⁴⁵ Does the level of intensity and organization in the violent clashes between the Nigerian security forces and Boko Haram give rise to the level of a non-international armed conflict?⁴⁶ Does government repression of street protests in Kiev prior to the ousting of President Viktor Yanukovych amount to crimes against humanity?⁴⁷ These assessments could also arise in the context of case-specific investigations or prosecutions. What sets them apart is not their content per se, but their role in determining the scope of the Court's jurisdiction to proceed at all, that is, the Court's competence to open investigations into a situation,⁴⁸ as opposed to its ability to pursue particular charges within the confines of a particular case theory.⁴⁹ Moreover, whereas during the case-specific stage the prosecutor can deploy the full range of investigative powers at his/her disposal for the determination of the truth, at the preliminary examination stage, including during Article 15 proceedings, the scope for fact-finding and *prima facie* attribution is far more constrained to open source materials, testimony taken at the seat of the Court and any other information otherwise provided. It is true that this is carried out against the lowest evidentiary threshold in the Statute. Nonetheless, its outcome remains determinative in terms of ICC procedure, namely dismissal of the situation or its progression towards opening full-scale investigations. And while a decision not to proceed based on lack of jurisdiction can be reconsidered based on further submissions (Articles 15(6) and 53(4)) or

⁴⁴ Ibid., paras 21–6.

⁴⁵ See Report on Preliminary Examination Activities 2013, OTP, ICC, November 2013, paras 71–8, which determines that the limited number of alleged deaths due to excessive force, the limited number of reported acts of torture, rape, and sexual violence, large-scale detentions but of limited duration of up to 24 hours, and the number of alleged serious injuries, do not appear to be linked to an alleged attack against the opposition members of the civilian population nor cumulatively provide a basis for finding a widespread or systematic attack against opposition members of the civilian population involving the multiple commission of prohibited acts pursuant to a state policy within the meaning of Art 7. The report goes on to note the ongoing assessment of more recent allegations which 'may be evidence of an escalating pattern of criminal acts that could alter the characterisation of the earlier post-coup period and provide a basis for considering it as a continuous widespread or systematic attack carried out pursuant to a policy'; ibid., para. 80.

⁴⁶ See Situation in Nigeria, Art 5 Report, OTP, ICC, 5 August 2013, which states the OTP is unable to arrive at a positive conclusion on the matter, and the later Report on Preliminary Examination Activities 2013 (n 45) paras 18 and 214 *et seq.*, which does.

⁴⁷ See temporal scope of the Art 12(3) declaration lodged by Ukraine on 9 April 2014 with respect to alleged crimes occurring on its territory from 21 November 2013 to 22 February 2014 <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/997/declarationRecognitionJurisdiction09-04-2014.pdf> accessed 8 August 2014.

⁴⁸ Art 53(1)(a) ICC Statute, Rule 48 ICC RPE.

⁴⁹ Arts 58(1)(a), 61(7), or 74 ICC Statute.

at the request of the Pre-Trial Chamber following a review triggered by the referring entity (Article 53(3)(a)), the tools available to conduct the assessment remain the same.

7.4 Personal Jurisdiction

Together with territory, the nationality of the alleged offender provides one of two bases for the assertion of criminal jurisdiction.⁵⁰ Since active personality extends to alleged crimes committed anywhere by a State Party national, the nationality of the alleged offender will have important effects on the Court's jurisdiction. It may, for the same reason, form the focus of future litigation, particularly in cases of unclear or contested nationality claims.

Nationality has traditionally been viewed as the vital link between the individual and international law, particularly with regard to individuals abroad,⁵¹ since it is only through the medium of nationality that states may prescribe law for and exercise extraterritorial jurisdiction over their nationals or espouse claims on their behalf and incur liability for their wrongs.⁵² In this regard, the competence of a state to designate a person as its national is classically treated as a matter within the reserved domain of domestic jurisdiction.⁵³ Nonetheless, the effects of that nationality on the international sphere, including any limitations thereto, are regulated by international law.⁵⁴ It is thus open to international courts and tribunals to determine how they should receive competing or contested nationality claims in the exercise of their own competence.⁵⁵

⁵⁰ Art 12 provides for jurisdictional competence over alleged crimes committed by the national of a State Party (Art 12(2)(a)) or of a non-Party State that has accepted the exercise of jurisdiction by the Court (Art 12(3)). Personal jurisdiction is confined to natural persons (Art 25(1)) who are over the age of 18 years at the time of the alleged conduct (Art 26).

⁵¹ R Jennings and A Watts (eds), *Oppenheim's International Law* 9th edn (London/New York: Longman 1996) 849, 857.

⁵² R Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 *Harvard International Law Journal* 1. See generally Jennings and Watts (n 51) 857–9.

⁵³ Thus, the Permanent Court of International Justice ('PCIJ') held that questions of nationality are in principle within the reserved domain of state jurisdiction and not regulated by international law, although this may be restricted by treaty obligations voluntarily accepted by that state; *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, *Advisory Opinion*, 1923 PCIJ Series B, No 4, 7 February 1923, at 24, paras 40–1. The PCIJ similarly held 'generally speaking, it is true that a sovereign State has the right to decide what persons shall be regarded as its nationals', while noting this is subject only to the treaty obligations entered into; *Acquisition of Polish Nationality*, *Advisory Opinion*, 1923 PCIJ Series B, No 7, 15 September 1923, para. 27.

⁵⁴ As the PCIJ observed, it is a settled principle that the effect of domestic laws on the international plane is determined by international law; *Certain German interests in Polish Upper Silesia (Germany v Poland)* (Merits) Judgment (1926) PCIJ Series A, No 7, 26 May 1926, at 19: '[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures'.

⁵⁵ See e.g. Judgment, *Delalić et al.*, IT-96-21-A, AC, ICTY, 20 February 2001, para. 76, 'the nationality granted by a State on the basis of its domestic laws is not automatically binding on an international tribunal which is itself entrusted with the task of ascertaining the nationality of the victims for the purposes of the application of international humanitarian law'; *Iran v United States*, 'International law...does not determine who is a national, but rather sets forth the conditions under which that determination must be recognized by other States'; Case No A/18, 5 *Iran–U.S. Cl. Trib. Rep.* 251, 260 (1984).

Although the ICTY has examined issues related to nationality for the purpose of determining the protected person status of alleged victims in accordance with the Geneva Convention IV,⁵⁶ contestation over the nationality of an offender has yet to arise at the international level.⁵⁷ Before the ICC to date all of the situations and cases that have been investigated relate to alleged crimes committed on the territory of the relevant state. Nonetheless, other situations under preliminary examinations have considered jurisdiction on the basis of active personality, notably in relation to Iraq where nationals of States Parties, primarily UK service members, are alleged to have committed, *inter alia*, acts of murder, torture, and inhuman treatment of persons in detention on the territory of Iraq, which is not a Party to the Statute.⁵⁸ As this situation demonstrates, although nationality of the offender offers a significant basis to investigate alleged crimes, it also suffers from several obvious limitations as to the overall reach of the Court. In Iraq, thus, it cannot extend to allegations against Iraqi or US nationals.⁵⁹ This means that where the ICC jurisdiction is exercised solely on the basis of nationality the Court may not be able to give equal treatment to all parties or actors involved. Some perpetrators of certain nationalities may be subject to the Court's jurisdiction, perhaps exclusively on one side of the conflict, while others may not. This might impede the overall impact of the Court and generate complaints of selectivity and inconsistency within the situation even if legal criteria have been impartially applied. Nevertheless, the import of the Court exercising jurisdiction in relation to situations that may otherwise remain subject to impunity cannot be easily dismissed, particularly where the nationals in question fall within the category of persons who appear to bear the greatest responsibility for serious crimes, i.e. they would fall within the routine scope of prosecutorial strategy.

One possible factual scenario that might arise is where a State Party national commits an alleged crime in the context of an interoperable command and control structure, i.e. in the context of multinational deployments, such as in Iraq. In these circumstances the Court's personal jurisdiction would persist irrespective of whether the State Party national is the commander or the subordinate. If the State Party national is the commander whose subordinates commit crimes, the Court's personal

⁵⁶ See e.g. *Delalić et al.* (n 55) paras 56–85; Judgment, *Tadić*, IT-94-1-A, AC, ICTY, 15 July 1999, paras 164–6. The Tribunal, relying on the object and purpose of the nationality requirement in Art 4 of the Geneva Convention IV adopted an approach hinging on substantial relations (i.e. ethnicity/allegiance to a Party to the conflict) rather than formal bonds of nationality (which were otherwise shared between the perpetrator and the victim).

⁵⁷ As Fruli notes, the Nuremberg and Tokyo Tribunals exercised jurisdiction over the vanquished enemy party; the ICTY exercised jurisdiction by virtue of the territory of the former Yugoslavia (i.e. irrespective of nationality); and the ICTR with respect to the territory of Rwanda as well as Rwandan nationals committing genocide abroad, although no cases were brought on the basis of active personality; M Fruli, ‘*Jurisdiction Ratione Personae*’ in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press) 527–32.

⁵⁸ OTP's response to communications received concerning Iraq, 9 February 2006; and more recent reopening of the preliminary examination: ‘Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq’, *ICC Press Release*, 13 May 2014.

⁵⁹ By contrast, in Afghanistan and Georgia, because the territorial State is a Party to the Statute, the Court may exercise jurisdiction in respect of alleged ICC crimes committed by any nationals on Afghan or Georgian soil, including by the nationals of non-Party States.

jurisdiction will extend over those acts or omissions of the commander irrespective of whether the physical perpetrators are State Party nationals, since it is the conduct attributed to the State Party national that is the subject of proceedings before the Court. Although the Court will need to pronounce on both the alleged conduct of the commander and the alleged conduct of the non-Party State physical perpetrators,⁶⁰ the latter are examined only to the extent necessary to determine the criminal responsibility of the former. Indeed, no criminal jurisdiction is asserted *per se* over the physical perpetrators and no findings of criminal responsibility attach thereto. In this respect, it is standard practice for courts to pronounce on the involvement of other actors in a criminal enterprise for the purpose of determining the criminal responsibility of a particular accused. There is thus no reason to exclude the responsibility of a State Party national for a crime physically perpetrated by another person, irrespective of whether that other person is a State Party national or a non-Party State national. Similarly, if the State Party national who is the focus of the case is the subordinate physical perpetrator and commits the alleged crime under the command and control of a non-Party State national, personal jurisdiction will persist over the former, even if the Court may need to examine certain factual and legal questions related to the nature of that command. Were it not so, the personal jurisdiction of the Court could be avoided by embedding State Party nationals into units comprised of other nationalities. Although in practice the responsibility imputed to the suspect may give rise to complex factual parameters, including in cases built on co-perpetration or common purpose where the State Party national may sit in a triangular relationship with one or more non-Party State nationals and their non-Party State subordinates, to the extent that the Chamber can disentangle the different forms of participation there is no reason why the Court's personal jurisdiction should not apply as a matter of law.

What of dual national suspects who enjoy the nationality of both a State Party and a non-Party State? Does the Court have to resolve competing nationality claims to determine its own jurisdiction based, for example, on the 'effective nationality' or 'genuine link' test?⁶¹ Issues related to closeness of nexus for the purpose of determining nationality

⁶⁰ For example in the case against Saif al-Islam Gaddafi, the Appeals Chamber observed that Mr Gaddafi was not alleged to have committed crimes with his own hand, but that he used the Libyan Security Forces to commit the alleged crimes as an indirect co-perpetrator, with the underlying criminal conduct allegedly carried out by a large number of direct perpetrators in the course of various incidents. As such it held that 'the "conduct" that defines the "case" is both that of the suspect, Mr Gaddafi, and that described in the incidents under investigation which is imputed to the suspect'. It nonetheless distinguished between 'the conduct described in the incidents under investigation which is imputed to the suspect', i.e. that committed by the physical perpetrators, which it described as 'a necessary component of the case' and which 'forms the core of any criminal case' versus 'the conduct of the suspect him or herself that is the basis for the case against him or her'; Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', *Gaddafi, Situation in Libya*, AC, ICC, ICC-01/11-01/11-547-Red, 21 May 2014, para. 62. Although this was applied in the context of a determination of the admissibility of a case, it would appear to have equal relevance for determinations of jurisdiction.

⁶¹ See *Nottebohm Case (Liechtenstein v Guatemala)*, Judgment of 6 April 1955 [1995] ICJ Reports 4. The principle of effective nationality is also present in a number of earlier international treaties; see e.g. Art 5 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930) 179 LNTS 89: 'Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory

could conceivably arise where the person whose surrender is sought by the Court falls within the scope of an Article 98 agreement with the requested State Party under one nationality but not the other. Closeness of nexus might possibly also be considered as a relevant factor by the Court in the context of an admissibility challenge brought by more than one state, perhaps with similar credentials as to the genuineness of the national proceedings concerned, where both assert jurisdiction on the basis of the nationality of the offender. In these circumstances, the ICC would be free to determine the effects of different nationality claims brought by a suspect in view of the competence of the Court to proceed with a surrender request or to determine admissibility.⁶²

However, as a matter of jurisdiction, there appears no reason why a person should be able to rely on the effective nationality test in order to avoid criminal responsibility. In particular, the test adopted in *Nottebohm* was applied in the context of inter-state arbitration to govern the abuse by individuals of diplomatic protection claimed from more than one state, not for the application of criminal law.⁶³ As Sloane observes, *Nottebohm* properly concerns the general principle of law prohibiting the abuse of rights in the context of diplomatic claims espousal:

[I]t operates to prevent states or their nationals from manipulating the liberal international legal regulation of nationality as a way to expand their right to bring diplomatic protection claims or, conversely, to render inadmissible the otherwise legitimate diplomatic protection claims of another state.⁶⁴

As such, the ICJ's dicta on the effectiveness of nationality is neither directly nor easily transferable to other areas of adjudication.⁶⁵ Indeed in criminal cases, the assertion of a second foreign nationality typically will not bar a domestic court from exercising its criminal jurisdiction over its own nationals. Even though states are not required under international law to give effect to another state's ascription of nationality, the individual will still be a national of that state for the purpose of its own laws.⁶⁶ This approach is consistent also with the commentary to draft Article 5 (jurisdiction over nationals) of the 1935 Harvard Draft Convention on Jurisdiction with Respect to Crime:

In case of double or multiple nationality, any State of which the accused is a national is competent under this article....Whether, in case of double or multiple nationality,

either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.' As Brownlie observes, although the International Court of Justice refers to both concepts, strictly speaking the general principle of *genuine link* is distinguishable from that of *effective link* in that the former relates to the narrower situation of naturalization obtained on the basis of fraud or duress, which is therefore voidable; I Brownlie, *Principles of Public International Law* 4th edn, (Oxford: Oxford University Press 1990) 397–8, 418.

⁶² See *supra* (n 54) and (n 55).

⁶³ In *Nottebohm*, Guatemala further claimed that Lichtenstein had acted fraudulently in granting nationality to Nottebohm, although the International Court of Justice did not directly address this aspect of the claim; *Nottebohm* (n 61) 26; discussed in Brownlie (n 61).

⁶⁴ Sloane (n 52) 29. ⁶⁵ Ibid.

⁶⁶ See e.g. formulation in Art 1 Convention on Certain Questions Relating to the Conflict of Nationality Laws (n 61): 'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality'. See generally Jennings and Watts (n 51) 856; Sloane (n 52) 3.

an accused is a national of the State which is attempting to prosecute and punish is a question to be determined by reference to such principles of international law as govern nationality. If international law permits the State to regard the accused as its national, its competence is not impaired or limited by the fact that he is also a national of another State.⁶⁷

Since the ICC exercises its jurisdiction on the basis of competence delegated to it by States Parties, it would appear to be competent to exercise criminal jurisdiction over any national of a State Party in the same way that the State Party's own domestic courts could. For the purpose of asserting criminal jurisdiction over a dual national suspect, therefore, there appears to be no reason why the Court need consider either the closeness of nexus of each nationality claim or the extra-territorial reach of domestic law over the conduct of each state's nationals abroad. Thus, the fact that an individual has more than one nationality should not shield a person from criminal liability and so deprive the Court of jurisdiction.

Another question is whether nationality must have been obtained when the crime was committed or at the time of prosecution.⁶⁸ According to the former, a person becomes liable to prosecution by the state of his nationality at the time of the offence, and this liability is not terminated by subsequent expatriation or naturalization abroad.⁶⁹ In relation to nationality at the time of prosecution, state practice varies for prosecutions brought with respect to persons who have obtained the forum state's nationality after the offence was committed. Reliance in such cases is typically reserved for particularly serious offences such as the commission of war crimes, particularly in relation to the Second World War,⁷⁰ although at least in the case of war crimes the assertion of criminal jurisdiction irrespective of nationality would in any event be necessary under the repression requirements of the Geneva Convention's grave breaches regime.⁷¹

⁶⁷ 'Harvard Research Draft Convention on Jurisdiction with Respect to Crime' (1935) 29 *American Journal of International Law* (Supp.) 532–3; see discussion in Deen-Racsmany who relies on an approach to dual nationality based on the principle of equality: 'since all states of which the person is a national are equals, they may derive the same rights from this link irrespective of its strength, including the right to exercise jurisdiction over crimes committed by that person'; Z Deen-Racsmany, 'The Nationality of the Offender and the Jurisdiction of the International Criminal Court' (2001) 95 *American Journal of International Law* 666, 610.

⁶⁸ Art 5 of the Harvard Research Draft Convention on Jurisdiction with Respect to Crime reflects the permissive rule that states may choose to exercise jurisdiction over their own nationals on either ground; see Harvard Research Draft Convention (n 67) 519 *et seq.*

⁶⁹ *Ibid.*, 531. As the commentary continues: 'Were the rule otherwise, a criminal might escape prosecution by change of nationality after committing the crime'; *ibid.*, 532.

⁷⁰ See e.g. Section 1, War Crimes Act 1991 (UK) and the subsequent case brought against Anthony Sewoniuk, a Belorussian Nazi collaborator from pre-war Poland (now Damachava, Belarus), who served in the SS, later deserted and joined the Polish army, and became a British national after the war; Judgment, *R. v Sawoniuk*, Court of Appeal (Criminal Division), 10 February 2000.

⁷¹ Art 49 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 ('Geneva Convention I'); Art 50 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 ('Geneva Convention II'); Art 129 Geneva Convention relative to the Treatment of

Two questions therefore arise as to the persistence of the Court's personal jurisdiction where: (i) the suspect, having had the nationality of a State Party at the time of the alleged offence, changes nationality thereafter, thereby losing State Party nationality at the time ICC jurisdiction is asserted (nationality at the time of the offence); and (ii) the suspect does not have State Party nationality at the time of the offence, but does so at the time the ICC seeks to exercise its jurisdiction (nationality at the time of prosecution).

One option could be to examine the manner in which the particular State Party's own domestic legislation prescribes extra-territorial jurisdiction over its own nationals, the argument being that since the ICC exercises its jurisdictional competence by way of delegation, the Court could follow the particular approach taken by the state which would ordinarily assert jurisdiction on this basis. Support might be found in the complementarity regime, which provides that the Court is to have regard to the jurisdiction of states that would normally exercise jurisdiction over the crime concerned (Article 18(2)), and that any state with jurisdiction may challenge the admissibility of the case (Article 19(2)(b)). Since domestic law, not the ICC Statute, regulates matters of prescriptive jurisdiction, and since the Court will be bound to accept the standing of such states to assert their jurisdiction in the manner so prescribed (irrespective of resolution on the merits), it might be argued that the Court could logically extend its own exercise of jurisdiction on the same basis as the domestic court concerned would. However, such a reading would make the parameters of the ICC's jurisdiction dependent on municipal characterization, which might result in inconsistencies and lacunae. Moreover, while the principles of territory and active personality applied by the Court under Article 12(2)(a)–(b) flow from commonly recognized bases of jurisdiction conferred by States Parties, the Court need neither mirror nor follow the manner in which such jurisdiction is asserted domestically.⁷² This is demonstrated by the fact that although all states exercise jurisdiction over crimes occurring on their territory, not all do so for offences committed by their nationals abroad, and if so in only limited circumstances depending on the particular offence. To exercise jurisdiction based on active personality, however, the Court is not required to first ascertain whether the state of nationality of the suspect itself exercises such a base of jurisdiction with respect to the particular conduct alleged before the ICC. States, nonetheless, enjoy broad discretion in the matter of prescriptive jurisdiction,⁷³ and

Prisoners of War (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 137 ('Geneva Convention III'); Art 146 Geneva Convention relative to the Protection of Civilian Persons in Time of War (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 ('Geneva Convention IV'). The Harvard Draft Convention includes active personality jurisdiction based on nationality at the time of prosecution in the light of each state's prerogative as to how it chooses to prescribe jurisdiction over its own nationals, as well as to avoid the risk of impunity resulting from persons who may seek to change their nationality so as to benefit from the laws of another state that refuses extradition of its own nationals; Harvard Research Draft Convention (n 67) 532.

⁷² State practice also varies, for example, in the extension of nationality jurisdiction with respect to residence or other connections of allegiance owed by aliens, as well as in relation to stateless persons and refugees; Brownlie (n 61) 303; Deen-Racsmann (n 67) 616–22.

⁷³ As the PCIJ held in the *Lotus* case, states are presumed to enjoy broad discretion in matters of prescriptive jurisdiction: *France v Turkey* (*Lotus* case), PCIJ, Series A. No. 10 (1927) para. 46.

a state can delegate the exercise of such discretionary jurisdiction with respect to its territory and nationals to the ICC by way of a treaty, irrespective of how it chooses to prescribe such jurisdiction domestically, and without the ICC being bound by its municipal characterization or application.

A better approach is to look to the Court's own legal framework. In particular, Article 22 provides that criminal responsibility under the Statute arises where the conduct constitutes, at the time it takes place, a crime within the jurisdiction of the Court. Thus, the subsequent loss of nationality after the commission of the crime should be irrelevant to the question of whether the individual fell within the personal jurisdiction of the Court at the time the crime occurred. For the same reason, however, this would suggest that the Court cannot exercise personal jurisdiction where the person obtains State Party nationality subsequent to committing the crime.⁷⁴ Article 24 further provides that no person shall be criminally responsible under the Statute for conduct prior to the entry into force of the Statute. However, this appears to relate to the general temporal threshold stipulated in Article 11(1) and not to the entry into force of the Statute for a particular State Party (Article 11(2)), since an individual committing a crime on the territory of another State Party will still be subject to the jurisdiction of the Court even if the Statute had not yet entered into force for his/her state of nationality.

The treaty-based considerations as to the personal parameters of the Court's jurisdiction under Article 12 are set aside where the Security Council refers a situation. In particular, when acting under Chapter VII of the UN Charter, the Security Council can place binding obligations (including the acceptance of jurisdiction) on any UN Member State, thereby enabling the exercise of ICC jurisdiction over the national of any UN Member State. The authority of the Security Council to do so derives from the UN Charter, not from the Rome Statute. The Statute, which regulates the competence of the Court, merely provides an enabling legal basis for the ICC to recognize and receive such a referral. Article 13(b) thus serves as a bridging mechanism between the pre-existing competence of the Security Council to take certain measures under Chapter VII of the UN Charter and the competence of the Court to act upon such a referral.⁷⁵

⁷⁴ This is without prejudice to the particular facts and possibly complex circumstances that might arise in a concrete case in situations of unclear acquisition, termination or transfer of allegiance. Although not directly transferable see e.g. the approach towards complex facts adopted by the ICTY Appeals Chamber *supra* (n 56). Art 22 ICC Statute would of course not apply to the exercise of domestic jurisdiction, including in relation to state requests or challenges brought pursuant to Arts 18(2) and 19(2)(b). See contra, Deen-Racsmany (n 67) 615, who argues that nationality either at the time of prosecution or at the time of commission should suffice for the assertion of ICC jurisdiction to avoid the undesirable results, including impunity and abuse, that might flow from individuals manipulating their nationality status to avoid liability.

⁷⁵ In this regard, Art 13(b) ICC Statute neither creates nor confers upon the Security Council the power to make a referral: instead, this power is presumed to already exist under Chapter VII of the UN Charter, as is borne out by the practice of the Security Council in creating ad hoc tribunals. Rather, Art 13(b), as with all the other provisions of the Statute, regulates the competence of the Court, and in this respect, the ability of the Court to recognize and act upon a referral from the Security Council. As the provision states, this has the consequence of enabling the ICC to exercise its jurisdiction. Hence the wording 'The Court may exercise its jurisdiction... if: (b) a situation... is referred... by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations', meaning the Court's

A different set of considerations arise in relation to Security Council referrals, not so much as to the interpretive scope of nationality, but as to the limits that may be placed on the exercise of ICC jurisdiction. To date the Security Council has not conferred jurisdiction expressly by reference to personal parameters, designating the exercise of ICC jurisdiction instead by reference to territory—although it could conceivably do so as it did when establishing the jurisdiction of the ICTR on the basis of both territory and active personality.⁷⁶ It might appear worryingly selective were the Security Council to extend criminal jurisdiction by dint of nationality only, providing jurisdiction only with respect to certain nationals and not others, where this purposefully failed to encompass all parties to the conflict or was contrary to the factual pattern of allegations before it, bearing in mind the view repeatedly expressed during the drafting history for the need to prevent states or the Security Council pre-determining the focus of future ICC investigations by reference to a particular conduct, suspect, or party. Indeed, the adoption of the term ‘situation’ which would form the subject of a referral, as opposed to alternatives such as ‘case’ or ‘matter’, was chosen to prevent such outcomes.⁷⁷ As described earlier, while there might be circumstances where the ICC enjoys partial personal jurisdiction within a situation due to its treaty-based limitations, meaning it can only examine the conduct of State Party nationals on the territory of a non-Party State, the imposition of restrictions on personal parameters by the Security Council as a matter of choice would arguably offend the principle that a referring body cannot limit the jurisdictional parameters of a situation to one side of the conflict or to particular individuals, or for that matter exclude certain nationals.

Although the Security Council has to date not chosen to confer jurisdiction by virtue of active personality, it has controversially sought to limit the personal scope of situations otherwise provided for on the basis of territory. Following earlier Security Council Resolutions 1422 (2002) and 1487 (2003) which had sought, in the abstract, to prevent the ICC from exercising jurisdiction over nationals of non-Party States participating in United Nations peacekeeping operations, the same formulation was carried

competence is engaged where the Security Council decides to so act in accordance with the UN Charter. The same logic applies to Art 16, which again merely serves as a bridging provision between an act by the Security Council under its own Charter regime and the recognized consequence of that act for the ICC under the Rome Statute. See also Jacobs, Chapter 12, this volume.

⁷⁶ See Art 1 Statute of the International Criminal Tribunal for Rwanda, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Annex: ‘The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.’

⁷⁷ See Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. I (n 19) para. 146: ‘Some delegations were uneasy with a regime that allowed any State party to select individual suspects and lodge complaints with the Prosecutor with respect to them, for this could encourage politicization of the complaint procedure. Instead, according to these delegations, States parties should be empowered to refer “situations” to the Prosecutor in a manner similar to the way provided for the Security Council in article 23 (1). Once a situation was referred to the Prosecutor, it was noted, he or she could initiate a case against an individual. It was suggested, however, that in certain circumstances a referral of a situation to the Prosecutor might point to particular individuals as likely targets for investigation.’ This scheme is reflected in the formulation of Art 14(1)–(2) ICC Statute.

over into the first referral by the Security Council of a situation to the ICC.⁷⁸ In particular, Resolution 1593 (2005), referring the Situation in Darfur, Sudan, includes the following:

Taking note of the existence of agreements referred to in Article 98-2 of the Rome Statute...

*Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.*⁷⁹

The impact of the apparent carve out on personal jurisdiction remains contested, including among UN Member States. While the United States has unequivocally expressed its views on its intended scope,⁸⁰ other states have voiced disquiet over its retention and legal effects. For example, in the debates on the adoption of Resolution 1593, Brazil abstained from voting due to the inclusion of paragraph 6 and the reference to Article 98, recalling in this regard its earlier objections to Resolutions 1422 and 1487:⁸¹

The text just approved contains a preambular paragraph through which the Council takes note of the existence of agreements referred to in article 98-2 of the Rome Statute. My delegation has difficulty in supporting a reference that not only does not favour the fight against impunity but also stresses a provision whose application has been a highly controversial issue. We understand that it would be a contradiction to

⁷⁸ UNSC Res 1422 (12 July 2002) UN Doc S/RES/1422 was adopted on the eve of the entry into force of the Statute in July 2002, after the US threatened to exercise its veto to block the otherwise routine extensions for all upcoming UN peacekeeping operations, beginning with the United Nations Mission in Bosnia and Herzegovina. A number of states in open discussion before the vote on both resolutions and during parallel proceedings at the ICC Preparatory Commission suggested that the Council may have violated the express terms of Art 16 and inappropriately interfered with the treaty-making process: see UN Doc S/PV.4568 (Resumption 1) + Corr.1 (10 July 2002); UN Doc S/PV.4772 (12 June 2003); PCNICC/2002/L.3 (18 July 2002).

⁷⁹ UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593, para. 6. See also UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970, para. 6: ‘Decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State’, referring in its preamble to Art 16, not Art 98(2). See also UNSC Res 1422 (n 78) and UNSC Res 1487 (12 June 2003) UN Doc S/RES/1487, also invoking Art 16 rather than Art 98(2).

⁸⁰ UN Doc S/PV.5158 (31 March 2005) 3: ‘The United States continues to fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute. That strikes at the essence of the nature of sovereignty.... The language providing protection for the United States and other contributing States is precedent-setting, as it clearly acknowledges the concerns of States not party to the Rome Statute and recognizes that persons from those States should not be vulnerable to investigation or prosecution by the ICC, absent consent by those States or a referral by the Security Council. We believe that, in the future, absent consent of the State involved, any investigations or prosecutions of nationals of non-party States should come only pursuant to a decision by the Security Council.’

⁸¹ See UN Doc S/PV.4772 (n 78) 13.

mention, in the very text of a referral by the Council to the ICC, measures that limit the jurisdictional activity of the Court. In addition, Brazil also was not in a position to support operative paragraph 6, through which the Council recognizes the existence of exclusive jurisdiction, a legal exception that is inconsistent in international law.⁸²

Similar sentiments were aired by Argentina:

We believe that the letter and spirit of the Rome Statute must be respected and that the balance of its provisions must be preserved, taking into account the legitimate concerns of States without weakening in any way the powers of the Court. For that reason, we regret that we had to adopt a text that establishes an exception to the jurisdiction of the Court. It is our hope that this will not become standard practice.⁸³

And by the Philippines:

We also believe that the International Criminal Court (ICC) may be a casualty of resolution 1593 (2005). Operative paragraph 6 of the resolution is killing its credibility—softly, perhaps, but killing it nevertheless. We may ask whether the Security Council has the prerogative to mandate the limitation of the jurisdiction of the ICC under the Rome Statute once the exercise of its jurisdiction has advanced. Operative paragraph 6 subtly subsumed the independence of the ICC into the political and diplomatic vagaries of the Security Council.⁸⁴

The same formulation was repeated in operative paragraph 6 of Security Council Resolution 1970 (2011) referring the Situation in Libya,⁸⁵ but was linked this time in its preamble to Article 16 as opposed to Article 98(2), resulting in similar observations.⁸⁶

While a factual basis to contest the issue did not arise in the context of Darfur, the prosecutor has openly questioned the exemption before the Security Council in the Libya context, in particular in relation to allegations concerning the targeting practice of NATO-led sorties, suggesting the operative paragraph 6 of Resolution 1970 was void of legal effect insofar as it affected the exercise of ICC jurisdiction: '[t]he Office does not have jurisdiction to assess the legality of the use of force and evaluate the proper scope of NATO's mandate in relation to UNSC Resolution 1973. The Office does have a mandate, however, to investigate allegations of crimes by all actors.'⁸⁷

⁸² UN Doc S/PV.5158 (n 80), records of debates on draft Resolution S/2005/218, at 11.

⁸³ Ibid., 7–8. ⁸⁴ Ibid., 6.

⁸⁵ See e.g. para. 6 of UNSC Res 1970 (n 79): ‘Decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State’.

⁸⁶ See e.g. UN Doc S/PV.6491 ‘Peace and security in Africa’ (26 February 2011), record of debates on draft Resolution S/2011/95, at 7: ‘Brazil is a long-standing supporter of the integrity and universality of the Rome Statute. We oppose the exemption from jurisdiction of nationals of those countries not parties to the Rome Statute. In the face of the gravity of the situation in Libya and the urgent need for the Council to send a strong, unified message, my delegation supported this resolution. However, we express our strong reservation concerning paragraph 6. We reiterate our conviction that initiatives aimed at establishing exemptions of certain categories of individuals from the jurisdiction of the International Criminal Court are not helpful to advancing the cause of justice and accountability and will not contribute to strengthening the role of the Court.’

⁸⁷ Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011), OTP, ICC, 16 May 2012, para. 54.

Although the Security Council failed to refer the Situation in Syria to the ICC following the veto exercised by Russia and China, the formulation at paragraph 7 of draft Resolution S/2014/348 mirrored in relevant part Resolutions 1593 and 1970.⁸⁸ The wording again triggered disquiet over its apparent incongruity with the Rome Statute and the freedom of the Court to determine its impact, as expressed by Argentina:

The Security Council does not have the power to declare an amendment to the Statute in order to grant immunity to nationals of States non-parties who commit crimes under the Statute in a situation referred to the Court. That is to say, nothing in the text of paragraph 7 or of any other paragraph of the draft resolution on which we have just voted would have had the power to amend the standard of the Statute with regard to the Court's jurisdiction in a given situation or the fact that if a decision is needed, the Court is ultimately the judge of its own jurisdiction.⁸⁹

The inclusion of such provisions appears problematic for several reasons. For example, to the extent that Resolution 1593 takes cognizance of the fact that Article 98 agreements exist with respect to the deployment of foreign personnel, the legal effects of such agreements are already incorporated into Part 9 of the Statute and take direct effect within the legal regime of the Court as a matter of state cooperation. Thus, the Court cannot proceed with a request that would place a State Party in potential violation of another treaty obligation with respect to a third state's national. The purpose of Article 98 in this regard is not to regulate the exercise of criminal jurisdiction, but to avoid a conflict of laws. Reference to Article 16 in the same resolutions is also superfluous since it has no impact on jurisdictional matters, regulating only possible interruptions of investigations or prosecutions. The resolutions described, however, attempt to fold the provisions of Articles 16 and 98 into the jurisdictional scheme of the Court itself. In particular, in each, the operative paragraph is framed in terms of exclusive criminal jurisdiction, a concept that belongs properly to status of forces agreements (SOFA) or status of mission agreements (SOMA), whereby states may agree bilaterally on the reversion of criminal jurisdiction exclusively to the sending state. It has no place, however, in a Security Council resolution vis-à-vis the powers of the ICC insofar as the Council is neither establishing a SOFA with the ICC nor an agreement with respect to the division of competence. Instead, the formulation is imposed as a jurisdictional exemption from that which would otherwise be applied by an independent international body. Moreover, such jurisdictional carve-outs seek to do that which neither Article 16 nor Article 98 of the Statute permit, for under both provisions the Court's jurisdiction is not nullified, only its exercise is postponed. In the case of Article 16, the Court's acknowledged competence is subject to a time-bound renewal process, failing which the exercise of jurisdiction proceeds. Under Article 98, while

⁸⁸ UN Doc S/2014/348 (22 May 2014) para. 7: '*Decides that nationals, current or former officials or personnel from a State outside the Syrian Arab Republic which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Syrian Arab Republic established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.*'

⁸⁹ UN Doc S/PV.7180 'The situation in the Middle East (Syria)' (22 May 2014), record of debates on draft Resolution S/2014/348, at 11.

an agreement under sub-paragraphs 1 or 2 may modify the cooperation obligations of the requested state, it does not deprive the Court of jurisdiction. Indeed the *raison d'être* for Article 98 is recognition that the Court has and is exercising jurisdiction with respect to a particular sought person.

The Court will have to determine the boundaries of its own competence in the context of any concrete case that is brought before it and so consider the legal effects of any purported restriction to the exercise of its jurisdiction. Clearly, whereas the Security Council can impose Chapter VII obligations on UN Member States requiring them to comply with its decisions in accordance with its functions and powers under the UN Charter, and while such obligations take precedence for UN Member States over any conflicting treaty obligations under international law,⁹⁰ the Council cannot so obligate an international organization with separate legal personality.⁹¹ As such, the Security Council cannot seek to effectively amend the operation of the Rome Statute contrary to the terms expressly provided for in the treaty by enshrining jurisdictional exemptions to the exercise of ICC jurisdiction.

On adoption of the Darfur referral, the US notably argued that what the Council was doing was no different from what States Parties had decided in allowing an opt-out from war crimes for seven years pursuant to Article 124 of the Statute, suggesting that what is available to States Parties should also be available to non-Party States, in particular at the Council's request.⁹² Notwithstanding views over the inclusion of Article 124, its existence is contained within the treaty itself pursuant to the agreement of negotiating states at the time of its adoption and is therefore binding on the Court. So is Article 16 enabling the Security Council to request a deferral of an ICC investigation or prosecution for a renewable twelve-month period. Amendments of the Statute by the Assembly of States Parties would similarly bind the Court.⁹³ By contrast, the adoption of a resolution that sought to amend the statutory regime for the exercise of the Court's jurisdiction via Chapter VII of the UN Charter would offend fundamental treaty-making processes, liable to be rendered invalid in any concomitant proceedings before the Court.

The aims of the Security Council might have been better served perhaps if, instead of referring situations to the ICC on the basis of territory accompanied by an opt-out on particular nationalities, it had referred the situation by virtue of active personality

⁹⁰ Arts 25 and 103 UN Charter.

⁹¹ See R Rastan, 'Testing Cooperation: The ICC and National Authorities' (2008) 2 *Leiden Journal of International Law* 431, 441–4 and accompanying text in n 6.

⁹² United States: 'Protection from the jurisdiction of the Court should not be viewed as unusual. Indeed, under article 124, even parties to the Rome Statute can opt out from the Court's jurisdiction over war crimes for a period of seven full years, and important supporters of the Court have in fact availed themselves of that opportunity to protect their own personnel. If it is appropriate to afford such protection from the jurisdiction of the Court to States that have agreed to the Rome Statute, it cannot be inappropriate to afford protection to those that have never agreed. It is our view that non-party States should be able to opt out of the Court's jurisdiction, as parties to the Statute can, and the Council should be prepared to take action to that effect as appropriate situations arise in the future'; UN Doc S/PV.5158 (n 80) 3.

⁹³ Arguably, the Security Council could impose Chapter VII obligations on UN Member States to give effect to its decision through the international organizations of which they were a part, including the Assembly of States Parties, but could not directly amend the Statute or alter the Court's jurisdictional regime.

by opting in with respect to certain nationalities only. This might have ostensibly avoided the difficulties described with respect to the Court's jurisdictional regime, even if it would have occasioned the same political and policy concerns as to selectivity—particularly where it purposefully failed to encompass all the parties to the conflict involved or the factual pattern of allegations. However, this route would have triggered its own controversies, not least of which would be its consistency with the strong opposition voiced throughout the negotiations against selective referrals linked to particular conduct, suspects, or parties.⁹⁴ It would also have contradicted the more fully developed provisions concerning proceedings initiated by states, whereby a State Party referral concerning 'a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed' results in a request to the prosecutor to 'investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes'.⁹⁵ Similarly Rule 44, in clarifying the scope of a declaration lodged under Article 12(3) by a non-Party State (i.e. in analogous situations where the Court would otherwise not have jurisdiction), confirms that this '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). It would be difficult to argue that the Security Council should enjoy a broader right than states to make selective referrals or declarations, particularly where no such distinction is found in the debates during negotiations, and no special considerations, such as the Council's Chapter VII authority under the UN Charter, merit modification of the Court's own powers under the Rome Statute.

7.5 Territorial Jurisdiction

The territorial jurisdiction of the Court is delimited by Article 12 to crimes occurring on the territory of a State Party (Article 12(2)(a)) or a state that has accepted the jurisdiction of the Court on an ad hoc basis (Article 12(3)). It also extends to crimes committed on board a vessel or aircraft which is registered to either of these states.⁹⁶ This form of jurisdiction is an alternative to that asserted on the basis of active personality described previously. This territorial limitation is set aside where the Security Council refers a situation pursuant to Article 13(b), which may concern alleged crimes committed on the territory of any UN Member State.

The exercise of criminal jurisdiction within one's own territory is one of the most traditional aspects of state sovereignty.⁹⁷ That right includes the ability to exercise

⁹⁴ See *supra* (n 77).

⁹⁵ Art 14(1) ICC Statute. The fact that the Statute prevents a referring body from restricting the scope of preliminary examination or investigation does not mean that specific allegations against named individuals or identified incidents cannot be provided. Indeed, States are encouraged to provide such information: 'As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation' (Art 14(2)). Such information may also be sought by the Prosecutor following a State Party or Security Council referral (Rule 104).

⁹⁶ Art 12(2)(a) ICC Statute.

⁹⁷ 'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.' *Island of Palmas Case (Netherlands v U.S.)*, Permanent Court of Arbitration (1928), 2 UN Rep. International Arbitral Awards, 829.

jurisdiction over foreign nationals committing crimes on its territory, subject only to certain restrictions relating to the state or diplomatic immunity with respect to certain foreign nationals on a state's soil in such capacity, or agreements relating to exclusive criminal jurisdiction between a sending state and the host state, such as a SOFA. The application of these same principles is recognized in the Statute, except that they apply not as limitation to the exercise of jurisdiction (Article 27), but as limitation to the obligations that can be placed on States Parties concerning the surrender of foreign nationals to the Court (Article 98).⁹⁸ In this respect, the provisions of the Rome Statute whereby jurisdiction may be exercised with respect to the nationals of non-Party States who committed crimes on the territory of States Parties is not novel and represents a generally recognized base for the assertion of criminal jurisdiction pursuant to international cooperation in the suppression of treaty-based crimes such as piracy,⁹⁹ terrorism,¹⁰⁰ drug trafficking,¹⁰¹ torture,¹⁰² war crimes,¹⁰³ and genocide.¹⁰⁴ The only difference with the ICC is that States Parties have authorized the Court to substitute itself for their own jurisdiction through delegation.¹⁰⁵ Rather than creating a form of collective extra-territoriality towards that non-obligated third state, amounting to unilateral, interventionist action in violation of Article 34 of the Vienna Convention on the Law of Treaties,¹⁰⁶ the Rome Statute enables the exercise of jurisdiction not with respect to an action against a third state, but with respect to the nationals of such third

⁹⁸ See *supra*, section 4.

⁹⁹ Arts 14–22, Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11; Arts 100–7 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

¹⁰⁰ Art 4 Convention for the Suppression of Unlawful Seizure of Aircraft (signed 16 December 1970, entered into force 14 October 1971) 860 UNTS 105; Art 5 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (concluded 23 September 1971, entered into force 26 January 1973) 974 UNTS 178; Art 3 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167; Art 5 International Convention Against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205; Art 3 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (signed 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221; Art 2 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (concluded 10 March 1988, entered into force 1 March 1992) 1678 UNTS 304; Art 7 International Convention for the Suppression of the Financing of Terrorism (9 December 1999, entered into force 10 April 2002) 2178 UNTS 197.

¹⁰¹ Art 36(2)(iv) Single Convention on Narcotic Drugs (adopted 39 March 1961, entered into force 13 December 1964) 520 UNTS 151; Art 4(2)(b) Convention Against the Illicit Traffic in Narcotic Drugs (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95.

¹⁰² Art 5(2) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

¹⁰³ Art 49 Geneva Convention I (n 71); Art 50 Geneva Convention II (n 71); Art 129 Geneva Convention III (n 71); Art 146 Geneva Convention IV (n 71).

¹⁰⁴ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

¹⁰⁵ The Nuremberg Tribunal held that the framers of the Nuremberg Charter had done the same, stating ‘The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law’; Judgment, IMT Nuremberg, 30 September 1946, 22 IMT 447.

¹⁰⁶ The position is classically expressed by D Scheffer, ‘The United States and the International Criminal Court’ (1999) 93 *American Journal of International Law* 12; and R Wedgwood, ‘The International Criminal Court: An American View’ (1999) 10 *European Journal of International Law* 93.

state, meaning no international obligations are thereby created by the treaty for the third state.¹⁰⁷

Looking at the practice of the ICC to date, the territorial delimitation of a situation has been the principal way in which the Court's jurisdiction has been exercised. The Situations *in* the DRC, Uganda, Central African Republic, Darfur, Kenya, Libya, Côte d'Ivoire, and Mali are all territorially defined. This is also in line with the way in which referrals have been characterized, although the Court has exercised some discretion in interpreting the territorial scope of referrals.¹⁰⁸ The cases arising from these situations also relate to acts allegedly committed within the confines of one state. Moreover, to date none of the resultant cases from any of the situations before the Court concern the exercise of jurisdiction over third state nationals from non-Party States committing crimes on the territory of the situation country.¹⁰⁹ Only the situation referred by the Comoros 'with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza strip' relates to alleged crimes occurring on the territory of more than one state. It is also the first State Party referral that triggers the exercise of jurisdiction in relation to the territory of other states, while referring also to crimes committed on its own territory, and the first to do so in relation to flag jurisdiction.¹¹⁰ Moreover, it is a situation of partial jurisdiction, since of the eight vessels forming part of the flotilla, the Court has only territorial jurisdiction in relation to three ships registered to States Parties, namely the vessels registered in the Comoros, Greece, and Cambodia—although this appears not to have had any substantive impact given that the main allegations concerned the excessive use of force on-board the *MV Mavi Marmara*, registered in the Comoros.¹¹¹ Other than the Comoros, it is only in situations currently or previously under preliminary examination that crimes have allegedly been committed by the nationals of non-Party States on the territory of States Parties, including in South Korea, Afghanistan, and Georgia.

¹⁰⁷ It might be argued that the jurisdiction of international bodies differs from that of national forums because the protections under law of state immunities can be set aside by an international court, thereby depriving a third state of internationally recognized protections that seek to ensure the unimpeded conduct of its foreign relations and non-interference in the performance of official functions by its nationals abroad. However, as described, the Statute enshrines applicable limitations under international law to the surrender of third state nationals based on state or diplomatic immunity or non-surrender agreements, which may lawfully suspend the cooperation obligations of States Parties in a concrete case.

¹⁰⁸ See e.g. the referral by the Government of Uganda in relation to 'Northern and Western Uganda', which the prosecution characterized as the situation in 'Northern Uganda', and the Presidency assigned it to Pre-Trial Chamber II as the situation in 'Uganda'; Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, Kony et al., *Situation in Uganda*, ICC-02/04-01/05-53, PTC II, ICC, 27 September 2005, 1, paras 30-1. By contrast, the Security Council referral of the situation in Darfur was maintained by the Court in relation to only that region of Sudan, doubtless because the ICC does not otherwise possess jurisdiction in relation to the rest of the country.

¹⁰⁹ Even in the situations in Darfur and Libya, although the suspects in the cases concerned are nationals of non-Party States, their nationality corresponds to territory where the crimes occurred, i.e. they are not third state nationals.

¹¹⁰ Decision Assigning the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia to Pre-Trial Chamber I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13-1, Presidency, ICC, 5 July 2013.

¹¹¹ The other vessels were registered to Turkey, Kiribati, Togo, and the US; *ibid.*, Annex 1.

A number of issues related to territory might arise in future proceedings. For example, it may be possible that the Court exercises only partial territorial reach over a particular armed conflict or incidence of violence spanning more than one territory. Violence in state A, where the Court has territorial jurisdiction, might cross the border into state B, where it does not. As a result, an international armed conflict might only be partially captured by the territorial reach of the Court. This might result in disjointed jurisdictional reach, since the personal jurisdiction would remain intact for state A nationals crossing into state B, but would not extend to state B nationals unless they entered state A.

Another variant may concern the territorial reach of the Court with respect to the particular conduct of an individual where his or her contribution is made outside of the territory of the state where the crimes occur, be this from the territory of another State Party or that of a non-Party State. In the *Mbarushimana* case, for example, the defence sought to argue that the suspect was not amenable to the scope of the situation because his contribution was made on the territory of France not the DRC. Since the DRC had referred the situation with respect to crimes occurring on its own territory, it was argued that those allegedly taking place abroad would fall foul of its territorial reach.¹¹² The issue was only raised in preliminary form in a defence leave to reply, which was ultimately denied as the Chamber held that these were new legal arguments unrelated to any issues arising from the prosecution's response to the defence's jurisdictional challenge. Even though the Chamber did not rule on the merits, the argument raises a number of interesting questions. As a preliminary matter, it is doubtful whether a contribution to the commission of a crime by a group of persons acting with a common purpose, as alleged in the case, triggers considerations of territoriality, since all of the mental and material elements of the alleged crimes occurred in the DRC.¹¹³ Assuming, however, in relation to a different factual scenario that territoriality did apply, the question would relate to the *locus delicti* and the reach of liability for persons engaging in acts in one territory where the effects are caused in the other. International law has long recognized the permissibility of an extra-territorial application of the territorial based on the subjective or objective application of the territorial principle.¹¹⁴ For the assertion of jurisdiction, it has commonly been accepted that it is

¹¹² Defence request for leave to reply to the Prosecution's response to the Defence challenge to the jurisdiction of the Court and Defence request to adduce oral testimony, *Mbarushimana, Situation in the Democratic Republic of the Congo*, PTC I, ICC, ICC-01/04-01/10-323, 1 August 2011, para. 6: 'in so far as the sum total of Mr Mbarushimana's alleged contribution to the criminal common purpose is concerned (i.e. his purported handling of the "deceitful" international media campaign)—all of it was conducted on French territory and not in the DRC. In circumstances such as these, therefore, the Defence will argue that the basic precondition for jurisdiction under Article 12 of the Rome Statute ceases to exist since the referral was not made by the State on the territory of which "the conduct in question" occurred.'

¹¹³ In relation to Art 25(3)(d), the Statute provides that the contribution shall be intentional and shall either: (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) be made in the knowledge of the intention of the group to commit the crime. Art 30(2) provides that a person has intent where (a) in relation to conduct, that person means to engage in the conduct; or (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.

¹¹⁴ See e.g. *Lotus* case (n 73). The objective territoriality principle relates to acts commenced abroad, but completed in the forum state, while the subjective territoriality principle relates to acts initiated in

necessary and sufficient that one constituent element of the act or situation has been consummated in the territory of the state that claims jurisdiction.¹¹⁵ A state can claim jurisdiction, thus, if the offence has been committed, in part or in whole, in its territory, in the sense that a constituent element of the offence occurred in its territory.¹¹⁶ Accordingly, there appears to be no reason why the Court could not exercise jurisdiction pursuant to a referral from the state where the crime was completed, for example, based on the objective application of the territoriality principle.¹¹⁷ Moreover, although in the *Lotus* case *mens rea* was irrelevant to the assertion of jurisdiction under the objective territorial principle since the crime was one of inadvertence, arguably intention and motive could be taken into account as a further factor where the suspect aimed for the consequence to occur within the territory of another state.¹¹⁸

Finally, issues of territorial scope may also arise with respect to disputed territories. For example, the Court has or is currently examining a number of situations where the demarcation of state boundaries is contested, including in relation to Palestine,¹¹⁹ Georgia,¹²⁰ and Ukraine¹²¹. In these circumstances, because the issue relates to one

the forum state, but completed abroad. See also the principle of ubiquity (Ubiquitätsprinzip) under, e.g., Section 9 of the German Criminal Code (Strafgesetzbuch, StGB). See also C Blakesly, 'Jurisdiction' in C Bassiouni (ed.), *International Criminal Law*, vol. 2 (Leiden: Martinus Nijhoff 1999) 48; S Bourgon, 'Jurisdiction Ratione Loci' in Cassese et al. (n 57) 556–7.

¹¹⁵ C Ryngaert, *Jurisdiction in International Law* (New York: Oxford University Press 2008) 75–6. See generally C Blakesly, 'Jurisdiction' in C Bassiouni (ed.), *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms*, vol. 2, 3rd edn (Leiden: Martinus Nijhoff 2008) 96–108. See also Harvard Research Draft Convention on Jurisdiction with Respect to Crime (n 67) 495, which provides: 'a crime is committed "in whole" within the territory when every essential constituent element is consummated within the territory; it is committed "in part within the territory" when any essential constituent element is consummated there. If it is committed either "in whole or in part" within the territory, there is territorial jurisdiction.'

¹¹⁶ As Akehurst notes, '[t]his is the formulation adopted in the *Lotus* case, by the Harvard Research Draft Convention on Jurisdiction with Respect to Crime, by Article 18 of the American Law Institute's *Restatement of Foreign Relations Law*, by the criminal codes of many countries and by many judicial decisions in common law countries and elsewhere'; M Akehurst, 'Jurisdiction in International Law' (1972–3) 46 *British Yearbook of International Law* 145, 152–3. The 'constituent elements' approach under the objective territorial principle should be distinguished from the 'effects doctrine' since, whereas the effect caused in the former is a constituent part of the offence, that arising in the latter is a mere consequence or repercussion of conduct completed abroad; Jennings and Watts (n 51) 446–78; *Timberlane Lumber Co. v Bank of Maericia*, 549 F.2d 597 (1976); *Laker Airwarys v Sabena*, 731 F.2d 909 (1984); *Hartford Fire Insurance v California*, 509 US 764,113 Sup.Ct.2891 (1993); *F. Hoffman-LaRoche Ltd v Empagran S.A.* 124 S.Ct.2359 (2004).

¹¹⁷ See also Bourgon (n 114) 567.

¹¹⁸ See Akehurst (n 116) 155. The territorial scope of a referred situation with respect to the territory of the DRC itself was also discussed in the *Mbarushimana* case, namely whether the scope of the situation extended only to the Ituri region or applied to the whole of the DRC, including also events occurring in neighbouring North and South Kivu; see Decision on the 'Defence Challenge to the Jurisdiction of the Court', *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-451, PTC I, ICC, 26 October 2011, para. 26 ('*Mbarushimana* Decision on Jurisdiction'). For further discussion see Rastan, 'The Jurisdictional Scope of Situations before the International Criminal Court' (n 32).

¹¹⁹ Although this is contested bilaterally between Israel and Palestine, the UN position is based on the pre-1967 borders; see e.g. UNGA Res 67/120 (14 January 2013) UN Doc A/RES/67/120.

¹²⁰ Although the breakaway region of South Ossetia only declared its independence after the August 2008 armed conflict between Georgia and Russia.

¹²¹ Although the temporal focus of the Art 12(3) declaration lodged with the Court spans the period 21 November 2013–22 February 2014, before the breakaway region of Crimea declared independence and was subsequently annexed by Russia.

of jurisdictional precondition in respect of the territorial boundaries of a State Party pursuant to Article 12(1)–(2), it may be reasonable for the Court to follow the practice of the United Nations, since membership of the Statute is subject to UN rules and procedures on treaty participation by virtue of the Secretary General's role as treaty depositary.¹²² This may concern contested territorial or maritime delimitation which has been subjected to final arbitral determination or which otherwise remains unresolved;¹²³ issues related to *de facto* or *de jure* control;¹²⁴ state succession;¹²⁵ or questions as to the scope of territorial application in view of so-called non-metropolitan territories versus the metropolitan territories, where the mother country is distinct from its colonies and overseas territories or dependencies, meaning parts of the territory of a state may, under its domestic law, be subject to a separate legal regime, or in view of non-autonomous or non-independent territories for the conduct of whose foreign relations certain states are internationally responsible.¹²⁶

7.6 Temporal Jurisdiction

The temporal parameters of the Court's jurisdiction apply as a default from the entry into force of the Statute (1 July 2002).¹²⁷ Accordingly, while the territorial and personal parameters of the Court's jurisdiction may vary over time, as more states become party to the Statute or states not party become subject to ICC jurisdiction by virtue of Article 12(3) declarations or United Nations Security Council referrals, and while its subject matter jurisdiction may undergo amendment, the temporal delimitation for the entry into force of the Statute is fixed.¹²⁸ Article 22 further enshrines the principle that no person shall be criminally responsible under the Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court (*nullum crimen sine lege*). Article 24 provides that no one will be held criminally

¹²² Art 125 ICC Statute. In respect of non-Party States, although the verification procedure for a state that lodges a declaration under Art 12(3) is not defined in the Statute, the Prosecutor has to date observed that it will follow the same procedure as that which would apply were the state concerned to seek to become a State Party—the premise being that Art 12(3) is available as a mechanism for the acceptance of the exercise of ICC jurisdiction to a state that would otherwise be able to become a State Party: meaning, in reverse, that if the entity concerned could not become a State Party, it cannot, in the alternative, lodge an ad hoc declaration, as the ‘state’ concerned under each limb of Art 12 must possess the same essential prerequisites. See Situation in Palestine, OTP, ICC, 3 April 2012, para. 6; ‘The determination of the Office of the Prosecutor on the communication received in relation to Egypt’, *ICC Press Release*, 8 May 2014.

¹²³ See e.g. competing communications entered by UK (11 March 2010) and Argentina (19 May 2010) asserting territorial application of the Rome Statute with respect to the Falkland Islands/Islas Malvinas; available at United Nations Treaty Collection online publication of all treaty actions undertaken in relation to the Rome Statute <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVIII-10&chapter=18&lang=en> accessed 9 August 2014.

¹²⁴ For example, in the case of United Nations Council for Namibia established in 1967, although South Africa continued at the time to exercise *de facto* control over the territory, the Council exercised *de jure* competence, *inter alia*, to enact any necessary laws and recognitions and became a party to numerous treaties deposited with the Secretary General; Summary of Practice of the Secretary General as Depositary of Multilateral Treaties, ST/LEG/7/Rev.1 (1999) para. 90.

¹²⁵ Ibid., paras 288–90.

¹²⁶ Ibid., para. 263.

¹²⁷ Art 11 ICC Statute.

¹²⁸ This is in the sense that, subject to amendment of the Statute which is theoretically possible, there is nothing in the legal instruments of the ICC which foresees any modification to the date of entry into force of the Statute.

responsible under the Statute for conduct prior to the entry into force of the Statute (non-retroactivity).¹²⁹

With respect to individual States Parties, for those states that were part of the initial states whose ratification was necessary to bring the treaty into force, the temporal jurisdiction of the Court with respect to offences committed on their territory or by their nationals will date from the entry into force of the Statute itself, namely 1 July 2002. For those states that acceded to the Statute after its entry into force, the Statute will come into effect with respect to offences committed on their territory or by their nationals according to the timetable contained in Article 126 of the Statute, namely on the first day of the month after the 60th day following the date of the deposit by such state of its instrument of accession. This may be modified by the acceding state if it so chooses by the lodging of a declaration accepting the exercise of the jurisdiction of the Court from an earlier period prior to it becoming a State Party (not earlier than 1 July 2002), during which period it would effectively be treated as a non-Party State that has accepted the exercise of ICC jurisdiction.¹³⁰

A State Party may choose to limit the temporal jurisdiction of the Court over war crimes for an initial seven-year period after the entry into force of the Statute with respect to its nationals or its territory. Article 124 only refers to States Parties that are granted this right; as such it appears that it cannot be relied upon by a non-Party State accepting the exercise of jurisdiction by the Court under Article 12(3). This is supported by the wording of Rule 44, which was specifically adopted to clarify that an Article 12(3) declaration cannot limit the material jurisdiction of the Court. The rule reads in relevant part: ‘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 and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply’.¹³¹ Article 124 would similarly appear to be unavailable to a state not party to the Statute which is the object of a Security Council referral, since a referral pursuant to Chapter VII of the UN Charter is neither dependent on the separate consent of states, nor can it be made the object of a unilateral opt-out of jurisdiction.

The clearest effect of the timing of such acceptance of the Statute by individual states is its impact on the exercise of ICC jurisdiction. For example, because Afghanistan

¹²⁹ As Per Saland, Chairman of the Working Group on the General Principles of Criminal Law during the Rome Conference, observes in the context of debates on the question of continuing crimes, the lack of agreement on the choice of a verb to go with the word ‘conduct’ in Art 24—such as ‘committed’, ‘occurred’, ‘commenced’, or ‘completed’—was only resolved by suggesting the removal of any verb, even if stylistically it did not read well in English, thereby enabling the Court to settle the issue; P Saland, ‘International Criminal Law Principles’, in Lee (n 8) 196–7.

¹³⁰ Art 11(2) ICC Statute. See e.g. Art 12(3) declaration lodged by Uganda on becoming a State Party (Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as amended on 27 September 2005, *Kony et al., Situation in Uganda*, ICC-02/04-01/05-53, PTC I, ICC, 27 September 2015, para. 39); see also El Zeidy, Chapter 8, this volume.

¹³¹ The provision was adopted to remedy the apparent inconsistency between the wording of Art 12(3), which refers to the acceptance of ‘the exercise of jurisdiction by the Court with respect to the crime in question,’ and Art 13 which speaks of a ‘situation in which *one or more of such crimes* appears to have been committed’ with reference in the *chapeau* to ‘a crime referred to in article 5’; J Holmes, ‘Jurisdiction and Admissibility’ in Lee (n 8) 326–7.

acceded to the Statute on 1 May 2003, the Court has no territorial jurisdiction over alleged crimes committed in Afghanistan between 1 July 2002 and 30 April 2003, absent an Article 12(3) declaration to that effect. The same would apply to personal parameters relevant to the nationals of States Parties where the entry into force for that state occurs after July 2002. This could create the odd situation, such as in Iraq, where for certain State Party nationals allegedly committing crimes on the territory of Iraq active personality jurisdiction runs from 1 July 2002 (e.g. UK, Poland, Australia, Denmark), while for other State Party nationals it starts later (e.g. Georgia from 1 December 2003, Japan from 1 October 2007).

In relation to the temporal scope of State Party referrals, while a State Party may choose to circumscribe the timeframe of a particular situation it submits for investigation, it could not definitively limit the temporal jurisdiction of the Court since, subject to the entry into force date for that state as well as Article 124, the Court would enjoy inherent jurisdiction with respect to alleged crimes committed on that state's territory or by its nationals.¹³² Thus, the prosecutor could always seek Pre-Trial Chamber authorization under Article 15 to extend the temporal scope of any situation so referred to encompass a broader time period.¹³³

Restrictions with respect to the entry into force of the Statute for particular States Parties do not apply where the Security Council refers a situation, although the Council cannot trespass the absolute demarcation of the entry into force of the Statute itself (Article 11). It is worth recalling that the Security Council cannot authorize the ICC to act beyond the powers conferred upon it under the Statute. Unlike the ad hoc Tribunals, the ICC is not a subsidiary organ of the Council in the sense that the principal organ possesses the competence to determine the membership, structure, mandate, and duration of existence of its subsidiary organ.¹³⁴ As noted earlier, the ICC, as an international organization with a distinct legal personality, cannot be bound by the decisions of the Security Council which seeks to change the constitutional boundaries of the Court's competence. In particular, the principle of attribution holds that an international organization cannot act beyond the powers attributed to it by its constituent treaty.¹³⁵ Thus, the Security Council cannot expand the temporal scope of the Court beyond the provisions of the Rome Statute, since the ICC would then be acting *ultra vires* its own legislative framework.¹³⁶ It is true that the territorial and personal parameters of the Court's jurisdiction can be modified by the Security Council, by enabling the exercise of ICC jurisdiction over persons or territory which would not otherwise be amenable to the Court. But this is expressly provided for within the

¹³² Art 12(1) ICC Statute. See, however, Art 124.

¹³³ For the same reasons, an Art 15 communication with respect to a particular set of dates could not constrain the discretionary choices of the Prosecutor to open investigations and to select the parameters thereof.

¹³⁴ D Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (New York: Oxford University Press 1999) 130.

¹³⁵ H Schermers and N Blokker, *International Institutional Law: Unity within Diversity* (Leiden: Martinus Nijhoff 2003) 155.

¹³⁶ D Sarooshi, 'The Peace and Justice Paradox: The International Criminal Court and the UN Security Council' in D McGoldrick et al., *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart Publishing 2004) 95, 106–7. See Rastan, 'Testing Cooperation' (n 91) 441–4.

jurisdictional scheme of the Statute.¹³⁷ Specifically, when the Security Council makes a referral, it enables the exercise of existing jurisdictional bases to be extended to the territory and/or nationals of other states; it is not changing the statutory jurisdictional framework itself.

While the Security Council cannot backdate the temporal jurisdiction of the Court to before the entry into force of the Statute, it can delimit it post that date. In particular, when it makes a referral with respect to the territory or nationals of a non-Party State, the Security Council is not required to invest the ICC with temporal jurisdiction from 1 July 2002. But for a Security Council referral in these circumstances, the ICC would have no jurisdiction at all. Thus, subject to Article 11, the Security Council can dictate the temporal scope of the referral, by way of a start and/or end date, and so define the temporal jurisdiction of the Court with respect to the referred situation. The same occurs where a State not Party to the Statute lodges a declaration accepting the exercise of jurisdiction by the Court under Article 12(3), granting the ICC jurisdiction where it would otherwise have none.¹³⁸ Nonetheless, given that the Court will often be faced with situations of ongoing violence, the setting of an end date while a conflict is still raging would likely appear arbitrary, even if not legally impermissible; whereas an end date would appear more appropriate in the context of a temporally well-defined set of events that have concluded.

A final general issue that may arise relates to the question of ‘continuing crimes’, notwithstanding the inviolability of Article 11 as an absolute demarcation. Arising in the context of cases of enforced disappearance where the particular completed act may be said to ‘continue’ after the time of its initial occurrence until such time as the person’s whereabouts are disclosed and the truth about them is discovered, the concept of continuity has enabled human rights bodies to examine unsolved cases of disappearances committed prior to entry into force of relevant conventions because the continuing nature of the crimes extends into the present.¹³⁹ This specific scenario is treated explicitly in footnote 24 of the Elements of Crimes in relation to the crime against humanity of enforced disappearance of persons, which specifies: ‘[t]his crime falls under the jurisdiction of the Court only if the attack referred to in elements 7 and 8 occurs after the entry into force of the Statute’.¹⁴⁰ Untreated, however, in the Statute or Elements is whether the same would apply to other ICC crimes.

¹³⁷ Art 13(b) ICC Statute. For the same reason, the Council also cannot alter the subject matter jurisdiction of the Court, since the applicable law before the Court is governed by Art 21 and the statutory amendment procedure, which resides within the exclusive domain of the Assembly of States Parties. See the earlier discussion on personal jurisdiction.

¹³⁸ It is worth noting in this regard, that an Art 12(3) declaration should not be equated with a state referral, which can only be made by a State Party. Instead, it serves to satisfy a required precondition for the exercise of ICC jurisdiction under Art 12, which must then be separately triggered into exercise according to Art 13 by either the Prosecutor acting *proprio muto* or by a State Party referral. While the Security Council may also refer a situation concerning a state that has lodged an Art 12(3) declaration, it would need to rely on such a declaration as the basis to do so.

¹³⁹ See e.g. *Chapman Blake v Guatemala*, Merits, IACtHR Series C No 36, IHRL 1419 (IACtHR 1998), [1998] IACtHR 1 (24 January 1998).

¹⁴⁰ Elements of Crimes (n 40) for Art 7(1)(i).

Arguably, if the offence classically associated with continuing crimes does not permit retroactive application beyond the scope of Article 11, the same logic could reasonably be extended to other offences, bearing in mind also the proscription against retroactive application of the Statute under Article 22. Although not treated yet in the case law of the ICC, in the *Nahimana et al.* case before the ICTR, the Trial Chamber found that acts of incitement to genocide that occurred in 1993 and continued in time until the commission of the genocide in 1994 fell within the jurisdiction of the Tribunal, notwithstanding the temporal start date of ICTR's jurisdiction from 1 January 1994.¹⁴¹ On appeal this finding was reversed. In particular, the Appeals Chamber clarified that the crime of direct and public incitement to commit genocide is completed as soon as the discourse in question is uttered or published, even though the effects of incitement may extend in time.¹⁴² The Appeals Chamber also rejected the prosecutor's argument that the articles in the publication *Kangura* and the broadcasts of *Radio télévision libre des mille collines* (RTLM) constituted one continuing incitement to commit genocide, and that the Trial Chamber could therefore convict the appellants on the basis of the totality of the articles and broadcasts, including those occurring prior to 1994.¹⁴³ It held that even if it could be concluded that the totality of the articles and broadcasts constituted one continuing incitement to commit genocide, the appellants could only be convicted for acts of direct and public incitement to commit genocide carried out in 1994.¹⁴⁴ Such a reading would support the view that also at the ICC, there is no scope of considering acts which pre-date the entry into force of the Statute even if they continue beyond that date.

A slightly different question relates to the scope of the Court to consider crimes that commence before the entry into force of the ICC Statute and which continue thereafter, but where all the requisite elements can be considered as fulfilled within the temporal scope of the Statute. Clearly, as in the example in *Nahimana*, for acts which represent discrete events that extend over time, such as repeat acts of torture against the same victim, the Court may only examine criminal responsibility with respect to those acts which post-date 1 July 2002.¹⁴⁵ Other crimes, however, may be less straightforward. In *Lubanga*, for example, both the Pre-Trial Chamber and the Trial Chamber observed that the crime of conscription or enlistment of children under the age of 15 years occurred every day that the children continued to be illegally recruited.¹⁴⁶

¹⁴¹ Judgment, *Nahimana et al.*, ICTR-99-52-A, AC, ICTR, 28 November 2007, para. 723.

¹⁴² Ibid. ¹⁴³ Ibid., para. 724.

¹⁴⁴ The Appeals Chamber nonetheless noted that, even if a conviction for incitement could not be based on the 1993 RTLM broadcasts, the Trial Chamber could have considered them as contextual elements of the 1994 broadcasts to explain how the RTLM listeners perceived the 1994 broadcasts and the impact these broadcasts may have had; stating it could similarly have admitted the pre-1994 *Kangura* articles as potentially relevant and of probative value; *ibid.*, 724–5.

¹⁴⁵ See nonetheless *ibid.*

¹⁴⁶ Decision on Confirmation of Charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-803-tEN, PTC I, ICC, 29 January 2007, para. 248: 'Finally, the Chamber considers that the crime of enlisting and conscripting is an offence of a continuing nature—referred to by some courts as a "continuous crime" and by others as a "permanent crime". The crime of enlisting or conscripting children under the age of fifteen years continues to be committed as long as the children remain in the armed groups or forces and consequently ceases to be committed when these children leave the groups or reach age fifteen'; Judgment pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, Trial Chamber I, ICC, 14 March 2012, para. 618: 'These

Although not raised in the context of Article 11, this holding might suggest that the moment of first recruitment may not be as decisive to the crime as is the moment of abduction that triggers an enforced disappearance. This is because whereas the requisite elements of enforced disappearance are cumulative—namely arrest/detention/abduction followed by denial or refusal¹⁴⁷—the requisite element with respect to child soldiers is singular: conscription or enlistment of children under 15 into an armed group or force.¹⁴⁸ Read in the light of the interpretation in *Lubanga*, this would mean that the essence of the prohibition is the inclusion of children under 15 within the membership of an armed group or armed force for the duration of such membership. Although the initial act of enlistment or conscription will constitute a discrete event in time, that which is prohibited is not merely the original recruitment of the child, but his or her continued membership in the armed group or force for the duration of such membership while under the age of 15 years. This would render the starting point less decisive since all of the elements of the crime could be said to have occurred within the temporal jurisdiction of the Court, notwithstanding the conduct extended in time from before the activation of the Court's temporal threshold. Strictly speaking, this is less a continuing crime, but more an extension of the idea of repeat acts that have their origin before the entry into force of the Rome Statute. If this logic is accepted, its application to certain other crimes all of whose contextual parameters continue to occur after the temporal threshold of the Court jurisdiction could be explored without offending Articles 11 and 22 of the Statute or footnote 24 of the Elements of Crimes.

Turning to ICC decisions related to temporal jurisdiction, the issue has arisen in connection with the scope of particular situations before the Court. In the two Article 15 proceedings to date, the Pre-Trial Chambers took differing approaches as to whether the Court could authorize the prosecutor to investigate only historic crimes, or also to prospectively grant authorization to investigate ongoing criminal activity. In the Kenya Situation, Pre-Trial Chamber II set the start date at 1 June 2005 (Kenya's date of accession) and established an outer limit at the date of the prosecutor's application (26 November 2009), since this was the last opportunity the prosecutor had to assess the information available prior to its submission for the Chamber's examination.¹⁴⁹ According to the Chamber an Article 15 application could, by definition, only extend to events up to the date of the prosecutor's authorization request. Although this was not controversial in relation to Kenya, where the crimes related to the post-election violence had long subsided, in many contexts the ICC has faced situations of ongoing violence, as borne out by its early practice.¹⁵⁰ By contrast, Pre-Trial

offences are continuous in nature. They end only when the child reaches 15 years of age or leaves the force or group.'

¹⁴⁷ Elements of Crimes (n 40) for Art 7(1)(i).

¹⁴⁸ Elements of Crimes (n 40) for Art 8(2)(b)(xxvi) and Art 8(2)(e)(vii).

¹⁴⁹ Kenya Art 15 Decision (n 31) paras 201–7.

¹⁵⁰ As discussed in Rastan, 'The Jurisdictional Scope of Situations before the International Criminal Court' (n 32) 22, the interpretation of the Pre-Trial Chamber appears to impose an unnecessary restriction on statutory powers otherwise envisaging the investigation of ongoing crimes and would moreover appear impractical. In situations of ongoing violence so opened under Art 15, the prosecution would need to artificially curtail its powers in the middle of its investigations after a certain time limit since it would have had no authority to investigate further without reverting to the Chamber for authorization to continue. Moreover, it could inappropriately draw the Chamber into deciding upon investigative

Chamber III, assigned with the Situation in Côte d'Ivoire, did not see a need to set an end-date to the temporal scope of the authorized situation based on the moment the prosecution submitted its application, which would have been particularly inappropriate in the Côte d'Ivoire context since the Court faced a 'volatile environment' which had the potential to re-escalate.¹⁵¹ The Chamber held that the prosecutor could investigate ongoing crimes occurring after the date of authorization as long as they were sufficiently linked to the scope of the situation:¹⁵²

Bearing in mind the volatile environment in Côte d'Ivoire, the Chamber finds it necessary to ensure that any grant of authorisation covers investigations into 'continuing crimes'—those whose commission extends past the date of the application. Thus, crimes that may be committed after the date of the Prosecutor's application will be covered by any authorisation, insofar as the contextual elements of the continuing crimes are the same as for those committed prior to 23 June 2011. They must, at least in a broad sense, involve the same actors and have been committed within the context of either the same attacks (crimes against humanity) or the same conflict (war crimes). Therefore if the authorisation is granted, it will include the investigation of any ongoing and continuing crimes that may be committed after the 23 June 2011 as part of the ongoing situation.¹⁵³

Similar considerations were applied going backwards in order to determine the start date of investigations in Côte d'Ivoire.¹⁵⁴ Following further submissions and having satisfied itself that crimes with sufficient nexus to the previously authorized situation also occurred during this earlier period, the Pre-Trial Chamber III proceeded to supplement its authorization decision to back-date the temporal scope of the situation to alleged crimes occurring since 19 September 2002.¹⁵⁵ The Chamber characterized this entire period, constituting periods of armed conflict, abeyance, and renewed violence, as a single situation, holding:

[T]he violent events in Côte d'Ivoire in the period between 19 September 2002 and 28 November 2010, although reaching varying levels of intensity at different locations and at different times, are to be treated as a single situation, in which an ongoing crisis involving a prolonged political dispute and power-struggle culminated in the events in relation to which the Chamber earlier authorised an investigation.¹⁵⁶

strategies, since each sequential application would place before the Pre-Trial Chamber options for new or extended investigative leads.

¹⁵¹ *Côte d'Ivoire* Art 15 Decision (n 32) para. 179.

¹⁵² *Ibid.*, para. 178.

¹⁵³ *Ibid.*, paras 178–9.

¹⁵⁴ Specifically, although the Prosecution had sought authorization for a proposed investigative focus on events occurring since 28 November 2010, it had also made general submissions that the events were linked with earlier crimes pre-dating the events of November 2010. The Prosecutor had therefore stated that the Chamber could opt to provide jurisdiction over the entire period since 19 September 2002, based on the date of the original Art 12(3) declaration lodged by the government of Côte d'Ivoire. Some of the victims' representations had also pointed to alleged crimes arising from the earlier period. Request for authorization of an investigation pursuant to Art 15, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-3, OTP, ICC, 23 June 2011, paras 42 and 182.

¹⁵⁵ Decision on the 'Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010', *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-36, PTC III, 23 February 2012 ('Côte d'Ivoire Second Article 15 Decision').

¹⁵⁶ *Ibid.*, para. 36.

The above findings of Pre-Trial Chamber III relied in large part on the earlier finding of Pre-Trial Chamber I assigned with the Situation in the DRC. In particular, in *Mbarushimana* Pre-Trial Chamber I and later, the defence questioned whether the case fell within the existing situation in the DRC, since the alleged crimes related to events taking place during 2009 at considerable temporal distance from the original referral by the DRC in 2004. Accordingly, the Chamber examined whether these events were sufficiently linked to the facts that triggered the initial referral—suggesting, by implication, that it might constitute a separate situation.¹⁵⁷ The Pre-Trial Chamber framed its inquiry in relation to its supervisory functions to identify the scope of the situation, *inter alia*, in the light of the requirement in Article 53(1)(a) to establish whether a crime ‘has been or is being committed’.¹⁵⁸ In satisfying itself as to the scope of the DRC referral to cover contemporary events, the Chamber opined that, pursuant to Articles 13 and 14 of the Statute, a State Party in any event may only refer to the prosecutor an entire situation and that:

[a]ccordingly, a referral cannot limit the Prosecutor to investigate only certain crimes, e.g. crimes committed by certain persons or crimes committed before or after a given date; as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated.¹⁵⁹

As to whether there was a sufficient link between the crimes alleged in the prosecutor’s application and the overall scope of the situation, the Chamber stated:

[F]or the case at hand not to exceed the parameters defining the DRC situation under investigation, the crimes referred to in the Prosecutor’s Application must have occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court through the above mentioned referral. In the view of the Chamber,

¹⁵⁷ Decision requesting clarification on the Prosecutor’s Application under Art 58, *Situation in the Democratic Republic of the Congo*, ICC-01/04-575, PTC I, ICC, 11 October 2010. The Chamber was satisfied that the original referral from the DRC was not limited to past crimes occurring in particular locations, but to crimes that were ongoing throughout the country as a whole (*situation qui se déroule dans mon pays depuis le 1er juillet 2002*); while the Prosecutor in his notification to the Presidency and to States Parties, upon the opening of investigations, also characterized the situation as encompassing the entire territory of the DRC since 1 July 2002; Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, *Mbarushimana, Situation in the Democratic Republic of the Congo*, PTC I, ICC, ICC-01/04-01/10-1, 11 October 2010, para. 5.

¹⁵⁸ Decision requesting clarification on the Prosecutor’s Application under Art 58 (n 157) paras 6–8. Notably, the approach adopted by Pre-Trial Chamber I differed from that of Pre-Trial Chamber II in the Kenya Art 15 Decision (n 31), which held that, in the context of an Art 15 application, the wording of Art 53(1)(a) indicated that the Prosecutor could seek to investigate crimes that have occurred up until the time of the filing of the application, para. 206. For discussion see Rastan ‘The Jurisdictional Scope of Situations before the International Criminal Court’ (n 32) 21–3.

¹⁵⁹ Ibid. Similarly, although the government of Uganda defined the scope of its referral as related to the LRA, the Prosecutor clarified with the government of Uganda that the OTP would examine allegations from all parties to the conflict; see letter of Prosecutor dated 17 June 2004 annexed to Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, ICC-02/01, Presidency, ICC, 5 July 2004. Rule 44, dealing with declarations lodged pursuant to Art 12(3), also provides that a declaration ‘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). See discussion in Rastan, ‘The Jurisdictional Scope of Situations before the International Criminal Court’ (n 32).

it is only within the boundaries of the situation of crisis for which the jurisdiction of the Court was activated that subsequent prosecutions can be initiated. Such a situation can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral.¹⁶⁰

The Chamber further held that it was not necessary to prove that a particular entity or organization concerned was committing crimes at the time of the referral, i.e. in order for it to have contributed to the situation of crisis triggering the same referral. Instead, the critical question was whether the ‘crimes committed’ were ‘sufficiently linked to the situation of crisis which was ongoing at the time of the referral and was the subject of the referral’, ‘not the particular timing of the events underlying an alleged crime’. For this purpose, the Chamber further held that it was ‘irrelevant whether particular individuals or events subsequently charged by the Prosecutor could not have been charged at the time of the original referral for crimes within the jurisdiction of the Court’.¹⁶¹

This approach towards defining the temporal scope of a situation by virtue of the interconnected parameters of ongoing violence is similar in some respect to that of Pre-Trial Chamber I in the *Al Bashir* case (Darfur, Sudan), which found a nexus between ongoing crimes occurring over a large territory and over a five-year period characterized by varying levels of intensity.¹⁶² The combined findings in the *Mbarushimana* case, the Situation in Côte d’Ivoire, and the *Al Bashir* case, as to the required nexus between situation and cases, particularly concerning the conduct of different parties and incidents of violence that may vary over time, may be summarized as follows. In determining whether a sufficient nexus exists between the jurisdictional scope of a situation and crimes spanning different time periods, locations, and periods of intensity, the factors that a Chamber may consider include:

¹⁶⁰ Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana (n 157) para. 6.

¹⁶¹ *Mbarushimana* Decision on Jurisdiction (n 118) paras 41–2. The Chamber also dismissed the argument that since contemporaneous events in the Kivus and the activities of the FDLR did not prompt the referral, there was no causal link to Mr Mbarushimana as an alleged member of the FDLR, observing: ‘[b]y its very nature, the link required for an event to be encompassed in the scope of a situation can stretch over a number of years; accordingly, it cannot be required that the person targeted by the Prosecutor’s investigation be active throughout the duration of the relevant time-frame’; *ibid.*, para. 50.

¹⁶² See e.g. Second Decision on the Prosecutions’ Application for a Warrant of Arrest, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-94, PTC I, ICC, 12 July 2010, para. 15 (*‘Al Bashir Second Article 58 Decision’*): ‘[t]he above-mentioned attack on the said part of the civilian population of Darfur was large in scale, as it affected hundreds of thousands of individuals and took place across large swathes of the territory of the Darfur region... [t]he above-mentioned attack was systematic as it lasted for well over five years and the acts of violence of which it was comprised followed, to a considerable extent, a similar pattern’. These crimes also post-dated in part the date of the Security Council referral; see Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-3, PTC I, ICC, 4 March 2009, para. 37 (*‘Al Bashir Article 58 Decision’*), identifying the temporal parameters of the situation, based on Security Council Resolution 1593 (2005), as encompassing crimes within the jurisdiction of the Court occurring ‘since July 2002’.

- a. whether there is continuity, at least in a broad sense, between the principle actors/groups involved,¹⁶³ although this is not a strict requirement as groups may re-form and re-group under different headings or subsequently emerge (see d.),¹⁶⁴ and
- b. whether there is a link between the contextual elements of the crimes¹⁶⁵—i.e. whether the crimes have occurred in the context of the same attacks for crimes against humanity, the same armed conflict for war crimes,¹⁶⁶ or in the context of a manifest pattern of similar conduct directed against the target group for genocide.¹⁶⁷

By contrast, the Court need not consider as determinative:

- c. restrictions on the investigation of ongoing crimes (i.e. those falling within a. and b.) committed after the date of the referral or Article 15 application;¹⁶⁸
- d. whether specific actors/groups were in existence at the time of the referral or authorization application;¹⁶⁹ and
- e. whether the suspect was allegedly committing crimes at the time of the referral or authorization application.¹⁷⁰

The application of these factors corresponds to the prosecutor's more recent determination that contemporaneous crimes committed in the CAR, involving, *inter alia*, attacks led by Seleka and anti-Balaka armed groups, constitute a different situation and therefore warrant a separate preliminary examination, distinct from the situation previously referred by the government of the CAR in December 2004.¹⁷¹ Although the current wave of violence undoubtedly has some antecedents in the earlier conflict that engulfed the country, the decision to treat it as a new situation suggests that the contemporary violence has features distinguishing it from the earlier events in the light of factors such as the level of continuity between the actors or groups involved, and whether the violence is a recurrence that is linked to the earlier armed conflict

¹⁶³ *Côte d'Ivoire* Art 15 Decision (n 32) para. 179.

¹⁶⁴ *Mbarushimana* Decision on Jurisdiction (n 118) paras 40–2.

¹⁶⁵ Alternatively characterized by Pre-Trial Chamber III as a focus on incidents that 'form part of the same crisis or sequence of events for which an investigation has already been authorized'; *Côte d'Ivoire* Second Art 15 Decision (n 155) para. 14.

¹⁶⁶ *Côte d'Ivoire* Art 15 Decision (n 32) para. 179.

¹⁶⁷ Art 6, Elements of Crimes (n 40); *Al Bashir* Art 58 Decision (n 162) para. 113; *Al Bashir* Second Art 58 Decision (n 162) para. 8.

¹⁶⁸ *Mbarushimana* Decision on Jurisdiction (n 118) para. 41; contra, *Kenya* Art 15 Decision (n 31). See *supra* (n 132), (n 133), and (n 138) and accompanying text, nonetheless, on delimitations that may apply where end-date temporal parameters have been made express in a referral.

¹⁶⁹ *Mbarushimana* Decision on Jurisdiction (n 118) para. 42.

¹⁷⁰ Ibid., para. 50. For more detailed discussion of the accompanying case law see Rastan, 'The Jurisdictional Scope of Situations before the International Criminal Court' (n 32).

¹⁷¹ See annex to Decision Assigning Situation in the Central African Republic to PTC III, ICC-01/05-1, *Situation in the Central African Republic*, Presidency, ICC, 19 January 2005, describing the scope of the referral as encompassing 'crimes under the jurisdiction of the Court that may have been committed since 1 July 2002, anywhere on the territory of the Central African Republic'. See also 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a new Preliminary Examination in Central African Republic', *ICC Press Release*, 7 February 2014.

period or forms part of the same attacks against the civilian population. This distinction appears to have been confirmed by, or perhaps triggered, the second referral by the Government of the CAR of 30 May 2014 requesting the prosecutor to investigate ongoing crimes committed on its territory since 1 August 2012.¹⁷²

7.7 Conclusion

As noted earlier, issues related to jurisdictional parameters are relevant not only for determining the statutory scope of the Court's competence, but also for identifying the nexus between specific alleged acts and the situation that has been referred by a State Party or the Security Council or which has been authorized by the Pre-Trial Chamber, thus shaping the competence of the ICC to exercise its jurisdiction in a particular case. Jurisdiction may raise its head in many and multiple guises, in ways not dissimilar to those treated variously in other areas of public international law and domestic criminal law. It thus offers a rich area for continuing academic inquiry and Court practice.

¹⁷² See Annex to Decision Assigning the Situation in the Central African Republic II to Pre-Trial Chamber II, ICC-01/14-1, *Situation in the Central African Republic II*, Presidency, ICC, 18 June 2014.

Ad Hoc Declarations of Acceptance of Jurisdiction

The Palestinian Situation under Scrutiny

*Mohamed M. El Zeidy**

8.1 Introduction

On 3 April 2012 the former Prosecutor of the ICC removed the embargo on a statement which addressed one of the most controversial legal and political issues the Court has faced since the beginning of its operation.¹ This is the issue of the ad hoc declaration lodged by the Palestinian Minister of Justice on 22 January 2009, accepting the jurisdiction of the Court pursuant to Article 12(3) of the Rome Statute (the Statute). The declaration was probably lodged in response to Israel's military operation carried out in Gaza from 27 December 2008 to 18 January 2009, known as 'Operation Cast Lead'.²

A few years later and in particular from 13 June 2014 onwards, Israel carried out a number of 'massive' military operations in the Occupied Palestinian Territory, including East Jerusalem and the Gaza Strip.³ This caused a 'critical humanitarian situation',⁴ which prompted the establishment of an independent international commission of inquiry to 'investigate all violations of international humanitarian law and international human rights law' in these areas.⁵

Public records reveal that on 25 July 2014 the Palestinian Minister of Justice and the Attorney General of Gaza complained to the ICC against Israel's military operations.⁶

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¹ OTP's decision, Situation in Palestine, 3 April 2012 <<http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>> accessed 9 September 2014 ('Prosecutor's 3 April 2012 statement').

² See Report of the United Nations Fact Finding Mission on the Gaza Conflict—Executive Summary, UN Doc A/HRC/12/48(Advance 1) (23 September 2009) para. 29.

³ UN Human Rights Council Res S-21/1, 'Ensuring respect for international law in the Occupied Palestinian Territory, including East Jerusalem', UN Doc A/HRC/RES/S-21/1 (23 July 2014) preamble para. 12.

⁴ Ibid., preamble para. 13.

⁵ Ibid., para. 13; also 'UN Rights Council Appoints Members of Commission to Investigate Purported Gaza Violations', *UN News Centre*, 11 August 2014 <<http://www.un.org/apps/news/printnews.asp?nid=48459>> accessed 15 September 2014.

⁶ 'Palestine Filed Complain at ICC: Accuses Israel of War Crimes', *Global Research*, 26 July 2014 <<http://www.globalresearch.ca/palestine-filed-complain-at-icc-accuses-israel-of-war-crimes/5393396>> accessed 15 September 2014.

It is probable that the two Palestinian officials lodged a declaration under Article 12(3) of the Statute—similar in nature to the one submitted in January 2009. Within less than two weeks, however, it was reported that the President of the Palestinian Authority instructed the withdrawal of the ‘complaint’ from the ICC.⁷ This is not surprising. The President of the Palestinian Authority seems to have had in mind a different strategy. Apparently, the Palestinian President first thought of resorting to the Security Council to pass a resolution which aimed at ending the long lasting Israeli occupation by the end of 2017⁸ before heading towards the ICC. After a failed attempt on 30 December 2014 to secure the 9 affirmative votes required for passing the resolution,⁹ the Palestinian Authority resorted once more to the ICC. But this time the Palestinians not only lodged a third declaration under article 12(3) but also acceded to the Rome Statute. The Palestinian Authority submitted the third declaration on 31 December 2014 accepting the jurisdiction of the Court for “crimes committed in the occupied [...] territory, including East Jerusalem, since June 13, 2014”¹⁰. This was the exact complaint included in the second declaration which the Palestinian President instructed to withdraw from the ICC. Two days later, on 2 January 2015, the Palestinian Authority also deposited its instrument of accession of the Rome Statute with the Secretary-General of the United Nations.¹¹ Both actions on the part of Palestine were acknowledged by the representatives of the two international bodies (the Secretary-General of the United Nations and the Registrar of ICC) on 6¹² and 7¹³ January 2015 respectively.

It is commonly known that the drafters of the Statute opted for a system of ‘inherent’ or ‘automatic’ jurisdiction.¹⁴ A state which has ratified or acceded to the Statute becomes automatically subject to the Court’s jurisdiction with respect to the crimes set out in Article 5 and defined in Articles 6–8 *bis*.¹⁵ Yet, in order for the Court to exercise its jurisdiction with respect to these crimes (in response to a State Party referral or a *proprio motu* initiative on the part of the Prosecutor), the Statute imposes an additional precondition, namely that the crime was committed either on the territory

⁷ ‘Palestinian Authority withdraws complaint against Israel’, *Voltaire Network*, 7 August 2014 <<http://www.voltairenet.org/article185015.html>> accessed 15 September 2014; ‘Correction: Saleem al-Saqqa pledges to maintain Palestinian complaint to ICC’, *Voltaire Network*, 9 August 2014 <<http://www.voltairenet.org/article185038.html>> accessed 15 September 2014.

⁸ ‘UN Security Council action on Palestinian statehood blocked’, UN News Centre, <<http://www.un.org/apps/news/story.asp?NewsID=49709#>> accessed 9 January 2015.

⁹ *Ibid.*

¹⁰ ‘Declaration Accepting the Jurisdiction of the International Criminal Court’, 31 December 2014, <<http://www.icc-cpi.int>> accessed 9 January 2014.

¹¹ ‘Palestine declares acceptance of ICC jurisdiction since 13 June 2014’, 5 January 2015, ICC-CPI-20150105-PR1080, <<http://www.icc-cpi.int>> accessed 9 January 2014.

¹² State of Palestine: Accession, Reference: C.N.13.2015.TREATIES-XVIII.10 (Depositary Notification), 6 January 2015.

¹³ See, Registrar’s letter of acceptance of the declaration, ICC Ref: 2015/IOR/3496/HvH, 7 January 2015.

¹⁴ Art. 12 (1) Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (‘Rome Statute’).

¹⁵ Arts 5, 6–8 *bis*, and 12(1) Rome Statute.

of a State Party (territoriality principle)¹⁶ or by a national of a State Party (active personality principle).¹⁷

An alternative to the mechanism of automatic jurisdiction retained for States Parties is the regime envisaged under Article 12(3) of the Statute. This provision enables a non-State Party to the Statute which has a direct link to the crimes to consent to the Court's exercise of jurisdiction on an ad hoc basis and subject to the same conditions provided for in Article 12(2) concerning such crimes arising from a particular situation.¹⁸ The state is thus not pressured to accede to the Statute.¹⁹ Given that Palestine is not a party to the Statute, it was likely that the Palestinian Authority would avail itself of this option.

Much has been written in the past on the status of Palestine, questioning its eligibility to meet a core requirement under Article 12(3), namely whether it satisfies the requisite elements for 'statehood' under international law²⁰ and/or whether it qualifies

¹⁶ Arguably, the Court should consider the principle of territoriality in its broader form, that is, 'objective' and 'subjective' territoriality. See, e.g., R Rastan, 'The Jurisdictional Scope of Situations before the International Criminal Court' (2012) 23 *Criminal Law Forum* 1, 19. For an account of this theory, see CRyngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press 2008), pp. 75–6; C Blakesly, 'Jurisdiction' in M C Bassiouni, *International Criminal Law*, vol. II (Leiden/Boston: Martinus Nijhoff 2008) 48; M C Bassiouni, *International Extradition: United States Law and Practice* (New York: Oceana, Oxford University Press 2007) 359–67.

¹⁷ This requirement is waived in case of a Security Council referral under Art. 13(b) of the Statute in the sense that the Council may refer a situation involving the commission of crimes on the territory of a non-State Party and/or by nationals of a non-State Party to the Statute; according to this scenario the Security Council referral has the effect of not only activating the Court's jurisdiction with respect to State Parties but also providing jurisdiction over non-State Parties. See, e.g., UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593, and UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970 referring the situations in Darfur (Sudan) and Libya respectively to the ICC; see also in this regard Decision on the Prosecution Application under Art. 58(7) of the Statute, ICC, *Harun and Ali Kushayb, Situation in Darfur Sudan*, ICC-02/05-01/07-1-Corr, PTC I, ICC, 27 April 2007, para. 16; Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur Sudan*, ICC-02/05-01/09-3, PTC I, ICC, 4 March 2009, paras 36, 40; Decision on the Prosecutor's Application under Art. 58 Relating to Abdel Raheem Muhammad Hussein, *Hussein, Situation in Darfur Sudan*, ICC-02/05-01/12-1-Red, PTC I, ICC, 1 March 2012, para. 7. In the context of the Libya situation see, Decision on the 'Prosecutor's Application Pursuant to Art 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi', *Situation in Libya*, ICC-01/11-01/11-1, PTC I, ICC, 27 June 2011, para. 9.

¹⁸ Art. 12(3) Rome Statute; Rule 44(2) of the Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, 3–10 September 2002 (First Session of the Assembly of State Parties) part II.A. On the rational for introducing Rule 44 see, J Holmes, 'Jurisdiction and Admissibility' in R Lee et al. (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers 2001) 325–7.

¹⁹ See M El Zeidy, 'The Legitimacy of Withdrawing State Party Referrals and Ad hoc Declarations under the Statute of the International Criminal Court' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden/Boston: Martinus Nijhoff Publishers 2009) 61. See generally on Art. 12(3), C Stahn, M El Zeidy, and H Oláculo, 'The International Criminal Court's Ad hoc Jurisdiction Revisited' (2005) 99 *American Journal of International Law* 421; S Freeland, 'How Open Should the Door Be?—Declarations by non-States Parties under Article 12(3) of the Rome Statute of the International Criminal Court' (2006) 75 *Nordic Journal of International Law* 211; M Inazumi, 'The Meaning of the State Consent Precondition in Article 12 (2) of the Rome Statute of the International Criminal Court: A Theoretical Analysis of the Source of International Criminal Jurisdiction' (2002) 49 *Netherlands International Law Review* 159.

²⁰ M Shaw, 'The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law' (2011) 9 *Journal of International Criminal Justice* 301 (arguing that Palestine is not an independent state under the principles of public international law, in particular given that it does not have an effective government with control 'over the de facto separate administration of

as a ‘state’ for the purposes of the Statute.²¹ To this end, scholars have arrived at different conclusions, either challenging the validity of the declaration lodged by the Palestinian Authority in 2009²² or arguing in favour of its acceptance by the Court.²³ This chapter will focus on the situation of Palestine from a different perspective. It will analyse the approach of the Prosecutor in treating the declaration lodged in 2009. In this respect, the chapter will argue that, in order to preserve the integrity, impartiality, and judicial mandate of the Court, the Prosecutor should have addressed the 2009 declaration differently and with more caution. The chapter will also address the practical challenges that have arisen and may arise with Article 12(3) declarations lodged by Palestine. The discussion remains relevant and significant for the purpose of treating potential ad hoc declarations of a similar nature lodged by entities with contested statehood. This would be the case, for instance, if Taiwan or the Turkish Republic of Northern Cyprus lodged declarations under Article 12(3) of the Statute. As such, the present contribution seeks to inform future approaches of the Court.²⁴

The chapter will start by scrutinizing the manner in which the former Prosecutor addressed the Palestinian declaration lodged in 2009 in his statement of 3 April 2012 (section 8.2). This part aims at revealing the inconsistencies and legal errors in the former Prosecutor’s approach in resolving the issue *sub judice*. In highlighting these inconsistencies and legal errors, the chapter will subsequently offer alternative avenues to deal with problems of this nature, avenues which are embedded in the Statute or the Regulations of the Court (RoC) (section 8.3). Further, the chapter will address the situation of Palestine in light of its new status, and the two subsequent declarations lodged on 25 July 2014 and 31 December 2014 respectively. These later developments raise a number of different challenges: to what extent, if at all, may the Prosecutor rely on the 2009 declaration (first declaration) in order to investigate the recent military operations carried out by Israel and Hamas; who may bind the state in lodging an Article 12(3) declaration; and can an Article 12(3) declaration be withdrawn? Is it permissible to accept an article 12(3) declaration with retroactive effect?

the Gaza Strip’, *ibid.*, 306–8); but see, J Quigley, ‘The Palestine Declaration to the International Criminal Court: The Statehood Issue’ in C Meloni and G Tognoni (eds), *Is there a Court for Gaza?: A Test Bench for International Justice* (The Hague: T. M. C. Asser Press 2012) 432–5 (arguing that the requirement of effective control is more relaxed so far as ‘no competing entity claims title’ as was the case with Gaza and the West Bank until 1967. Moreover, the fact that Gaza and the West Bank were later under Israel’s control as a belligerent occupant did not entail that Palestinian sovereignty over these parts was affected); also J Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge: Cambridge University Press 2010) 208–25.

²¹ A Pellet, ‘The Palestinian Declaration and the Jurisdiction of the International Criminal Court’ (2010) 8 *Journal of International Criminal Justice* 981 (arguing in favour of a functional approach to Art. 12(3) of the Statute); Y Shany, ‘In Defence of Functional Interpretation of Article 12(3) of the Rome Statute’ (2010) 8 *Journal of International Criminal Justice* 329 (arguing that although the Rome Statute leaves some room for flexibility in interpreting the term ‘state’ for the purposes of the Palestinian Declaration, the ability of the Palestinian National Authority to delegate jurisdiction is constrained by the Oslo Accords which prevents it from, *inter alia*, exercising jurisdiction over Israeli nationals), *ibid.*, 336–7, 339–40, 343.

²² Shaw (n 20).

²³ See, *inter alia*, W Worster, ‘The Exercise of Jurisdiction by the International Criminal Court over Palestine’ (2012) 26 *American University International Law Review* 1153; Pellet (n 20).

²⁴ I have covered the legal regime governing Art 12(3) declarations, in the main, in other contributions; see El Zeidy, ‘The Legitimacy of Withdrawing State Party Referrals and Ad hoc Declarations under the Statute of the International Criminal Court’ (n 19); Stahn, El Zeidy, and Olásolo (n 19).

8.2 The 2009 Palestinian Declaration: Inconsistencies and Legal Uncertainties

In a statement of 3 April 2012, the former Prosecutor of the ICC presented a two-page document comprising eight paragraphs which expounded his position towards the declaration lodged by the Government of Palestine in 2009. In developing his reasoning, the former Prosecutor stated:

- [...]
2. In accordance with article 15 of the Rome Statute, the Office of the Prosecutor initiated a preliminary examination in order to determine whether there is a reasonable basis to proceed with an investigation. The Office ensured a fair process by giving all those concerned the opportunity to present their arguments. The Arab League's Independent Fact Finding Committee on Gaza presented its report during a visit to the Court. The Office provided Palestine with the opportunity to present its views extensively, in both oral and written form. The Office also considered various reports with opposing views. In July 2011, Palestine confirmed to the Office that it had submitted its principal arguments, subject to the submission of additional supporting documentation.
 3. The first stage in any preliminary examination is to determine whether the pre-conditions to the exercise of jurisdiction under article 12 of the Rome Statute are met. Only when such criteria are established will the Office proceed to analyse information on alleged crimes as well as other conditions for the exercise of jurisdiction as set out in articles 13 and 53(1).
 4. The jurisdiction of the Court is not based on the principle of universal jurisdiction: it requires that the United Nations Security Council (article 13(b)) or a 'State' (article 12) provide jurisdiction. Article 12 establishes that a 'State' can confer jurisdiction to the Court by becoming a Party to the Rome Statute (article 12(1)) or by making an ad hoc declaration accepting the Court's jurisdiction (article 12(3)).
 5. The issue that arises, therefore, is who defines what is a 'State' for the purpose of article 12 of the Statute? In accordance with article 125, the Rome Statute is open to accession by 'all States', and any State seeking to become a Party to the Statute must deposit an instrument of accession with the Secretary-General of the United Nations. In instances where it is controversial or unclear whether an applicant constitutes a 'State', it is the practice of the Secretary-General to follow or seek the General Assembly's directives on the matter. This is reflected in General Assembly resolutions which provide indications of whether an applicant is a 'State'. Thus, competence for determining the term 'State' within the meaning of article 12 rests, in the first instance, with the United Nations Secretary-General who, in case of doubt, will defer to the guidance of the General Assembly. The Assembly of States Parties of the Rome Statute could also in due course decide to address the matter in accordance with article 112(2)(g) of the Statute.
 6. In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise

of jurisdiction by the Court under article 12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term ‘State’ under article 12(3) which would be at variance with that established for the purpose of article 12(1).

7. The Office has been informed that Palestine has been recognised as a State in bilateral relations by more than 130 governments and by certain international organisations, including United Nation bodies. However, the current status granted to Palestine by the United Nations General Assembly is that of ‘observer’, not as a ‘Non-member State’. The Office understands that on 23 September 2011, Palestine submitted an application for admission to the United Nations as a Member State in accordance with article 4(2) of the United Nations Charter, but the Security Council has not yet made a recommendation in this regard. While this process has no direct link with the declaration lodged by Palestine, it informs the current legal status of Palestine for the interpretation and application of article 12.
8. The Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction.²⁵

The former Prosecutor’s line of reasoning suffers from inconsistencies and a number of legal errors.

As a preliminary observation, in paragraph 2 of this document as well as in other documents released, the former Prosecutor acknowledged that as part of his preliminary examination, and for the sake of ensuring ‘a fair process’, he had given ‘all those concerned the opportunity to present their arguments’.²⁶ He requested oral as well as written submissions from different sources.²⁷ He received submissions from Palestine, Israel, the Arab League, and a number of academics.²⁸ He also conducted meetings with NGOs and the Palestinian Minister of Justice, and welcomed ‘further meetings’ with Israel on the question of the jurisdiction of the Court.²⁹ In a response to a letter sent by the Deputy High Commissioner for Human Rights on 14 December 2009 enquiring about the Palestinian declaration, the Prosecutor stated, *inter alia*, that he was ‘analysing the Court’s jurisdiction over alleged crimes committed by different parties during the conflict in Gaza in December 2008 and January 2009’.³⁰

Public records reveal that all this information related to the jurisdiction of the Court and the different interpretations of Article 12(3) were available to the Prosecutor by early May 2010. Indeed, in his report entitled ‘Summary of submissions on whether

²⁵ Prosecutor’s 3 April 2012 statement (n 1).

²⁶ Ibid., para. 2.

²⁷ OTP, Situation in Palestine: Summary of submissions on whether the declaration lodged by Palestinian National Authority meets statutory requirements, 3 May 2010 <<http://www.icc-cpi.int/NR/rdonlyres/553F5F08-2A84-43E9-8197-6211B5636FEA/282852/PALESTINEFINAL201010272.pdf>> accessed 15 September 2014.

²⁸ Ibid. ²⁹ Ibid.

³⁰ OTP, Letter to Deputy High Commissioner for Human Rights, OTP/INCOM/PSE/OHCHR-1/JCCD-ag, 12 January 2010 <<http://www.icc-cpi.int/NR/rdonlyres/FF55CC8D-3E63-4D3F-B502-1DB2BC4D45FF/281439/LettertoUNHCR1.pdf>> accessed 15 September 2014.

the declaration lodged by the Palestinian National Authority meets statutory requirements' issued on 3 May 2010, the Prosecutor summarized, *inter alia*, the different views presented concerning the possible interpretations of Article 12(3).³¹ Based on the available material he could have certainly taken a position on the matter at least in 2010, if not even earlier, upon receipt of the declaration.

Yet, this was not the case. It took the Prosecutor more than three years to realize that 'it was the practice of the Secretary-General to follow or seek the General Assembly's directive' on whether Palestine 'constitutes a "State"' and that a determination as such 'rests, in the first instance, with the...Secretary-General'.³² One wonders, if the Prosecutor believed that the Court was not the competent organ to interpret the term 'State' for the purpose of Article 12, why then did he encourage submissions and conduct meetings with the parties, the Arab League, and NGOs on the interpretation of Article 12(3)? Even if these submissions or meetings were deemed necessary to guide him in his determination, nothing in these documents refers to the solution arrived at by the Prosecutor. This suggests that the approach adopted by the Prosecutor in closing the matter was not dependent on the submissions. Thus, the process did not really require postponement upon their receipt since they were anyway of no substantial use. A decision could have been delivered much earlier.

It is true that neither the Statute nor the Rules of Procedure and Evidence (the Rules) or the RoC set a particular deadline for the Prosecutor to conduct a preliminary examination with respect to a particular situation. However, this should not be an invitation for an abuse of process. In a rare decision issued by the Court in the context of the situation in the CAR,³³ Pre-Trial Chamber III compared the lapse of time since the start of the preliminary examination with two other situations—Uganda and the DRC. The Chamber observed that the preliminary examinations in these situations were completed within two to six months, while in the CAR situation almost two years had passed since the date of the referral without reaching a decision under Article 53(1).³⁴ The Chamber questioned the Prosecutor's delay and called for the provision of information regarding the status of his preliminary examination.³⁵ Despite the Prosecutor's disapproval of the Chamber's move as being devoid of an appropriate legal basis, he nevertheless furnished the Chamber with the required information.³⁶

Such a proactive stance on the part of the judiciary³⁷ was unlikely to take place in the Palestinian context. This is partly so because the Prosecutor was not acting in response

³¹ Situation in Palestine: Summary of submissions (n 27).

³² Prosecutor's 3 April 2012 statement (n 1) para. 5.

³³ Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, *Situation in the Central African Republic*, ICC-01/05-6, PTC III, ICC, 30 November 2006.

³⁴ Ibid., p. 4. ³⁵ Ibid., p. 5.

³⁶ Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, *Situation in the Central African Republic*, ICC-01/05-7, OTP, ICC, 15 December 2006.

³⁷ Although this decision was also prompted by a request from the Central African Republic to enquire about the delay in deciding within a reasonable time whether or not the Prosecutor intended to initiate an investigation; see Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic (n 33) pp. 2–3.

to either a State Party referral or a Security Council referral which automatically trigger the jurisdiction of the Court.³⁸ In the case of a referral, the Prosecutor should inform the Presidency³⁹ which, in turn, is duty bound to assign the relevant situation to a Pre-Trial Chamber. This was not the case in the context of the Palestinian declaration, as the Prosecutor was acting *proprio motu*. In this case a request for authorization to initiate an investigation was required. In the absence of such a request from the Prosecutor, no Pre-Trial Chamber will be seized of the relevant situation under preliminary examination, save for one scenario referred to in Regulation 46(3) of the RoC.⁴⁰ Since the Prosecutor refrained from placing a request for authorization under Article 15(3), it was doubtful that any Pre-Trial Chamber not formally assigned with the situation would question his delay in conducting the preliminary examination and ruling on the matter.

Be that as it may, the Prosecutor's questionable practice casts doubt on the legitimacy of the entire legal process before the Court. Public announcements posted right after his decision to close the matter support this idea. In a press article published on 11 April 2012, the Israeli Foreign Minister was quoted saying that diplomats had worked against the request to open an investigation in relation to operation Cast Lead and that '[not] many understand how much work ha[d] been put into this issue'.⁴¹ If one reads these words in light of the manner in which the Prosecutor responded to a number of legal questions in his statement of 3 April 2012, it becomes apparent that he indeed avoided addressing the matter *sub judice*.

In paragraph 3 of his statement, the Prosecutor advanced that the first stage in any preliminary examination 'is to determine whether the preconditions to the exercise of jurisdiction under article 12 of the Rome Statute are met. Only when such criteria are established will the Office proceed to analyse information on alleged crimes as well as other conditions for the exercise of jurisdiction set out in articles 13 and 53(1)'.⁴²

The biggest flaw in the Prosecutor's line of reasoning is his attempt to dissociate Article 12 from Article 53(1) and treat them as two separate, consecutive steps. By so doing, the Prosecutor tried to avoid making an explicit finding or determination under Article 15(3) or (6), although the Statute obliges him to do so. According to Article 15(2), the Prosecutor 'shall analyse the seriousness of the information received... and he or

³⁸ Given that the mere lodgement of a declaration accepting the ad hoc jurisdiction of the Court was not sufficient per se to trigger the jurisdiction of the Court, the former Prosecutor was conducting his preliminary examination under the umbrella of Art. 15, acting on his own initiative in accordance with Art. 15 with a view to moving forward the legal process if need be.

³⁹ See, e.g., Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-1, PTC I, ICC, 28 September 2010 (reclassified as public pursuant to Pre-Trial Chamber I's decision ICC-01/04-01/10-7, dated 11 October 2010) para. 5 (noting that the Prosecutor informed the President on 17 June 2004 after having determined that there was a reasonable basis to initiate an investigation under Art. 53(1)).

⁴⁰ Said scenario will be discussed in more detail under section 8.3 *infra*.

⁴¹ 'PLO envoy: Palestine can join ICC', *Ma'an News Agency*, 10 April 2012 <<http://www.maannews.net/eng/ViewDetails.aspx?ID=475280>> accessed 15 September 2014.

⁴² Prosecutor's 3 April 2012 statement (n 1) para. 3.

she may seek additional information from [different sources]', which he actually did. The next step the Statute envisages is either that the Prosecutor concludes 'that there is a reasonable basis to proceed with an investigation' or 'that the information provided does not constitute a reasonable basis for an investigation'. In reaching this conclusion, Rule 48 of the Rules dictates that '[i]n determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1(a) to (c). An integral part of such consideration under article 53(1) [concerns] the question of jurisdiction in its broad sense'.

Article 53(1)(a) stipulates that '[i]n deciding whether to initiate an investigation, the Prosecutor shall consider whether: (a) The information available...provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed....' In the first decision before the Court authorizing the Prosecutor to commence an investigation into the situation in the Republic of Kenya (the Kenya Authorization Decision), Pre-Trial Chamber II stated that:

[T]he reference to 'crime within the jurisdiction of the Court' may support an interpretation that the Chamber is only to consider the subject-matter jurisdiction referred to in article 5(1) of the Statute. Adopting such an interpretation, however, would amount to an absurd conclusion, because it excludes an examination of the *other jurisdictional requirements*, the existence or absence of which would directly impact on the Chamber's determination of whether to authorize the commencement of an investigation. Thus, the Chamber considers that according to a contextual and teleological interpretation, the phrase 'a crime within the jurisdiction of the Court' would mean that an examination of the *necessary jurisdictional prerequisites* under the Statute must be undertaken. This construction ensures that the Chamber is in a position to properly assess whether the Court is acting within the scope of its legal parameters before ruling on the Prosecutor's Request.⁴³

Moreover, relying on the Appeals Chamber's interpretation of the notion of 'jurisdiction',⁴⁴ Pre-Trial Chamber II concluded by saying:

Thus, the Chamber considers that for a crime to fall within the jurisdiction of the Court, it has to satisfy the following conditions: (i) it must fall within the category of crimes referred to in article 5 and defined in articles 6, 7, and 8 of the Statute (*jurisdiction ratione materiae*); (ii) it must fulfill the temporal requirements specified under article 11 of the Statute (*jurisdiction ratione temporis*); and (iii) it must meet one of the two alternative requirements embodied in article 12 of the Statute (*jurisdiction ratione loci* or *ratione personae*). The latter entails either that the crime occurs on the territory of a State Party to the Statute or a State which has lodged a

⁴³ Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, ICC, 31 March 2010, paras 36–7 (emphasis added).

⁴⁴ Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Art 19(2)(a) of the Statute of 3 October 2006, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-772, AC, ICC, 14 December 2006, paras 21–2.

declaration by virtue of article 12(3) of the Statute, or be committed by a national of any such State.⁴⁵

In the situation in Côte d'Ivoire, Pre-Trial Chamber III followed a similar path when it addressed the various jurisdictional parameters of the situation including the validity of the declaration lodged by the new Government of Côte d'Ivoire within the broader framework of Article 53(1)(a).⁴⁶ The Chamber confirmed the validity of the initial declaration lodged by the former regime in 2003 and stated that the two letters submitted to the Court on 14 December 2010 and 3 May 2011,

do not seek to restrict or amend the scope of [said] Declaration but, instead, they specifically confirm the acceptance by the Republic of Côte d'Ivoire of the ICC's jurisdiction as regards crimes allegedly committed in the recent past. *The Chamber concludes that the Court has jurisdiction over crimes allegedly committed in Côte d'Ivoire since 19 September 2002, on the basis of the Declaration of acceptance of 18 April 2003 and the letters of December 2010 and May 2011.*⁴⁷

It follows that neither the Court's statutory documents nor the jurisprudence of the Court support an interpretation in favour of a mid-way solution in the sense of refraining from making an explicit finding under either Article 15(3) or Article 15(6) on the basis of the criteria set out in Article 53(1). A process of not deciding is not envisaged as the statement of the Prosecutor suggests. Although the Prosecutor's internal policy seems to favour a four-phase analysis for the conduct of preliminary examinations,⁴⁸ such policy should not override the obligations imposed by the Statute and the Rules if this would result in inconsistency.⁴⁹

The failure of providing an explicit determination under Article 15(3) or (6) was partly due to the Prosecutor's belief that he was not called upon to define 'what is a "State" for the purpose of article 12 of the Statute'. According to the Prosecutor,

[i]n instances where it is controversial or unclear whether an applicant constitutes a 'State', it is the practice of the Secretary-General to follow or seek the General Assembly's directives on the matter.... Thus, *competence* for determining the term 'State' within the meaning of article 12 rests, in the first instance, with the United Nations Secretary-General who, in case of doubt, will defer to the guidance of the General Assembly.⁵⁰

⁴⁵ Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (n 37) paras 38–9 (footnotes omitted).

⁴⁶ Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14-Corr, PTC III, ICC, 15 November 2011, paras 14–15, 21–2, 186–7.

⁴⁷ Ibid., paras 14–15 (emphasis added).

⁴⁸ See OTP, Policy Paper on Preliminary Examinations, November 2013, paras 77–84.

⁴⁹ Art. 21(1) Rome Statute. On Art. 21, see Bitti, Chapter 18, this volume; also, G Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers 2009) 281 ff. Notably even if there is an inconsistency between the Statute and the Rules of Procedure and Evidence, the former prevails; see, Art. 51(5) Rome Statute.

⁵⁰ Prosecutor's 3 April 2012 statement (n 1) para. 5.

Alternatively, the Assembly of States Parties ‘could also in due course’ decide to resolve the matter pursuant to Article 112(2)(g), the Prosecutor argued. The Prosecutor proceeded by stating that ‘[i]n interpreting and applying article 12..., it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the *legal* determination whether Palestine qualifies as a State’.⁵¹

This reasoning is flawed. One cannot adhere to the Prosecutor’s argument that the competence for making such a determination for the purpose of Article 12 lies in the first place within the United Nations. This is so for the simple reason that any international judicial body has the power and even the obligation to apply and interpret the legal instrument governing its operation. This is also a consequence of the principle of *compétence de la compétence*,⁵² consistently accepted by general international law. In *Nottebohm*, the International Court of Justice (ICJ), held that, ‘in the absence of any agreement to the contrary, an international tribunal has...the power to interpret...the instruments which govern [its] jurisdiction’.⁵³ Similarly, in *Fisheries Jurisdiction*, the ICJ confirmed in a stronger language that ‘in accordance with its Statute and its settled jurisprudence, [it] must examine *proprio motu* the question of its own jurisdiction to consider the Application of the United Kingdom’.⁵⁴

The same approach was more recently adopted in a number of decisions issued by the ICC. In *Kony et al.*, Pre-Trial Chamber II, guided by the jurisprudence of the ICJ regarding the principle of *compétence de la compétence*, stressed its primary role to interpret the provisions of the Statute. The Chamber stated that ‘one of the major consequences entailed by [the principle of *compétence de la compétence*] is that it is...for the judicial body whose jurisdiction is being debated to have the last say as to the way in which its statutory instruments should be construed’.⁵⁵ Having laid down the main principle, the Chamber proceeded by applying it to the issue *sub judice*, when it stated: ‘it is for [the Chamber] to construe and apply the rules on admissibility as well’.⁵⁶

Apart from the foregoing argument, it is clear from the plain text of the second sentence of Article 1 of the Statute that ‘[t]he jurisdiction and functioning of the Court shall be governed by the provisions of [the] Statute’.⁵⁷ In this context, there is interplay

⁵¹ Ibid., para. 6 (emphasis added).

⁵² For a through overview, see L de Chazournes, ‘The Principle of *Compétence de la Compétence* in International Adjudication and Its Role in an Era of Multiplication of Courts and Tribunals’ in M Arsanjani et al. (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Leiden/Boston: Martinus Nijhoff Publishers 2011) 1027 ff.

⁵³ Judgment of 18 November 1953 (Preliminary Objection), *Nottebohm (Liechtenstein v. Guatemala)* [1953] ICJ Reports 111, 119.

⁵⁴ Judgment of 2 February 1973 (Jurisdiction of the Court), *Fisheries Jurisdiction (United Kingdom v. Iceland)* [1973] ICJ Reports 3, para. 12 (emphasis added).

⁵⁵ Decision on the Admissibility of the Case under Art 19(1) of the Statute, *Kony et al.*, ICC-02/04-01/05-377, PTC II, ICC, 10 March 2009, para. 46. Generally on the principle before the ICC, see Decision on the Confirmation of charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-373, PTC II, ICC, 23 January 2012, para. 24; Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Bemba, Situation in Central African Republic*, ICC-01/05-01/08-424, PTC II, ICC, 15 June 2009, para. 23.

⁵⁶ Ibid.

⁵⁷ Decision on the Postponement of the Execution of the Request for Surrender of Saif Al-Islam Gaddafi Pursuant to Art 95 of the Rome Statute, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-163, PTC I, ICC, 1 June 2012, para. 29.

between the last sentence of Article 1 and Article 21, which spells out and regulates the applicable law before the Court.⁵⁸ According to Article 21(1)(a), the Court shall apply '[i]n the first place [the] Statute, Elements of Crimes and its Rules of Procedure and Evidence'. Other sources of law are mentioned in the same provision but only serve as secondary sources. Thus, the Prosecutor who represents one of the four main organs of the Court is not supposed, in principle, to exercise his/her legal functions outside the legal framework designed by this provision. This provision also makes clear in its second and third paragraphs that the interpretation of the law (which includes the Statute) is an inherent and an integral function of the Court. Even in the absence of such an indication, any judicial body must be endowed with an interpretative function. As the ICJ stated, albeit in a different context, '[n]owhere is any provision to be found forbidding the Court, "the principle judicial organ of the United Nations", to exercise...an interpretative function which falls within the normal exercise of its judicial powers....'⁵⁹

Thus if the interpretation of a legal provision under the Statute such as Article 12 (which is jurisdictional in nature) or any other provision, like Article 125, falls within the judicial powers of the Court, it is difficult to agree with the Prosecutor that he was not competent to construe an integral part of that provision, namely the term 'State'. Further, it is also striking to say that the 'legal determination' as to whether 'Palestine qualifies as a State for the purpose of acceding to the Rome Statute' is a matter for the 'relevant bodies at the United Nations or the Assembly of States Parties'. If a decision on the matter entails a 'legal determination', as the Prosecutor acknowledges, how, then, can such a determination which lies within the pure competence of a judicial body be delegated to a political body such as the United Nations?

The fact that the interpretation of Article 12 or any other legal provision under the Statute falls within the sole competence of the Court, does not mean *per se* that the Prosecutor was not entitled to be *guided* by the practices of other bodies, be it judicial or political, such as the General Assembly. Such guidance will often fall outside the framework of Article 21, unless, for instance, it reaches the level of a principle or rule of international law.⁶⁰ Nevertheless, the Prosecutor may seek said guidance (only) in order to assist him/her in making the final legal determination under Article 15(3) or (6).

In *Loizidou*,⁶¹ the European Court of Human Rights (ECtHR), in ruling on an alleged breach by Turkey of its obligations under Article 1 of Protocol No. 1, was faced, *inter alia*, with the issue of the legal status of the Turkish Republic of Northern Cyprus (TRNC) under international law. Despite the objection made by the Turkish Government at the preliminary objection phase against lodging the application, as it

⁵⁸ O Triffterer, 'Article 1: The Court' in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edn (München: C. H. Beck 2008) 60.

⁵⁹ Advisory Opinion of 28 May 1948, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, [1948] ICJ Reports 57, 61; see also more recently Judgment of 31 March 2014 (Merits), *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, ICJ, para. 82 (noting that the interpretation of the convention under consideration 'is the task of [the] Court').

⁶⁰ Art. 21(1)(b) Rome Statute.

⁶¹ Judgment of 23 March 1995, *Loizidou v. Turkey (Preliminary Objections)* (Application No. 15318/89), ECtHR; Judgment of 18 December 1996, *Loizidou v. Turkey (Merits)* (Application No. 15318/89), ECtHR.

was deemed a ‘political propaganda’ which aimed at ‘simulating a debate before the Court on the status of the “TRNC”’,⁶² the Court did not consider ‘such motivation to be an abuse of its procedures’.⁶³ Instead the Court examined whether the matters complained of were capable of falling within the jurisdiction of Turkey even though they occurred outside its territory. The Court concluded they did.⁶⁴ On the merits, in order to rule on the alleged responsibility of Turkey, the ECtHR had to decide on the validity of Article 159 of the TRNC Constitution, which in turn involved an imperative pronouncement on the legal status of the TRNC under international law. The ECtHR stated:

In this context the Court takes note of United Nations Security Council Resolution 541 (1983) declaring the proclamation of the establishment of the ‘TRNC’ as legally invalid and calling upon all States not to recognise any Cypriot State other than the Republic of Cyprus. A similar call was reiterated by the Security Council in Resolution 550 (adopted on 11 May 1984). In November 1983 the Committee of Ministers of the Council of Europe also condemned the proclamation of statehood and called upon all States to deny recognition to the ‘TRNC’....A position to similar effect was taken by the European Community and the Commonwealth Heads of Government....Moreover it is only the Cypriot Government which is recognised internationally as the Government of the Republic of Cyprus in the context of diplomatic and treaty relations and the working of international organisations....

[...]

In the Court’s view, the principles underlying the Convention cannot be interpreted and applied in a vacuum. Mindful of the Convention’s special character as a human rights treaty, it must also take into account any relevant rules of international law when deciding on disputes concerning its jurisdiction pursuant to Article 49 of the Convention (art. 49). In this respect it is evident from international practice and the various, strongly worded resolutions referred to above...that the international community does not regard the ‘TRNC’ as a State under international law and that the Republic of Cyprus has remained the sole legitimate Government of Cyprus—itself, bound to respect international standards in the field of the protection of human and minority rights. Against this background the Court cannot attribute legal validity for purposes of the Convention to such provisions as Article 159 of the fundamental law on which the Turkish Government rely.⁶⁵

In the same vein, in the *Cyprus* case, the ECtHR followed the same approach when it stated:

The Court, like the Commission, finds that the respondent Government’s claim cannot be sustained....it notes that it is evident from international practice and the condemnatory tone of the resolutions adopted by the United Nations Security Council and the Council of Europe’s Committee of Ministers that the international community does not recognise the ‘TRNC’ as a State under international law. The Court

⁶² Judgment of 23 March 1995, *Loizidou* (n 55) para. 42.

⁶³ Ibid., para. 45. ⁶⁴ Ibid., para. 64.

⁶⁵ Judgment of 18 December 1996, *Loizidou* (n 55) paras 42–4.

reiterates the conclusion [that] the Republic of Cyprus has remained the sole legitimate government of Cyprus and on that account their *locus standi* as the government of a High Contracting Party cannot therefore be in doubt.⁶⁶

It follows that when the ECtHR was faced with a question which required a pronouncement on the legal status of an entity, it did so as part of exercising its judicial powers, rather than deciding that it was not competent to make such a ruling, as the ICC Prosecutor did. In interpreting and applying Article 12, the Prosecutor could have been equally guided by the pronouncements of other political bodies such as the General Assembly or the Security Council or international practice to determine the legal status of Palestine within the international community at the time of making his determination. He could have then taken a decision on the status of Palestine for the purposes of interpreting Article 12 based on the declared stance of the international community.

In paragraph 7 of his statement, the Prosecutor correctly referred to those international organizations and states which have recognized Palestine as a state, as well as to the status provided to Palestine by the General Assembly. He also acknowledged that this ‘informs the current legal status of Palestine for the interpretation of and application of article 12’.⁶⁷ Nonetheless, he surprisingly concluded that his office ‘could in the future consider allegations of crimes committed in Palestine, should [the United Nations or the Assembly of States Parties] resolve the legal issue relevant to an assessment of article 12’.⁶⁸ Thus the question remains: if the available information ‘informs the current legal status of Palestine’, why did he need to wait for a determination by any of the other organs referred to in his statement? This suggests that the Prosecutor had reached an implicit conclusion that Palestine was not a state for the purpose of Articles 12 and 125 of the Statute. Yet, he avoided taking an explicit decision on this matter in accordance with Article 15(6). By so doing, he issued one of the most controversial statements in the history of the Court, which is certain to cast doubt on the legitimacy of the institution.

8.3 Potential Review and Alternative Avenues

The Prosecutor’s approach towards the Palestinian declaration reveals the delicacy of the matter and the complexity of the decision-making process in a situation with high political ramifications. This reality begs the question as to what extent may the judiciary, if at all, be involved during the preliminary examination phase and thereafter. This is significant especially when dealing with declarations involving controversial questions. Arguably it would have been appropriate if the Prosecutor at least had made an attempt to engage the judiciary in the course of his preliminary examination. The benefit of this approach, if possible, is to share the burden and decrease

⁶⁶ Judgment of 10 May 2001, *Cyprus v. Turkey* (Application No. 25781/94), ECtHR, para. 61.

⁶⁷ Prosecutor’s 3 April 2012 statement (n 1) para. 7.

⁶⁸ Prosecutor’s 3 April 2012 statement (n 1) para. 8.

potential accusations concerning the politicization of the Prosecutor as well as the Court's credibility.

As argued under section 8.2 of this chapter, judges were unlikely to step in during the process of preliminary examination. This is partly so because the Court's statutory documents do not explicitly⁶⁹ allow for Chamber's involvement before the Prosecutor has taken a formal decision⁷⁰ under Article 15, save for a few instances to be discussed later in the chapter. This conclusion is in line with the practice of the Court.⁷¹ In the DRC situation, the legal representative of victims requested Pre-Trial Chamber I (PTC I) to review a decision taken by the Prosecutor to suspend the investigation into the situation of the DRC as being 'equivalent to a tacit decision not to prosecute under Article 53(2)(c) of the Statute'.⁷² In its ruling on the request, PTC I did not consider that the Prosecutor's decision to suspend the investigation temporarily was sufficient to meet the requirements of Article 53(1)(c) or 2 (c). Instead, the Chamber considered that 'the Prosecutor did not take a decision not to investigate or not to prosecute, under paragraph 1(c) or 2(c) of article 53... [and accordingly] the request made by the legal representative of victims that the Chamber review, pursuant to article 53(3)(b)... [was] not appropriate at [that] stage and [had] no legal basis'.⁷³ A month earlier the same Chamber considered a quite similar request submitted by the Woman's Initiatives for Gender Justice.⁷⁴ The Chamber considered that the request was inappropriate because 'investigations in the Situation in the DRC [were] ongoing and the Prosecutor h[ad] not taken any decision not to investigate or prosecute',⁷⁵ in order to trigger the supervisory role of the Chamber.

Another statutory reason and perhaps even a practical one for the non-involvement of the judiciary at this stage lies in the fact that no Chamber will be assigned with the situation *sub judice* if the Prosecutor has not informed the Presidency of his/her intention to submit an authorization request to commence an investigation.⁷⁶

The idea of the Chamber's intervention to supervise prosecutorial discretion is more controversial when it comes to negative decisions taken by the Prosecutor under

⁶⁹ Arguably, the Chamber may rely on its implied powers of review. For an elaboration on this possibility, see M El Zeidy, 'The Gravity Threshold under the Statute of the International Criminal Court' (2008) 19 *Criminal Law Forum* 35.

⁷⁰ See Arts 15(3) and 53(1) and (3) Rome Statute; Rules 48 and 105(2), (4) Rules of Procedure and Evidence. A review for possible authorization under Art. 15(3) is possible not to mention mandatory for the Prosecutor to begin his/her investigation. However, it is still debatable whether a review of an Article 15(6) decision is possible or not, as will be discussed later in this chapter. But see in the context of a State Party referral under Arts 13(a) and 14(1), Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic (n 33).

⁷¹ Notably the Court's practice on this matter is in relation to proceedings conducted under Art. 53, namely those resulting from a State Party referral, as opposed to proceedings conducted under Art. 15. Yet, the principle approach equally applies to both triggering methods.

⁷² Decision on the Requests of the Legal Representatives for Victims VPRS 1 to VPRS 6 regarding 'Prosecutor's Information on further Investigation', *Situation in the Democratic Republic of the Congo*, ICC-01/04-399, PTC I, ICC, 26 September 2007, 2.

⁷³ Ibid., 5.

⁷⁴ Decision on the Request Submitted Pursuant to Rule 103(1) of the Rules of Procedure and Evidence, *Situation in the Democratic Republic of the Congo*, ICC-01/04-373, PTC I, ICC, 17 August 2007 (and registered in the record of the case on 20 August 2007).

⁷⁵ Ibid., para. 5.

⁷⁶ Regulations 45 and 46(2) RoC.

Article 15(6), namely when he/she ‘concludes that the information provided does not constitute a reasonable basis for an investigation’.⁷⁷ The reason is that there are at least two different interpretations concerning the possibility of review of Article 15(6) decisions. Thus even if one considers that the Prosecutor’s statement of 3 April 2012 constituted a formal decision under Article 15(6), one needs to enquire about the scope, if any, of such review.

Article 53(3) regulates the instances in which the relevant Pre-Trial Chamber is entitled to exercise its review powers over the Prosecutor’s discretion. The provision permits the Pre-Trial Chamber to review a decision of the Prosecutor not to initiate an investigation into a situation in accordance with Article 53(1). Yet, such review power is subject to some limitations. The supervisory role of the Chamber may be triggered by a request put forward by either the State Party making the referral,⁷⁸ or the Security Council if it was the referring body.⁷⁹ Alternatively, a *proprio motu* review is also envisaged by the drafters of the Statute but *only* when the Prosecutor’s decision not to proceed with an investigation is based on the consideration that it ‘would not serve the interests of justice’.⁸⁰

The text is silent when it comes to a review of decisions undertaken pursuant to Article 15(6) as opposed to Article 53(1).⁸¹ This lacuna was partly resolved by the introduction of Rule 48 of the Rules, which draws the link between Articles 53 and 15. According to said rule, ‘[i]n determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a)–(c)’.⁸² This means *a contrario* that if one or more of these requirements have not been met, the Prosecutor should determine thereafter that there is no reasonable basis to proceed under Article 15(6). Nevertheless, the fact that Rule 48 unifies the applicable criteria for a determination under Articles 53(1) and 15(3) or (6) does not necessarily mean that decisions taken under both provisions are subject to review under Article 53(3), especially that the latter, as stated, does not refer to Article 15.

Rule 105 of the Rules may provide some guidance in this regard. According to Rule 105(1), ‘[w]hen the Prosecutor decides not to initiate an investigation under article 53, paragraph 1, he or she shall promptly inform’ the referring state or the Security Council as the case may be.⁸³ Sub-rule 4 comes into play to cover a situation in which the Prosecutor decides not to investigate solely on the basis of the interests of justice as provided under Article 53(1)(c).⁸⁴ Thus, on their face these two paragraphs govern

⁷⁷ See also, C Stahn, ‘Judicial Review of Prosecutorial Discretion: Five Years On’ in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden/Boston: Martinus Nijhoff Publishers 2009) 272.

⁷⁸ Art. 53(3)(a) Rome Statute; Rule 105(1), (3), (4), and (5) Rules of Procedure and Evidence.

⁷⁹ Ibid. ⁸⁰ Art. 53(3)(b) Rome Statute; Rules 49, 105(2) Rules of Procedure and Evidence.

⁸¹ In the same vein, G Turone, ‘Powers and Duties of the Prosecutor’ in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press 2002) 1158.

⁸² Rule 48 Rules of Procedure and Evidence; Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (n 37) paras 20–5.

⁸³ Rule 105(1) Rules of Procedure and Evidence.

⁸⁴ Rule 105(4) Rules of Procedure and Evidence.

proceedings carried out under Article 53(1), and accordingly, go hand in hand with Article 53(3).

A different language appears under Rule 105(2). Sub-rule 2 states that '[w]hen the Prosecutor decides not to submit to the Pre-Trial Chamber a request for authorization of an investigation, rule 49 shall apply'.⁸⁵ Sub-rule 1 of the latter provision stipulates that '[w]here a decision under article 15, paragraph 6, is taken, the Prosecutor shall promptly ensure that notice is provided' to those who provided the information.⁸⁶ Sub-rule 2 proceeds by stating that such notice 'shall also advise of the possibility of submitting further information regarding the same situation in the light of new facts and evidence'.⁸⁷ Nowhere in this provision is the slightest reference made to a review of a decision taken by the Prosecutor under Article 15(6). It follows that the drafters of the Rules seem to have intended to distinguish between proceedings undertaken pursuant to Article 53(1) and those carried out in accordance with Article 15.

This conclusion finds support in the drafting history of the Rules. According to one commentator, France proposed a possibility of a *proprio motu* review by the Pre-Trial Chamber for negative decisions taken by the Prosecutor on the basis of the interests of justice.⁸⁸ Nonetheless, this proposal was vigorously opposed by some delegations on the ground that 'the discretion vested in the Prosecutor according to article 15 must not be compromised and that it would be inconsistent with the Statute to provide for such a direct control of the Prosecutor'.⁸⁹ Further, with the introduction of Rule 105(2), it becomes 'difficult to argue that the Prosecutor's decision not to seek authorization under article 15 could be subject to a review by the Pre-Trial Chamber under article 53',⁹⁰ the same commentator added.

Despite this more plausible interpretation, Pre-Trial Chamber II seems to have favoured a different approach. In the Kenya Authorization Decision, the Chamber stated:

Unlike sub-paragraphs (a) and (b), which require an affirmative finding, sub-paragraph (c) does not require the Prosecutor to establish that an investigation is actually in the interests of justice. Indeed, the Prosecutor does not have to present reasons or supporting material in this respect. Thus, the Chamber considers that a review of this requirement is unwarranted in the present decision, taking into consideration that the Prosecutor has not determined that an investigation 'would not serve the interests of justice', which would prevent him from proceeding with a request for authorization of an investigation. Instead, such a review may take place in accordance with article 53(3)(b) of the Statute if the Prosecutor decided not to proceed with such a request on the basis of this sole factor. It is only when the Prosecutor decides that an investigation

⁸⁵ Rule 105(2) Rules of Procedure and Evidence.

⁸⁶ Rule 49(1) Rules of Procedure and Evidence.

⁸⁷ Rule 49(2) Rules of Procedure and Evidence.

⁸⁸ H Friman, 'Investigation and Prosecution' in R Lee et al. (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (New York: Transnational Publishers 2001) 497.

⁸⁹ Ibid.

⁹⁰ Ibid., 498. But see, G Bitti, 'Article 53—Ouverture d'une enquête' in J Fernandez and X Pacreau (eds), *Statut de Rome de la Cour Pénale Internationale, Commentaire Article par Article* (Paris: A. Pedone 2012) 1178–81.

would not be in the interests of justice that he or she is under the obligation to notify the Chamber of the reasons for such a decision, thereby triggering the review power of the Chamber.⁹¹

The exact approach was followed by Pre-Trial Chamber III in its decision authorizing an investigation into the situation in Côte d'Ivoire.⁹² By so doing the two Chambers opted for a different interpretation which seems to rely on the fact that Rule 105(4) does not explicitly exclude a situation covered under sub-rule 2 from the possibility of review under Article 53(3)(b). Yet, the two Chambers failed to explain how they have arrived at their common conclusion. Until the Appeals Chamber decides on the matter, this interpretation will remain controversial.

Having said this, it is clear that even if one considers that the statement of 3 April 2012 constitutes a formal decision under Article 15(6), judges would have never been able to review it given that it was not a decision adopted under the umbrella of the interest of justice. Rather the decision was taken, if at all, within the scope of Article 53(1)(b) which relates to jurisdiction.

Despite this conclusion, there remain still a few options, apart from the traditional route of judicial review, which require an initiative on the part of the Prosecutor to involve the Pre-Trial Chambers in the course of the preliminary examination (i.e. before deciding on the matter).

To start with the Statute, one could consider Article 119(1) which stipulates that '[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court'.⁹³

So far there is only a handful of decisions which touch upon the interpretation of Article 119(1). Yet these decisions were confined to resolving judicial disputes between the Pre-Trial Chambers and the relevant State. The application of the provision was also triggered *proprio motu* by the relevant Pre-Trial Chamber as opposed to the Prosecutor. In *Al Bashir*, Pre-Trial Chamber I disagreed with Malawi's failure to arrest the suspect due to the immunity procedural barrier invoked by the Government and stated that the latter 'did not respect the sole authority of [the] Court to decide whether immunities [were] applicable', in accordance with Article 119(1).⁹⁴ The exact approach

⁹¹ Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (n 43) para. 63 (footnotes omitted).

⁹² Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire' (n 46) para. 207.

⁹³ Art. 119(1) Rome Statute. Also one may argue that the Prosecutor could have invoked Art. 19(3) to seize the Chamber. However, elsewhere I argued that Art. 19(3) is not applicable during the early stages of proceedings and in particular until a case phase has been reached. I still believe that this should be the correct way to go and in line with the Court's practice relating to the interpretation of Art. 19; see M El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Leiden/Boston: Martinus Nijhoff Publishers 2008) 265–6; see also in the same vein, Decision on the Prosecutor's Application for Warrants of Arrest, Art 58, *Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-20-Anx2, PTC I, ICC, 10 February 2006, para. 20 (where the Chamber made an explicit pronouncement that Art. 19(3) determination concerns 'cases').

⁹⁴ Corrigendum to the Decision Pursuant to Art 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, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-139-Corr, PTC I, ICC, 13 December 2011, para. 11.

was followed by the same Chamber in relation to Chad.⁹⁵ More than two years later Pre-Trial Chamber II found a violation on the part of the DRC for the same reason.⁹⁶ However, nowhere in these decisions did any of these Chambers provide an interpretation regarding the scope of application of Article 119(1) beyond what was specified in their pronouncement quoted earlier. Thus some further analysis is warranted.

The key element in Article 119(1) is the existence or absence of a ‘dispute’. In the *Land and Maritime Boundary*, the ICJ relying on previous jurisprudence of the Permanent Court of International Justice defined a ‘dispute’ as ‘a disagreement on a point of law or fact, a conflict of legal views’.⁹⁷ In more recent jurisprudence, the ICJ construed the term ‘dispute’, albeit in a different context (i.e. interpretation of Article 60 of the ICJ Statute), as ‘a difference of opinion or views between the parties’.⁹⁸ Certainly, the said ‘dispute’ should, in principle, arise between at least two parties to the proceedings or an organ of the Court and one or more parties.

In the Palestinian situation, the dispute which could have engaged the judiciary was one between the Prosecutor and Palestine or Israel or both. Arguably at this early stage (preliminary examination), the Prosecutor could have brought to the attention of the Pre-Trial Division information to show that there existed a dispute as to the ‘judicial functions of the Court’.⁹⁹ It would have been sufficient to prove that there was a disagreement or differing views regarding a point of law, namely the exercise of jurisdiction before the Court or the interpretation and application of a jurisdictional provision under the Statute (i.e. Article 12). The scope of the ‘judicial functions’ referred to in Article 119(1) as argued by one of the founding fathers of the Statute includes questions of jurisdiction together with the pre-conditions.¹⁰⁰ Thus the Prosecutor could have seized the judiciary with the question under consideration by

⁹⁵ Decision pursuant to Art 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-140-tENG, PTC I, ICC, 13 December 2011, para. 10.

⁹⁶ Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-195, PTC II, ICC, 9 April 2014, para. 16.

⁹⁷ Judgment of 11 June 1998 (Preliminary Objections), *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* [1998] ICJ Reports 275, 314, para. 87; Advisory Opinion of 26 April 1988, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, [1998] ICJ Reports 12, 27, para. 35

⁹⁸ Order of 18 July 2011 (Request for the Indication of Provisional Measures), *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, [2011] ICJ Reports 537, para. 22; Judgment of 11 November 2013, *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ, para. 33.

⁹⁹ See also, Judgment of 11 November 2013 (*Cambodia v. Thailand*) (n 98) para. 33 (noting that ‘it is not required that a dispute... “should have manifested itself in a formal way;... it should be sufficient if the two Governments have in fact shown themselves as holding opposite views”’); also, Judgment of 10 December 1985, *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)* [1985] ICJ Reports 192, 217–18, para. 46.

¹⁰⁰ R Clark, ‘Article 119: Settlement of Disputes’ in Triffterer (ed.) (n 58) 1729. It follows that the argument put forward by the Prosecutor in his statement of 3 April 2012 that ‘interpreting and applying article 12 ... [was] for ... the Assembly of States Parties’, pursuant to Art. 112(g), was misleading as being inconsistent with the Statute. See Prosecutor’s 3 April 2012 statement (n 1) paras 5 and 6; also Art. 112(g) Rome Statute (‘Perform any other function consistent with *this Statute* or the Rules of Procedure and Evidence’). Since Art. 119(1) covers situations which involve resolving issues related to the judicial functions of the Court, then relying on Art. 112(g) would be inconsistent with the Statute, i.e. Art. 119(1).

way of an application to be lodged with the Pre-Trial Division in order to assist him in deciding on the matter.

The Prosecutor could have also followed a slightly different path, based on Regulation 46(3) of the RoC. According to this provision, '[a]ny matter, request or information not arising out of a situation assigned to a Pre-Trial Chamber...shall be directed by the President of the Pre-Trial Division to a Pre-Trial Chamber according to a roster established by the President of that Division'.¹⁰¹ Although sub-regulation 3 does not specify the exact scope and nature of the 'matter' or 'request', certainly these terms refer to issues of a juridical nature. This conclusion may be inferred from the language used in sub-regulation 2 which stipulates that '[t]he Pre-Trial Chamber shall be responsible for any matter, request or information arising out of the situation assigned to it'. The reference to a 'matter' or 'request arising out of the situation' makes clear that these terms entail legal problems. This construction is confirmed by two decisions issued by Pre-Trial Chamber II in response to filings received by the Chamber involving questions of law.¹⁰² In the Kenya situation, Pre-Trial Chamber II noted that:

[W]henever a document is linked to a situation of which a Pre-Trial Chamber is seized of, it is the duty of the Registry to transmit this document without undue delay to the Chamber assigned with the situation,...If the document is not linked to a situation of which a Pre-Trial Chamber is seized of, the Registry has to transmit it without undue delay to the President of the Pre-Trial Division in accordance with regulation 46(3) of the Regulations.¹⁰³

Thus it would have been also possible to engage one of the Pre-Trial Chambers in resolving the issues arising out of the interpretation of Article 12 even though there was no Chamber assigned with the situation of Palestine. In this context, it is the relevant Pre-Trial Chamber or the President of the Pre-Trial Division as opposed to the Presidency who is entitled to order the Registry to open a situation record for the purpose of regulation 46(3) proceedings.¹⁰⁴

¹⁰¹ Regulation 46(3) RoC; see also Decision assigning the 'Request for review of the Prosecution's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014' to Pre-Trial Chamber II, *Request under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/14-1, President of the Pre-Trial Division, ICC, 10 September 2014 (notified on 11 September 2014).

¹⁰² Decision on a Request for Leave to Appeal, *Situation in the Republic of Kenya*, ICC-01/09-43, PTC II, ICC, 11 February 2011, para. 14; Second Decision on Application by Nine Persons to be Questioned by the Office of the Prosecutor, *Situation in the Republic of Kenya*, ICC-01/09-39, PTC II, ICC, 31 January 2011, para. 2, fn. 2 ('Albeit not applicable in this context, the Chamber, for possible future purposes, draws the Registrar's attention to regulation 46(3) of the Regulations of the Court and the existing roster in case she deems that a matter, request or information does not arise out of a situation assigned to a Pre-Trial Chamber'); see also, 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', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2205, AC, ICC, 8 December 2009, para. 69 (noting that the Regulations of the Court could cover legal matters i.e. 'matters of practice and procedure').

¹⁰³ Decision on a Request for Leave to Appeal, *Situation in the Republic of Kenya* (n 102) para. 14; more recently, see Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014', *Request under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/14-3, PTC II, ICC, 12 September 2014.

¹⁰⁴ Regulation 20(1) of the Regulations of the Registry, ICC-BD/03-03-13, last sentence: 'The Registry shall open a situation record...as ordered by a Chamber or the President of a Division'.

8.4 Palestine's New Status and its Effect on the First and Second Declaration

As mentioned in the introduction, Israel initiated a number of 'massive' military operations in the Occupied Palestinian Territory, including East Jerusalem and the Gaza Strip, known as 'Operation Protective Edge'. This operation led to the establishment of an independent international commission of inquiry to 'investigate all violations of international humanitarian law and international human rights law' in these areas.¹⁰⁵ With the Prosecutor's controversial statement of 3 April 2012, arguing that he was not in a position to decide and, by implication, rule on the validity of the first declaration lodged back then, he left a number of issues unresolved. One of these issues is the extent of the validity of the first declaration lodged by the Palestinian authorities in January 2009 in relation to the most recent events, and therefore, whether there was a need for lodging the subsequent declarations of 25 July and 31 December 2014.

With the adoption of General Assembly Resolution 67/19 of 29 November 2012,¹⁰⁶ Palestine has been accorded the status of a non-member observer state in the United Nations.¹⁰⁷ The effect of this elevation is, *inter alia*, that Palestine may become a party to multilateral treaties which are open to 'any State' ('all States' formula)¹⁰⁸ such as the Rome Statute,¹⁰⁹ and may equally accept the *ad hoc* jurisdiction of the ICC under article 12(3). Thus the problem which the Prosecutor invoked in April 2012 no longer exists. The question remains whether or not the Prosecutor may rely on the old declaration in order to investigate the recent military operations carried out by Israel and Hamas (Operation Protective Edge) or any previous operation such as Operation Cast Lead, regardless of the second and third declarations. This question might appear nowadays irrelevant given that Palestine have acceded to the Rome Statute on 2 January 2015 and lodged two consecutive declarations on 25 July and 31 December 2014. However, this question remains relevant because the subsequent unilateral acts undertaken by the Palestinian Authority are still restricted in terms of temporal jurisdiction and subject matter jurisdiction. Palestine deposited its instrument of accession on 2 January 2015, and thus, according to article 126(2) of the Rome Statute, the Statute entered into force for that State on 1 April 2015. This means that the Court may exercise its jurisdiction only over events which take place as of that date, unless Palestine accepts the jurisdiction of the Court with retroactive effect by way of submitting a declaration under article 12(3) setting out the temporal scope of such acceptance of jurisdiction. This is what Palestine has done by lodging the second and third declarations on 25 July and 31 December 2014. But even after submitting these two declarations, and regardless of the question of their validity, the temporal jurisdiction of the Court remains restricted because these declarations, unlike the first declaration, are confined to the

¹⁰⁵ UN Human Rights Council Res S-21/1 (n 3) para. 13.

¹⁰⁶ UNGA Res 67/19 (29 November 2012) UN Doc A/RES/67/19.

¹⁰⁷ Ibid., para. 2.

¹⁰⁸ 'Issues related to General Assembly resolution 67/19 on the status of Palestine in the United Nations', Memorandum submitted by P O'Brien, 21 December 2012, para. 15; see also on the 'all States' formula, Summary of Practice of the Secretary-General As Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, paras 81–2 ('Summary of Practice').

¹⁰⁹ Art. 125 Rome Statute.

period related to Operation Protective Edge. Accordingly if the Prosecutor were able to rely on the first declaration, she might even decide to investigate events related to both sides of the conflict as early as 1 July 2002. These issues will be examined in more details in the following paragraphs.

Certainly, if the Palestinian accession to the Rome Statute was done separately without lodging any supplementary ad hoc declarations, this would have eliminated or avoided to a certain extent some of the controversial questions accompanying the delegation-based theory of jurisdiction on which Article 12(3) is premised.¹¹⁰ But this is no more the case and the Court has to address any controversial question surrounding said declarations in its jurisprudence if the situation arises.

Regarding the initial (first) declaration, there are at least two different ways of treating it. In several parts of his statement of 3 April 2012, the Prosecutor argued vigorously that he was not in a position to decide on the question before having received an answer from the United Nations competent organs or the ASP.¹¹¹ Thus if the Prosecutor insisted that he was not the one to decide at the time, until the issue of Palestine's status was resolved, do we really need a new declaration now? The question of the status of Palestine has in the meantime been resolved for the purposes of the Rome Statute and the current Prosecutor can now take a formal decision on what her predecessor has left open with respect to the first declaration.

Differently, if one considers the statement of 3 April 2012 as a formal decision under Article 15(6), then there is merit in expecting at least a new letter validating the old declaration or a new declaration. A post validation letter could be similar in essence to the two letters submitted by the new Government of Côte d'Ivoire in 2010 and 2011.¹¹² In such a case, the letter would renew the intention to accept the jurisdiction of the Court on an ad hoc basis in relation to the duration and scope of the initial declaration, or even going beyond that. If one observes that the Prosecutor removed Palestine from the list of states under preliminary examination right after the issuance of his statement, there is even more room to argue that, in effect, he took a formal decision and therefore it is the accurate procedural avenue to receive a new declaration, as the initial one would be considered invalid. The invalidity of the declaration not only results from the Prosecutor's previous ruling, but also from the fact that General Assembly Resolution 67/19 does not seem to have changed the status of Palestine retroactively (i.e. it only produces its effect *ex nunc* and not *ex tunc*).¹¹³ The current Prosecutor's recent statement on the matter strengthens this line of argument.

¹¹⁰ For a useful discussion on these controversial questions and potential solutions, see K Ambos, 'Palestine, UN Non-Member Observer Status and ICC Jurisdiction' (*EJIL: Talk*, 4 May 2014) <<http://www.ejiltalk.org/author/kambos/>> accessed 15 September 2014; E Kontorovich, 'Israel/Palestine—The ICC's Uncharted Territory' (2013) 11 *Journal of International Criminal Justice* 979; Y Ronen, 'Israel, Palestine and the ICC—Territory Uncharted but not Unknown' (2014) 12 *Journal of International Criminal Justice* 7.

¹¹¹ Prosecutor's 3 April 2012 statement (n 1) paras 3, 5, and 6.

¹¹² Although in the context of Côte d'Ivoire, the Court did not consider that the initial declaration of 18 April 2003 was invalid; Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire' (n 46) paras 14–15.

¹¹³ UNGA Res 67/19 (n 100); also A Zimmermann, 'Palestine and the International Criminal Court *Quo Vadis?*' (2013) 11 *Journal of International Criminal Justice* 303, 308; Ambos (n 110).

In her press statement issued on 2 September 2014, the present Prosecutor tried to correct what her predecessor had done by confirming that the 3 April 2012 statement was a formal decision based on ‘lack of jurisdiction’, as Palestine at the time was not entitled to accede to the Rome Statute, and accordingly, could not lodge an Article 12(3) declaration.¹¹⁴ This clearly reveals that the current Prosecutor has confirmed the invalidity of the old declaration given that Palestine, in her opinion, was not entitled to accept the ad hoc jurisdiction of the Court from the outset. This is so despite some arguments that could be made to the contrary.¹¹⁵ By so doing, the Prosecutor has closed the door on relying on the old (first) declaration. The only available avenue left for Palestine was either to accede to the Statute or to lodge a new declaration or do both as they actually did. Since the first declaration is deemed invalid, it is therefore worth considering the validity and legal effects of the second and third declarations.

The available public information reveals that on 25 July 2014, the Palestinian Minister of Justice and the Attorney General of Gaza complained to the ICC against Israel’s military operations, apparently by way of lodging a second declaration under Article 12(3).¹¹⁶ This second declaration was allegedly withdrawn a few days later.¹¹⁷ A few months later, the President of the State of Palestine lodged with the ICC Registrar the third declaration accepting the jurisdiction of the Court in relation to the same events set out in the second declaration and setting the starting date as of 13 June 2014 – the start of the Operation Protective Edge. This third declaration has so far not been withdrawn. These developments shift the focus to the validity of these declarations, and to what extent, if at all, these declarations may be withdrawn.

The issue at stake is no longer whether the status of Palestine enables it to accede to the Rome Statute or lodge an Article 12(3) declaration, given that this question has been answered in the affirmative. Rather the question is who is entitled to lodge a declaration under article 12(3) on behalf of the State of Palestine or any other State in order to ensure the validity of said declaration? In particular, were the Minister of Justice and the Attorney General in their capacity legally entitled to lodge the second declaration? What about the third declaration? What are the legal effects of these declarations? This question of validity has gone unnoticed in literature, especially in response to the first declaration, which was also submitted by the Minister of Justice. The bulk of contributions focused on the validity of the initial declaration from the standpoint of the statehood of Palestine. But none has questioned the capacity of the Palestinian Minister of Justice from the standpoint of international law to lodge the first declaration. The same holds true in relation to the second declaration of

¹¹⁴ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: ‘The Public Deserves to Know the Truth about the ICC’s Jurisdiction over Palestine’, 2 September 2014 <http://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx> accessed 15 September 2014.

¹¹⁵ The fact that the Prosecutor referred to the summary practice of the Secretary General without relying on a precedent such as that of Cook Islands, which was included in the ‘all States’ formula after its membership in the World Health Organization, raises some doubts as to the validity of his decision. Palestine was equally a member of the UNESCO and other international organizations and yet the Prosecutor selectively deviated without any convincing legal justification. See, Summary of Practice (n 108) paras 85–6.

¹¹⁶ ‘Palestine Filed Complain at ICC: Accuses Israel of War Crimes’ (n 6).

¹¹⁷ ‘Palestinian Authority withdraws complaint against Israel’ and ‘Correction: Saleem al-Saqqa pledges to maintain Palestinian complaint to ICC’ (n 7).

25 July 2014. The situation appears different with respect to the third declaration given that it was signed by the President of the State of Palestine.

The capacity of the Palestinian Minister of Justice and the Attorney General of Gaza to bind the Palestinian Authority seems to be restricted from the standpoint of international law. It is common under general international law that there is a certain category of state officials entitled by virtue of their positions and functions to represent their state in international relations. Their capacity to bind the state is undisputed and of a customary nature. This category has been commonly referred to by the ICJ on different occasions.

In ruling on a request for the indication of provisional measures in the *Genocide* case, the ICJ spoke of Heads of States among those falling within this limited category. Responding to an argument concerning the legitimacy of the President of Bosnia and Herzegovina and his capacity to bind the state, the ICJ stated that the Court 'has been seised of the case on the authority of a Head of State, treated as such in the United Nations; [and that] the power of a Head of State to act on behalf of the State in its international relations is universally recognized'.¹¹⁸ In its Judgment of 11 July 1996 regarding the preliminary objections, the Court reiterated its finding when it stated that, '[a]ccording to international law, there is no doubt that every Head of State is presumed to be able to act on behalf of the State in its international relations'.¹¹⁹

A few years later, the ICJ spoke in broader terms about those state officials who, due to the nature of their functions, are empowered to bind their states in international relations. In *Yerodia*, the ICJ, albeit in the context of immunities, declared that the power to act on behalf of the state is mainly granted to a Head of State, Prime Minister, and the Minister of Foreign Affairs. The Court stated that 'a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office'.¹²⁰ Thus the Court has made it clear that these state officials by virtue of their functions are traditionally empowered to act on behalf of the state without any further requirement. As the Court has stated in the same judgment, the acts of a Minister of Foreign Affairs 'may bind the State represented, and there is a presumption, that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State'.¹²¹ This is more the case when it comes to the Head of State or the Prime Minister, where there is certainly a presumption that they have 'full powers' to bind their relevant state. This makes it clear that there is no apparent problem of validity concerning the third declaration as it was signed by the President of the State of Palestine who enjoys full powers to bind his State.

¹¹⁸ Order of 8 April 1993 (Provisional Measures), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [1993] ICJ Reports 3, para. 13.

¹¹⁹ Judgment of 11 July 1996 (Preliminary Objections) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)* [1996] ICJ Reports 595, para. 44.

¹²⁰ Judgment of 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] ICJ Reports 3, para. 53.

¹²¹ Ibid.

The practice of the ICJ, the main judicial body responsible, *inter alia*, for addressing questions of international law, is less clear on the question of whether there is also a customary rule supporting a finding that a Minister of Justice or an Attorney General by virtue of their positions are presumed to have ‘full powers’ to bind their state.

In the *Armed Activities* case (Congo), the ICJ reiterated that such a customary rule exists with respect to the category of state officials mentioned above (Heads of State, Heads of Government and Ministers of Foreign Affairs).¹²² It added that this customary rule concerning this category of state officials ‘finds expression in Article 7, paragraph 2, of the Vienna Convention on the Law of Treaties’.¹²³

Turning to the question concerning the capacity of the Rwandan Minister of Justice to bind her state, the ICJ noted that:

[W]ith increasing frequency in modern international relations other persons representing a State in specific fields *may be authorized by that State* to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials. In this case, the Court notes first that Ms Mukabagwiza spoke before the United Nations Commission on Human Rights in her capacity as Minister of Justice of Rwanda and that she indicated *inter alia* that she was making her statement “on behalf of the Rwandan people”. The Court further notes that the questions relating to the protection of human rights which were the subject of that statement fall within the purview of a Minister of Justice. It is the Court’s view that the possibility cannot be ruled out in principle that a Minister of Justice may, under certain circumstances, bind the State he or she represents by his or her statements (emphasis added).¹²⁴

The relevant part of this judgment clearly suggests that the ICJ intended to broaden the category of state officials who may bind their states under certain circumstances. This category may include a Minister of Justice and ‘other persons representing a State in specific fields’. Yet, it is not clear from the language employed by the Court whether it meant that this category of state officials which includes the Minister of Justice is also presumed to have ‘full powers’. This ambiguity is strengthened if one reads the relevant part of the judgment which states that ‘other persons representing a State in specific fields *may be authorized by that State* to bind it’.¹²⁵ Arguably this language suggests that a ‘Minister of Justice’ or ‘holders of technical ministerial portfolios’ may not be presumed to have ‘full powers’ by virtue of their positions as is the case with the limited category referred to in article 7(2)(a) of the Vienna Convention on the Law of Treaties.¹²⁶ Rather, in order to recognize the binding nature of their acts on the international plane, further confirmation concerning the existence of such ‘full power’ is required. This is regulated by the Vienna Convention on the Law of Treaties.

¹²² *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, para. 46.

¹²³ Ibid.

¹²⁴ Ibid., paras 47–48.

¹²⁵ Ibid., para. 47.

¹²⁶ Art. 7(2)(a) Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (‘VCLT’).

Article 7(1) stipulates that:

[...] A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if: (a) he produces appropriate full powers; or (b) it appears from the practice of the State... concerned or from other circumstances that [the] intention was to consider that person as representing the State for such purposes and to dispense with full powers.¹²⁷

The notion of ‘full powers’ has been defined in Article 2 of the Convention as ‘a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing *any other act with respect to a treaty*.¹²⁸ The question of acting on behalf of a state by way of lodging an ad hoc declaration of acceptance of the jurisdiction of the Court does not fall within the scenarios of ‘negotiating, adopting or authenticating the text of a treaty’. Rather it is clear that such a unilateral act of a state’s representative may fit within ‘any other act with respect to a treaty’. This addition was intended by the drafters to cover situations where ‘full powers’ go beyond the conclusion of a treaty.¹²⁹ Thus the question remains whether the Palestinian Minister of Justice or the Attorney General possess ‘full powers’ or the circumstances in which they lodged the declaration reveal that it was the intention to empower them to represent Palestine.

Public sources reveal that the Interim President of Palestine has requested the Prosecutor to ‘nullify the complaint filed on July 25, 2014’ by the Minister of Justice and the Attorney General.¹³⁰ In an interview conducted with the Palestinian Foreign Minister on 19 August 2014, the latter was also quoted saying that the Minister of Justice ‘filed this lawsuit in his own name without consulting his government, without taking permission or authorization from this government, and without consulting the Authority president, who is the President of Palestine’.¹³¹ This information, if it does not negate the fact that the two state officials lacked the necessary ‘full powers’ to bind Palestine before the Court, at least casts doubt on whether they possessed such powers. As such, it was for the Prosecutor or the Registrar to verify the matter with the Palestinian Authority. In the absence of such verification, the Court should not act upon this declaration or any other declaration lodged by any person allegedly representing his/her state apart from

¹²⁷ VCLT, Art. 7 . See generally on Art. 7, P Gautier, ‘1969 Convention: Article 2, Use of Terms’ in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. I (Oxford: Oxford University Press 11) 33 ff.

¹²⁸ Art. 2(1) VCLT (n 132). See generally, P Kovacs ‘Article 7: Full Powers’ in Corten and Klein (eds) (n 127) 125 ff (emphasis added).

¹²⁹ 1966 *Yearbook of the International Law Commission*, vol. II, 189.

¹³⁰ ‘Palestinian Authority withdraws complaint against Israel’ (n 7).

¹³¹ ‘Palestinian foreign minister interviewed on lawsuit lodged with ICC’ Al Arabya TV, 19 August 2014; see also ‘Report: Palestinian Authority preventing ICC from investigating Israel, Hamas for war crimes’, *The Jerusalem Post*, 12 September 2014 <<http://www.jpost.com/Arab-Israeli-Conflict/Report-Palestinian-Authority-preventing-ICC-from-investigating-Israel-Hamas-for-war-crimes-375166>> accessed 15 September 2014.

the limited category referred to in Article 7(2) of the Vienna Convention on the Law of Treaties and referred to in the jurisprudence of the ICJ.

This brings me to the question of withdrawal of this declaration. It is clear that in the absence of 'full powers' to represent Palestine, the declaration submitted by the Minister of Justice and the Attorney General becomes invalid, and accordingly, the question of withdrawal of the second declaration becomes moot. However, this is not the case with respect to the third declaration. There might still be a possibility to request its withdrawal due to the enormous political pressure imposed by Israel and the United States on the Palestinian Authority. This has taken the form of threats of cutting around 400 million dollars annual aid provided by the United States.¹³² Israel has also frozen the 'transfer of NIS 500 million in tax revenue'¹³³ to the Palestinian Authority. Thus the question of withdrawal of ad hoc declarations merits some analysis.

The ICJ was often faced with a similar question regarding the effects that the withdrawal or expiry of a declaration may have on the jurisdiction of the Court. The leading authority on the issue is the *Nottebohm* case delivered by the Court in 1953. In that case the ICJ faced the issue of whether the expiry of the declaration by which Guatemala accepted the compulsory jurisdiction of the Court had the effect of depriving the Court of its jurisdiction to adjudicate on the claim. In this context, the ICJ responded by stating:

There can be no doubt that an Application filed after the expiry of this period would not have the effect of legally seising the Court. But neither in its Declaration nor in any other way did Guatemala then indicate that the time-limit provided for in its Declaration meant that the expiry of the period would deprive the Court of jurisdiction to deal with cases of which it has been previously seised... Once the Court has been regularly seised, the Court must exercise its powers... After that, the expiry of the period fixed for one of the Declarations on which the Application was founded is an event which is unrelated to the exercise of the powers conferred on the Court by the Statute, which the Court must exercise whenever it has been regularly seised... An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established...¹³⁴

Four years later, the ICJ reiterated the same rule in in the *Case Concerning Right of Passage Over Indian Territory*, when the Court stated that '[i]t is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction'.¹³⁵ This became a common practice of the ICJ in subsequent cases addressing the withdrawal

¹³² 'Hamas urges Palestinian leadership to seek ICC justice', *Middle East Crisis*, 25 August 2014 <<http://www.ksat.com/content/pns/ksat/news/2014/08/23/mideast-crisis.html>> accessed 15 September 2014.

¹³³ 'US: Palestine not a state, does not qualify for ICC membership', *The Jerusalem Post*, 9 January 2015, at <http://www.jpost.com/landedpages/printarticle.aspx?id=387031>.

¹³⁴ *Nottebohm* (n 53) 121–3.

¹³⁵ Judgment of 26 November 1957 (Preliminary Objection), *Case Concerning Right of Passage over Indian Territory (Portugal v. India)* [1957] ICJ Reports 125, 142.

or termination of declarations.¹³⁶ The same rule may equally apply to the ICC, and the Court should not act differently in a purported withdrawal.

However, one needs to distinguish between a withdrawal requested after a referral was made by a State Party or a Security Council and one requested after lodging an Article 12(3) declaration. As to the former, the legal effect of a referral is to engage the jurisdiction of the Court, and thus, any request to suspend the proceedings at any stage on the basis of alleged withdrawal should be denied as having no bearing on the jurisdiction of the Court.¹³⁷

This might not be the case with declarations lodged under Article 12(3). The mere lodging of an ad hoc declaration under Article 12(3) of the Rome Statute is not in itself sufficient to trigger the jurisdiction of the Court. A declaration is generally limited to extending the temporal, personal, and territorial jurisdictional parameters of the Court. As a matter of fact, an Article 12(3) declaration is deemed one of the preconditions to the exercise of the Court's jurisdiction, and should be clearly distinguished from the Court's triggering method, mirrored in Articles 13, 14, and 15. Consequently, the Prosecutor is not obliged to begin any preliminary activity as a direct consequence of the lodging of a declaration of acceptance, unless there is an explicit request to that effect,¹³⁸ or if he/she decides to proceed on the basis of his/her *proprio motu* powers.

Once the jurisdiction of the Court has been activated or triggered it is not logical to speak of withdrawal, since, even if it were accepted as a legitimate unilateral act, it would not affect current proceedings of relevance to the situation. This conclusion finds support not only in the ICJ jurisprudence referred to here, but also in a number of cases before the Inter-American Court of Human Rights (IACtHR). In the *Constitutional Court* case, the IACtHR argued that the Court asserted jurisdiction to consider the case a week before Peru's alleged withdrawal of its recognition of the Court's contentious jurisdiction. Citing the Commission's brief, the decision stated that such 'purported withdrawal have [sic] no effect whatever on the Court's exercise of jurisdiction... A unilateral action by a State cannot divest an international court of jurisdiction it has already asserted'.¹³⁹ The Court followed the exact approach in the *Ivcher Bronstein* case.¹⁴⁰ However, this may not be the case in the absence of any request to activate the jurisdiction of the Court or if the Prosecutor has remained inactive. In this respect, there may be some room for considering the possibility of accepting Palestine's withdrawal of its ad hoc acceptance of the exercise of jurisdiction by the Court during this interim stage.

¹³⁶ Judgment of 26 November 1984 (Jurisdiction of the Court and Admissibility of the Application) *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* [1984] ICJ Reports 392, para. 54.

¹³⁷ With respect to withdrawal from the Statute which might be another possibility, the answer is much simpler as this scenario is already envisaged and addressed under article 127 of the Rome Statute. In this regard, a request for withdrawal does not deprive the Court from proceeding with its investigations, prosecutions or trials if they have started prior to that request. See Art. 127(2) Rome Statute.

¹³⁸ Stahn, El Zeidy, and Olasolo (n 19) 423–4.

¹³⁹ *Constitutional Court Case, Competence, Judgment of 24 September 1999, Inter-Am Ct. H.R. (Series C), No. 55 (1999)*, para. 24.

¹⁴⁰ *Ivcher Bronstein Case, Competence, Judgment of 24 September 1999, Inter-Am Ct. H.R. (Series C) No. 54 (1999)*, para. 24.

Also of relevance to the discussion is whether Palestine may accept the retroactive exercise of jurisdiction of the Court pursuant to article 12(3) after the adoption of General Assembly Resolution 67/19. The principle arguments underlying this latter question have been sufficiently addressed in scholarly writings,¹⁴¹ and settled in the practice of the Court. It has been accepted practice before the ICC that a non-State Party or even a State Party may lodge an Article 12(3) declaration with retroactive effect. In this respect, it should be empathized that retroactivity does not entail a possibility for the exercise of jurisdiction of the Court beyond the temporal limitation imposed by Article 11, namely 1 July 2002.¹⁴² In the situation in Côte d'Ivoire, Pre-Trial Chamber III agreed to exercise jurisdiction in relation to crimes allegedly committed in the country since 19 September 2002, although the Government lodged its declaration dated 18 April 2003 on 1 October 2003.¹⁴³ Similarly, in the Uganda situation, Pre-Trial Chamber II adhered to the idea that Uganda might accept the exercise of the Court's jurisdiction for crimes which had taken place prior to the entry into force of the Statute for that state. In the warrant of arrest issued against the leader and Commander-in-Chief of the LRA, Joseph Kony, Pre-Trial Chamber II noted the 'Declaration on Temporal Jurisdiction', in which the Ugandan Government 'accepted the exercise of the Court's jurisdiction for crimes committed following the entry into force of the Statute on the 1st day of July 2002'.¹⁴⁴ The Appeals Chamber confirmed the retroactive effect of an Article 12(3) declaration.¹⁴⁵ It also confirmed the possibility of accepting the exercise of the Court's jurisdiction at the time of the lodging of the declaration for future events.¹⁴⁶ Yet, in the context of Palestine the question is trickier and might call for deviating, to a certain extent, from this principle rule. As stated earlier, it has been argued that the General Assembly Resolution 67/19 produces its effect *ex nunc*. Thus, the fact that Palestine was not entitled to lodge a declaration of acceptance of jurisdiction of the Court prior to the adoption of this resolution makes it equally the case that it should not be able to accept the exercise of jurisdiction of the

¹⁴¹ K Heller, 'Yes, Palestine Could Accept the ICC's Jurisdiction Retroactively' (*Opinio Juris*, 29 November 2012) <<http://opiniojuris.org/2012/11/29/yes-palestine-could-accept-the-iccs-jurisdiction-retroactively/>> accessed 15 September 2014; A Zimmermann (n 112); Ambos (n 104); and more generally El Zeidy, 'The Legitimacy of Withdrawing State Party Referrals and Ad hoc Declarations under the Statute of the International Criminal Court' (n 19) 70.

¹⁴² The general rule is that the Court may exercise jurisdiction only in respect of crimes committed after the Statute's entry into force in relation to that state (Art. 11(1)). The invocation of Art. 12(3) is the exception in order to extend the jurisdiction of the Court to cover events from the Statute's entry into force (Art. 11(2)).

¹⁴³ Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire' (n 46) para. 15.

¹⁴⁴ Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, *Situation in Uganda*, ICC-02/04-01/05-53, PTC II, ICC, 27 September 2005, para. 32.

¹⁴⁵ Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of proceedings, *Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-321, AC, ICC, 12 December 2012, para. 83 (noting that 'the Statute also serves the purpose of deterring the commission of crimes in the future, and not only of addressing crimes committed in the past'). See also, 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 (ICC- 02/11-01/11-129)', *Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-212, PTC I, ICC, 15 August 2012, para. 61.

¹⁴⁶ Ibid.

Court in relation to crimes committed prior to that date.¹⁴⁷ However, Palestine may still accept the jurisdiction of the Court retroactively up until 29 November 2012, the date of adoption of General Assembly Resolution 67/19. Indeed, the Palestinian Authority seems to have realized the potential legal problems which might arise if it had lodged an article 12(3) declaration that goes back to 1 July 2002 as in the case of the first declaration. Instead, the Palestinian Authority has chosen a much neater avenue when it decided to restrict its third declaration to events which do not predate Operation Protective Edge (13 June 2014). By doing so, Palestine not only confined the scope of investigations to events which took place as of 13 June 2014 onwards, but also it made it more difficult, if not impossible, for the Court to reject the retroactive application of its jurisdiction for the date specified in the third declaration based on its settled jurisprudence. This does not deny the fact that any interested party may still contest the third declaration in terms of its validity or scope of application by way of a jurisdictional challenge under article 19(2) of the Statute.

8.5 Conclusion

The practice of the Prosecutor in addressing the first declaration of Palestine is alarming. It may trigger a trend of renouncing responsibility, at a time when the international community is critically assessing and scrutinizing the work of the institution after more than a decade from the start of its operation. True, the situation of Palestine is a sensitive matter and carries with it some highly political questions. Yet this reality should not compromise the main feature of the ICC as being an international institution with a purely judicial mandate. Arguably Palestine was the first real test for the Court to assess its legitimacy, and certainly it is not the last situation with difficult political ramifications. Taiwan and the TRNC may also pose quite similar difficulties if one day they approach the Court under Article 12(3). The Court, in turn, cannot continue denying responsibility for resolving questions of a purely judicial nature (jurisdictional questions) by dumping them on other organs of the United Nations or on the ASP.

There is always room to seek guidance from other bodies such as the relevant organs of the United Nations. But seeking guidance does not mean that political organs are entitled to decide on legal matters which fall within the pure mandate of the Court. The Prosecutor could have resolved the controversy surrounding the Palestinian question still by being guided by the position of the international community towards Palestine at the time. He could have also compared the situation of Palestine to the similar situation of the Cook Islands, which was included in the 'all States' formula after having been admitted to the membership of the World Health Organization.¹⁴⁸ Alternatively, he could have shared the responsibility by way of seizing the judiciary through the various available procedural avenues discussed in this study.

¹⁴⁷ But see contra, A Wills, 'Old Crimes, New States and the Temporal Jurisdiction of the International Criminal Court' (2014) 12 *Journal of International Criminal Justice* 407, 428–30.

¹⁴⁸ See (n 114). Equally Palestine was admitted to the UNESCO.

The questions surrounding the second and third declarations are relatively less controversial, as they do not pose the same political problem. However, the question of who may bind his/her State is of no less importance. If not resolved from the outset, it could lead to political friction and uncertainties vis-à-vis other States. This is apparent, for example, in the context of Egypt, where a group of lawyers representing, *inter alia*, the Freedom of Justice Party claimed the right to bind the state by way of accepting the ad hoc jurisdiction of the Court over the events which followed the ousting from power of former President Mohamed Morsi.¹⁴⁹ The official Government actually exercising ‘effective control’ over the Egyptian territory denied the acceptance of jurisdiction of the Court.¹⁵⁰ The Prosecutor stood up to her responsibilities and resolved the legal controversy in-house. Had the Prosecutor refrained from resolving the legal dispute concerning who may lodge an Article 12(3) declaration, it would have certainly created a situation of uncertainty. It would have also led to negative legal and political implications.

It is not clear, however, whether the Prosecutor is going to respond to the second Palestinian declaration, if at all, given that thus far there is no press statement issued by the Prosecutor or the Registrar indicating that the Court is examining the said declaration.¹⁵¹ In the absence of said information, it is difficult to predict whether and to what extent the Prosecutor will rule on questions related to the validity of the second declaration or the possibility of its withdrawal. This might be the case especially after the Palestinian Authority acceded to the Rome Statute and lodged its third declaration on 31 December 2014. Thus if questions concerning the scope, retroactivity, validity or possibility of withdrawal of a declaration were to be ever addressed, this is likely to take place in the course of proceedings related to the third declaration.

If Palestine has decided to yield to the political pressure exerted by greater powers and requested withdrawal, this does not mean *per se* that the Court will lack jurisdiction to consider allegations against Israel and Palestine. It only means that the Court will not be in a position to consider retroactively the events related to Operation Protective Edge as the Statute enters into force for Palestine as a result of its accession only on 1 April 2015.

The experience of Palestine before the Court as a whole should make us rethink of more productive ways to respond to potential future declarations lodged by entities with controversial status under international law.

¹⁴⁹ ‘Communication seeking to accept the ICC’s jurisdiction over Egypt is dismissed’, *ICC Press Release*, 1 May 2014.

¹⁵⁰ Ibid. See, Pre-Trial Chamber II, “Decision on the ‘Request for review of the Prosecutor’s decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar’s Decision of 25 April 2014’”, 12 September 2014, ICC-RoC46(3)-01/14-3; also for a request for leave to appeal and reconsideration of this decision, ICC-RoC46(3)-01/14-5.

¹⁵¹ But see ‘Report: Palestinian Authority preventing ICC from investigating Israel, Hamas for war crimes’ (n 131).

Self-Referrals as an Indication of the Inability of States to Cope with Non-State Actors

*Harmen van der Wilt**

9.1 Introduction

On 13 July 2012 Mali's Minister of Justice referred the situation in the Republic of Mali for further investigation to the prosecutor of the ICC, asserting that grave and massive violations of human rights and of international humanitarian law had been committed, especially in the northern parts of the territory. It was noted that Mali's domestic jurisdiction was not capable of prosecuting and judging the culprits.¹

Mali's initiative is the fourth example of a somewhat curious phenomenon, dubbed as 'self-referrals', in which states invoke Article 14 of the Rome Statute of the ICC in order to refer the prosecution and trial of perpetrators of international crimes to the Court. Uganda's President Museveni initially set the trend in motion by referring the situation concerning the LRA to the ICC.² The DRC soon followed suit.³ The CAR also took the opportunity to release itself from a highly complicated task, a task which exceeded its capacities.⁴ It took the Prosecutor some time to decide whether he should comply with the latter request, but two years later he announced the opening of an investigation, which resulted in the arrest and subsequent surrender to the Court of Jean-Pierre Bemba.⁵

While the Prosecutor has welcomed the initiatives of African governments as a golden opportunity to engage in fruitful cooperation with willing authorities, the

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¹ République du Mali, Renvoi de la situation au Mali, No 0076/MJ-SG (13 July 2012) <<http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>> accessed 15 July 2013 ('Lettre de Renvoi de la situation au Mali').

² 'President of Uganda refers situation concerning the Lord's resistance Army to the ICC', *ICC Press Release*, 29 January 2004. The Prosecutor subsequently decided to open an investigation: 'Prosecutor of the International Criminal Court opens an investigation into Northern Uganda', *ICC Press Release*, 29 July 2004. For a seminal analysis of the conflict and the demarches of the Ugandan government, see M El Zeidy, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC' (2005) 5 *International Criminal Law Review* 83.

³ 'Prosecutor receives referral of the situation in the Democratic Republic of Congo', *ICC Press Release*, 19 April 2004, resulting in the first investigation: 'The Office of the International Criminal Court opens its first investigation', *ICC Press Release*, 23 June 2004.

⁴ 'Prosecutor receives referral concerning Central African Republic', *ICC Press Release*, 7 January 2005.

⁵ 'Prosecutor opens an investigation in the Central African Republic', *ICC Press Release*, 22 May 2007; Warrant of Arrest for Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1, PTC III, ICC, 23 May 2008.

practice of ‘self-referrals’ has not been spared its share of sharp criticism.⁶ Some authors hold that ‘self-referrals’ are a ‘creative interpretation’ of Article 14, because the drafters of the Rome Statute never seriously contemplated them.⁷ Others have questioned the compatibility of self-referrals with the legal architecture of the Rome Statute, arguing that an auto-referral does not preclude the Court from addressing the admissibility of a case and pointing out that such referrals are not easy to reconcile with a state’s positive obligations regarding the prosecution and trial of international crimes.⁸ Such objections of a legal nature are often supplemented by grave concerns that the practice of self-referrals is conducive to political manipulation. Governments will try to entice the Court to focus its attention on their political foes, while themselves staying aloof of any international scrutiny.⁹ In a refreshing rebuttal of the mainstream criticism, Darryl Robinson has taken stock of the arguments.¹⁰ He carefully demonstrates that, contrary to most assertions, the referral of a situation by a state on whose territory international crimes were committed was anticipated and discussed during the drafting procedure. Robinson adds that, while the concern about ‘selective externalization’ is compelling, political manoeuvring by states is nothing new. Self-referrals may aggravate the risk of political manipulation, but this should only make the Court more vigilant in ensuring that it is not used as a tool to serve the interests of states.

I will not involve myself in all these sophisticated legal arguments, but rather aim to ponder the phenomenon of self-referrals against the backdrop of a confusing and rapidly changing world order, characterized by dwindling state authority. This chapter starts from the premise that self-referrals reflect convoluted situations in which state-sponsored groups and non-state actors contend for power and resources, usually to the detriment of the civilian population. In other words: they defy the state-centred paradigm of international criminal justice.¹¹ What all self-referrals have in common is

⁶ The first commentators on ‘self-referrals’ were rather mild in their judgments, but pointed at possible political repercussions, see C Kress, “Self-Referrals” and “Waivers of Complementarity”: Some Considerations in Law and Practice’ (2004) 2 *Journal of International Criminal Justice* 944; and P Gaeta, ‘Is the Practice of “Self-Referrals” a Sound Start for the ICC?’ (2004) 2 *Journal of International Criminal Justice* 949.

⁷ The most pronounced advocate of this point of view is W Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (2009) 6 *Journal of International Criminal Justice* 751; W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press 2010) 309. Similar objections have been voiced by M Arsanjani and M Reisman, ‘Law-in-Action of the International Criminal Court’ (2005) 99 *American Journal of International Law* 385, 389–90: ‘[B]efore and during the Rome negotiations, no one assumed that governments would want to invite the future court to investigate and prosecute crimes that occurred in their territory.’ See also A Müller and I Stegmiller, ‘Self-Referrals on Trial: From Panacea to Patient’ (2010) 8 *Journal of International Criminal Justice* 1267, 1269.

⁸ See in particular J Kleffner, ‘Auto-Referrals and the Complementary Nature of the ICC’ in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers 2009) 41.

⁹ Schabas argues that ‘self-referral, far from being an expedient to provide a fledgling institution with some cases, is actually a trap. If a State refers a situation against itself, that is, against its rebels, it is doing so with a result in mind’; W Schabas, ‘Complementarity in Practice’: Some Uncomplimentary Thoughts’ (2008) 19 *Criminal Law Forum* 5, 22.

¹⁰ D Robinson, ‘The Controversy over Territorial State Referrals and Reflections on ICL Discourse’ (2011) 9 *Journal of International Criminal Justice* 355.

¹¹ For a similar point of view, see P Akhavan, ‘Self-Referrals before the International Criminal Court: Are States the Villains or the Victims of Atrocities?’ (2010) 21 *Criminal Law Forum* 103.

that governments contend that they are unable to conduct fair and effective criminal proceedings against non-state actors over whom they do not wield control and that they therefore seek the assistance of the ICC. The main objective of this chapter is to investigate how the ICC has reacted to these claims of ‘inability’. I will demonstrate that the ICC has largely side-stepped the issue by holding that a state’s inactivity renders a situation admissible and precludes any assessment of its ‘(un)willingness’ or ‘(in)ability’. Only recently—in a decision on Libya’s challenge to the Court’s jurisdiction, claiming that it *was* able to dispense criminal justice—the ICC shed more light on ‘inability’ and its parameters.

In my opinion, a thorough discussion of the concept of ‘inability’ is crucial because it may expose the embarrassing conclusion that international criminal justice is ill-equipped to cope with fragile states and powerful non-state actors. After all, if a state is considered ‘unable’, the next logical question is whether the ICC is likely to perform the function more successfully. We may have serious reasons to doubt this, not only because the ICC is highly dependent on the cooperation of states—the prospects thereof being dire in the case of failed states—but also in view of the fact that the ICC lacks the proper legal tools to prosecute and try non-state actors. In order to buttress this final point, I will show that the ICC has no jurisdiction over terrorism and has—outside the scope of armed conflict—very limited options for charging non-state actors who engage in heinous crimes. The disconcerting conclusion may well be that the odium of ‘inability’ applies not only to states.

This chapter is structured as follows. Section 9.2 starts by scrutinizing past self-referrals in order to discern what motivated the states in question to seize the Court. Section 9.3 investigates the reaction of the ICC to claims by the referring states that they were incapable of enforcing criminal law in respect of non-state adversaries. In section 9.4 the focus shifts to the ICC’s possibilities to offer relief. I will demonstrate that terrorism is outside the jurisdictional scope of the ICC, leaving the Court virtually powerless to address international crimes committed by non-state actors, beyond the realm of armed conflict. In section 9.5 I will reflect on the state-centred focus of international criminal justice, which explains the scepticism towards self-referrals and which may be in need of amendment in view of the proliferation of non-state actors, many of whom are responsible for international crimes. Section 9.6 concludes the chapter by noting some final observations.

9.2 Self-Referrals: Genuine ‘Inability’ or Insidious Attempt to Frame One’s Enemies?

When studying the language of self-referrals, one observes that they all share an air of helplessness. In view of protracted civil strife or other political and social tensions, the official authorities claim that they are not able to take legal action against perpetrators of international crimes.¹² In its letter of jurisdiction, the government of Uganda

¹² See Müller and Stegmiller (n 7) 1280, who correctly criticized the ICC’s practice of issuing only press releases in which the original declarations are paraphrased, hampering a more thorough comparison of the texts. The authors suggest that the Court put the full texts on the website. Apparently, the ICC has

avowed that it ‘had been unable to arrest… persons who may bear the greatest responsibility for the crimes within the referred situation’, adding that ‘the ICC is the most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility’; and that the government of Uganda ‘has not conducted and does not intend to conduct national proceedings in relation to the persons most responsible’.¹³

Even more explicit and general in the acknowledgement of its own limited capacity to engage in criminal law enforcement, the DRC admitted in its letter of referral that ‘les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus ni d’engager les poursuites nécessaires sans la participation de la Cour Pénale Internationale’.¹⁴

In a similar exhibition of modesty the *Cour de Cassation* of the CAR expressed its opinion that, ‘the national justice system was unable to carry out the complex proceedings necessary to investigate and prosecute the alleged crimes’.¹⁵

Finally, Mali’s government echoed its colleagues by proclaiming the honour of deferring the gravest crimes to the OTP ‘dans la mesure où les juridictions malientes sont dans l’impossibilité de poursuivre ou juger les auteurs’.¹⁶

These claims of inability need not surprise us, as they often, at least partially, reflect reality and are facilitated by the admissibility regime itself, as will be demonstrated in the next section. What is perhaps slightly more puzzling is that two governments have attempted to reconcile this humble attitude with efforts to steer the attention of the ICC’s prosecutor exclusively in the direction of crimes committed by rebel enemies. In the case of Uganda, President Museveni clarified that a key issue of the investigation should be ‘locating and arresting the [LRA] leadership’, adding that he intended to exclude the leadership of the LRA from a proposed amnesty, in order to ensure that those bearing the greatest responsibility for the crimes committed in northern Uganda were brought to justice. No mention was made of any crimes committed by the official Ugandan People’s Defence Forces (UPDF).¹⁷ Mali’s Minister of Justice was perhaps less explicit, but nonetheless clear, when he addressed the letter of self-referral to the OTP, stating that:

Il s’agit de violations graves et massives des droits de l’Homme et du Droit International Humanitaire commises notamment dans la partie Nord du territoire: *les executions sommaires des soldats de l’armée malienne*, les viols des femmes et jeunes filles, les massacres des populations civiles, l’enrôlement d’enfants soldats, les tortures, les pillages généralisés des biens appartenant aussi bien à l’Etat qu’aux particuliers, les disparitions forcées, *la destruction des Symboles de l’Etat*, des Edifices, des Hôpitaux, des

taken this advice to heart—see, for example, the availability of Mali’s original letter on the website of the ICC.

¹³ Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, *Situation in Uganda*, ICC-02/04-01/05-53, PTC II, 27 September 2005, para. 37.

¹⁴ Lettre de M. Joseph Kabila, ICC-01/04-01/06-39-AnxB1, 3 March 2004, reclassified as public pursuant to Decision ICC-01/04-01/06-46.

¹⁵ ICC Press Release 7 January 2005 (n 4).

¹⁶ Lettre de Renvoi de la situation au Mali (n 1).

¹⁷ ICC Press Release 29 January 2004 (n 2).

*Tribunaux , des Mairies, des Ecoles, du Siège d'ONG et d'Organisme Internationaux d'aide, la Destruction des Eglises, des Mausolées et des Mosquées.*¹⁸

The emphasized parts suggest that the enemy had targeted assets of the state including human resources, property, and state symbols, yet the letter is silent on any atrocities that may have been committed by the governmental forces.

How did the ICC prosecutor react to these one-sided accusations? In the case of Uganda, Prosecutor Ocampo had made it clear to President Museveni that the ICC would interpret the referral as concerning all crimes under the Rome Statute committed in northern Uganda, obviously alluding to the possibility that atrocities committed by government forces would be investigated too.¹⁹ However, Ocampo has been criticized for not living up to this firm position, as indictments were only issued against members of the rebel LRA.²⁰ The prosecutor tried to counter the criticism by invoking the gravity principle, noting that:

The criteria for selection of the first case was gravity. We analysed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA.²¹

In spite of promises made by President Museveni, to date none of the representatives of the official authorities has been brought to justice.

While such demarches may be expected, they give cause for great concern, as self-referrals are not only a formal triggering mechanism, but may also serve as an important source of information. Any attempt to influence the prosecutorial policy should bolster the OTP in its resolve to maintain its independence and seek information from all sources. Although political realities will undoubtedly determine the degree to which the prosecutor will be under the sway of states, his or her independence towards the state making a self-referral can at least be buttressed by legal arguments. A self-referral entails a transfer of criminal proceedings and marks a significant change in the sovereign authority of a state to define its legal position vis-à-vis power contenders. As long as a sitting government is ‘in charge’ of criminal law enforcement, it has the legitimate power to disqualify any violent challenge of its authority as ‘criminal’ or an act of ‘terrorism’. Of course, states that are committed to the rule of law will investigate and, if necessary, prosecute violations of human rights committed by their own agents. Nonetheless, they have an advantage over any contender that challenges their position by violent means. By referring a situation to the ICC, governments forfeit, at least partially, this definitional advantage over their adversaries.

¹⁸ Lettre de Renvoi de la situation au Mali (n 1) (emphasis added).

¹⁹ Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Art 53, *Kony et al., Situation in Uganda*, ICC-02/04-01/05-68, PTC II, ICC, 2 December 2005.

²⁰ See, for instance, Amnesty International, ‘Uganda: First Ever Arrest Warrants by International Criminal Court—a First Step towards Addressing Impunity’ (14 October 2005).

²¹ ‘Statement by the Chief Prosecutor on the Uganda Arrest Warrants’, *ICC Press Release*, 14 October 2005, 2.3.

States that refer a situation to the Court and acknowledge that they are not capable of dealing with the conflict themselves, yet insist that they should have a say in the choice of accused, try to have their cake and eat it too.²² They attempt to occupy the moral high ground, whereas the very act of surrendering their adjudicative prerogatives suggests that they have left that lofty place. A strong awareness of this inconsistency will assist the Court in asserting its independence towards the state of referral and remind the Court that it is expected to judge the criminal nature of the conduct, irrespective of the status of the perpetrator. In short, while I share the concern of those who consider self-referrals as a potential instrument to steer the policy of the OTP, it is rather easy to reject any claim by ‘self-referring’ states that they have a voice in the selection of cases. Arguably more difficult is the assessment of the plea of ‘inability’. Section 9.3 will consider this issue.

9.3 Puzzled Trial Chambers Struggling with the Concepts of ‘Inactivity’ and ‘Inability’

The arguments advanced by states that have engaged in self-referrals allude to the second prong of the complementarity principle which renders priority to domestic jurisdictions and only allows the ICC to intervene when the former prove to be ‘unwilling’ or ‘unable’ to genuinely carry out investigations or prosecutions (see Preamble, Article 1, in conjunction with Article 17 Rome Statute). In an attempt to further define ‘inability’, Article 17, section 3 of the Rome Statute requires the Court to consider ‘whether, due to a total or substantial collapse or unavailability of its national system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to start proceedings’.

The threshold is rather high, as the provision requires the legal and factual incapacities to be caused by the demise of the legal and political infrastructure. Apparently, the definition does not cover incidental failures to obtain custody over the suspect or evidence. Moreover, the replacement of the initial adjective ‘partial’ with ‘substantial’ [collapse] made the criteria more rigid.²³

In the *Lubanga* case, Pre-Trial Chamber I addressed the admissibility of the case which the DRC submitted to the Court.²⁴ Referring to the letter of the DRC’s President, Pre-Trial Chamber I confirmed Congo’s negative assessment of its own capabilities, opining that:

²² In this respect an interesting article of Mohamed El Zeidy deserves to be mentioned. El Zeidy carefully investigates whether State Parties are allowed to withdraw previously made referrals and concludes that they have no control over the termination of the proceedings before the ICC. This conclusion suggests a partial surrender of sovereignty in the realm of criminal law enforcement. M El Zeidy, ‘The Legitimacy of withdrawing State Party Referrals and ad hoc Declarations under the Statute of the International Criminal Court’ in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers 2009) 55.

²³ On this issue and its background, see M El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Leiden: Martinus Nijhoff Publishers 2008) 224–6.

²⁴ Decision on the Prosecutor’s Application for Warrants of Arrest, Art 58, *Situation in the Democratic Republic of the Congo*, ICC-01/04-520-Anx2, PTC I, ICC, 10 February 2006.

In the Chamber's view...it appears that the DRC was indeed unable to undertake the investigation and prosecution of the crimes falling within the jurisdiction of the Court committed in the situation in the territory of DRC since 1 July 2002. In the Chamber's view, this is why the self-referral of the DRC appears consistent with the ultimate purpose of the complementarity regime, according to which the court by no means replaces national criminal jurisdictions, but it is complementary to them.²⁵

The Pre-Trial Chamber seems to deduce the admissibility of the case directly from the fact that the DRC had proved to be unable to start criminal proceedings against Mr Lubanga. However, the Chamber observed some progress, finding that:

[T]he DRC national judicial system has undergone certain changes, particularly in the region of Ituri where a *Tribunal de Grande Instance* has been re-opened in Bunia. This has resulted inter alia in the issuance of two warrants of arrest by the competent DRC authorities for Thomas Lubanga Dyilo in March 2005 for several crimes, some possibly within the jurisdiction of the Court, committed in connection with military attacks from May 2003 onwards and during the so-called Ndoki incident in February 2005. Moreover as a result of the DRC proceedings against Mr Thomas Lubanga Dyilo, he has been held in the *Centre Pénitentiaire et de Reéducation* de Kinshasa since 19 March 2005. Therefore, in the Chamber's view, the Prosecution's general statement that the DRC national judicial system continues to be unable in the sense of article 17(1) (a) to (c) and (3) of the Statute does not wholly correspond to the reality any longer.²⁶

It appears that these improvements did not prompt the Court to change its mind and leave the prosecution and trial of Mr Lubanga to the authorities of the DRC. The Chamber applied a rigid test, and considered whether the national proceedings encompassed the conduct that constituted the basis for the ICC prosecutor's charges, to wit the conscription, enlistment, and use of child soldiers. Denying that this was the case, the Chamber concluded that the DRC had remained 'inactive' in respect of the specific case before the Court, adding that, 'in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability'.²⁷ This final sentence is slightly spurious, as shortly beforehand, the Chamber concurred with the DRC that the latter was unable to pursue criminal proceedings.

The decision of the Pre-Trial Chamber in *Lubanga* has been censured for conflating 'inactivity' and 'inability'.²⁸ This is on the basis that the assessment of 'unwillingness' and 'inability' presupposes activities that can sustain such a judgment. As long as a state does not move at all, issues of admissibility do not arise. This is borne out by a literal interpretation of the text of Article 17 of the Rome Statute that requires a current investigation or prosecution, an investigation that has ended in a decision to drop the case or a previous trial of the person for conduct which is the subject of the complaint. In other words, the Pre-Trial Chamber correctly held that a case is by definition admissible if a state does nothing at all, but that opinion is difficult to reconcile with its earlier finding that 'inactivity' connotes 'inability'.

²⁵ Ibid., para. 35.

²⁶ Ibid., para. 36.

²⁷ Ibid., para. 40.

²⁸ Cf. El Zeidy, *The Principle of Complementarity* (n 23) 228–32.

In the *Katanga* case, the Appeals Chamber corrected the inconsistencies which surfaced in *Lubanga*.²⁹ The Trial Chamber had introduced, perhaps somewhat artificially, a second form of unwillingness which came to the fore in the aim to see the persons brought to justice, but not before national courts. It is possible that the Pre-Trial Chamber harboured the conviction that the complementarity principle should be literally interpreted, entailing an obligation for domestic jurisdictions to investigate and prosecute and that each and every default on this obligation would automatically imply unwillingness. The Appeals Chamber managed to circumvent the question of whether the Pre-Trial Chamber's interpretation of 'unwillingness' was correct or not. The Appeals Chamber concurred with the prosecutor's submission, holding that 'the question of unwillingness or inability of a State having jurisdiction over the case becomes relevant only where, due to ongoing or past investigations or prosecutions in that State, the case appears to be inadmissible'.³⁰ The Chamber drew the logical conclusion that inaction of the state rendered an inquiry into these difficult and sensitive issues redundant, concluding:

Therefore, in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraph (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction... renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.³¹

The Appeals Chamber fully subscribed to the opinion of scholars evidenced by an acknowledgement in a footnote of the judgment. Meanwhile, the Appeals Chamber sanctioned the practice of self-referrals, thereby indirectly distancing itself from the opinion of the Trial Chamber, indicating that:

[T]here may be merit in the argument that the sovereign decision of a State to relinquish jurisdiction in favour of the Court may well be seen as complying with the 'duty to exercise its criminal jurisdiction', as envisaged in the sixth paragraph of the Preamble.³²

The approach of the Appeals Chamber in *Katanga* has the obvious merit that it is consistent with the object and purpose of the Rome Statute.³³ But the drawback of this interpretation is that it pre-empts a serious scrutiny of any claims of 'inability'. If a state proposes to refer the situation to the ICC and remains inactive, the Court can suffice

²⁹ 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, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1497, AC, ICC, 25 September 2009.

³⁰ Ibid., para. 75.

³¹ Ibid., para. 78.

³² Ibid., para. 85.

³³ For an exhaustive analysis of the two-pronged admissibility test, see D Robinson, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 *Criminal Law Forum* 67.

to accept the offer, without having to inquire whether the state has good reasons to outsource its primary obligation. Perhaps this was at the back of the Trial Chamber's mind when it decided to dedicate an *obiter dictum* to the issues of 'unwillingness' and 'inability' in the *Bemba* case.³⁴ As briefly mentioned previously, the *Cour de Cassation* itself indicated that the prosecution and trial of Mr Bemba would exceed the powers and resources of the CAR. Defence counsel challenged this 'inability', suggesting that the self-referral was inspired by political motives. After the Trial Chamber had concluded that the courts had dismissed the charges, without deciding 'not to prosecute Mr Bemba', it reiterated the findings of the Appeals Chamber in *Katanga* that it was not required to examine unwillingness and inability.³⁵ Nonetheless and 'for the sake of completeness', the Trial Chamber added some considerations on both the concepts of 'unwillingness' and 'inability'. In respect of 'inability', the Chamber first emphasized that, while the opinions of the judges of national courts might be of relevance, it was the state's (unwillingness or) inability that counted. The Trial Chamber noted the continued operations of the rebel faction *Mouvement de libération du Congo* and the consequent instability of the region as factors affecting the quality of the judicial system. It observed that the complex case would inevitably last for several months and would require extensive protective measures for witnesses which would be extremely difficult or impossible for the CAR authorities to implement. In view of all these considerations, the Trial Chamber concluded that:

Given the relative complexity and extent of the prosecution case against the accused for crimes alleged committed in 2002–2003, the Chamber accepts that the prosecuting authorities and the national courts in the CAR would be unable to handle the case against this accused nationally.³⁶

It is remarkable that the Trial Chamber in *Bemba* concentrates its inquiry of the CAR's ability to genuinely prosecute perpetrators of international crimes on the question of whether it has the powers to do so in the specific case, rather than engaging in a more general assessment of the quality of the legal system. That seems a sensible way to proceed. After all, the pertinent issue is whether the state has the capacity to accomplish the particular trial in question.

In the *Al-Senussi* case the Pre-Trial Chamber followed a similar approach.³⁷ It emphasized that its analysis was limited to the determination of whether Libya genuinely was unwilling or unable to carry out proceedings against Mr Al-Senussi for the case that was before the Court, adding that its performance had to be assessed in the light of the relevant law and proceedings applicable to domestic proceedings in Libya.³⁸ In other words, the criminal law system served as a normative framework, indicating both the limitations and possibilities of the proceedings against Mr Al-Senussi. Defence counsel pointed at the precarious security situation in Libya, including the

³⁴ Decision on the Admissibility and Abuse of Process Challenges, *Bemba, Situation in the Central African Republic*, TC III, ICC, ICC-01/05-01/08-802, 24 June 2010.

³⁵ *Ibid.*, para. 243. ³⁶ *Ibid.*, para. 246.

³⁷ Decision on the admissibility of the case against Abdullah Al-Senussi, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-466-Red, PTC I, ICC, 11 October 2013.

³⁸ *Ibid.*, paras 202–3.

authorities' defective control over detention facilities and the state's incapacity to provide sufficient protection for witnesses and victims involved in the case against Mr Al-Senussi. Moreover, the Defence asserted that a local lawyer capable of representing Mr Al-Senussi in the domestic proceedings was yet to be appointed.³⁹

In addressing the issue of security concerns and whether the deficiencies of the legal system prejudiced the proceedings against Mr Al-Senussi, the Pre-Trial Chamber took a very practical approach. It observed that the fact that Mr Al-Senussi was already in custody of the Libyan authorities indicated that these problems seemingly had not affected the ability to obtain the accused.⁴⁰ Further, the Pre-Trial Chamber found that while the gathering of evidence might suffer from absence of effective protection programmes for witnesses and a lack of control over detention facilities, barring access to potential witnesses, these issues were not relevant in the case at hand. The Chamber held that:

[A]t least some of the evidence and testimony that (*sic*) necessary to carry out the proceedings against Mr Al Senussi...has therefore already been collected, and there is no indication that collection of evidence and testimony has ceased or will cease because of unaddressed security concerns for witnesses against Mr Al-Senussi or due to the absence of governmental control over certain detention facilities.⁴¹

In response to the Defence claim that Al-Senussi would lack legal representation, the Chamber observed that this would potentially become a fatal obstacle to the progress of the case, but contrasted Al-Senussi's situation to the one facing Mr Gaddafi. In the latter case, Mr Gaddafi was not under the control of the Libyan authorities and attempts to secure legal representation had repeatedly failed, whereas Mr Al-Senussi was imprisoned in Tripoli, local lawyers of his tribe had indicated their willingness to represent him, and the delay in their appointment was caused by security problems which could be overcome.⁴² In conclusion, the Pre-Trial Chamber did not find Libya 'unable' to prosecute the crimes, as there was not a total or substantial collapse or unavailability of the national system.

A consideration of the case law indicates that gradually the parameters of 'inability' are taking shape. Whereas the decision of the Appeals Chamber in *Katanga* appeared to cut off any further discussion on 'unwillingness' and 'inability' in the context of self-referrals, the Trial Chamber in *Bemba* detected some space to pay attention to these issues. Moreover, a further elucidation could be expected where Trial Chambers are required to assess the reverse situation, to wit, states positively asserting their right and power to conduct national proceedings and challenging the admissibility of the situation before the ICC, as was demonstrated in the *Al-Senussi* case. Two aspects in these recent developments are worth emphasizing. First of all, Trial Chambers tend to focus their attention on the capacity of the national state to proceed with the particular case under scrutiny rather than satisfying themselves through a global assessment of the political and legal infrastructure. This approach works both ways. On the one

³⁹ Ibid., para. 230. ⁴⁰ Ibid., para. 294. ⁴¹ Ibid., para. 298.

⁴² Ibid., paras 307–8 referring to Decision on the admissibility of the case against Saif Al-Islam Gaddafi, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-344-Red, PTC I, ICC, 31 May 2013, para. 213.

hand, the formal availability of an ‘at first sight’ functioning court and police system does not imply that a state has the real power and resources to accomplish proceedings against a mighty adversary who is suspected of international crimes, as was the situation in the *Bemba* case. On the other hand, the security problems and lack of control faced by a state in transition after civil armed conflict will not trigger the verdict of ‘inability’ if they are of a temporal nature and do not affect the state’s capacity to obtain essential evidence and custody over the accused. Second, Trial Chambers show some understanding and sensitivity for the predicament of ‘fragile’ states recovering from civil strife, when they pay attention to unstable security situations and insufficient territorial control as indicators of ‘inability’. These factors may in particular hamper any efforts of criminal law enforcement against non-state actors challenging the state’s power monopoly. Whether the ICC is capable of assisting states to overcome such precarious situations is the topic of the next section.

9.4 The ICC and Non-State ‘Terrorists’

If a case is held admissible, either as a consequence of the state’s inaction or after the ICC’s finding that the state is unwilling or unable, the Court must then decide whether it will pursue the criminal proceedings itself.⁴³ In view of the fact that governments in particular encounter problems of law enforcement in respect of rebels, allegedly engaging in international crimes, the question arises whether the ICC has sufficient tools to prosecute and try non-state actors. As the proposed targets of ICC investigations have frequently been disqualified as terrorists,⁴⁴ it is necessary first to investigate whether the ICC has jurisdiction over this crime.

The political enemies of the African governments that have referred the situation to the ICC are subject to its jurisdiction if they have committed one of the core crimes—genocide, war crimes, or crimes against humanity. In the Statutes of both the ICTR (Article 4(d)) and the SCSL (Article 3(d)) ‘acts of terrorism’ explicitly feature as a war crime. Moreover, the Appeals Chamber of the ICTY has previously concluded that terrorization of the civilian population, committed during an armed conflict, has crystallized into a war crime under customary international law.⁴⁵ The Appeals Chamber confirmed the ruling of the Trial Chamber that terrorization of

⁴³ It is important to emphasize that a state, by refraining from taking action, can never force the Court to exercise jurisdiction, as this decision belongs to the exclusive competence of the Court itself; compare Art 13 of the Rome Statute which provides that the Court may exercise its jurisdiction. See also Akhavan (n 11) 112.

⁴⁴ ‘African Union urges the UN Security Council to Declare Joseph Kony’s Lord’s Resistance Army a Terrorist Organization’, *The New Times*, 30 June 2012 <http://www.newtimes.co.rw/news/views/article_print.php?150398&a=5542&icon=Print> accessed 10 March 2014; D Leger, ‘U.S. labels Mali rebel group a terrorist organization’, *USA Today*, 21 March 2013 <<http://www.usatoday.com/story/news/nation/2013/03/21/terror-group-mali/2005799>> accessed 22 July 2013.

⁴⁵ Judgment, *Galić*, IT-98-29-A, AC, ICTY, 30 November 2006, paras 91–8 (*Galić Appeals Judgment*). The Trial Chamber, while recognizing that the ICTY had jurisdiction over terror as a war crime under Art 3 of its Statute, left the question of the customary international law nature of the crime of terror in abeyance, Judgment and Opinion, *Galić*, IT-98-29-T, TC I, ICTY, 5 December 2003, para. 138 (*Galić Trial Judgment*).

the civilian population constituted a serious infringement of a rule of international humanitarian law, to wit Article 51(2) of the First Additional Protocol to the Geneva Conventions (Additional Protocol I) that prohibits ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population’.⁴⁶ The Trial Chamber clarified that the relevant provisions in the Additional Protocols purported to extend the protection of civilians from terror, as Article 33 of Geneva Convention IV had only a limited scope, protecting a subset of civilians in the hands of the Occupied Power.⁴⁷ Consequently, Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II address all persons—belligerents, civilians, and organized groups alike—and implore them to renounce terrorism in the territory of the party to a conflict.⁴⁸ Whether the violation of these essential rules of international humanitarian law also entailed criminal responsibility could, in the opinion of the Appeals Chamber, be inferred from ‘state practice indicating an intention to criminalise the prohibition, including statements by government officials and international organisations, as well as punishment of violations by national courts and military tribunals’.⁴⁹ After a comprehensive analysis of these instruments and decisions, the Appeals Chamber concluded that customary international law indeed imposed individual criminal liability for violations of the prohibition of terror against the civilian population.

These findings of the ICTY, important as they may be, are of no avail for the assessment of the jurisdiction *ratione materiae* of the ICC, because Article 8 of the Rome Statute does not include terror as a war crime. Assaults by rebel-armed groups on civilians arguably could be classified as ‘intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities’, which qualifies as a war crime both in international armed conflicts (Article 8(2)(b) (i) of the Rome Statute) and in non-international armed conflicts (Article 8(2)(e)(i) of the Rome Statute). However, the conspicuous and aggravating mental element of special intent to intimidate the civilian population is lacking in these definitions. The closest offence to terrorism in the Rome Statute is the war crime of hostage-taking, which requires an intention ‘to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons’.⁵⁰ This is

⁴⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3. Art 13(2) of Additional Protocol II reads exactly the same; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

⁴⁷ *Galić* Trial Judgment (n 45) para. 120.

⁴⁸ Compare also A Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’ (2006) 4 *Journal of International Criminal Justice* 944.

⁴⁹ *Galić* Appeals Judgment (n 45) para. 92.

⁵⁰ Art 8(2)(c)(iii) Elements of Crimes, ICC-ASP/1/3(part II-B) 3–10 September 2002 (First Session of the Assembly of States Parties), as amended 31 May–11 June 2010 (Review Conference of the Rome Statute of the ICC, Kampala).

strongly reminiscent of one of the *mens rea* elements of terrorism as a crime under customary international law, as defined by the Special Tribunal for Lebanon.⁵¹

Beyond the realm of armed conflict the prospects of the ICC exercising jurisdiction over terrorism are even worse. The Special Tribunal for Lebanon has acknowledged that terrorism is a crime under customary international law, but the Tribunal explicitly excluded the application of that customary norm during armed conflict.⁵² These findings create the rather peculiar situation of two separate regimes—one of the war crime of terror during armed conflict and one of terrorism in peacetime. Both are apparently crimes under customary international law, but none is subject to the jurisdiction of the ICC.⁵³ Indeed, during the conference preceding the drafting of the Rome Statute, terrorism in peacetime, as a separate crime under the jurisdiction of the ICC, was purposively left out.⁵⁴ The only possibility of the ICC seizing jurisdiction over an act(s) of terrorism would be if those acts were to qualify as a crime against humanity. In the wake of 9/11, several distinguished lawyers and politicians defended this position, pointing at the magnitude and extreme gravity of the attack.⁵⁵ However, this was obviously an exceptional case, in which the demanding requirements of the concept were met once only. In the *Kenya Decision*, a Pre-Trial Chamber of the ICC explored the limits of crimes against humanity, shedding in particular some light on the requirements of organizations that would be capable of committing crimes against humanity.⁵⁶ Rejecting the position that only state-like organizations might qualify, the majority advanced the capacity of groups to perform acts which infringe human rights as a point of reference. It was stated that considerations that would help the Court assess the issue included:

- i) whether the group is under a responsible command, or has an established hierarchy; ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against the civilian population; iii) whether the group exercises

⁵¹ Compare the Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Ayyash et al., STL-11-01/1, AC, STL, 16 February 2011, para. 85, in which the Appeals Chamber of the Special Tribunal for Lebanon advanced an authoritative definition of terrorism under customary international law. See also Art 1(1) Council Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism [2002] OJ L164:

Each member state shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

- Seriously intimidating a population, or
- Unduly compelling a Government or international organisation to perform or abstain from performing any act;...

See also J Van den Vijver, ‘Prosecuting Terrorism in International Tribunals’ (2010) 24 *Emory International Law Review* 541.

⁵² Decision on the Applicable Law, Ayyash et al. (n 51) paras 107–8.

⁵³ For a critical assessment of this ‘under inclusive approach’ of the Special Tribunal for Lebanon, see M Gillett and M Schuster, ‘Fast-Track Justice: The Special Tribunal for Lebanon Defines Terrorism’ (2011) 9 *Journal of International Criminal Justice* 1011–14.

⁵⁴ For an excellent analysis of the negotiations, see Van den Vijver (n 51) 534–41.

⁵⁵ See A Cassese, ‘Terrorism is Also Disrupting Some Crucial Legal Categories of International Law’ (2001) 12 *European Journal of International Law* 993, 994–5.

⁵⁶ Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, ICC, 31 March 2010, paras 115–28.

control over part of the territory of a State; iv) whether the group has criminal activities against the civilian population as a primary purpose; v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; vi) whether the group is part of a larger group, which fulfils some or all of the aforementioned criteria.⁵⁷

This somewhat more lenient interpretation of one of the crucial elements of crimes against humanity opens the door for broadening the scope of jurisdiction in respect of rebel-armed groups which engage in terrorist offences. However, in view of the other requirements of the element of ‘organization’ and the prerequisite that the attack should be ‘widespread or systematic’, virtually excluding an incidental and improvised terrorist assault, the threshold is still rather high. Moreover, the decision has been sharply censured for its departure from customary international law.⁵⁸

9.5 Self-Referrals and the State-Centred Paradigm of International Criminal Justice

The previous section has demonstrated that the denunciation of rebel groups as ‘terrorists’ does not assist the ICC in its endeavours to dispense fair and effective justice over non-state actors. On the contrary, it serves to highlight the fact that the ICC does not have jurisdiction over terrorism in armed conflict or in peacetime.

This jurisdictional gap is symptomatic of a wider and more profound problem—namely, that the ICC is notoriously inapt to prosecute and try non-state actors. In case of armed conflict, which is traditionally governed by the international humanitarian law regime of reciprocal rights and obligations of the belligerents, the Court has sufficient means at its disposal to administer justice in respect of all parties to the conflict. However, the determination of the existence of an armed conflict as a condition for the application of international humanitarian law requires findings of violence of considerable duration and intensity.⁵⁹ Moreover, the Trial Chamber of the ICTY in Čelebići has explicitly sought to distinguish an armed conflict from cases of civil unrest or terrorist activities, emphasizing ‘the protracted extent of the armed violence and the extent of organisation of the parties involved’ as key considerations.⁶⁰ Beyond the pale of armed conflict, the ICC has virtually no powers to move against non-state perpetrators of international crimes.

⁵⁷ Ibid., para. 93.

⁵⁸ See Dissenting Opinion of Judge Hans-Peter Kaul to Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (n 56); C Kress, ‘On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision’ (2010) 23 *Leiden Journal of International Law* 855.

⁵⁹ Compare Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić*, IT-94-1-AR72, AC, ICTY, 2 October 1995, para. 70: ‘An armed conflict exists whenever there is a resort to armed forces between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.’

⁶⁰ Judgment, *Delalić*, IT-96-21-T, TC, ICTY, 16 November 1998, para. 184.

Those scholars, like Schabas, who believe that international crimes are by definition committed by states, or that at least the ICC should focus exclusively on state-crimes, may find no difficulty with this predicament. They argue that the ICC owes its very existence to the fact that states forsake their primary duty to prosecute very serious crimes, precisely because they are involved in those crimes.⁶¹ Schabas puts forward the extreme view that the ICC should not bother with 'non-state actors' and terrorism. He points out that, 'international atrocities, and crimes against humanity in particular, were created so that such acts could be punished elsewhere, and therefore so that impunity could be addressed effectively'.⁶² He then seeks to contrast the official crooks with their anti-poles:

We do not, by and large, have the same problems of impunity with respect to 'non-state actors'. Most states are both willing and able to prosecute the terrorist groups, rebels, mafias, motorcycle gangs, and serial killers who operate within their own borders. At best, international law is mainly of assistance here in the area of mutual legal assistance. For example, *there is little real utility in defining 'terrorism' as an international crime, because as a general rule the states where the crimes are committed are willing and able to prosecute*.⁶³

Schabas' suspicion of the 'self-referral' practice derives directly from this position. He postulates an antagonistic relationship between the Court and states under scrutiny, which is no doubt caused by the former's intention to reveal the latter's darkest secrets. And next he presents any change in this relationship as clear evidence of the state's attempts to conceal its own sins and turn the attention of the Court to the crimes of its adversary. The gist of Schabas' discourse is of course that this foul reversal was never contemplated by the drafters of the Rome Statute, stating that:

Implicit in self-referral is the idea that the Court operates in a benign and cooperative relationship with States. Rather than focus on crimes of State, *which was surely the vision when the Court was being established*, it has turned its attention to rebel groups. Not only is such a Court not particularly threatening to States, they will call upon its services in pursuit of their own political agendas, as the Uganda situation indicates.⁶⁴

Although not all writers subscribe to the logically coherent, albeit rather extreme conclusions of Schabas, the opinion that states are the principal villains and targets of international criminal justice is pretty pervasive.⁶⁵ I must admit that I have adhered

⁶¹ W Schabas, *Unimaginable Atrocities; Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press 2011) 44: '[C]rime is internationalized primarily because of impunity before the national jurisdiction, that is, because national justice fail to prosecute. The reason why they fail is, as a general rule, because the government itself is complicit.'

⁶² Ibid., 150.

⁶³ Ibid., 150 (emphasis added).

⁶⁴ Schabas, 'Complementarity in Practice' (n 9) 33 (emphasis added).

⁶⁵ Compare M Bassiouni, *Crimes Against Humanity in International Criminal Law* 2nd revised edn (The Hague: Kluwer Law International 1999) 243–6; A Cassese, *International Criminal Law* 2nd edn (Oxford: Oxford University Press 2008) 11: 'Strikingly, most of the offences that [international criminal law] proscribes and for the perpetration of which it endeavours to punish the individuals that allegedly committed them, are also regarded by international law as wrongful acts *by states* to the extent that they are large-scale and systematic: they are international delinquencies entailing the "aggravated responsibility" of the state on whose behalf the perpetrators may have acted. This holds true not only for

to that point of view for a long time myself, but I increasingly tend to wonder whether this position is not obsolete. The commission of international crimes is no longer the prerogative of the state, if it ever was.⁶⁶ The future may witness scores of atrocities which cannot be attributed to repressive and *strong* states, but which are rather the effect of the withering away of *weak* states. On the African continent in particular, social tissues crumble and nation-states, confronted with insurmountable problems of overpopulation, disease, climate change, environmental degradation, soaring crime rates, and internecine warfare, fall apart.⁶⁷ The institutional voids are occupied by rebel groups, warlords, and other power contenders, competing for scarce resources and creating problems for the population along the way.

These are highly complex socio-political issues and it would be preposterous to suggest that the ICC could provide structural solutions. But it may not be too far-fetched to assume that the Court may assist governments in agony by initiating prosecutions in high-profile cases, for example, against members of Mali's Ansar al Dine. The pertinent question is whether the international community is prepared to take the claim of 'inability' seriously. It is my impression that this is yet to be done sufficiently. The harsh contention that self-referrals are contrary to the duty of the state to prosecute international crimes itself suggests that appeals to the Court's assistance are insincere and conceal darker motives. Nor am I particularly impressed by Schabas' rash conclusion that the ICC prosecutor's reliance on the confirmation of the CAR's *Cour de cassation* that the judicial system of the country is incapable of prosecution, proves that the courts are functional.⁶⁸ After all, the mere existence of a court system does not imply that the judicial authorities are—legally and practically—capable of coping with large-scale atrocities.

In my view, the choice between the options is rather clear. One may agree with Schabas that atrocities committed by non-state actors are none of the Court's business, as the ICC is historically and principally predestined to tackle states only. It would, in my view, imply an institutionalized bias and a callous disregard of current misery, but the choice is defensible in view of the ICC's limited resources and the consideration that structural violence should be remedied by other means. However, if one decides to take that road, it would be more realistic and straightforward to amend

genocide and crimes against humanity, but also for systematic torture, large-scale terrorism and massive war crimes.' For a slightly different, arguably more nuanced view, see R Cryer et al., *An Introduction to International Criminal Law and Procedure* (New York: Cambridge University Press 2007) 5: '[T]he subject matter of international criminal law, as we use it, deals with the liability of individuals, irrespective of whether or not they are agents of a State.'

⁶⁶ For a similar point of view, see G Werle and B Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a "State-like" Organization?' (2012) 10 *Journal of International Criminal Justice* 1167: 'Large-scale violence today is no longer perpetrated only by states or other territorially organized entities. Militias and paramilitary units, terrorist groups and criminal networks have also emerged as important actors in the international arena, along with political parties and private security firms. It has long been clear that this new array of non-state actors is challenging traditional state-centred international law.'

⁶⁷ Compare the disconcerting article by R Kaplan, 'The Coming Anarchy: How Scarcity, Crime, Overpopulation, Tribalism, and Disease Are Rapidly Destroying the Social Fabric of our Planet', *The Atlantic Monthly*, February 1994.

⁶⁸ Schabas, 'Complementarity in Practice' (n 9) 18.

the Rome Statute and abolish the ‘inability’-prong of the admissibility test altogether. Alternatively, one might reason that the Court has an important part in ending the impunity of the perpetrators of the most serious crimes, irrespective of whether they are committed by state organs or non-state actors. But in that case one must be prepared to go the whole way. This choice entails a serious and careful assessment of a self-referral, including an investigation into the remaining powers of the state to proceed with the situation itself and a preliminary estimation of who bears the greatest responsibility, in view of prosecutorial priorities. Moreover, it presupposes that the Court has the tools to move against non-state actors. It has been one of the objectives of this chapter to prove that these tools are defective—at least outside the scope of armed conflicts.

9.6 Some Final Reflections

This chapter has sought to discuss the practice of self-referrals against the background of fragile states who are confronted by powerful contenders and are subsequently enmeshed in protracted civil strife. I have argued that self-referrals should not be rejected forthwith, but should be taken seriously, as the call for help may be sincere and may reflect the waning of state power, incapable of reining in non-state actors that constitute new menaces to human rights. Of course the single self-referral does not relieve the ICC from its obligation to investigate the crimes committed by all parties to the conflict, but I consider this duty to be self-evident, because the self-referral itself entails a renunciation of the state’s prerogative to monopolize the definition of criminal conduct. Nor do I suggest that governments are less guilty—they often share a significant portion of the blame for letting things get out of hand; I merely contend that self-referrals *may* indicate that non-state actors bear the greatest responsibility for the most serious crimes.

The insight that states no longer have the dubious privilege of being the only massive human rights violators is gradually gaining currency. As Akhavan has eloquently put it: ‘An important aspect of “self-referrals” relates to the mutuality of interests between the Court and States Parties because of the unprecedented capacity of non-State actors to commit large-scale atrocities, combined with the manifest historical failure of inter-State human rights mechanisms’, adding that ‘In the contemporary world...an effective and realistic policy cannot disregard the unprecedented incidence of fragile or failed States besieged by powerful insurgencies of criminal organisations.⁶⁹

And the ICC has approved the practice of self-referrals, lending a sympathetic ear to the claims of states that they are unable to initiate criminal proceedings themselves, because they are simply no longer in ‘full control’. However, the paradigm of the state as the major perpetrator of international crimes still prevails in legal scholarship. This probably accounts for the widespread suspicion against self-referrals, a theory that I attempted to illustrate earlier, but it has wider repercussions, because the

⁶⁹ Akhavan (n 11) 104.

state-centred paradigm permeates the Rome Statute as well. And that is in my view precisely the reason the ICC is ill-equipped to prosecute and try non-state actors.

Political scientists appear to confirm that the representation of the state as sole perpetrator of international crimes is outdated. In his groundbreaking study *The Better Angels of Our Nature*, Steven Pinker advances the consolidation of the state, committed to the rule of law, as an important—and arguably one of the main—factor(s) in the reduction of violence.⁷⁰ This book offers a powerful challenge to the conventional wisdom that attributes endemic violence mainly to strong repressive states, an opinion that is fuelled by the twentieth century's experiences. Pinker draws attention to the upsurge of so-called anocracies, 'a form of rule that is neither fully democratic nor fully autocratic'.⁷¹ These weak and unstable administrations try to survive by selling out 'patronage jobs to their clansmen, who then extort bribes for police protection, favourable verdicts in court, or access to the endless permits needed to get anything done'.⁷²

These 'arrangements' breed violence, as Pinker observes, quoting, with approval, his colleague Mueller, who in *The Remnants of War* notes:

that most armed conflict in the world today no longer consists of campaigns for territory by professional armies. It consists instead of plunder, intimidation, revenge, and rape by gangs of unemployable young men serving as warlords or local politicians, much like the dregs rounded up by medieval barons for their private wars.⁷³

Such analyses are revealing and should be taken to heart, both by legal scholars and international criminal tribunals. They may prompt a different view on the practice of self-referrals and may invite a reconsideration of substantive parts of the Rome Statute. Any discussions on the extension of the Court's jurisdiction to the crime of terrorism are beyond the scope of this chapter, but the message is that these debates should continue if international criminal justice wishes to keep pace with political and social developments.

⁷⁰ S Pinker, *The Better Angels of Our Nature: The Decline of Violence in History and Its Causes* (New York: Viking Penguin 2011) especially chapters 2–7.

⁷¹ Ibid., 310. ⁷² Ibid.

⁷³ See J Mueller, *The Remnants of War* (Ithaca: Cornell University Press 2004), who sketches the scene as follows: 'Many of these wars have been labelled "new war", "ethnic conflict", or, most grandly, "clashes of civilizations". But in fact, most, though not all, are more nearly opportunistic predation by packs, often remarkably small ones, of criminals, bandits, and thugs. They engage in armed conflict either as mercenaries hired by desperate governments or as independent or semi-independent warlords or brigand bands. The damage perpetrated by these entrepreneurs of violence, who commonly apply ethnic, nationalist, civilizational, or religious rhetoric, can be extensive, particularly to the citizens who are their chief prey, but it is scarcely differentiable from crime'; *ibid.*, 1.

Admissibility Challenges before the ICC

From Quasi-Primacy to Qualified Deference?

*Carsten Stahn**

Magic mirror on the wall, who is the fairest one of all?
 You...are fair; it is true.
 But [someone else] is even fairer than you

From: Grimm's Fairy Tale, *The Story of Snow White and the Seven Dwarves*
 (trsl. Margaret Hunt)

10.1 Introduction

The principle of complementarity¹ is one the cornerstones of the Rome Statute ('the Statute') of the ICC. Admissibility determinations under Article 19 of the Statute have been subject to extensive contestation in the ICC context.² Traditionally, they have been primarily viewed as instruments for the settlement of disputes over conflicts of jurisdiction. While open to states and defendants³, they were largely conceived as a safeguard for the protection of domestic sovereignty interests. This formal vision stands in contrast to the broader systemic function of complementarity in the Rome system of justice⁴ and the environment in which the Court has come to exercise

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¹ See generally C Stahn and M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011); S Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013).

² E.g. M Newton, 'The Complementarity Conundrum: Are We Watching Evolution or Evisceration?' (2010) 8 *Santa Clara Journal of International Law* 115; T Hansen, 'A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity' (2012) 13 *Melbourne Journal of International Law* 217–34; C Jalloh, 'Kenya v. the ICC Prosecutor' (2012) 53 *Harvard International law Journal* 227–43; F Mégrét and M Samson, 'Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials' (2013) 11 *Journal of International Criminal Justice* 571–89; M C Pitts, 'Being Able to Prosecute Saif Al-Islam Gaddafi: Applying Article 17 (3) of the Rome Statute to Libya' (2013) 27 *Emory International Law Review* 1291–339; A Bishop, 'Failure of Complementarity: The Future of the International Criminal Court Following the Libyan Admissibility Challenge' (2013) 22 *Minnesota Journal of International Law* 388.

³ See Art 17(2).

⁴ Paragraph 11 of the preamble of the Rome Statute contains a commitment 'to guarantee lasting respect for and the enforcement of international justice'. See generally C Stahn, 'Taking Complementarity Seriously: On the Sense and Sensibility of "Classical", "Positive" and "Negative" Complementarity' in Stahn and El Zeidy (eds) (n 1) 233–81. For a critique of 'burden-sharing, see P McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-Sharing Policy as an Example of Creeping Cosmopolitanism' (2014) 13 *Chinese Journal of International Law* 259–96.

jurisdiction. Much of the activity of the Court has focused on situations or countries that are engaged in conflict or post-conflict transitions. In this context, the very essence of sovereignty and the state itself is in flux. This has raised particular challenges for complementarity. In some instances, the Court has been viewed as a legitimate substitute of domestic jurisdiction (e.g. *Katanga, Gbabgo*). In other cases, it has been perceived as a competing forum (Libya), or even as an obstacle to domestic justice efforts (Kenya).⁵

The Appeals Chamber of the ICC has adopted a rather technical and cautious approach towards complementarity. It has interpreted admissibility as a ‘two prong-test’, based on the distinction between inaction and domestic action.⁶ It has further developed an ‘incident’-specific definition of the ‘same conduct’/‘same case’ test which sets a high threshold for inadmissibility.⁷ Through this jurisprudence, the Court has translated many of the complexities and underlying dilemmas of ICC engagement into formal questions of law and procedure. The interpretation of Article 17 has been a port of entry for admissibility challenges and clarification of core concepts, while the concept of ‘interests of justice’ under Article 53 has largely remained a dead letter in practice.⁸ In the absence of alternatives, admissibility proceedings under Article 19 have become a channel to adjudicate different types of disputes: (i) disputes over the merits of ICC engagement with domestic consent (e.g. based on self-referrals), and (ii) state challenges to ICC intervention, grounded in transitional justice claims or more categorical objections to the exercise of ICC jurisdiction.

In particular, the methodology of admissibility assessments has come under criticism. It has become standard practice to assess the relevance of domestic action in admissibility proceedings, by virtue of a comparison of national measures with the ‘case’ before the ICC, at the time of the admissibility challenge. The Appeals Chamber introduced the image of the ‘mirror’ in order to explain its approach. It stated,

⁵ On Kenya, see C Sriram and S Brown, ‘Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact’ (2012) 12 *International Criminal Law Review* 219–44.

⁶ 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, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07 OA 8, AC, ICC, 25 September 2009, para. 78 (*Katanga Appeals Judgment*) (‘[I]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability’).

⁷ Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11 OA 4, AC, ICC, 21 May 2014, paras 71–3 (*Gaddafi Appeals Judgment*); Judgment on the Appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October entitled ‘Decision on the admissibility of the case against Addullah Al-Senussi’, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11 OA 6, AC, ICC, 24 July (*Al-Senussi Appeals Judgment*), para. 119.

⁸ See OTP, ‘Policy Paper on Interests of Justice’, September 2007 <http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf> accessed 3 October 2014; C Stahn, ‘Judicial Review of Prosecutorial Discretion: 5 Years On’ in C Stahn and G Sluiter, *The Emerging Practice of the International Criminal Court* (Leiden/Boston: Brill 2009) 247–79.

[W]hat is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating.⁹

This practice has been subject to challenge, from both states concerned and members of the Bench. In particular, Judge Ušacka has continuously expressed concerns against an overly strict interpretation of the requirement of similarity between ICC proceedings and state action. She argued that

if this test is to be applied in order to compare a case before the Court with a domestic case, the Court will come to wrong and even absurd results, potentially undermining the principle of complementarity and threatening the integrity of the Court.¹⁰

Requiring states to ‘copy’ ICC practice is a ‘double-edged’ sword. It encourages short-term justice response at the domestic level, and is likely to create artificial outcomes that lack sustainability. This contribution argues that it is time to turn the ‘mirror’ around and to reflect critically about the effects of this practice, as suggested by the crux of Grimm’s *Snow White* tale.

There is a discrepancy between the formal nature and constraints of admissibility procedures and the ongoing dynamics in situation countries. Complementarity is not static, but dynamic. In particular, the role of time and the space for ‘parallel engagement’ of the ICC and domestic jurisdictions has not received sufficient attention in the negotiations of the complementarity regime and existing jurisprudence.

This contribution seeks to re-think the *status quo*. It examines the existing legal framework and jurisprudence. It then investigates current dilemmas, in particular the required threshold for admissibility challenges, the accommodation of the ‘time factor’ in situations under scrutiny, and the role of the Court after a finding of inadmissibility. It argues that it is unhelpful to construe admissibility proceedings in an ‘all-or nothing’ fashion, i.e. as a binary and definitive choice of the proper forum of jurisdiction. It pleads for a more ‘elastic’ and ‘sustainable’ vision which allows for deference of cases, based on context-sensitive approaches and ongoing interaction between the Court and domestic jurisdictions.¹¹ It suggests giving greater attention to the concept of ‘qualified deference’, initially coined by Mark Drumbl in connection with the relationship between international criminal justice and transitional justice.¹² It proposes some practical ways to operationalize this concept in ICC admissibility practice in

⁹ *Gaddafi Appeals Judgment* (n 7) para. 73; in the same vein *Al-Senussi Appeals Judgment* (n 7) para. 119.

¹⁰ *Gaddafi Appeals Judgment* (n 7), Dissenting Opinion of Judge Anita Ušacka, para. 48.

¹¹ On the nexus between complementarity and development, see UNDP, ‘Complementarity and Transitional Justice: Synthesis of Key Emerging Issues for Development’, 16 November 2012 <http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Discussion%20Paper%20E2%80%93%20Complementarity%20and%20Transitional%20Justice%20E2%80%93%202012%20_%20EN.pdf> accessed 3 October 2014.

¹² See M Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007) 193–4; id., ‘Policy through Complementarity: The Atrocity Trial as Justice’ in Stahn and El Zeidy (n 1) 222–31, at 222 (‘[t]he ICC should accord national accountability mechanisms, broadly categorized, qualified deference in situations of potential jurisdictional overlap and competition. The deference is qualified, and hence rebuttable, which means that the international criminal law institution could assume jurisdiction in certain circumstances’).

order to mitigate existing tensions ('time management' of parallel proceedings, monitoring of deference, and 'conditional admissibility').

10.2 The Status Quo

Admissibility challenges have a particular status in ICC procedure. They are 'proceedings *sui generis*'.¹³ They are formally part of the criminal process (i.e. pre-trial or trial), but involve aspects of inter-state litigation and systemic considerations relating to the objectives of the Court, including the appropriate balance between its role as a 'watchdog' and its function as 'gentle incentivizer' of domestic proceedings.¹⁴ Article 19 challenges have been a testing ground for different conceptions of complementarity. Investigating and prosecuting international crimes is the 'overarching common goal of the Court and the States'.¹⁵ The Court has adopted a strongly ICC-centric vision in its existing case law. It is still in the process of identifying a proper balance between its own role and authority as a judicial body, consensual burden-sharing, and deference to domestic jurisdiction. Core definitions, principles (e.g. burden of proof), and tests are emerging in decisions and becoming 'routine vocabulary' in case law. But many underlying problems remain unresolved or in need of further specification.

In the *Katanga* case, it has become evident that Defence challenges are likely to remain unsuccessful in cases of self-referrals, which are often based on a tacit agreement between the prosecution and the referring state on the forum of jurisdiction.¹⁶ The Kenyan cases have triggered considerable debate on the 'same conduct' test,¹⁷ and the question to what extent existing interpretations of Article 17 make it unreasonably difficult for states to meet the requirements of the complementarity test.¹⁸ The ICC has been criticized for turning complementarity in effect into primacy of ICC jurisdiction,¹⁹ in light of its approach towards Article 17 and its legalistic justification of ICC authority

¹³ See *Gaddafi Appeals Judgment* (n 7), Dissenting Opinion of Judge Anita Usacka, para. 61.

¹⁴ On the multi-faceted nature of the ICC, see F Jessberger and J Geneuss, 'The Many Faces of the International Criminal Court' (2012) 10 *Journal of International Criminal Justice* 1081–94.

¹⁵ *Gaddafi Appeals Judgment* (n 7), Dissenting Opinion of Judge Anita Ušacka, para. 57.

¹⁶ See G Bitti and M El Zeidy, 'The *Katanga* Trial Chamber Decision: Selected Issues' (2010) 23 *Leiden Journal of International Law* 319, at 329.

¹⁷ See generally R Rastan, 'What is a "Case" for the Purpose of the Rome Statute?' (2008) 19 *Criminal Law Forum* 435; D Robinson, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 *Criminal Law Forum* 67.

¹⁸ See 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', *Muthaura, Kenyatta and Ali, Situation in Kenya*, ICC-01/09-02/11 OA, AC, ICC, 30 August 2011 ('*Muthaura, Kenyatta and Ali Appeals Judgment*'); 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', *Ruto, Kosgey and Sang, Situation in Kenya*, ICC-01/09-02/11 OA, ICC, AC, 30 August 2011 ('*Ruto, Kosgey and Sang Appeals Judgment*').

¹⁹ See the critique by K J Heller, 'A Sentence-Based Theory of Complementarity' (2012) 53 *Harvard International Law Journal* 202–49; W Schabas, *An Introduction to the International Criminal Court* 4th edn (2011) at 193 and Pitts (n 2) at 1339 ('an approach more akin to the concurrent jurisdiction that was granted to the ICTR and ICTY, rather than the complementary jurisdiction that the Rome Statute drafters intended'). On complementarity and primacy, see M El Zeidy, 'From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 bis of the ad hoc Tribunals' (2008) 57 *International and Comparative Law Quarterly* 403–15.

and intervention. The Libyan cases have partially reversed this trend. The Appeals Chamber clarified, *inter alia*, that ‘there is no requirement in the Statute for a crime to be prosecuted as an international crime domestically’.²⁰ This jurisprudence leaves some space to enable the exercise of domestic jurisdiction. It further distinguished circumstances relating to the *Gaddafi* and the *Al-Senussi* cases, and upheld the first successful admissibility challenge in the history of the ICC, namely the inadmissibility decision in the *Al-Senussi* case, dated 11 October 2013.²¹ The Appeals Chamber specified that challenges relating to the fairness of proceedings and violation of due process rights of defendants in domestic proceedings do not per se constitute grounds for a finding of unwillingness.²² But many ambiguities remain.

10.2.1 Article 19 challenges in review

Existing challenges under Article 19(2) can be divided into two major categories: challenges by defendants and challenges by states. Both categories of challenges were originally drafted from the perspective of an antagonistic vision of ICC jurisdiction and domestic jurisdiction. This is clear from the title and wording of Article 19. They are conceived as challenges ‘to’ the jurisdiction of the Court. Article 19(2)(a) speaks of ‘challenges to the admissibility of a case’.²³ The inherent assumption was that defendants would challenge admissibility to protect themselves from the exercise of jurisdiction by the ICC. Similarly, it was assumed that states would use Article 19 to prioritize domestic jurisdiction over ICC action. This is reflected in Article 19(2)(b), which ties the ground of challenge to domestic investigations or prosecutions.²⁴

This bipolar vision has become subject to closer scrutiny. In ICC practice, the defence has intervened on different grounds in admissibility proceedings. In some cases, defendants left it opaque whether they would prefer to be tried domestically. In other cases, they had a pronounced interest in being tried before the ICC, in light of standards of fairness in ICC procedure and potential lower sentencing (*Gaddafi*, *Al-Senussi*). The wording of the Statute remains vague in this respect. The drafters did not necessarily contemplate circumstances in which a defendant would have an interest in challenging the ‘inadmissibility’ of a case, following a successful state challenge.

Similarly, states have voiced conflicting priorities. While Kenya and Libya fall into the classical category of challenges that seek to uphold domestic jurisdiction, states such as the DRC, Côte d’Ivoire, or the CAR have failed to support defence challenges and argued in favour of the exercise of ICC jurisdiction. The fact that a state would support the exercise of ICC jurisdiction, or even encourage it through a voluntary decision to give priority to the ICC, does not fit into this traditional scheme.

²⁰ See *Al-Senussi* Appeals Judgment (n 7) para. 119.

²¹ Decision on the admissibility of the case against Abdullah Al-Senussi, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11, PTC I, ICC, 11 October 2013 (*Al-Senussi* Admissibility Decision’); *Al-Senussi* Appeals Judgment (n 7).

²² *Al-Senussi* Appeals Judgment (n 7) paras 230 and 231.

²³ See Art 19(2)(a).

²⁴ See wording in Art 19 (2) (b) (‘on the ground that it is investigating or prosecuting the case or has investigated or prosecuted’).

Admissibility proceedings have brought out novel nuances in the interaction between the ICC and domestic jurisdiction. The *Katanga* case marked the first instance in which admissibility was challenged under Article 19. In its challenge, the defence argued that the ICC should defer to domestic jurisdiction since Katanga was subject to international crime allegations in the DRC, including a wider range of crimes (genocide, war crimes, crimes against humanity). The defence noted that ‘the “same conduct” test as developed and applied by the ICC Pre-Trial Chamber’ is a ‘wrong test’, since it ‘amounts to primacy’²⁵ and ‘could negatively impact on the purposeful design of the Statute—which was meant to encourage domestic proceedings’.²⁶ It proposed an alternative methodology, namely a ‘comparative gravity-test’, geared at ‘comparing the gravity of the (intended) scope of investigations at the national level and the (intended) scope of investigations by the ICC Prosecutor’.²⁷ According to this test, the admissibility threshold would only be met if ‘the scope of investigations by the ICC prosecutor would significantly exceed in gravity the scope of national investigations’.²⁸ The Appeals Chamber discarded this reasoning, based on the wording of Article 17, and confirmed the ‘same conduct test’. It held that ‘in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court’.²⁹ It added that ‘there may be merit in the argument that the sovereign decision of a state to relinquish its jurisdiction in favor of the Court may well be seen as complying with the “duty to exercise [its] criminal jurisdiction” as envisaged in the [...] Preamble’.³⁰ This justification opened up a new conceptual space for burden-sharing and a potential ‘sharing of labor’ between the ICC and domestic jurisdictions, as suggested in the 2003 OTP expert paper on complementarity³¹ and a ‘positive’ conception of complementarity.³²

This conception was reaffirmed in other contexts. In *Bemba*, the Defence challenged admissibility on the ground that domestic authorities in the CAR had allegedly taken a decision not to prosecute Bemba, which would require deference to domestic jurisdiction. It argued that domestic decisions entailed findings on the merits of the case which would bar ICC admissibility, since the state had ‘decided not to prosecute the person concerned’ within the meaning of Article 17(l)(b) of the Statute.³³ The CAR

²⁵ Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Art 19 (2) (a) of the Statute, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07, 11 March 2009, para. 39.

²⁶ Ibid., para. 43.

²⁷ Ibid., para. 46.

²⁸ Ibid., para. 46.

²⁹ *Katanga* Appeals Judgment (n 6) paras 2, 75–8.

³⁰ Ibid., para. 85.

³¹ OTP, Informal Expert Paper, ‘The Principle of Complementarity in Practice’ (2003) paras 7–15 <<http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>> accessed 3 October 2014.

³² On ‘positive complementarity’, see Stahn (n 4); W Burke White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’ (2008) 49 *Harvard International Law Journal* 53–108; C Stahn, ‘Complementarity: A Tale of Two Notions’ (2008) 19 *Criminal Law Forum* 87–113.

³³ Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08OA3, ICC, AC, 19 October 2010, para. 48 (*Bemba* Appeals Judgment)

authorities, which had referred the situation to the Court by way of a self-referral,³⁴ contested this allegation and ‘clearly expressed’ the ‘wish to see Mr Bemba held accountable for the serious human rights violations committed on the territory of the CAR’.³⁵ The Appeals Chamber conceded that a Trial Chamber ‘should accept *prima facie* the validity and effect of the decisions of domestic courts, unless presented with compelling evidence indicating otherwise’ when it determines the status of domestic judicial proceedings.³⁶ But it rejected the appeal, noting that domestic proceedings did not amount ‘to a decision not to prosecute within the meaning of article 17 (l) (b) of the Statute’.³⁷ It recalled that ‘a “decision not to prosecute” in terms of article 17 (1) (b) of the Statute does not cover decisions of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC’.³⁸

In *Laurent Gbagbo*, the Defence invited the Chamber ‘to interpret “conduct” in a flexible manner, focusing on the general conduct of the suspect in relation to the context in which the crimes were committed rather than the conduct related to the direct commission of the crimes’.³⁹ It argued that ‘national proceedings for economic crimes constitute the same case as that under prosecution before the Court’.⁴⁰ It submitted that ‘the short-sighted view of complementarity’ adopted by the Court ‘fails to take account of the wider goals of international criminal justice, in particular the need for national jurisdictions to build capacity to try such crimes domestically in order to involve the affected communities as part of the overall process of reconciliation and peace building’.⁴¹ The state concerned (Côte d’Ivoire) backed ICC admissibility, in line with its encouragement of ICC action through its declaration of acceptance of jurisdiction under Article 12 (3). It stated ‘that, in view of the initiation of proceedings before the Court against Mr Gbagbo, national authorities chose to refrain from opening an investigation into, or proceedings against Mr Gbagbo for violent crimes’.⁴²

Thus, in all three cases, state authorities sided with the ICC, rather than the defence, since they had an interest in seeing the case being tried internationally. They refrained from challenging ICC action, since they had triggered ICC involvement by consent, i.e. a self-referral (DRC, CAR) or a declaration under Article 12(3) (Côte d’Ivoire).⁴³

³⁴ On self-referrals, see C Kress, ‘Self-Referrals and Waivers of Complementarity: Some Considerations in Law and Policy’ (2004) 2 *Journal of International Criminal Justice* 944–8; P Gaeta, ‘Is the Practice of ‘Self-Referrals’ a Sound Start for the ICC?’ (2004) 2 *Journal of International Criminal Justice* 949–52; M El Zeidy, *The Principle of Complementarity in International Criminal Law* (Leiden/Boston: Brill, 2008) 211–36; D Robinson, ‘The Controversy over Territorial State Referrals and Reflections on ICL Discourse’ (2011) 9 *Journal of International Criminal Justice* 355–84.

³⁵ *Bemba* Appeals Judgment (n 33) para. 57 (‘there was no decision not to prosecute Mr Bemba in the CAR’).

³⁶ *Ibid.*, para. 66.

³⁷ *Ibid.*, para. 68.

³⁸ *Ibid.*, para. 74, referring to *Katanga* Appeals Judgment (n 6) para. 83.

³⁹ Decision on the ‘Requête relative à la recevabilité de l’affaire en vertu des Articles 19 et 17 du Statut’, *Laurent Gbagbo, Situation in the Republic of Côte d’Ivoire*, ICC-02/11-01/11, PTC I, ICC, 11 June 2013, para. 11.

⁴⁰ *Ibid.*, para. 8.

⁴¹ *Ibid.*, para. 12

⁴² *Ibid.*, para. 32.

⁴³ Note that Côte d’Ivoire challenged admissibility in relation to Simone Gbagbo. See Requête de la République de Côte d’Ivoire sur la recevabilité de l’affaire Le Procureur c. Simone Gbagbo, et demande de sursis à exécution en vertu des articles 17, 19 et 95 du Statut du Rome, *Simone Gbagbo, Situation in the Republic of Côte d’Ivoire*, ICC-02/11-01/12-11-Red, 30 September 2013.

The coin flipped in those situations in which the ICC engagement lacked consent of domestic authorities, i.e. in the context of Security Council referrals (Libya) or *proprio motu* action of the prosecutor against a defiant government (Kenya). Sudan could have challenged ICC action against leading suspects (e.g. *Omar Al-Bashir, Ahmad Haroun*), although it is not a State Party.⁴⁴ But it deliberately chose not to engage at all in a judicial manner with the ICC.⁴⁵ It therefore refrained from making a challenge under Article 19. The first official state challenge was brought by Kenya on 31 March 2011. Kenya sought to prioritize domestic justice options, following the issuance of summonses to appear for key Kenyan suspects in relation to the post-electoral violence.⁴⁶ The second challenge was made by Libya on 1 May 2012.⁴⁷ The Libyan government also preferred domestic justice for the trial of members of the former Gaddafi regime. The interests of the defence differed across the situations. While Kenyan defendants joined the ‘government’ line, *Gaddafi* and *Al-Senussi* opposed the government challenge and expressly requested surrender to the Court.⁴⁸ The *Gaddafi* defence supported ICC admissibility, arguing that ‘[j]ustice will not be served by domestic proceedings’, since they are ‘so ineliminably tainted by violations of domestic law that either the defendant would have to be released, or, the proceedings will go down in history as a manipulated spectacle of victor’s revenge’.⁴⁹ The *Al-Senussi* defence appealed the 11 October 2013 inadmissibility decision of the Pre-Trial Chamber, arguing that the case that ‘should be tried at the ICC in accordance with the principle of complementarity’, since Libya is not able to ‘carry out genuine proceedings or willing to bring Mr Al-Senussi to justice in an impartial and independent manner, having regard to the recognised standards of due process under international law’.⁵⁰ Defence motions were visibly driven by fairness concerns and fears relating to the application of the death penalty in Libyan proceedings.⁵¹

In its jurisprudence, the ICC set high bars for admissibility challenges under Article 19(2)(b). In its challenge, Kenya questioned whether the admissibility test requires that the same persons be investigated by the national jurisdiction. It argued that the ICC should exercise discretion in the application of the principle of complementarity

⁴⁴ Art 19 (2)(c).

⁴⁵ See Sudan Tribune, ‘Sudan Rules Out Plans to Challenge ICC Jurisdiction over Darfur’, 18 March 2007 <<http://www.sudantribune.com/spip.php?article20845>> accessed 3 October 2014.

⁴⁶ Application on behalf of the Government of The Republic of Kenya pursuant to Art 19 of the ICC Statute, *Ruto, Kosgey, Sang, Muthaura, Kenyatta and Ali, Situation in Kenya*, ICC-01/09-02/11-26, 31 March 2011.

⁴⁷ Application on behalf of the Government of Libya pursuant to Art 19 of the ICC Statute, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-130, 1 May 2012.

⁴⁸ Defence Response on behalf of Mr Abdullah Al-Senussi to ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-356, 14 June 2013, para. 11.

⁴⁹ Public Redacted Version of the ‘Response to the Libyan Government’s further submissions on issues related to admissibility of the case against Saif Al-Islam Gaddafi’, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-281-Red2, 18 February 2013, para. 11.

⁵⁰ See *Prosecutor v Saif Al-Islam Gadaffi and Abdullah Al-Senussi*, Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s ‘Decision on the Admissibility of the Case against Abdullah Al-Senussi’, ICC-01/11-01/11-474, 4 November 2013, para. 3.

⁵¹ For a discussion, see C Stahn, ‘Libya, the ICC and Complementarity: A Test for Shared Responsibility’ (2012) 10 *Journal of International Criminal Justice* 325–51.

to allow proceedings to progress, since there is a presumption in favour of national jurisdictions. The Pre-Trial Chamber rejected the challenge within eight weeks. The Appeals Chamber upheld the decision. It grounded the ‘same conduct’ test in the Statute.⁵² It noted that a ‘case is only inadmissible before the Court if the same suspects are being investigated by Kenya for *substantially the same conduct*’.⁵³ It specified that a challenge under Article 19(2)(b) requires concrete investigative ‘steps directed at ascertaining whether…suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses’.⁵⁴ The mere ‘preparedness to take such steps’ or ‘the investigation of other suspects’ would not be sufficient.⁵⁵

This requirement is compatible with the wording of Article 19(2)(b) (‘is investigating’), the structure of Article 17(1), and the nexus of Article 19 to the concept of the ‘case’. It strengthens the authority of the ICC to assert or maintain jurisdiction in cases of parallel domestic efforts. But it has been criticized on several grounds. One objection relates to the threshold for domestic action, and the tension between the ‘prong test’ and the ‘unwillingness’/‘inability’ limb of the complementarity test under Article 17(2) and (3). The existing test provides significant emphasis on inaction under Article 17(2). It blurs the boundaries to unwillingness or inability under Article 17(2) and (3) ‘by requiring a state to prove e.g. the existence of a full-fledged investigation or prosecution of a case in order to establish that there is no situation of inactivity’.⁵⁶

The second difficulty of the test is that it is based on an ‘either/or’ logic which makes it difficult to accommodate interaction between the Court and domestic jurisdictions or ‘positive complementarity’ approaches in the context of admissibility challenges. The Court formally separated the treatment of requests for ICC cooperation with domestic jurisdictions under Article 93(10) from admissibility challenges. It held that ‘a determination on the inadmissibility of a case pursuant to article 17 of the Statute does not [necessarily] depend on granting or denying a request for assistance under article 93(10) of the Statute’.⁵⁷ It then formulated strict conditions for dealing with a request under Article 93 (10), arguing that:

the requesting State Party (Kenya) must have, at least, either conducted an investigation, or be doing so with respect to ‘conduct which constitutes a crime within the

⁵² See *Muthaura, Kenyatta and Ali Appeals Judgment* (n 18) paras 40, 41–3, 62; *Ruto, Kosgey and Sang Appeals Judgment* (n 18) para. 40. The same person/same conduct test may be derived from Arts 17(1)(c) and 20(3) which refer to ‘the same conduct’ in relation to the same person. The link between Art 17(1)(c) and the principle of *ne bis in idem* implies that a case must relate to the same person and the same conduct. A similar inference can be drawn from Art 90(1), which deals with the choice of forum allocation with respect to competing requests for extradition and surrender, and explicitly sets out the same person/same conduct test, relating it back to the tests for admissibility. *Ruto, Kosgey and Sang Appeals Judgment* (n 18), fn. 81.

⁵³ *Muthaura, Kenyatta and Ali Appeals Judgment* (n 18) paras 40, 41, and 42.

⁵⁴ *Ibid.*, para. 41. ⁵⁵ *Ibid.*

⁵⁶ *Muthaura, Kenyatta and Ali Appeals Judgment* (n 18), Dissenting Opinion of Judge Anita Ušacka, ICC-01/09-01/11-336, 20 September 2011, para. 27.

⁵⁷ Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Art 19(2)(b) of the Statute, *Ruto, Kosgey and Sang, Situation on Kenya*, ICC-01/09-01/11-101, PTC II, ICC, 30 May 2011, para. 34 (“This conclusion finds support in the fact that a State may exercise its national jurisdiction by way of investigating or prosecuting, irrespective of and independent from any investigative activities of the Prosecutor”).

jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State'. This entails that the requesting State Party must show that it is at a minimum investigating or has already investigated one or more of the crimes referred to in article 5 and defined in articles 6–8 of the Statute. Alternatively, the State Party must demonstrate that it is either doing or has done so with respect to conduct constituting 'a serious crime under the national law'.⁵⁸

As a result, a domestic state is unlikely to receive cooperation from the Court, unless it has started investigations relating to the 'same case'. Read in conjunction with the jurisprudence on the 'same conduct' test, this approach leaves limited space to take into account emerging justice efforts under domestic jurisdiction. As highlighted by Judge Ušacka, this jurisprudence makes it difficult for states to start 'taking investigative steps or prosecuting a case' 'during admissibility proceedings', and virtually impossible for the Pre-Trial Chamber 'to adapt the admissibility proceedings to... changing circumstances'.⁵⁹ It might thus be under-inclusive in relation to its accommodation of interests of state in transition.⁶⁰ It provides, in particular, limited weight to the idea that 'the overall goal of the Statute to combat impunity can also be achieved by the Court through means of active cooperation with the domestic authorities'.⁶¹

In the Libyan cases, the ICC upheld these principles. Libya expanded on the arguments and challenges presented by the Kenyan government. It argued that the 'same conduct' test should be defined, 'taking into account that "the state is to be accorded a margin of appreciation as to the contours of the case to be investigated, and the ongoing exercise of the national authorities' prosecutorial discretion as to the focus and formulation of the case"'.⁶² It submitted that 'a domestic prosecutor may legitimately hold genuine differences of opinion with the ICC prosecutor regarding the appropriate contours of a particular case and the overall interests of justice'.⁶³ It claimed that 'domestic authorities should not be unduly restrained in pursuing a national accountability agenda by being compelled to conduct an investigation and prosecution that mirrors precisely the factual substance of the investigation being conducted from time to time by the [OTP]'.⁶⁴ Libya argued that the notion of 'conduct' should be interpreted as referring to 'criminal transaction', implying that a case should be inadmissible where 'domestic proceedings relate to similar and/or related incidents

⁵⁸ Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Art 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, *Situation in Kenya*, ICC-01/09, PTC II, ICC, 29 June 2011, para. 33.

⁵⁹ *Muthaura, Kenyatta and Ali Appeals Judgment* (n 18), Dissenting Opinion of Judge Anita Ušacka, para. 28.

⁶⁰ *Gaddafi Appeals Judgment* (n 7), Dissenting Opinion of Judge Anita Ušacka, para. 55. In the Kenyan proceedings, the Court failed to address the question as to whether the investigative functions of the Truth, Justice, and Reconciliation Commission would be a bar to admissibility.

⁶¹ *Ibid.*, para. 65 (adding that '[t]he Court, together with other international organisations and other States, is in an ideal position to actively assist domestic authorities in conducting such proceedings, be it by the sharing of materials and information collected or of knowledge and expertise').

⁶² *Al-Senussi Admissibility Decision* (n 21) para. 33.

⁶³ *Ibid.*, para. 33.

⁶⁴ *Ibid.*, para. 33.

which arise out of substantially the same course of conduct as that being investigated by the Court'.⁶⁵

The Pre-Trial Chamber rejected this line of reasoning. It held that

[t]he principle of complementarity expresses a preference for national investigations and prosecutions but does not relieve a State, in general, from substantiating all requirements set forth by the law when seeking to successfully challenge the admissibility of a case.⁶⁶

Drawing on previous jurisprudence, the Chamber set out a list of principles that may be said to form the core of existing ICC law on admissibility challenges:

- i. a determination of admissibility is case-specific, the constituent elements of a case before the Court being the 'person' and the alleged 'conduct'; accordingly, for the Chamber to be satisfied that the domestic investigation covers the same 'case' as that before the Court, it must be demonstrated that: (a) the person subject to the domestic proceedings is the same person against whom the proceedings before the Court are being conducted; and (b) the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the Court';
- ii. the expression 'the case is being investigated' must be understood as requiring the taking of 'concrete and progressive investigative steps' to ascertain whether the person is responsible for the conduct alleged against him before the Court;
- iii. the determination of what is 'substantially the same conduct as alleged in the proceedings before the Court' will vary according to the concrete facts and circumstances of the case and, therefore, requires a case-by-case analysis;
- iv. the assessment of the subject matter of the domestic proceedings must focus on the alleged conduct and not on its legal characterisation;
- v. a decision on the admissibility of the case must be based on the circumstances prevailing at the time of its issuance and 'for [a state] to discharge its burden of proof that currently there is not a situation of "inaction" at the national level, it needs to substantiate that an investigation is in progress at this moment';
- vi. 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;
- vii. evidence 'is not only "evidence on the merits of the national case that may have been collected as part of the purported investigation to prove the alleged Crimes" but extends to "all material capable of proving that an investigation is ongoing", including, for example, "directions, orders and decisions issued by authorities in charge of the investigation as well as internal reports, updates, notifications or submissions contained in the file arising from the [domestic] investigation of the case"'.⁶⁷

⁶⁵ Ibid., para. 35.

⁶⁶ Ibid., para. 27; see also Decision on the admissibility of the case against Saif Al-Islam Gaddafi, *Gaddafi and Al-Senussi, Situation in Libya*, PTC I, ICC, 31 May 2013, ICC-OI/II-OI/II-344-Red, para. 52.

⁶⁷ *Al-Senussi* Admissibility Decision (n 21) para. 66.

The Appeals Chamber upheld the existing matrix. It validated existing approaches, and, in particular, the idea that domestic action must ‘mirror’ ICC practice.⁶⁸

10.2.2 Legal methodology in review

These principles reflect an inherent tension between ICC-centricity and contextualization. Through its reference to ‘case-by-case’ analysis in relation to ‘same conduct’, ICC jurisprudence seeks to take context into account in admissibility assessments. But the methodology adopted by the Court leaves *de facto* very little space for contextualization. States are judged across a set of uniform considerations that are based on a textual reading of the Statute. Both the timing and the necessity of action at the domestic level are predominantly driven by the investigative and prosecutorial choices of the ICC. This logic provides an incentive to reflect ICC standards in domestic action, which is in line with the idea of complementarity as a catalyst for compliance and the strengthening of accountability on a global scale.⁶⁹ But it poses challenges in relation to differentiation of conditions, and potential discrepancies between a Hague-driven and a domestic or local vision of justice.

The ‘mirroring’ test carries the risk that states implement international standards primarily to satisfy international audiences: the ICC, international donors, NGOs, etc.⁷⁰ This is likely to produce artificial results. If states strengthen domestic systems primarily for the sake of adjudicating specific cases domestically, reform efforts are geared towards ICC priorities rather than long-term domestic interests. This may ultimately run counter to the objective of the Rome Statute, which is to create a sustainable ‘system of justice’ with genuine domestic investigations and prosecutions.

A predominantly Hague-centred vision of complementarity also comes with certain potential ‘costs’. It may ‘undermine reasonable national efforts to prosecute by going against the logic of the burden-sharing goals of complementarity’, or ‘hinder the growth of effective national jurisdictions willing and able to prosecute the crimes, especially in Africa’.⁷¹

The current application of the admissibility regime of the ICC is not only an articulation of interpretive authority but also a manifestation of the exercise of ‘productive power’.⁷² Court action creates a social reality through its framing and choice of cases. Domestic states must adjust to this reality, and ‘model’ their own action after ICC proceedings, in order to be able to challenge admissibility successfully. Existing

⁶⁸ See (n 9).

⁶⁹ See J K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford: Oxford University Press, 2008) 318–31.

⁷⁰ On ‘donor’s justice’, see S Kendall, ‘Donor’s Justice: Recasting International Criminal Accountability’ (2011) 24 *Leiden Journal of International Law* 585.

⁷¹ C Jalloh, ‘International Decision: Situation in the Republic of Kenya: No. ICC-01/09-02/11-274-Judgment on Kenya’s Appeal of Decision Denying Admissibility’ (2012) 106 *American Journal of International Law* 118, at 120.

⁷² According to Foucault, power produces reality and generates subjectivity. On Foucault and ‘productive power’ in international law see L M Hammer, ‘A Foucauldian Approach to International Law; Descriptive Thoughts for Normative Issues’ (Aldershot: Ashgate, 2007) 20–1.

interpretations may be convincingly grounded in the law.⁷³ But they have some disturbing side effects. They foster a bifurcation between advanced and less developed states. States with a functioning and efficient legal system may be able to meet the threshold set by the ICC. Less developed states, or states with a temporary dysfunctional judicial system, may lack the necessary resources and human capital to challenge ICC action, in order to give room to domestic processes.⁷⁴

Existing case law reflects a ‘strange balance’ between prerogatives of the ICC and deference to domestic jurisdiction. Controversies over the existence and scope of domestic investigations and prosecutions have become the main ‘battlefield’ of admissibility findings. In this context, jurisprudence has considerably constrained the space of domestic autonomy. By contrast, conditions of inability and unwillingness under Article 17(2) and (3) have been interpreted with greater flexibility and space for deference to domestic action. This vision of complementarity facilitates quick action by the ICC. But it pays limited attention to systemic integration between international and domestic justice, and broader challenges of sustainability.

10.2.2.1 Article 17(1)—Too few prospects for deference?

The existing interpretation of Article 17(1) provides hardly any space for an integrated understanding of complementarity, i.e. interaction between international and domestic justice. Since the very start, admissibility depends on the advancement of the prosecutor’s case.

The Statute contains an early opportunity for states to request deference to domestic proceedings under Article 18, within a period of one month after the notification by the prosecutor that the ICC intends to open an investigation into the relevant situation. At this stage of proceedings, the Statute expressly encourages ‘a dialogue between the state and the prosecutor to ensure that there is no overlap in their respective areas of interest’.⁷⁵ This is reflected in Article 18(5).⁷⁶ But this provision has largely remained dead letter, since states supported the exercise of jurisdiction by the ICC, or lacked the means to seek deferral based on their own investigation and prosecutions. Under Article 18, it remains unclear how and by what criteria domestic action should be compared to prosecutorial action.⁷⁷ Moreover, the very invocation of Article 18

⁷³ See D Robinson, ‘Three Theories of Complementarity: Charge, Sentence or Process’ (2012) *Harvard International Law Journal* 165, 175–82.

⁷⁴ See also the critique by J Spilman, ‘Complementarity or Competition: The Effect of the ICC’s Admissibility Decision in Kenya on Complementarity and the Article 17(1) Inquiry’ (2013) *Richmond Journal of Global Law & Business Online* <<http://rjglb.richmond.edu/index.php/complementarity-or-competition-the-effect-of-the-iccs-admissibility-decision-in-kenya-on-complementarity-and-the-article-171-inquiry/>> accessed 3 October 2014.

⁷⁵ See J T Holmes, ‘Complementarity: National Courts versus the ICC’ in A Cassese, P Gaeta, and J R W D Jones (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford: Oxford University Press, 2002), at 681.

⁷⁶ It allows the Prosecutor to request periodic updates from states.

⁷⁷ See also *Ruto, Kosgey and Sang Appeals Judgment* (n 18) para. 39 (speaking of the ‘relative vagueness of the contours of the likely cases in article 18’).

bears certain risks for a state in relation to a future challenge. Article 18(7) limits the prospects of a subsequent challenge under Article 19 to ‘grounds of additional significant facts or significant change of circumstances’.⁷⁸

After the ‘Article 18 stage’, the space for dialogue is more limited. Domestic action is assessed against ICC action, which creates an environment of ‘competition’. States must meet ICC conditions to bring a successful challenge. The Appeals Chamber has introduced requirements for the ‘sameness’ of the ‘case’. But the object of comparison has long remained unclear. The Statute contains a paradox in relation to the ‘post-Article 18 stage’. Admissibility is formally tied to the notion of ‘case’. The prosecutor is deemed to take admissibility into account under Article 53 when deciding whether to move from preliminary examination to investigation. But at this stage, no ‘case’ exists formally. The prosecutor and the Pre-Trial Chamber still ‘operate within the parameters of an entire “situation”, rather than in relation to a specific “case”’⁷⁹ and it is thus more proper to speak of admissibility in relation to the ‘situation’.⁸⁰ The Pre-Trial Chamber has solved this dilemma by tying admissibility to a hypothetical assessment ‘of one or more potential cases within the context of a situation’.⁸¹ It specified that:

admissibility at the situation phase should be assessed against certain criteria defining a ‘potential case’ such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).⁸²

This ‘incident’-specific definition⁸³ reduces the likelihood of overlap between ICC action and domestic activities, and the prospects of deference to parallel domestic activities at this stage. The Chamber further acknowledged that ‘the Prosecutor’s selection of the incidents or groups of persons that are likely to shape his future case(s) is preliminary in nature and is not binding for future admissibility assessments’.⁸⁴ In light of this remaining uncertainty, states have to challenge a ‘moving target’ when they seek to call into question admissibility.

In the context of admissibility challenges under Article 19, the adequacy of an ‘incident’-related interpretation of the ‘same conduct’ test has been subject to considerable dispute. Different versions of the test have been formulated. The prosecutor has traditionally defended a ‘pure’ version of the ‘same conduct’ test, based on a literal

⁷⁸ See Art 18(7).

⁷⁹ Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in Kenya*, ICC-01/09, PTC II, ICC, 31 March 2010, para. 44 (‘Kenya Authorization Decision’).

⁸⁰ Ibid., para. 45 (‘accordingly, an assessment of admissibility during the article 53(1) stage should in principle be related to a “situation”’).

⁸¹ Ibid., para. 48.

⁸² Ibid., para. 50.

⁸³ In the *Gaddafi Appeal Judgment* (n 7) para. 62, the Appeals Chamber defined ‘incident’ as ‘referring to a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the court are allegedly committed by one or more direct perpetrators’.

⁸⁴ *Kenya Authorization Decision* (n 79) para. 50.

and systematic reading of the Statute.⁸⁵ This position has been blurred by the Appeals Chamber in the Kenyan decisions. The Appeals Chamber mysteriously added the word ‘substantially’ to the test, arguing that the domestic case must target the same person for ‘substantially the same conduct’.⁸⁶ The Chamber failed to explain the origin, meaning, and legal basis of this differentiation. The formulation bears resemblance to Article 35(2)(b) of the ECHR, which specifies that the ‘Court shall not deal with any application submitted under Article 34 that... is *substantially the same* as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information’.⁸⁷ This reasoning has triggered a vivid debate in the Libyan cases, as to whether ‘conduct’ refers to specific factual incidents or broader events, and which degree of symmetry is required between the two cases to declare a case inadmissible.

The prosecutor claimed that the addition of the word ‘substantially’ was not meant to modify the ‘sameness’ requirement per se, but rather described the ‘nature of the test’, i.e. the need for comparison,⁸⁸ based on the ‘identity, symmetry or equivalence’ of national proceedings to the ICC case.⁸⁹ The prosecution insisted that ‘conduct’ must always be understood as ‘incident-specific’.⁹⁰ Libya defended a broader understanding of the ‘same conduct’ test, claiming that conduct relates essentially to the time, space, and subject matter of the accused’s alleged action. It argued that the domestic process must not necessarily mirror precisely what the ICC would do in the same circumstances. It submitted that an incident-specific interpretation of a ‘case’ would run counter to the object and purpose of the Rome Statute, since it undermines state discretion. It argued that the Statute only requires a state to investigate or prosecute ‘similar and/or related incidents arising out of substantially the same course of conduct as well as other serious allegations of crimes’.⁹¹ It suggested that conduct relates to a ‘criminal transaction’, i.e. ‘a number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan’.⁹² The notion of ‘incident’ would merely serve as an indication as to whether the domestic criminal process addresses the ‘same conduct’.

ICC jurisprudence has diverged on this point. The Pre-Trial Chamber has adopted a flexible reading (‘broad mirror’ approach) that is closer to Libya’s position. It argued that domestic coverage of some or all incidents may constitute a relevant indicator

⁸⁵ For a full statement, see Prosecution’s Response to ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11, 2 May 2013, paras 33 *et seq.* (‘OTP Response’).

⁸⁶ *Muthaura, Kenyatta and Ali Appeals Judgment* (n 18) paras 40, 41–3, 62; *Ruto, Kosgey and Sang Appeals Judgment* (n 18) para. 40.

⁸⁷ Emphasis added.

⁸⁸ See OTP Response (n 85) para. 32 (‘Any other interpretation would render the decision internally inconsistent and manifestly unreasonable’).

⁸⁹ *Ibid.*, para. 58. ⁹⁰ *Ibid.*, para. 28.

⁹¹ Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Art 19 of the ICC Statute, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-307-Conf-Exp, 2 April 2013, para. 60, as well as paras 72, 78, and 89.

⁹² *Ibid.*, para. 73.

that the case is indeed the same.⁹³ But it rejected a firmly incident-based reading of conduct, noting that '[w]hat is... required at every phase of the proceedings before the Court is that the alleged criminal conduct be sufficiently described with reference to precise temporal, geographic and material parameters', but 'not that such conduct be invariably composed of one or more "incidents" of a pre-determined breadth'.⁹⁴

The Appeals Chamber deviated from the Pre-Trial Chamber on this point on appeal. It defended a 'strict mirror' approach, stressing the key role of incidents in the determination of the 'sameness' of conduct, 'alongside the conduct of the suspect under investigation'.⁹⁵ It argued that it is 'hard to envisage a situation in which the Prosecutor and a State can be said to be investigating the same case in circumstances in which they are not investigating any of the same underlying incidents'.⁹⁶

It related the formulation 'substantially the same' to the degree of overlap with the domestic case, and defended a case-by-case assessment. The explanation remained vague, and is likely to trigger further dispute in future cases.⁹⁷ The Appeals Chamber stated:

The real issue is, therefore, the degree of overlap required as between the incidents being investigated by the Prosecutor and those being investigated by a State—with the focus being upon whether the conduct is substantially the same... If there is a large overlap between the incidents under investigation, it may be clear that the State is investigating substantially the same conduct; if the overlap is smaller, depending upon the precise facts, it may be that the State is still investigating substantially the same conduct or that it is investigating only a very small part of the Prosecutor's case. For example, the incidents that it is investigating may, in fact, form the crux of the Prosecutor's case and/or represent the most serious aspects of the case. Alternatively, they may be very minor when compared with the case as a whole.⁹⁸

This jurisprudence is marked by frictions. The Appeals Chamber derives the 'strict mirror' approach from statutory interpretation. But the parameters applied, i.e. 'substantial' sameness, and the incident-based interpretation of 'same conduct' are in essence jurisprudential creations. The case-by-case approach appears to suggest some flexibility in assessment. But the space for deference is in reality thin. The method of comparison promoted by the Appeals Chamber makes it difficult for states to challenge admissibility. It pays little attention to whether and how broader goals of international justice are achieved, since it largely excludes goals and context from the assessment.⁹⁹

⁹³ *Al-Senussi* Admissibility Decision (n 21) para. 77.

⁹⁴ Ibid., para. 75.

⁹⁵ *Al-Senussi* Appeals Judgment (n 7) para. 73.

⁹⁶ Ibid., para. 72.

⁹⁷ See *Gaddafi* Appeals Judgment (n 7), Dissenting Opinion of Judge Anita Ušacka, para. 51 ('in my opinion, article 17 (1) (a) of the Statute, applied in accordance with the principle of complementarity, does not require domestic authorities to investigate ("substantially) the same" conduct as the conduct that forms the basis of the "case before the Court").

⁹⁸ *Al-Senussi* Appeals Judgment (n 7) para. 72.

⁹⁹ For a broader focus, see *Gaddafi* Appeals Judgment (n 7), Dissenting Opinion of Judge Anita Ušacka, para. 58 ('While there should be a nexus between the conduct being investigated and prosecuted domestically and that before the Court, this "conduct" and any crimes investigated or prosecuted in relation thereto do not need to cover all of the same material and mental elements of the crimes before the Court and also do not need to include the same acts attributed to an individual under suspicion').

This might lead to awkward results. For instance, in some cases it might make sense to assess the genuineness of domestic investigations relating to incidents that the Court has not itself investigated, in order to make a proper choice on the appropriate forum. Such considerations are difficult to reconcile with the hard requirements set by the Appeals Chamber. Moreover, the ‘sameness’ test as a whole embraces a specific reading of complementarity. It supports the vision of ICC investigations and prosecutions as a ‘role model’ for domestic cases. Promoting ‘preference’ for national proceedings, and encouraging domestic investigations and prosecutions, becomes a secondary consideration.¹⁰⁰

10.2.2.2 Article 17(2) and (3): too much space for deference?

This approach contrasts with more flexible jurisprudence on conditions of inability and unwillingness, and in particular the role of due process considerations in admissibility assessments which was at the heart of the dispute in the Libyan cases. In this context, there is a strong shift towards the other extreme, namely great latitude towards domestic processes.

The prosecutor pleaded for a relaxed application of admissibility standards. The prosecution submitted that:

while Article 17 sets out benchmarks to enable the Court to identify cases that cannot be genuinely heard before national courts, the Statute’s complementarity provisions should not become a tool for overly harsh structural assessments of the judicial machinery in developing countries or in countries in the midst of a post-conflict democratic transition which, as Libya notes, will not possess a sophisticated or developed judicial system.¹⁰¹

It claimed that fairness towards defendants should only be taken into account ‘where the national investigation or proceedings lack fundamental procedural rights and guarantees to such a degree that the national efforts can no longer be held to be consistent with the object and purpose of the Statute and Article 21(3).¹⁰²

This understanding was challenged by the defence. The Appeals Chamber adopted a narrow reading of the protection of ‘due process’ considerations under Article 17(2)(c), which leaves considerable leeway for the toleration of ‘flawed’ domestic trials.

It held:

the concept of proceedings ‘being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice’ should generally be understood as referring to proceedings which will lead to a suspect evading justice, in the sense of not appropriately being tried genuinely to establish his or her criminal responsibility, in the equivalent of sham proceedings that are concerned with that person’s protection.¹⁰³

¹⁰⁰ See OTP Response (n 85) para. 46 (‘the Statute does not seek to guarantee a right of national prosecution at all costs. Rather, it recognizes only a preference for genuine national proceedings where they relate to the specific case before the Court’).

¹⁰¹ *Al-Senussi* Admissibility Decision (n 21) para. 186.

¹⁰² Ibid., para. 188.

¹⁰³ *Al-Senussi* Appeals Judgment, (n 7) para. 218.

It confined admissibility of ICC cases and non-deference to domestic jurisdiction to circumstances

where violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be ‘inconsistent with an intent to bring the person to justice’.¹⁰⁴

The Chamber provided some examples. It engaged with minimum standards, with an implicit focus on proceedings resulting in the death penalty. It noted that proceedings which ‘are, in reality, little more than a predetermined prelude to an execution’ and therefore contrary ‘to even the most basic understanding of justice’ would be insufficient to render a case inadmissible.¹⁰⁵ It then added that there may be no deference to domestic jurisdiction ‘when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice’ since in ‘such circumstances, it is even arguable that a State is not genuinely investigating or prosecuting at all’.¹⁰⁶

This reasoning differs from the framework of the ad hoc tribunals which set more stringent conditions for the deferral of cases to domestic jurisdictions under Rule *bis*.¹⁰⁷ Appeals Chamber jurisprudence grants significant discretion to domestic systems as to the ‘justice process’ and limits ICC scrutiny to ‘travesty of justice’.¹⁰⁸ This approach stands in marked contrast to the ICC-centric approach under Article 17(1). It may be criticized on several grounds. The ‘thin’ interpretation of due process protection might be under-inclusive, since it reduces inadmissibility to cases that are already covered under Article 17(1). If lack of fairness is only relevant in cases which demonstrate a lack of genuine investigation and prosecution (as implied by the Appeals Chamber), then Article 17(2)(c) becomes virtually redundant in relation to fairness. This stands in contrast to the chapeau of Article 17(2) which mandates the Court expressly to ‘have regard to the principles of due process recognized by international law’.¹⁰⁹ As in the context of Article 17(1), the Chamber failed to explore the possibility of adopting a dialogue-based understanding of complementarity which would promote continued interaction with domestic jurisdictions in deference of cases. Although Rule 11 *bis* deferrals differ formally from ICC admissibility decisions, the Chamber could have drawn inspiration from some features of this practice in order to monitor domestic proceedings after deference. But it failed to seize the opportunity (see further 10.4).

¹⁰⁴ Ibid., para. 230.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ See Rule 11 *bis* B (‘The Referral Bench may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and *after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out*’). Emphasis added.

¹⁰⁸ In support of this approach, see Mégré and Samson (n 2), at 586; see also K J Heller, ‘The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process’ (2006) 17 *Criminal Law Forum* 255–80. For a critique, see E Frey, ‘Between Show Trials and Sham Prosecutions: The Rome Statute’s Potential Effect on Domestic Due Process Protections’ (2012) 23 *Criminal Law Forum* 35–62.

¹⁰⁹ See Art 17(2).

10.3 Dilemmas

In existing jurisprudence, the ICC has given significant attention to the application of the ‘black letter’ law of the Statute and grounded interpretations in the foundational texts. This approach has a certain appeal and might be plausible at this stage of the Court’s existence. But it has also silenced certain problems that have emerged in practice and may have been less clear when the complementarity regime was drafted, namely: (i) dilemmas of timing, and (ii) approaches towards ‘qualified deference’.

10.3.1 Timing dilemmas

Issues of timing have been contemplated in the admissibility system. But some dimensions have not been fully thought through. Two fundamental challenges have emerged in practice that require further consideration: the interplay between requirements and timelines for challenges, and ‘*ex post* review’, based on subsequent developments.

10.3.1.1 *The ‘race for time’ dilemma*

The timing dimensions of Article 19 challenges have been mostly approached from the angle of judicial effectiveness,¹¹⁰ as seen through the lens of the Court. This is reflected in Article 18(7) and Article 19. Article 19(4) states that

The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial.

Any deviation from this rule is subject to judicial discretion, and additional limitations. This is clarified by the last sentence:

In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c), i.e. *ne bis in idem*.

The rationale is obvious. The express intent to limit the number of challenges and to concentrate them on the period before the commencement of the trial is designed to preserve the Court’s judicial resources and mitigate the implications of a finding of inadmissibility.¹¹¹ There is thus a certain predetermination to protect the interests of the Court. But the implications of this reasoning for domestic proceedings, and challenges of societies in transition, have not received much attention—partly because

¹¹⁰ Note that the accused is not obliged to make the challenge at the ‘earliest opportunity’ under Art 19(5).

¹¹¹ For a study of the early *Katanga* Trial Chamber decision, see D Jacobs, ‘The Importance of Being Earnest: The Timeliness of the Challenge to Admissibility in Katanga’ (2010) 23 *Leiden Journal of International Law* 331–42.

it was less evident that the Court would intervene actively in situations of ongoing conflict.

The existing system encourages states to ‘make a challenge at the earliest opportunity’, and this is made clear by Article 19(5). This incentive stands in tension with the jurisprudence on Article 17(1) which requires the state to carry out investigations or prosecutions that ‘mirror’ the ICC case. If the ICC case is the benchmark, domestic actors are typically placed at a disadvantage¹¹² since the ICC prosecution is in the ‘pool position’, steering the scope, focus, and pace of proceedings. Due to the high threshold adopted for challenges under Article 19, a state might be best advised to postpone the challenge until the latest possible moment, in order to enhance the scope of investigations or prosecutions and the quality of evidence. This result contrasts with the original logic of Article 19.

If a state postpones a challenge beyond the confirmation of charges, it might have to conduct a ‘quick’ investigation or trial, with a decision on the merits of the case, in order to benefit from *ne bis in idem*. None of the two implications is necessarily in line with the idea of fostering sustainable domestic justice after conflict, which should be a goal of complementarity.

10.3.1.2 The review dilemma

A second critical aspect of the current admissibility regime relates to the time frame of review. The situations in which the ICC acts are highly dynamic. The ICC system has not yet developed an adequate methodology to accommodate this tension. The Appeals Chamber made it clear in its jurisprudence that admissibility challenges are decided, based ‘on the facts as they exist at the time of the proceedings concerning the admissibility challenge’,¹¹³ i.e. the time of the proceedings on the admissibility challenge before the Pre-Trial Chamber. It specified this principle in *Katanga*. It noted:

Generally speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. This is because the admissibility of a case under article 17(l)(a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction.¹¹⁴

It then conceded in the same paragraph that ‘[t]hese activities may change over time’,¹¹⁵ but failed to draw conclusions from this. In subsequent proceedings, it systematically decided not to consider evidence postdating the appealed decision.¹¹⁶ An

¹¹² See also *Gaddafi* Appeals Judgment (n 7), Dissenting Opinion of Judge Anita Ušacka, para. 56 ('applying this strict approach raises a concern about timing, as the proceedings before the Court might have progressed further than the domestic proceedings or vice versa. Therefore, the “case before the Court” may already have many more concrete elements than a “case” which is still under investigation domestically').

¹¹³ *Katanga* Appeals Judgment (n 6) para. 56.

¹¹⁴ Ibid., para. 56.

¹¹⁵ Ibid., para. 56, adding that ‘a case that was originally admissible may be rendered inadmissible by a change of circumstances on the concerned States and vice versa’.

¹¹⁶ See *Gaddafi* Appeals Judgment (n 7) para. 44 ('the correct avenue would rather be for it to make an application under article 19 (4) of the Statute').

admissibility challenge therefore reflects only a snapshot of reality, based on the circumstances at the time of the challenge. Subsequent developments remain largely out of purview in light of the limited option for a state to bring a second challenge (Article 19(4)).

The selective focus of scrutiny poses a problem, since *ex post* review of admissibility decisions is subject to tied conditions. Two ‘post-admissibility’ scenarios must be distinguished.

The first is a situation where a case that has been ruled as admissible is affected by a change of circumstances that might render it inadmissible. In such circumstances, there might be an interest for deference to domestic jurisdiction in order to safeguard the resources of the Court. The Statute seeks to resolve such admissibility conflicts through judicial discretion and time bars. A first option is Article 19(3). If a case that has been deemed admissible becomes inadmissible due to a change of facts and circumstances, the prosecutor might seek ‘a ruling from the Court regarding a question of...admissibility’ under Article 19(3).¹¹⁷ But typically, such an inadmissibility claim might not coincide with the prosecutor’s interest in pursuing the case. A second option is a *proprio motu* determination by a Chamber. Article 19(1) allows a Chamber to take such a change in circumstance into account by virtue of its *proprio motu* powers.¹¹⁸ The wording (‘may’) implies that it is not obliged to do so.¹¹⁹ Deactivation of ICC activity through subsequent action by states (e.g. a second challenge¹²⁰) is subject to the already mentioned time limits. A state depends on the Court’s grant of ‘leave’ if it seeks to invoke a change of circumstances by way of an additional challenge. After commencement of the trial, the Statute allows for parallel proceedings. Any conflict over jurisdiction is then governed by a ‘race for judgment’, i.e. *ne bis in idem*. Where a defendant has been surrendered to the Court, it will be difficult for the domestic jurisdiction to ‘try’ the person (unless trials *in absentia* are allowed domestically). This framework of ‘post-admissibility’ developments is thus largely dependent on the progress of the ICC case and the interests of the Court.

Second, subsequent events might render a case admissible after it has been found to be inadmissible. A typical example is the *Al-Senussi* case, where circumstances on the ground changed after the successful admissibility challenge.¹²¹ The Statute does not provide much guidance on the legal regime relating to such developments. The prosecutor has the power to seek a reactivation of Court activities, after a successful admissibility challenge, by way of a ‘request for review’. This option is regulated in Article 19(10). This provision allows the prosecutor to ‘submit a request for a review of the

¹¹⁷ See also Kleffner (n 69) at 193. ¹¹⁸ Kleffner (n 69), at 192–3.

¹¹⁹ Consideration of jurisdiction is mandatory (‘shall’). See Art 19(1).

¹²⁰ For a second challenge, Hall suggests to ‘adopt a standard similar to that in Article 84 para. 1 (e) for revisions of convictions or sentences which would require that the challenge be based on newly discovered information, that the failure to discover that information was not the fault of the State making the new challenge and that the information be sufficiently important so that the decision on the ruling in admissibility would have been different’. See C K Hall in Triffterer, Art 19, para. 22.

¹²¹ See K J Heller, ‘It’s Time to Reconsider the *Al-Senussi* Case (But How?)’, Opinio Juris <<http://opiniojuris.org/2014/09/02/time-reconsider-al-senussi-case/>> accessed 3 October 2014.

decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.¹²² Article 19(10) is *lex specialis* to the general power to seek a ruling on admissibility under Article 19(3).¹²³ The framing of the provision suggests that the prosecutor is not obliged to react to all subsequent changes. A request for review is optional ('may') and tied to a partly 'subjective' test ('is fully satisfied'). This power of the prosecutor is not tied to specific temporal limitations. But it is subject to a high threshold, namely proof of new facts and circumstances. Facts must have arisen or become known after the decision on inadmissibility, and the new evidence must invalidate the basis of inadmissibility.

It is controversial whether a defendant might initiate a review in cases where the prosecutor fails to do so. An incentive might arise in contexts where a defendant prefers to be prosecuted by the ICC than by a domestic court. The wording of Article 19(2)(a) speaks against such an interpretation. It allows 'challenges to the admissibility of the case'. The request for reactivation of ICC admissibility following a change of circumstances is technically a 'challenge to inadmissibility'. According to a creative reading, the term 'admissibility' might be said to cover challenges to admissibility and inadmissibility.¹²⁴ But such an interpretation seems to go against the express distinction between 'challenges to admissibility' and 'requests for review' (Article 19(10)). It also conflicts with the division of authority and the role of parties in ICC proceedings. The prosecutor is the driving force behind the case. Article 61(7) makes it clear that a Chamber cannot force the prosecution to investigate or prosecute a case.¹²⁵ Chambers have continuously refrained from asserting such a power. It would thus be strange to award the Defence the authority to challenge 'inadmissibility' and reactivate the case in situations where the prosecution does not do so, and there is some logic in limiting this right to the prosecutor. It would also be contradictory to require that the prosecutor has to invoke 'new facts and circumstances' while the defence could simply rely on Article 19(2)(a).

10.3.2 Deference and monitoring

The problems relating to *ex post* review are related to a broader structural deficit of the existing complementarity regime: the lack of mechanisms and procedures to deal with deferral to domestic jurisdiction.

¹²² See Art 19(10).

¹²³ See also C K Hall, Art 19 in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (München/Oxford/Baden-Baden: C H Beck/Hart/Nomos, 2008), at 665, mn 36 ('In the absence of paragraph 10, the Prosecutor would have been able to seek a new ruling on the "question of...admissibility" pursuant to paragraph 3').

¹²⁴ See Heller (n 121).

¹²⁵ See Art 61(7)(c), granting the Chamber the power to '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'.

10.3.2.1 The rudimentary ICC framework on deferral of cases

The Statute is based on a binary ‘either/or’ logic. Once an admissibility challenge has been successful, the Court maintains jurisdiction, but must defer to domestic proceedings. The procedural consequences are not spelled out in much detail. The ‘case’ is in limbo. Case-related proceedings at the ICC cannot yet formally come to an end, since the prosecutor retains the right to make a request for review under Article 19(10). But certain procedural decisions such as the arrest warrant or requests for cooperation with the ICC might require adjustment in light of the change of the proper forum for proceedings.

A drastic example is Pre-Trial Chamber I’s follow-up decision to the confirmation of Libya’s successful admissibility challenge.¹²⁶ After dismissal of the defence appeal, the Chamber held that:

without prejudice to the Prosecutor’s right to submit a request for review of the Admissibility Decision under the conditions of article 19 (1) of the Statute, the proceedings against Mr Al-Senussi before this Court are concluded, the warrants of arrest against him no longer in effect, and the outstanding requests for cooperation in relation to the case transmitted by the Registrar to a number of States must be withdrawn.¹²⁷

It rather confusingly closed the ‘case’, noting that ‘proceedings against Abdullah Al-Senussi before the Court have come to an end’.¹²⁸

This decision reveals one of the significant weaknesses of the ICC system, namely the absence of a framework to refer cases back to domestic jurisdiction.¹²⁹ Rule 11 *bis* D contains specific instructions relating to referral of cases from the ICTY and the ICTR to domestic jurisdictions. It states:

- i. the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the state concerned;
- ii. the Referral Bench may order that protective measures for certain witnesses or victims remain in force;
- iii. the prosecutor shall provide to the authorities of the state concerned all of the information relating to the case which the prosecutor considers appropriate and, in particular, the material supporting the indictment;
- iv. the prosecutor may send observers to monitor the proceedings in the national courts on her behalf.¹³⁰

Rule 11 *bis* F even encompasses a right to revoke the referral of the case during domestic proceedings, which is grounded in the ‘primacy’ of the ad hoc tribunals. It states:

At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a national court, the Referral Bench may,

¹²⁶ Decision following the declaration of inadmissibility of the case against Abdullah Al-Senussi before the Court, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/011-01/011, PTC I, ICC, 7 August 2014.

¹²⁷ Ibid., para. 6.

¹²⁸ Ibid., p. 5.

¹²⁹ See also Kleffner (n 69), at 193.

¹³⁰ Rule 11 *bis* D.

at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.¹³¹

The ICC statutory framework is much more rudimentary, and does not contain a targeted provision on the treatment of deferrals. Guidance must be sought in general provisions. Article 68(1) allows the ordering of protective measures for witnesses and victims. Article 93(10) contains a discretionary norm on ICC cooperation and assistance to states, which might facilitate domestic proceedings. But this ‘reverse’ form of cooperation and assistance is subject to strict conditions. The Statute fails to clarify the conditions and legal consequences of post-(in)admissibility review under Article 93(10).¹³² Moreover, monitoring powers and modalities, which have played a key role in *11 bis* proceedings at the ad hoc tribunals,¹³³ are only addressed in a cursory fashion in the ICC Statute.

10.3.2.2 Post-(in)admissibility monitoring

Monitoring of subsequent domestic criminal proceedings is crucial to deal with changing circumstances in situations and to exercise continued scrutiny over domestic proceedings. It has taken on various forms in international criminal practice, ranging from reporting and trial monitoring to actual verification of standards and fair trial requirements. In the context of Rule 11 *bis* cases, judges have ordered the prosecutor to monitor national proceedings in the former Yugoslavia and Rwanda.¹³⁴ In some cases, monitoring has been outsourced to external actors, such as the OSCE or the African Commission of Human and Peoples’ Rights, which have been charged with extensive monitoring powers. In other cases, the Referral Bench has relied on monitoring under judicial scrutiny (i.e. appointment of a monitor by the Registrar) in order to facilitate its decision-making process on the fairness of domestic proceedings.¹³⁵

The ICC regime is rather underdeveloped in comparison with other international courts and tribunals. Its bare essence is reflected in two provisions: Article 18(5) and Article 19(11).

¹³¹ Rule 11 *bis* F.

¹³² Rule 62 specifies the procedure applicable to proceedings under Art 19 (10).

¹³³ On ‘monitoring’ under Rule 11 *bis*, see O Bekou, ‘Rule 11 *Bis*: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence’ (2009) 33 *Fordham International Law Journal* 723, 786–9.

¹³⁴ E.g. Decision on Rule 11 *bis* Referral, *Stanković*, Case No. IT-96-23/2-AR11bis.2, AC, ICTY, 15 November 2005, para. 56 (“The Appeals Chamber acknowledges that Rule 11 *bis* (D)(iv) and (F) of the Rules confer a substantial amount of discretion on the Prosecutor to send monitors on her behalf and to determine how best to go about that monitoring. However, that discretion cannot derogate from the Referral Bench’s inherent authority under this Rule. Just because the Prosecutor may send observers to monitor the proceedings in the national courts on her behalf does not mean that the Referral Bench lacks the authority to instruct the Prosecutor that she *must* send observers on the *Tribunal’s* behalf. The former does not preclude the latter”).

¹³⁵ Bekou (n 133) 786–9.

Article 18(5) addresses monitoring after deference of proceedings under Article 18. It states:

When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.¹³⁶

Article 19(11) establishes similar ‘monitoring’ powers in relation to admissibility proceedings. It states:

If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential.¹³⁷

These two specific provisions are complemented by Article 53(4), which provides the prosecutor with the general authority to evaluate national proceedings. It clarifies that the prosecutor ‘may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts and information’.¹³⁸

In the *Al-Senussi* case, Libya sought to mitigate the risks of deference to domestic jurisdiction by reference to continuing monitoring powers of the Court after a successful admissibility challenge. It argued that ‘any residual or obdurate concerns...regarding Libya’s domestic proceedings...ought to form the centrepiece of a monitoring and technical assistance program’,¹³⁹ grounded in ‘positive complementarity’. It suggested that monitoring of domestic proceedings in Libya would facilitate the exercise of review powers under Article 19(10) by the prosecutor¹⁴⁰ and facilitate continued ICC assessment of conditions of unwillingness under Article 17(2) and inability under Article 17(3).¹⁴¹ But this proposal was contested by the defence, and not taken up by the Chamber.

The existing ICC system, as it is reflected in the Statute, has several weaknesses. The first downside is that it relies entirely on monitoring by the prosecutor, instead of embracing broader mechanisms of monitoring that have been devised by other international courts of tribunals, including monitoring under judicial scrutiny. The focus on the role of the OTP is in line with its function as ‘master of the case’. But it has inherent limitations that constrain the purpose and functioning of monitoring schemes. Monitoring under the authority of the prosecutor is ‘party-driven’ and potentially ‘confrontational’ rather than cooperation-oriented. It is primarily geared towards prosecutorial decision-making processes and guided by prosecutorial interests, which may conflict with defence interests or state interests. This orientation facilitates vigilance, but is not necessarily suited to strengthening domestic investigations

¹³⁶ Art 18(5).

¹³⁷ Art 19(11).

¹³⁸ Art 53(4).

¹³⁹ Libyan Government’s consolidated Reply to the Responses by the Prosecution, Defence and OPCV to the Libyan Government’s Application relating to Abdullah Al-Senussi pursuant to Art 19 of the ICC Statute, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11, 14 August 2013, para. 173.

¹⁴⁰ Ibid., para. 173.

¹⁴¹ Ibid., para. 183.

and prosecutions through cooperation and assistance. In addition to capacity concerns, there are limits in relation to verification of compliance with standards. As a party to proceedings, the prosecutor is ill-equipped to set standards or offer advice on their compliance. Such a role might force the OTP to take a legal position on issues that could later be invoked against it. This conflict has been recognized by the Court as one of the impediments to a more ‘proactive’ approach on complementarity, based on ‘reverse cooperation’ under Article 93(10). The Court noted that

any form of cooperation from the Court to a national authority for the strengthening of their judicial/legal capacity would not amount to a safeguard from the Chamber finding a case admissible within the scope of article 17 of the Rome Statute.¹⁴²

The second weakness of the existing framework is its limited scope. Monitoring under an existing statutory provision relies entirely on submission of information by the state, as opposed to broader sources of information. Deeper issues of verification, on-site control, and further ongoing cooperation are left aside. This gap may be explained by reservations of states towards prosecutorial interference in internal affairs and domestic proceedings. But it is an impediment to complex and deeper forms of monitoring that involve trial inspection or technical assistance. This restrictive regime loses its appeal in cases where a state voluntarily accepts monitoring as part of an ongoing admissibility assessment, as evidenced by Libya’s submissions. There is a need to rethink the *status quo*.

10.4 Improving ‘Qualified Deference’

It is artificial to treat admissibility challenges as a binary ‘either/or’ choice, according to which ‘a declaration of admissibility or inadmissibility in accordance with this provision is the end of the matter’.¹⁴³ This approach is appealing from a narrow legal perspective, since it blends out politics and longer-term complementarity considerations. But it disregards the fact that the choice of the proper legal forum is more than an abstract dispute over competencies. It is inherently connected to the framing of domestic justice policies that go beyond the individual ‘case’. There is an urgent need to critically reflect the ‘mirror’ imagery, and to (re-)connect ICC practice more closely to longer-term visions of complementarity.

Complementarity is dynamic, while accountability may require coordination between the ICC and domestic authority. One way to address existing tensions is to provide greater attention to the idea of ‘qualified deference’ to domestic jurisdictions in complementarity assessments, and the conditions under which it might be operationalized. Qualifying ‘deference’ may provide a means to strike a more adequate balance between the strict application of the ‘same conduct’ test, and the more generous granting of deference under Article 17(2) and (3) (see 10.2.2). It may help mitigate some of the existing concerns relating to (i) the high threshold of ICC jurisprudence,

¹⁴² See Report of the Court on Complementarity, ICC-ASP/10/23, 11 November 2011, para. 6.

¹⁴³ See also Kleffner (n 69), at 190.

(ii) the management of ‘timing’ issues under the admissibility regime, in particular in relation to transitional societies, and (iii) the promotion of a deeper (rather than a thin) vision of complementarity, based on continued monitoring, mutual cooperation, and the development of sustainable domestic justice responses.

The appeal of the concept lies in the fact that it might facilitate a more dialogue and process-based understanding of complementarity, which is better geared at context, while maintaining checks and balances through ongoing ICC scrutiny or control. The idea of qualifying deference has mainly gained ground in the practice of other courts and tribunals after the adoption of the Rome Statute. It is not directly specified in the Statute, but in line with the role of the Court as ‘back-up’ for domestic jurisdictions and the statutory mandate to encourage domestic investigation and prosecution.¹⁴⁴

There are three different ways in which the concept can be applied to reconcile conflicting positions. They differ in their degree of vigilance and approach to admissibility:

- i. One solution is to award the state reasonable time to investigate and build the case after the notice of an admissibility challenge, and prior to a final decision on admissibility.¹⁴⁵ This option would grant the state a window of opportunity to meet ICC standards. Pending the admissibility decision, the ICC case and domestic proceedings co-exist. When deciding on the challenge, the Chamber would be able to take into account facts and circumstances at the time of the decision.
- ii. A second way is to allow deference to domestic jurisdiction, but to combine the deferral with continued judicial monitoring after a decision under Article 19. This approach does not alter the decision on admissibility per se, but would improve the follow-up.
- iii. Finally, the ICC could make greater use of conditions in admissibility proceedings. In some circumstances, it may be feasible to tie deferral to monitoring of specific conditions that must be satisfied in order to maintain domestic jurisdiction (‘conditional admissibility’). This approach is suitable in cases in which doubts remain in relation to the feasibility of final deference to a domestic jurisdiction. Deference would be conditional, while monitoring and supervision would be used to facilitate a final judicial decision on deference.

All three approaches may be grounded in mandates and powers provided under the Statute.¹⁴⁶

¹⁴⁴ See preamble Rome Statute, paras 4, 6, and 11; Resolution ICC-ASP/12/Res.4, Complementarity, 27 November 2013, para. 1.

¹⁴⁵ See Jalloh (n 2), at 242.

¹⁴⁶ They do not seek to abrogate the application of the ‘same conduct’ test. Rather, they seek to adjust its application more closely to the context in which the ICC operates.

10.4.1 Time-management of admissibility: managing parallel proceedings

At present, states face a ‘race against time’ in admissibility proceedings. These concerns may be addressed by a reconsideration of time management, i.e. additional flexibility to adjust their case after the filing of an admissibility challenge, and prior to the decision on admissibility. During this period, the ICC case remains admissible, but there are parallel proceedings. Legally, the prosecutor is bound to suspend the investigation under Article 19(7),¹⁴⁷ but ICC action is not barred entirely. The Chamber can authorize necessary investigative steps, as ‘referred to in article 18, paragraph 6’.¹⁴⁸ The state would be required to meet ‘the same conduct’ test, but would have an opportunity to adjust its investigations or prosecutions after the filing of the admissibility challenge. Additional monitoring structures could be put in place in order to verify whether state action is geared towards the ‘same case’. The admissibility decision would take into account the developments in the time period granted.

10.4.2 Monitoring of deference

The second approach seeks to minimize the risks associated with deference, i.e. to ensure that a case does not fall off the ‘radar screen’ after an admissibility challenge. Deference to domestic jurisdiction is not made conditional *per se*. Rather, the challenges connected with a deferral are mitigated through a strengthening of monitoring structures, based on continued judicial supervision.

This approach has merits in situations in which the case is ruled inadmissible by the Chamber, but requires further scrutiny in light of the remaining risks. In such circumstances, it is undesirable to terminate the ‘case’ at the ICC altogether with the decision on admissibility. The decision on admissibility would not end the ‘case’ at the Court, but merely suspend it. This is in line with the function of admissibility proceedings which are designed to inform the choice of the forum, rather than terminate ICC proceedings as such. Continued judicial scrutiny can be used in this period, i.e. after a decision on admissibility, but before the formal ‘ending’ of the ICC case, to verify circumstances through monitoring. Ultimately, this approach has two advantages: (i) It might make it easier to justify the exercise of domestic jurisdiction, while mitigating its risks. It would, in particular, maintain some leverage of the ICC over domestic proceedings and limit the risks of shielding suspects or sham proceedings at the domestic realm, after a successful challenge.¹⁴⁹ It would further (ii) strengthen the weak ‘monitoring’ scheme of the Statute, and address some of the shortcomings of prosecutorial monitoring (which may encounter objections from the defence¹⁵⁰ or suspicion from recalcitrant states).

¹⁴⁷ See Art 19(7).

¹⁴⁸ See Arts 19(7) and 18(6).

¹⁴⁹ See also Jalloh (n 71), at 124 (noting that in Kenya, ‘the government voluntarily offered to provide periodic investigative reports to the chamber and simultaneously requested the transfer of material evidence in the prosecutor’s possession for use in its domestic investigations’).

¹⁵⁰ Defence Response on behalf of Mr Abdullah Al-Senussi to ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11, 14 June 2013, para. 186 (‘Even if effective monitoring

Technically, continuing judicial authority might be justified on the basis of Article 19(1) ('The Court, may, on its own motion, determine the admissibility of a case in accordance with article 17'), and the function of the chamber as 'guardian of admissibility'. The power of judges to examine admissibility does not end with a successful challenge under Article 19(2), but continues until the 'case' ends. This is made clear by Article 19(10) which mandates the Chamber to carry out a 'review of the decision'. The term 'review' clearly implies that the relevant Chamber makes a decision on the original case in the 'post-admissibility' stage.

Critics might argue that the continued exercise of *proprio motu* powers under Article 19(1) at this stage conflicts with the role of the prosecutor. After all, the prosecutor is charged with continuing 'monitoring' responsibilities under Articles 53(4), and 19(10) and (11). But this argument is ultimately not convincing. Several reasons speak against this reading. This objection overstretches the function of Article 19(10). The fact that the prosecutor has the power to trigger a request for review and to monitor does not mean that the Chamber is barred from taking action. Article 19(10) is not necessarily intended to block Chamber action. 'Monitoring' initiated through Chamber action differs from the limited 'monitoring scheme' under Article 19(11). It is not confined to traditional channels of state reporting, but may encompass wider and more effective forms of scrutiny, such as monitoring by independent experts, NGOs, etc., as in the context of Rule 11 bis. Judicial scrutiny does not necessarily stand in contradiction to the powers of the prosecutor; it might complement or strengthen the exercise of prosecutorial authority under Article 19(10) and (11), as acknowledged in the *Al-Senussi* case.¹⁵¹

10.4.3 Conditional admissibility: supervising deference

A third option to strengthen 'qualified deference' is the use of conditions in admissibility decisions. In many contexts, the ICC is required to render admissibility decisions under uncertain conditions, i.e. in situations where facts and circumstances change in a short period of time. In current decisions, these doubts and uncertainties are often masked and clouded behind legal reasoning, since admissibility is treated as a 'yes or no' choice. This makes ICC practice vulnerable to criticism. It would be

were possible at the investigation or trial stage, it is not clear how the two parties whose interests are opposed to those of the defence—i.e. the two prosecuting authorities—are in a position to be the guardians of defence rights' ('Defence Response *Al-Senussi* Challenge').

¹⁵¹ 'The Office of the Prosecutor has some capacity to examine national proceedings and we do some of that from the seat of the Court in The Hague, but of course the OTP may not be in a position to permanently monitor proceedings in court every day, and the situation may be compared perhaps with the Yugoslavia and Rwanda tribunals in their 11 bis proceedings, whereas your Honours know the Court had requested the Prosecutor to enter into arrangements with other organisations... So the issue we would believe would be also open for this Court to consider, with submissions from the parties and participants, to consider, should that eventuality arise, who would be most appropriately placed to monitor'. See Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute', *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11, 2 April 2013, para. 203 ('Al-Senussi Admissibility Challenge').

preferable to recognize uncertainties, and devise techniques that allow them to be managed in a responsible way.

In the *Al-Senussi* Admissibility challenge, Libya invoked the possibility of using conditions in a decision on deference by the Pre-Trial Chamber¹⁵² in order to alleviate temporal constraints or clarify the circumstances under which deference is acceptable. This technique has several benefits. It might (i) take into account the ‘fluid’ nature of complementarity, and (ii) mitigate risks through the specification of targets, timelines for action, or substantive standards. Judges could, for instance, set certain temporal limits to deference, or make its final allocation dependent on the attainment of certain substantive benchmarks. Instead of making a final ruling on admissibility, judges could grant deference under certain conditions, in case of doubt.¹⁵³ The final decision on inadmissibility would only be made when and if the conditions were met. This differentiation might help the Court to adjust its practices to be more closely linked to context.¹⁵⁴

Neither Article 17 nor Article 19 refers to conditions,¹⁵⁵ and this option is thus more difficult to justify in legal terms. ‘Conditional admissibility’ could be introduced by statutory amendment of Articles 17 and 19, or the Rules of Procedure and Evidence.¹⁵⁶ But such a change might not necessarily be required. The power to tie admissibility to conditions may be inherent in the complementarity regime. The Court is the ultimate arbiter over complementarity, and it is mandated to rule on deference. Article 19(1) and (10) does not identify expressly under which condition a decision to refer a case back to a national criminal jurisdiction can be revoked.¹⁵⁷ The Court can clarify this point through judicial interpretation and practice. A legal justification for the use of conditions may in particular be derived from an *a majore ad minus* argument. If a Chamber is entitled to make a final finding on inadmissibility, based on the criteria of Article 17, it must have the power to rule on the steps leading to that result. This logic is particularly compelling in light of the nature of the decision on deference. Technically, deference would constitute an interim decision on inadmissibility, which becomes final when conditions are met. The use of conditions is a means by which the Chamber would be assisted in reaching its final assessment.¹⁵⁸

¹⁵² *Al-Senussi* Admissibility Challenge (n 149) para. 199 ('the Libyan Government invites the Court to declare the case inadmissible subject to the fulfilment of express conditions or other ongoing obligations...allowing the Libyan Government time to complete its domestic proceedings relating to Abdullah Al-Senussi subject to monitoring and the acceptance of assistance or the fulfilment of other express initiatives and obligations').

¹⁵³ See also Jalloh (n 2), at 242 (suggesting ‘deferral, perhaps on condition that the ICC Prosecutor monitors the trials and reports back to the Pre-Trial Chamber every six months’).

¹⁵⁴ The implementation of ‘conditional admissibility’ would require cooperation and monitoring. Cooperation can be sought under Arts 54, 86, 87, 88, and 93.

¹⁵⁵ See also *Al-Senussi* Admissibility Challenge (n 151) para. 201.

¹⁵⁶ Kleffner calls for the elaboration of an express procedural mechanism to refer cases back to national jurisdictions'. Kleffner (n 69), at 194.

¹⁵⁷ Ibid.

¹⁵⁸ For such an argument in the ICTY context, see ‘Decision on Rule 11 bis Referral’, *Stanković*, IT-96-23/2-AR11bis, ICTY, AC, 11 September 2005, para. 50 ('whatever information the Referral Bench reasonably feels it needs, and whatever orders it reasonably finds necessary, are within the Referral Bench's authority so long as they assist the Bench in determining whether the proceedings following the transfer will be fair').

It is evident that such an approach must be applied with caution. As rightly argued by the defence in *Al-Senussi*, deference cannot serve as ‘short cut’ to justify domestic jurisdiction in circumstances where Article 17 does not allow for it.¹⁵⁹ Conditional deference can only be used to guide final decision-making in cases where the exercise of domestic jurisdiction might be legitimately defended on the basis of Article 17. But such an approach is not precluded by the existing structure of Article 17 or a presumption in favour of admissibility. While Article 17(1) indeed contains an initial presumption in favour of ICC admissibility (the ‘Court shall determine that a case is inadmissible where...’), this presumption ceases once ‘the case is being investigated or prosecuted’ by a state which has jurisdiction over it. In case of state action, the use of conditions would thus not conflict with a presumption relating to admissibility.

10.5 Conclusions

ICC admissibility jurisprudence has been faithful to the text of the Statute and the structure of Article 17. There is growing objection to the ‘same conduct’ test, and its interpretation by the Appeals Chamber. Most criticism has focused on the under-inclusiveness of ICC admissibility approaches. States facing admissibility challenges perceive ICC admissibility as a ‘straitjacket’, which carries the risk of judging domestic investigations and prosecution by a ‘one-size-fits-all’ formula. In particular, the ‘incident’-specific interpretation remains subject to contestation, since it is not directly grounded in statutory text. The defence has criticized the limited weight given to due process considerations.

Some critics have suggested abolishing the ‘same conduct’ test altogether.¹⁶⁰ This would require a radical departure from the framing of admissibility structures, which might be unrealistic and encounter objection. Rather than abandoning the structure as a whole, it might be more feasible to develop the concept of ‘qualified deference’. This concept mitigates some of the critical side effects of the ‘mirror’ image used in jurisprudence. It might address risks in relation to both the under-inclusiveness and over-inclusiveness of ICC procedures. Three techniques might allow the Court to give sufficient space to domestic investigations and prosecutions, while retaining checks and balances inherent in the complementarity regime: (i) flexibility towards domestic jurisdictions to investigate and build the case after the filing of an admissibility challenge; (ii) greater monitoring after deference; and (iii) consideration of conditions to admissibility. Individual fragments of these approaches have been invoked in the *Al-Senussi* case. They can be pursued individually or collectively.

Greater attention to these techniques would not absolve the ICC from criticisms—some tensions are inherent in the mandate of the Court. But they might

¹⁵⁹ Defence Response *Al-Senussi* Challenge (n 150) para. 183 (arguing that where national proceedings are ‘inadequate’, the ICC should not ‘allow those proceedings to continue...until an undefined point at which their manifest inadequacy requires them to be declared inadmissible’).

¹⁶⁰ Heller (n 19), at 129. For a critique, see C Stahn, ‘One Step Forward, Two Steps Back? Second Thoughts on a “Sentence-Based” Theory of Complementarity’, (2012) 53 *Harvard International Law Journal* 183–96.

adjust the application of the complementarity regime better to context and transformative processes in transitional societies. Ultimately, they might shift the focus from mimicry-based and short-term approaches to complementarity to the overarching goal of the Statute, namely to strengthen domestic investigation and prosecution,¹⁶¹ and to ‘guarantee *lasting* respect for and enforcement of international justice’.¹⁶²

¹⁶¹ See preamble, para. 4.

¹⁶² See preamble, para. 11 (emphasis added).

11

The ICC and its Relationship to Non-States Parties

*Robert Cryer**

11.1 Introduction

In some ways, the level of ratification of the Rome Statute¹ is a triumph. In spite of pessimistic predictions about the likelihood of the Rome Statute entering into force quickly (or at all),² it took the (in international law terms) breakneck period of five years to achieve the necessary 60 ratifications to create the ICC. By way of contrast, it took roughly double that time for the International Covenant on Civil and Political Rights to come into force. There are 123 States Parties to the Rome Statute, representing almost two-thirds of the states in the world. That said, in a more cosmopolitan sense, this represents somewhat less than half of humanity, and a significant number of states, including three of the five permanent members of the Security Council (China, Russia, and the United States), are non-parties to the Statute. As a result, many States have no obligation to help the Court. As our most hopeless of undergraduates could tell us, Article 34 of the Vienna Convention on the Law of Treaties (VCLT) provides that '[a] treaty does not create either obligations or rights for a third State without its consent'.³ This, undoubtedly customary,⁴ principle really reflects a foundational principle of international law and the continuing role of consent in the still significantly decentralized international world.⁵ Indeed the ICC itself has made its fidelity to the principle clear, repeatedly opining that 'only States Parties to the Statute are under

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¹ Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute').

² See W Schabas, *An Introduction to the International Criminal Court* 3rd edn (Cambridge: Cambridge University Press 2007) xi.

³ See generally E David, 'Article 34' in O Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford: Oxford University Press 2011) 887. For a masterful survey of the area see D Bederman, 'Third Party Rights and Obligations in Treaties' in D Hollis (ed.), *The Oxford Guide to Treaties* (Oxford: Oxford University Press 2012) 328.

⁴ E.g. *Anglo-Iranian Oil Company Case* (Preliminary Objections) [1952] ICJ Rep 93, 109. Lord McNair, *The Law of Treaties* 2nd edn (Oxford: Oxford University Press 1961) Chapter XVI; M Villiger, *Commentary on the Vienna Convention on the Law of Treaties* (The Hague: Martinus Nijhoff 2009) 472.

⁵ See e.g. Villiger (n 4) 467; A Aust, *The Modern Law of Treaties* 2nd edn (Cambridge: Cambridge University Press 2007) pp. 256–7. For a thoughtful evaluation of a possible shift see B Kingsbury and M Donaldson, 'From Bilateralism to Publicness in International Law' in U Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press 2011) 79. For support of the traditional approach see B Roth, *Sovereign Equality and Moral Disagreement: Promises of a Pluralistic International Legal Order* (Oxford: Oxford University Press 2011).

an obligation to cooperate with the Court. Given that the Statute is a treaty governed by the Rules set out in the VCLT, it is only with the State's consent that the Statute can impose obligations on a non-State Party.⁶

Still, in spite of the fact that the US has vociferously asserted that the Rome Statute violates the *pacta tertii* principle,⁷ there is nothing inherently unlawful about a treaty effecting the interests (rather than legal rights) of third parties, which it is fair to say the ICC does.⁸ Indeed, given the objective legal personality of the ICC, it could be said that there is a lawful obligation on states to accept that personality even though they are not parties to the Statute.⁹

In a previous contribution,¹⁰ I sketched out aspects of the legal regime that is set up by the Rome Statute and other relevant documents (in particular the UN Charter) for non-States Parties. It is not the intention of this chapter to repeat that discussion in full here; however, the chapter will begin with a recap (and at times expansion) of that regime, and some of the themes were developed there. From there it will move on to some of the legal issues that have attained both academic and practical importance since that last contribution (which was published in 2008). It will then discuss developments in the relationship between the ICC and non-States Parties in concrete situations that have come (or not come) before the Court in that period, and its relationship with certain powerful states (in particular the US). It does not claim to be comprehensive;¹¹ after all, to cover everything would take at least a book-length treatment (of which this chapter forms only one part).

⁶ Decision Regarding Omar Al-Bashir's Potential Travel to the State of Kuwait, ICC 02/05-01/09, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-192, PTC II, ICC, 24 March 2014 ('Kuwait Decision'), para. 12. The language is from Decision of the Request of the Defence of Abdullah Al-Senussi to Make a Finding on Non-cooperation by the Islamic Republic of Mauritania and Refer the Matter to the Security Council, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-420, PTC I, ICC, 28 August 2013, para. 12. Similar language also appears in Decision Regarding the Visit of Omar Hassan Ahmad Al-Bashir to the Federal Republic of Ethiopia, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-199, PTC II, ICC, 29 April 2014, para. 12 and Decision Regarding Omar Al-Bashir's Potential Travel to the United States of America, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-162, PTC II, ICC, 18 September 2013 ('USA Decision'), para. 10.

⁷ D Scheffer, 'The United States and the International Criminal Court' (1999) 93 *American Journal of International Law* 12; M Morris, 'High Crimes and Misconceptions: The ICC and Non Party States' (2000) 64 *Law and Contemporary Problems* 131. For (accurate) rejoinders see F Mégrét, 'Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law' (2001) 1 *European Journal of International Law* 241; D Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *Journal of International Criminal Justice* 618.

⁸ G Danilenko, 'The Statute of the International Criminal Court and Third States' (1999–2000) 21 *Michigan Journal of International Law* 445, 448; Aust (n 5) 257 also gives the useful example of the EU and the effect it may have on competition outside the EU. Although see also R O'Keefe, 'The US and the ICC: The Force and Farce of the Legal Arguments' (2011) 24 *Cambridge Review of International Affairs* 335.

⁹ See (albeit not directly on the ICC) D Akande, 'International Organisations' in M Evans (ed.), *International Law* 4th edn (Oxford: Oxford University Press 2014) 248, 254–5.

¹⁰ R Cryer, 'The International Criminal Court and its Relationship to Third States' in G Sluiter and C Stahn (eds), *The Emerging Practice of the International Criminal Court* (The Hague: Brill 2008) 115.

¹¹ *Inter alia*, the relationship of the ICC to the UN will not be discussed in depth.

11.2 The Rome Statute and Third Parties: The Law

For its part, the Rome Statute contains a number of provisions that deal with the rights of third parties.¹² Owing, partly, to the influence of states at Rome who had no intention of joining, the Rome Statute is mostly very solicitous of the rights of third states. To turn to the importance of this, however, it should first be mentioned why it probably had to. This is because, in my view rightly, the Statute's drafters rejected the idea floated by the US¹³ that the Rome Statute should only deal with situations where both the territorial and nationality states had ratified it. Rejecting, on the other hand, universal jurisdiction,¹⁴ the drafters settled on Article 12 of the Statute, which reads as follows:

- 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
- 3. 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 9.¹⁵

Hence, and in spite of an interesting argument relating to Article 12(3) of the Statute by (the US lead negotiator) David Scheffer, outside a referral by the Security Council of a situation to the ICC under Chapter VII of the UN Charter as envisioned in Article 13(b) of the Rome Statute, there are two situations in which the ICC can exercise its jurisdiction in a manner that could affect the interests, and perhaps rights, of third (non-Party) States.¹⁶ The first of these is exercising jurisdiction over crimes committed on their territories by nationals of States Party to the Rome Statute. This does not

¹² See generally G Danilenko, 'ICC Statute and Third States' in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press 2002) 1871; B B Jia, 'The International Criminal Court and Third States' in A Cassese et al. (eds), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press 2009) 160.

¹³ See E Wilmshurst, 'Jurisdiction of the Court' in R Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer 1999) 127, 137.

¹⁴ See O Bekou and R Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' (2007) 56 *International & Comparative Law Quarterly* 49.

¹⁵ See generally S Williams and W Schabas, 'Article 12' in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Article by Article* 2nd edn (Oxford: Hart 2008) 547.

¹⁶ Scheffer's argument is that as Art 12(3)'s reference to States not Party implies that nationality non-States Parties' consent is required for the ICC to have jurisdiction (D Scheffer, 'The International Criminal Court' in W Schabas and N Bernaz (eds), *Routledge Handbook on International Criminal Law* (London: Routledge 2011) 67, 73–4). However, this is inconsistent with the *travaux* of the article, which reveal that it is a remnant of the 1994 ILC Draft Statute, where state opt-in for each crime was to be the norm (*ibid.*, 558–9). Nor is it consistent with the trend of the subsequent practice of the Court.

seem to have raised the ire of non-States Parties to any great extent. The same cannot be said of the other possibility, that of the ICC asserting jurisdiction over nationals of non-States Parties committing crimes on the territories of States Parties. This underpins the basis of the US objections mentioned earlier and, to some extent, other states.¹⁷ Legally they are, for the most part, unconvincing, but they remain a political obstacle for the Court.

In part because of these considerations, the Rome Statute provides for considerable protections for third states. So, for example, under Article 18 of the Statute,¹⁸ the Prosecutor, when seeking to initiate an investigation, is obliged to ‘notify all States parties and those States which... would normally exercise jurisdiction over the crimes concerned’. The notable ‘and’ shows that this obligation extends to non-States Parties to the Statute. Furthermore, any such non-State Party may make a complementarity challenge to the admissibility of cases before the Court (Article 18(2)). The fact that such a state must do so by the procedure provided for in the Statute and Rules and Procedure and Evidence does not infringe their rights, as those documents are providing for a gratuitous right to that state, in the sense that it was not legally required to. Hence the conditions fall under the (customary) Article 36(2) of the VCLT, which provides that:

A State exercising a right in accordance with paragraph 1... [which provides for treaties granting rights to third parties where the parties intend to,¹⁹ and the assumption of their consent to the granting of that right]... shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.²⁰

Therefore, by exercising the right (if not before), the state must be taken as having consented to the right in accordance with paragraph 1, and comply with the conditions under which that right may be exercised.²¹

Leaving aside the fact that the Rome Statute does not (and could not) impose any obligation on non-States Parties to cooperate with the Court (although they may do so—and the Court is entitled to ask them to do so—Articles 15(2) and 87(5)),²² the Rome Statute contains other provisions to further protect third parties. For example, there are protections for information provided in confidence (Article 87(5)) and a mechanism to determine priorities between requests for extradition and surrender (Article 90).²³ By far the most important though, and the one that has caused the most consternation, is immunities. It is, to this author, reasonably clear that state (functional) immunity does not attach

¹⁷ See e.g. U Ramanathan, ‘India and the ICC’ (2005) 3 *Journal of International Criminal Justice* 627; H Abtahi, ‘The Islamic Republic of Iran and the ICC’ (2005) 3 *Journal of International Criminal Justice* 635; B B Jia, ‘China and the International Criminal Court: Current Situation’ (2006) 10 *Singapore Yearbook of International Law* 87; for a useful contextual analysis of the Chinese position see D Zhu, ‘China, the International Criminal Court and International Adjudication’ (2014) 62 *Netherlands International Law Review* 43.

¹⁸ See generally D Ntanda Nsereko, ‘Article 18’ in Triffterer (n 15) 627.

¹⁹ Which is clearly the case here.

²⁰ See generally Villiger (n 4) 481 ff. On its customary status see ibid., 488; (and more sceptically) P D’Argent, ‘Article 36’ in Corten and Klein (n 3) 929, 930–1.

²¹ See D’Argent (n 20) 939–40. ²² And there is evidence that they have done so, see *infra*.

²³ See generally Jia (n 12) 164–5.

to international crimes to be prosecuted by the ICC.²⁴ In spite of some views to the contrary,²⁵ under general international law personal immunities remain applicable in relation to domestic courts (including with respect to cooperation obligations with the ICC) even with respect to international crimes.²⁶ Hence, although Article 27 of the Rome Statute removes immunities, including personal immunities, when a person is before the ICC itself,²⁷ Article 98 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 Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.²⁸

Hence, seemingly, whilst Parties to the Rome Statute may be taken to have waived such immunities, absent Security Council action non-States Parties' immunities remain.²⁹ Article 98(2) controversially extends this to treaty-based agreements not to surrender (a provision that has been used (and abused) by the US),³⁰ but the main bone of contention has been personal immunities of high-ranking state officials, as we will see in the section on the practice of the ICC on point.

11.2.1 Theme

Having briefly discussed the legal regime, here we are looking also to the *relationship* of the ICC to non-States Parties. This requires us to look beyond the provisions of the Statute, into what Mahnoush Arsanjani and Michael Resiman have called the 'Law in

²⁴ Although there are differences on precisely why; see e.g. D Akande and S Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 *European Journal of International Law* 815; A Orakhelashvili, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah' (2011) 22 *European Journal of International Law* 849; D Akande and S Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili' (2011) 22 *European Journal of International Law* 857. For a careful view see e.g. J Crawford, *Brownlie's Principles of Public International Law* 8th edn (Oxford: Oxford University Press 2012) 500–1. For opposition see B B Jia, 'The Immunity of State Officials for International Crimes Revisited' (2012) 10 *Journal of International Criminal Justice* 1303.

²⁵ Canvassed (sympathetically), for example, in Y Naqvi, *Impediments to Exercising Jurisdiction Over International Crimes* (The Hague: T. M. C. Asser Press 2010) 262–86.

²⁶ See R Cryer, H Friman, D Robinson and E Wilmshurst, *An Introduction to International Criminal Law and Procedure* 3rd edn (Cambridge: Cambridge University Press 2014) chapter 21.

²⁷ Whether this can be done in relation to non-parties is far from uncontroversial, see e.g. D Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 407; Cryer et al. (n 26) 556–61.

²⁸ See generally C Kreß and K Prost, 'Article 98' in Triffterer (n 15) 1601.

²⁹ On such action see *infra*.

³⁰ See D Scheffer, 'Article 98(2) of the Rome Statute: America's Original Intent' (2005) 3 *Journal of International Criminal Justice* 333.

Action' of the ICC.³¹ Here, building upon earlier work,³² there is an underlying theme that animates this chapter. This is diplomacy. The ICC, although a judicial institution, exists in a political world, and therefore, whether it (or anyone else) likes the fact, it has to engage in some forms of diplomatic activity. There are various reasons for this. One, for example, is the attempt to gain more States Parties to the Statute, thus increasing its bailiwick both jurisdictionally and for the hugely important issue of obtaining cooperation, both from States Parties and non-States Parties. This latter aspect may not seem to be the most exciting aspect of the Court's practice, and it has to a considerable extent been passed over in the commentary on the Court. However, it is key to the success of the Court that it obtain cooperation.³³ Without it, cases cannot be effectively progressed, either by the prosecution or defence.

That said, unfortunately to some extent, against the background of a weak enforcement regime for States Parties (as the difficulties the ICC is having with respect to witness protection shows³⁴), cooperation is all too negotiable even with States Parties, while with non-States Parties there is (outside of specific decisions of the Security Council on point) no obligation whatsoever to comply with orders of the ICC, hence any cooperation is all too often a matter of goodwill. That goodwill has to be, one way or the other, earned by the ICC, and, like all forms of diplomacy, involves compromise.

It would be impossible to look properly at the UN and run together the Security Council and General Assembly, but all too often when discussing the ICC, the various actors in the Court, the judges, Prosecutor, and Registry, are rather lumped together. Even when it comes to the interpretation of the Statute, it is crucial to remember that the judges are not the only interpreters of the Statute; the Prosecutor also has a role here, and a very important one. This is with respect to whether to initiate an investigation when he has either had a matter referred to him by States Parties or the Security Council under Article 12, or by virtue of the *proprio motu* powers provided for in Article 15 of the Statute.³⁵

Indeed, given the political fallout that has accompanied prosecutorial choices so far (in particular, the criticisms of the prosecutor for focusing (rightly or wrongly) on Africa),³⁶ in terms of the perceived legitimacy of the Court, the Prosecutor's role may be considered the most important one. Deciding which situations to investigate and which not to, is an exercise in judgement. Hence, in spite of the fact that Luis Moreno-Ocampo, the first prosecutor of the ICC, repeatedly asserted that he acted solely on the law, and would not take into account political considerations, this was not broadly believed. And rightly so; the decision on situation selection is one that cannot be taken

³¹ M Arsanjani and M Resiman, 'The Law-in-Action of the International Criminal Court' (2005) 99 *American Journal of International Law* 385.

³² Cryer (n 10).

³³ D Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press 2014) is a useful investigation of the ICC's work here.

³⁴ See R Cryer, 'Witness Tampering and International Criminal Tribunals' (2014) 27 *Leiden Journal of International Law* 191.

³⁵ See W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press 2010) 314 ff.

³⁶ On which see e.g. K Ambos, 'Expanding the Focus of the African Criminal Court' in W Schabas et al. (eds), *The Ashgate Research Companion to International Criminal Law* (Aldershot: Ashgate 2013) 499.

on solely legal grounds, and the practice of the prosecutor has been criticized on this basis. In an earlier contribution, this author looked into the decision of the prosecutor not to investigate the Iraq situation with this in mind. It is the purpose of parts of this chapter to look at some of the more recent aspects of the practice of the Court, to re-emphasize that the Court and its constituent organs have a necessary diplomatic side. This involves both Parties to the Rome Statute, non-Party States, and indeed other actors, including the Security Council.

11.3 The Practice of the Court with Respect to Third Parties

This section will investigate various aspects of the practice of the ICC. It will evaluate the evolution of the law relating to third parties, with particular focus on situations in which the Security Council has become involved. This raises complex issues of the nature of the underlying legal basis of the obligations on individuals and states in such circumstances, especially, in the former instance, aggression, and in the latter, immunities. Turning then to the practical political functioning of the Court, it will investigate the practice of the various organs of the Court situations in which the ICC has been asserting jurisdiction over non-States Parties. It will not discuss the practice of the ICC where a successful declaration has been made under Article 12(3) of the Statute, as such declarants are, for our purposes today, to be analogized to parties to the Statute.

To further the discussion this chapter will then look at the developing relationship between the ICC and one of the most important states in the contemporary world, the United States. In a linked manner, it will also look to the situation of Palestine, a country that has attempted to issue an Article 12(3) declaration, as it raises important issues relating to various States Parties and non-States Parties. That section will finish with a discussion of situations relating to third parties where the Security Council has not chosen to refer the situation to the ICC, to some extent to show the centrality of the role of the Security Council when it comes to non-States Parties, and the continued role of politics in international criminal law.

11.3.1 The nature of obligations for non-Party States and their nationals after a Security Council referral

Security Council referrals of situations in non-Party States have raised the issue of the basis of obligation for both non-Party States and individuals. When it comes to States Parties and their nationals (or for crimes on the territory of a State Party), the basis of obligation on the state is quite clearly its ratification of the Statute, and the basis of obligation on the individual can be either the Statute itself, or customary international law.³⁷ As Milanovic accurately observes, however, where there is an Article 12(3) declaration or Security Council referral,³⁸ owing to the *nullum crimen*

³⁷ See M Milanovic, 'Is the Rome Statute Binding on Individuals (and Why We Should Care)' (2011) 9 *Journal of International Criminal Justice* 25, 27 ff.

³⁸ The issues in relation to individuals are the same in both situations, so for simplicity's sake we will concentrate on the latter situation here.

sine lege principle, the former explanation of the binding nature of the direct criminal norms in those circumstances must be customary law; hence the ICC needs to read the Statute down to conform to customary law.³⁹ This is at one level important for the jurisdiction of the current jurisdiction of the Court, as in both instances of Security Council referrals the referral was, in part, retrospective. In terms of practical effects, however, this should not cause too many problems for the Court. This is because the Rome Statute reflects either pre-existing customary international law,⁴⁰ or customary law crystallized in the Rome negotiations along the lines envisioned in the *North Sea Continental Shelf* cases.⁴¹ One example of this may be the (criminalization of the) prohibition of the use of child soldiers. Even on the narrower view of pre-existing custom, Judge Robertson in the *Norman* case took the view that the crime's customary status crystallized at Rome.⁴²

The Rome 'fix', however, does not travel as well to Kampala, where the parties to the Rome Statute drafted, for the purposes of that Statute, the crime of aggression.⁴³ There is practice from the post-War era⁴⁴ which is sufficient to ground a customary crime of aggression.⁴⁵ But customary law was not really the basis of the compromise in Kampala,⁴⁶ and it is at the very least arguable that the definition in the Kampala amendments departs from customary international law.⁴⁷ It is (probably) true that, owing to the jurisdictional regime that accompanies the Kampala amendments, both the aggressor and victim states must have ratified the amendments for the ICC to have treaty-based jurisdiction over aggression.⁴⁸ However, this does not answer the question of the basis of the criminal prohibition on individuals in the event of a Security Council referral,⁴⁹ and the relationship of such referrals with the *nullum crimen sine lege* principle.⁵⁰

³⁹ Milanovic (n 37) 50.

⁴⁰ For reasoning to this effect for the vast majority of crimes see R Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press 2005) chapter 5.

⁴¹ *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) [1969] ICJ Rep 9, 39–41.

⁴² See Dissenting Opinion of Justice Robertson in Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), *Norman*, SCSL-14-14-AR72(E), AC, SCSL, 31 May 2004. See M Happold, 'International Humanitarian Law, War Criminality and Child Recruitment: The Special Court for Sierra Leone's Decision in *Sam Hinga Norman*' (2005) 18 *Leiden Journal of International Law* 283.

⁴³ For discussion see C Kreß and L von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 *Journal of International Criminal Justice* 1179. For the *travaux* see S Barriga and C Kreß, *The Travaux Préparatoires of the Crime of Aggression* (Cambridge: Cambridge University Press 2012).

⁴⁴ See K Sellars, *Crimes against Peace in International Law* (Cambridge: Cambridge University Press 2012).

⁴⁵ *R v Jones* [2006] UKHL 16; see also R Cryer, 'Aggression at the Court of Appeal' (2005) 10 *Journal of Conflict and Security Law* 209.

⁴⁶ See Cryer et al. (n 26) 311–16.

⁴⁷ M Milanovic, 'Aggression and Legality: Custom in Kampala' (2012) 10 *Journal of International Criminal Justice* 165, p. 184.

⁴⁸ Art 15bis see Cryer et al. (26) 323–5.

⁴⁹ The Council is able to vest the ICC with jurisdiction over non-States Parties (or States Parties that have not ratified the amendments by Art 15ter, see *ibid.*, 325–6.

⁵⁰ See Milanovic (n 47).

Leila Nadya Sadat has argued that the Rome negotiations represented a ‘constitutional moment’ with respect to the sources of international law, such that the asserted international community has developed to the extent to which it may have adopted a legislative function.⁵¹ There are considerable reasons to be sceptical of this.⁵² Beyond this, it is a further stretch, especially given the nature of the negotiations, and the linkage of jurisdiction and substance that characterized the Kampala negotiations, to assert that it was a similar ‘constitutional moment’ that Sadat asserts occurred in Rome. On the other hand, most of the critiques of the Kampala definition are that it is narrower, rather than broader, than customary international law,⁵³ so perhaps customary law can come to the rescue here, too.⁵⁴ Where (and if) it may be broader, owing to the *nullum crimen* principle, the ICC may have to engage in the difficult task of determining what the customary definition of aggression is. This will not be simple or uncontroversial, but the material is available from which such a definition may be derived. Furthermore, given the time frame before the ICC may operationalize its jurisdiction over aggression (not until at least 2017, and probably some time after that),⁵⁵ there may be some room for the ICC to argue that the Kampala definition has come to reflect customary law.

Turning to the basis of obligations on states, and the extent of such obligations, in the event of a Security Council referral, this is an issue which has caused far more controversy than the similar issue relating to individuals. It has arisen with particular force with respect to the question of obligations to cooperate and the applicability of immunities, in particular those of high-ranking state officials (especially, owing to the indictment of Omar Al-Bashir, Heads of State) of non-States Parties.⁵⁶ Sudan is not a Party to the Rome Statute, but in 2005 the Security Council referred the situation in Darfur to the ICC in Resolution 1593.⁵⁷ Operative paragraph 2 of that resolution required Sudan (although not other non-Party States) to ‘fully cooperate’ with the ICC.⁵⁸ As the ICC has noted, this means that other non-Parties, in spite of the Security Council referral, are not obliged to cooperate with the Court (although they

⁵¹ L Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (New York: Transnational 2002), 79, 103.

⁵² For critique see R Cryer, ‘International Criminal Law vs State Sovereignty: Another Round?’ (2005) 16 *European Journal of International Law* 979, 984–5.

⁵³ K Heller, ‘Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression’ (2007) 18 *European Journal of International Law* 477.

⁵⁴ As Milanovic accepts in (n 47) 185.

⁵⁵ Art 15bis, para. 3.

⁵⁶ For States Parties, ratification of the Rome Statute has been taken as a waiver of such immunities. On the Al-Bashir indictment see A Cayley, ‘The Prosecutor’s Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide’ (2008) 6 *Journal of International Criminal Justice* 829; C Gosnell, ‘The Request for an Arrest Warrant in *Al Bashir*: Idealistic Posturing or Calculated Plan?’ (2008) 6 *Journal of International Criminal Justice* 841.

⁵⁷ On the referral see R Cryer, ‘Sudan, Resolution 1593 and International Criminal Justice’ (2006) 19 *Leiden Journal of International Law* 195.

⁵⁸ G Sluiter, ‘Obtaining Co-operation from Sudan—Where is the Law?’ (2008) 6 *Journal of International Criminal Justice* 871, 877–8 queries the nature of this obligation, but as he notes, the ICC has taken it to mean that Part 9 of the Rome Statute is applicable. See further D Akande, ‘The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC’ (2012) 10 *Journal of International Criminal Justice* 299. The cognate paragraph of Resolution 1970 that referred the situation in Libya is similarly framed.

are ‘urged’ to do so).⁵⁹ Were the Council to require cooperation by non-States Parties, the basis of the obligation is the relevant Security Council Resolution (and the UN Charter) rather than the Rome Statute per se.⁶⁰

Soon after the passage of Security Council Resolution 1593, differing views were expressed about whether Sudan’s obligations under that resolution meant that President Al-Bashir’s immunities as Head of State were abrogated, such that Article 98(1) notwithstanding, other States (Parties to the Rome Statute or not) could arrest and transfer him to the Court. Paula Gaeta took the view that in spite of Resolution 1593, and the fact that the ICC, as an international court, could lawfully try Al-Bashir, his immunity before domestic jurisdictions was retained, and thus Article 98(1) remains applicable.⁶¹ This follows, for Gaeta, from the fact that the ICC has to abide by its Statute, and has not obtained a waiver of immunity from Sudan, which, Resolution 1593 notwithstanding, remains a non-State Party to the Statute.⁶² In addition, unlike the resolutions setting up the ICTY and ICTR (827 and 955 respectively), non-States Parties to the Rome Statute are not required to cooperate with the Court, but are merely urged to do so; hence for Gaeta, Article 103 of the UN Charter does not ‘bite’ so as to give those states a defence that trumps immunity.⁶³ Dapo Akande has responded to this, arguing that Resolution 1593 renders Sudan functionally a party to the Rome Statute; therefore, it can be taken as having given up its immunities, owing to the applicability of Article 27 to national authorities involved in cooperation as well as before the ICC.⁶⁴ This is because the Court must function in accordance with its Statute, and that includes Article 27, and any other interpretation would render Article 27 practically redundant.⁶⁵

The result Akande has argued for has prevailed in the jurisprudence of the Court (although African states have not, in spite of his visits, arrested Al-Bashir, and the African Union has insisted on the continued applicability of Article 98),⁶⁶ albeit not generally on the basis of his reasoning. In the early decisions on non-cooperation by states (Malawi and Chad) the relevant ICC Pre-Trial Chamber determined that those states had violated their obligations to arrest Al-Bashir.⁶⁷ It did so on the basis that in

⁵⁹ E.g. Kuwait Decision (n 6) para. 9 ⁶⁰ USA Decision (n 6) para. 10.

⁶¹ P Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’ (2009) 7 *Journal of International Criminal Justice* 315.

⁶² Ibid., 327–30. ⁶³ Ibid., 330–1.

⁶⁴ D Akande, ‘The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir’s Immunities’ (2009) 7 *Journal of International Criminal Justice* 333. Tladi criticizes this on the basis that it does not explain why the Security Council thought it necessary to include a duty to cooperate on Sudan in Resolution 1593 (D Tladi, ‘The ICC Decisions on Chad and Malawi: On Cooperation, Immunities and Article 98’ (2013) 11 *Journal of International Criminal Justice* 199, 212); however, this probably imputes too much subtlety to a negotiated text coming from a political body like the Security Council.

⁶⁵ Ibid., 340–2.

⁶⁶ See C Stahn, ‘Libya, The International Criminal Court and Complementarity: A Test for “Shared Responsibility”’ (2012) 10 *Journal of International Criminal Justice* 325, 331; Tladi (n 64) 201–4.

⁶⁷ Decision Pursuant to Art 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, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-139, PTC I, ICC, 12 December 2011 (‘Malawi Decision’); Décision Rendue en Application de l’Article 87-7 du Statut de Rome Concernant le Refus de la République du Tchad d’Accéder aux Demandes de Coopération dé Livrées par la Cour Concernant l’Arrestation et la Remise d’Omar Hassan Ahmad Al-Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-140, 13 December 2011.

the Chamber's view, Heads of State have no immunity before international courts.⁶⁸ They argued that owing to proceedings after the Second World War, prosecutions of Heads of State such as Slobodan Milošević and Charles Taylor, alongside the broad ratification of the Rome Statute, meant that custom had developed to the extent that there is no immunity in these circumstances,⁶⁹ and this includes cooperation.⁷⁰ With respect, the reasoning is rather thin, and the 'precedents' cited are not directly on point, as they are not about cooperation by domestic authorities, but about the question of immunity as a defence when someone is already before the relevant Court.⁷¹ This is not to say that the Chamber was wrong in its result, but its 'working out' was flawed.

When the Court returned to the issue in 2014, in the context of the DRC's failure to arrest Al-Bashir, it changed tack somewhat.⁷² Dropping the customary international law argument, the Chamber opined that:

the DRC claims that by issuing the 26 February 2014 Decision the Court placed the DRC in a situation where it was called upon to act inconsistently with its international obligations arising from the decision of the African Union 'to respect the immunities that come with [Omar Al Bashir's] position of Head of State'... The Chamber does not consider that such inconsistency arises in the present case. This is so because 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.' Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan 'cooperate fully' and 'provide any necessary assistance to the Court' senseless. Accordingly, the 'cooperation of that third State [Sudan] for the waiver of the immunity', as required under the last sentence of article 98(1) of the Statute, 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.⁷³

Turning to the DRC's asserted obligations to invoke Article 98(1) as a member of the AU, the Chamber responded that owing to Article 103 of the UN Charter, the implicit waiver contained in Resolution 1593 trumped any obligations the DRC had by virtue of its membership with the AU.⁷⁴ Whether this is considered convincing depends on whether it is thought that the nature of Resolution 1593 renders, *pace* Akande, Sudan essentially a party to the Rome Statute or whether it is necessary for the ICC

⁶⁸ Malawi Decision (n 67) para. 36.

⁶⁹ Ibid., paras 37–43.

⁷⁰ Ibid., para. 44.

⁷¹ Tladi (n 64) 206.

⁷² Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/056-01/09-195, PTC II, ICC, 9 April 2014.

⁷³ Ibid., paras 28–9.

⁷⁴ Ibid., para. 31.

to ask Sudan to waive Al-Bashir's immunity. General principles, such as the duty not to evade treaty obligations⁷⁵ (here under the UN Charter) and the principle *ex injuria jus non oritur*,⁷⁶ militate in favour of the absence of immunity here. Analogously it could also be argued that Sudan is estopped from claiming immunity by the principle *ex delicto non oritur actio*.⁷⁷ The ICC has not, to date, adopted such an approach, although its assertive jurisprudence here is consistent with that of a Court which, in this circumstance, has compulsory, rather than optional, jurisdiction.⁷⁸

11.3.2 Practical aspects of situations referred by the Security Council

The majority of the ICC's practice with respect to non-States Parties has related to the situations referred to it by the Security Council; hence these are the situations upon which we will concentrate. It must be noted, though, that the Security Council has, for the most part, referred the situations, then left the ICC to its own devices, leaving it high and dry when states are unwilling to cooperate.

11.3.2.1 Sudan

The early stages of the story of the relationship between the ICC and Sudan after the referral have been traced elsewhere.⁷⁹ Suffice it to say here that, in spite of sending the situation, the Security Council has proved unwilling to take firm action in the face of the Sudanese contempt for the Court. To all intents and purposes the ICC suffers from an absence of enforcement powers, especially in relation to non-States Parties to the Rome Statute.⁸⁰ However, where the Security Council has sent a situation to the Court, the Security Council is the relevant body that is meant to take action. As a result, the prosecutors, in their reports to the Council, have become increasingly strident in their statements, in an attempt to encourage (or perhaps shame) the Council into taking more forceful action. The early practice of the Council in responding to Sudanese non-cooperation was not promising, although the prosecutor was also rather coy about referring to that failure to help on behalf of the government of Sudan.⁸¹ This began to change by the turn of the decade: in the Prosecutor's Eleventh Report in 2010 the Prosecutor noted the Mechanism established under Security Council 1591 for targeting sanctions, including asset freezing, against individuals 'who (...) commit violations of international humanitarian or human rights law or other atrocities'. Commenting, perhaps a little pointedly, that the Council had previously invoked that process in relation to ICTY indictees, the prosecutor asserted that:

⁷⁵ See B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens 1953) 123: 'International law prohibits the evasion of a treaty obligation under the guise of an alleged exercise of a right.'

⁷⁶ Ibid., 187. ⁷⁷ Ibid., 155–8.

⁷⁸ On this see H Lauterpacht, *The Development of International Law by the International Court of Justice* (London: Stevens 1958) chapter 6.

⁷⁹ R Cryer, 'Darfur: Complementarity as the Drafters Intended?' in C Stahn and M El-Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press 2011) 1091.

⁸⁰ See e.g. Schabas (35) 982–5.

⁸¹ See Sluiter (n 58) 872–3.

[t]he failure to arrest Ahmad Harun and Ali Kushayb sends a signal that impunity will not only be tolerated, it will be encouraged.... The means to act are entirely within the UNSC's remit. The Prosecution would however urge the UNSC to focus first on individual measures in relation to Kushayb and Harun, in particular the identification and freezing of their assets.... the Council can take important measures, to ensure that Ahmad Harun and Ali Kushayb, both charged with crimes of sexual violence as war crimes and crimes against humanity, are subject to individual measures that will isolate them, ultimately ensure their arrest and surrender, and send the message to the victims in Darfur that the UN Security Council is protecting them.⁸²

The request fell on deaf ears in the Council.

Perhaps emboldened by this, alongside the failure of the Council to respond to two notifications to the Security Council of failures to arrest him abroad in 2010,⁸³ in 2011 Al-Bashir visited Djibouti and was not arrested. This led to the Pre-Trial Chamber deciding to inform the Assembly of States Parties and the Security Council of Djibouti's failure to enforce the arrest warrant.⁸⁴ Again, this failed to elicit any response from the Council. This was taken up by the prosecutor in the Fifteenth Report to the Council. Where the prosecutor noted that the role of the Council could not be 'overstated', and that '[w]henever the Council, and the international community at large, have failed to integrate the peace and justice requirements, the government of the Sudan has rejected cooperation'.⁸⁵ On the basis of the fact that the government of Sudan had failed in its obligations to cooperate with the Court, the Prosecutor asserted that the obligation to ensure compliance with the arrest warrants fell on 'the collective community of States' and the Security Council.⁸⁶ The Council, yet again, did not step up to the proverbial plate.

Therefore, in its Seventeenth Report, the Prosecutor noted the importance of the Security Council and the ASP to the Rome Statute to deal with the issue of Sudanese non-cooperation 'in a concerted and united fashion', and called upon the Security Council to ensure Sudanese compliance with the ICC's arrest warrants.⁸⁷ Yet again, the Council's response could be characterized by rolling tumbleweed.

This proved too much for the prosecutor, who, after Al-Bashir's visits to Ethiopia and Saudi Arabia, and the 13 November Pre-Trial Chamber decisions on non-cooperation

⁸² Eleventh Report of the Prosecutor to the UN Security Council Pursuant to UNSCR Resolution 1593 (2005), 17 June 2010, paras 64–6 and 94.

⁸³ Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-107, PTC I, ICC, 27 August 2010; Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-109, PTC I, ICC, 27 August 2010.

⁸⁴ Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute About Omar Al-Bashir's Recent Visit to Djibouti, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-129, PTC I, ICC, 12 May 2011.

⁸⁵ Fifteenth Report of the Prosecutor to the UN Security Council Pursuant to UNSCR Resolution 1593 (2005), 5 June 2012, para. 51.

⁸⁶ Ibid., para. 57.

⁸⁷ Seventeenth Report of the Prosecutor to the Security Council Pursuant to UNSCR Resolution 1593 (2005), 5 June 2013, paras 46 and 50.

with arrest warrants by (States Parties) the CAR and Chad, in her Eighteenth Report dropped, to a large extent, the diplomatic idiom with the Council. In the report she recalled the eight communications from the Court to the Council about Sudanese non-cooperation which had gone without response or action by the Council.⁸⁸ She continued:

The Council's silence and inaction contributes to the Sudan's continued determination to ignore the Council. As the Pre-Trial Chamber has further stated, '[w]hen the Security Council, acting under Chapter VII of the UN Charter, refers a situation to the Court as constituting a threat to international peace and security, it is expected that the Council would respond by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of the relevant State Party to the Statute to cooperate in fulfilling the Court's mandate entrusted to it by the Council. Otherwise, if there is no follow up action on the part of the Security Council, any referral by the Council to the ICC under Chapter VII would never achieve its ultimate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile.' ... Without stronger action by the Security Council and State Parties, the situation in the Sudan is unlikely to improve and the alleged perpetrators of serious crimes against the civilian population will not be brought to justice.⁸⁹

Sadly, the Council, in spite of referring the situation to the ICC, has proved entirely unwilling to follow up that referral with action designed to deal with Sudanese contumacy. As the prosecutor has said, this sends a message that the Security Council is unwilling to ensure that its actions with respect to non-States Parties are followed up. Given that the ASP, or the ICC itself, has no enforcement powers, this renders the Court incapable of functioning effectively with respect to non-States Parties who need to be 'encouraged' (coerced) into cooperation.⁹⁰ Without the support of the Security Council, there is little the ICC can do. It is in the position of a First World War Officer who has gone 'over the top' only to find no one has followed, and who is therefore trapped in No Man's Land.

11.3.2.2 Libya

Unfortunately, the Sudanese situation is not unique. In February 2011 the Security Council, in Resolution 1970, decided to send the situation in Libya to the ICC.⁹¹ In many ways, the resolution followed the precedent of Resolution 1593, refusing funding, granting immunity from the ICC's jurisdiction to peacekeepers, and imposing a duty to cooperate on Libya, but not other non-Party States. Unfortunately, in spite of the very quick (too quick for some)⁹² action of the prosecutor in bringing arrest

⁸⁸ Eighteenth Report of the Prosecutor to the UN Security Council Pursuant to UNSCR Resolution 1593 (2005), 11 December 2013, paras 53–4.

⁸⁹ *Ibid.*, paras 55 and 58.

⁹⁰ As the Court had said on various occasions, 'the ICC has no enforcement mechanism and thus relies on the States' cooperation, without which it cannot fulfil its mandate and contribute to ending impunity', see USA Decision (n 6) para. 12.

⁹¹ See generally Stahn (n 66).

⁹² See Bosco (n 33) 167–71, who notes that the Prosecutor here rather went against the wishes of the US and others.

warrants against, amongst others, Colonel Gaddafi, his son Saif, and his notorious head of security Abdullah Al-Senussi, there was little practical follow-up by the Council to support the prosecutor.

The closing of proceedings against Colonel Gaddafi in November 2011 after his death left proceedings against Saif Gaddafi and Al-Senussi. Libya has brought complementarity challenges in relation to both. It must be said that it is difficult to reconcile the decisions in relation to them. In relation to Gaddafi, the relevant Pre-Trial Chamber decided that, owing to the fact that such investigative steps that Libya had taken did not relate to the same case in the ICC's interpretation of that concept, and Gaddafi remained in Zintan, thus beyond the reach of the new authorities in Tripoli, who were unable to provide him with legal representation, his case was not barred by the principle of complementarity.⁹³ These findings were upheld, Judge Ušacka dissenting, by the Appeals Chamber in May 2014.⁹⁴ This was on the basis that the Chambers could not, on the basis of the evidence presented to them, determine the contours of the Libyan investigation,⁹⁵ and given this, it was unnecessary to determine willingness and ability.⁹⁶

With regard to Al-Senussi, however, who is in the hands of the Tripoli authorities, the Pre-Trial Chamber determined that the Libyan authorities, in spite of the fact that owing to their security situation they could not provide him with counsel, were able to invoke complementarity to render the case inadmissible.⁹⁷ As Kevin Heller has said, the two cases are irreconcilable on point.⁹⁸ There are those who have suggested that the fact that Al-Senussi may have information that would be highly embarrassing to some of the ICC's biggest backers relating to links they had with the Gaddafi regime (the UK in particular) and the US may have affected the Chamber's willingness to countenance trial before the ICC itself.⁹⁹ Such claims must, of course, remain speculative, but the thin nature of the reasoning in the case on point does not help remove such suspicions that diplomatic concerns may trump legal ones.

It is also the case that even where the ICC has determined the case to be admissible (i.e. Saif Gaddafi), Libya has refused to transfer the defendant; indeed it has gone as far as to detain ICC staff who were sent to visit him to take instructions.¹⁰⁰ Perhaps

⁹³ *Gaddafi Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01-344-Red, PTC I, ICC, 31 May 2013. See F Mégrét and M Samson, 'Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials' (2013) 11 *Journal of International Criminal Justice* 571.

⁹⁴ *Gaddafi Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'*, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01-547-Red, AC, ICC, 21 May 2014.

⁹⁵ *Ibid.*, para. 86.

⁹⁶ *Ibid.*, para. 213. Given the transitional nature of the Libyan situation, and her interpretation of the complementarity test, Judge Ušacka would have remitted the matter back to the Pre-Trial Chamber for rehearing.

⁹⁷ *Gaddafi Decision on the admissibility of the case against Abdullah Al-Senussi, Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-466-Red, PTC I, ICC, 11 October 2013.

⁹⁸ K Heller, 'The PTC I's Inconsistent Approach to Complementarity and the Right to Counsel' (*Opinio Juris*, 12 October 2013) <<http://opiniojuris.org/2013/10/12/ptc-inconsistent-approach-right-counsel/>> accessed 11 September 2014.

⁹⁹ R Fisk, 'Is the Hague Making a Mockery of Justice so that the CIA and MI6 Can Save Face?', *The Independent*, 31 October 2013.

¹⁰⁰ Fourth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011), 7 November 2011, para. 9.

surprisingly, the prosecutor's reports have remained decidedly diplomatic about Libyan intransigence and abuse of ICC staff.¹⁰¹ Indeed, the ICC apologised to Libya for the actions of those officials.¹⁰² In spite of the continued failure of the Libyan authorities to transfer Gaddafi to the Court, the prosecutor has only gone so far as to say that when meeting Libyan officials, '[t]he Office took the opportunity of the January [2014] meeting to call on the Libyan representatives of the Government's obligation to immediately surrender Saif Al-Islam Gaddafi to the Court, and does so again here'.¹⁰³ Some suspect that the soft-pedalling has to do with the release of the ICC officials, although it may also be to do with the fact that the aggressive tone adopted (including before the Security Council) by the prosecutor in relation to Sudan has not borne fruit. Equally, the Security Council has been similarly silent in relation to Libyan obfuscation and failure to respond to ICC orders here. Given this, Libya has continued to proceed on its own course, ignoring the orders of the Court at will. The ICC is, again, left alone without enforcement authority with respect to a non-State Party, as the body that could take action, the Security Council, has chosen not to do so.

11.3.3 The ICC and P-1(?): the United States

As is well known, the United States was heavily involved in the run-up to, and negotiations of, the Rome Statute.¹⁰⁴ However, it was unhappy with the outcome of the negotiations, and voted against the Statute at the end of the Rome Conference. Its opposition was framed in legal terms, but these were, in reality, a reframing of political objections into legal form.¹⁰⁵ It has been suggested that the main issue was the role of the Security Council,¹⁰⁶ but this really was epiphenomenal. The real sticking point was the possibility that the ICC could exercise jurisdiction over US nationals;¹⁰⁷ the role of the Security Council was really raised as a means to an end for ensuring exemption for US nationals. Although the US signed the Rome Statute at the last moment

¹⁰¹ See e.g. Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011), 8 May 2012, paras 10–11.

¹⁰² L Harding and J Borger, 'Libya Frees International Criminal Court Team Accused of Spying', *The Guardian*, 2 July 2013.

¹⁰³ Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011), 8 May 2014, para. 13

¹⁰⁴ See e.g. M Scharf, 'Getting Serious About an International Criminal Court' (1994) 6 *Pace International Law Review* 103; D Scheffer, 'The International Criminal Court: A Negotiator's Perspective' (2001) 167 *Military Law Review* 1; D Scheffer, *All the Missing Souls* (Princeton: Princeton University Press 2012) chapter 8. A more critical view can be found in M C Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of the International Criminal Court' (1999) 32 *Cornell International Law Review* 443. A useful early set of essays is S Sewell and C Kaysen, *The United States and the International Criminal Court* (New York: Rowman and Littlefield 2000).

¹⁰⁵ D Forsythe, 'The United States and International Criminal Justice' (2002) 24 *Human Rights Quarterly* 974; J Ralph, *Defending the Society of States: Why the US Opposes the International Criminal Court and its Vision of World Society* (Oxford: Oxford University Press 2007).

¹⁰⁶ W Schabas, 'United States Hostility to the International Criminal Court: It's All About the Security Council' (2004) 15 *European Journal of International Law* 701.

¹⁰⁷ See e.g. B Broomhall, *International Criminal Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press 2003) 163–4.

(31 December 2000), this was to ensure its role in influencing the later PREPCOM rather than as a true commitment to the ICC.¹⁰⁸

Even the signature was too much for the Bush administration, who withdrew from the PREPCOM and, in 2002, on the occasion of the 60th ratification of the Statute being received, (in)famously notified the Secretary General (the depositary of the Rome Statute) that it did not intend to ratify the Statute and therefore had no obligations (including not to defeat its object and purpose).¹⁰⁹ It then took various measures, *inter alia*, in the Security Council, but also purportedly in pursuance of a policy of creating rights under Article 98(2) through bilateral treaties.¹¹⁰ US hostility was hardly assuaged when one of the ICC's most vociferous critics, John Bolton,¹¹¹ came into the State department. However, in part owing to the good offices of France and the UK, the US was persuaded not to veto the referral of the situation in Darfur to the ICC in 2005.¹¹² US concerns were considerably assuaged, however, by the fact that the early practice of the ICC (in particular, the prosecutor) had been careful not to threaten US interests.¹¹³ This led Court officials also not to 'quibble' too much about the (questionably legal) limitations in Resolution 1593 (in particular, about funding and exemption of non-Party peacekeepers), and to treat anything relating to the US with considerable discretion. Such activities led the US to quietly pass material to the prosecutor to assist with investigations.¹¹⁴

The diplomatic role of the Court (in particular, the prosecutor) was clear to those who were watching. Such a role is key with non-Party States if cooperation is to be forthcoming. Whether it is worth the price (not investigating situations where great power interests are at issue) is another question.¹¹⁵ Nonetheless, it is beyond doubt that the ICC, whilst not always agreeing with US views, has discreetly sought them out as part of a (not always well-implemented) policy to engage the US and ensure its continued (admittedly somewhat limited) support during the second Bush administration (which notably did not include Bolton).¹¹⁶

With the change of administration to that of Barack Obama, and the introduction of officials more sympathetic to the ICC, relations with the Court improved further, in part owing to the continued silence of the prosecutor with respect to the Middle East and Afghanistan (where non-State Party nationals (especially US ones) had been accused of international crimes).¹¹⁷ Such discretion fed into the decision of the US to actively support the referral of the situation in Libya to the ICC in Resolution 1970 (2010), representing an extraordinary step, and voting for such a referral has considerably limited the US's ability to criticize the Court, although the US has used its support to leverage its efforts to influence the prosecutor over the referral.¹¹⁸ In addition,

¹⁰⁸ Broomhall (n 107) 168–72. ¹⁰⁹ Ibid., 178–81.

¹¹⁰ On these see D McGoldrick, 'Political and Legal Responses to the International Criminal Court' in D McGoldrick et al. (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart 2004) 389.

¹¹¹ See e.g. J Bolton, 'Risks and Weaknesses of the International Criminal Court from an American Perspective' (2000–1) 41 *Virginia Journal of International Law* 186.

¹¹² Bosco (n 33) 109–11. ¹¹³ Ibid., 112. ¹¹⁴ Ibid., 113–15.

¹¹⁵ We will return to this, *inter alia*, in the context of Palestine.

¹¹⁶ Bosco (n 33) 142–4 and 147.

¹¹⁷ On contacts between the US and ICC on point see *ibid.*, 161–2. On Afghanistan see *ibid.*, 165.

¹¹⁸ *Ibid.*, 169–71.

the new prosecutor, Fatou Bensouda, has been fairly clear that she will continue the (unexpressed) policy of not threatening US interests.¹¹⁹ This has, of course, not played as well in all constituencies, and has allowed critics of the Court (some of whom, it has to be said, are hardly impartial) to portray the Court as a tool of imperialist powers.¹²⁰

An interesting issue here is that the prosecutor has actively sought to engage the US at a diplomatic level, whilst, at least seemingly, not doing the same with Russia and China. The reasons for this must remain speculative, but good candidates must include the fact that they are very unlikely to become parties to the Rome Statute, or cooperate with the Court in any meaningful fashion. There are limits to what diplomacy can do, and perhaps to engage to the extent to which those states could be induced to change their mind would be a compromise too far. That said, others could say the same about the role the ICC has adopted (and the compromises it has made) with respect to the US.

11.3.4 A Prosecutor's headache: Palestine

It is difficult to imagine a more controversial situation that could come across a prosecutor's desk than that in the Middle East, in particular Israel/Palestine. That conflict has caused considerable vexation for a number of domestic jurisdictions, Belgium and the UK to name but two.¹²¹ Therefore, it is unlikely that the prosecutor particularly welcomed being dragged into the controversy in January 2009, when the Palestinian Authority submitted what is asserted to be an Article 12(3) acceptance of the ICC's jurisdiction, with specific reference to the Gaza Strip and Israel's deeply controversial 'Operation Cast Lead'.¹²² Not only was this, naturally (given the tensions in the area), deeply controversial as a matter in itself, but it also raised the issue of Palestinian statehood.¹²³

This is because, owing to the contested status of Palestine at the time, it was not clear whether or not Palestine was entitled to make such a declaration. Article 12(3) refers to states; therefore, whether or not he decided to open an investigation or not, to accept the declaration would have required the prosecutor to accept the statehood of Palestine. This would have had huge political effects, and the US had made it clear that it was hostile to such a move.¹²⁴ That said, to reject the declaration would reduce the legitimacy of the Court in the eyes of many states who supported Palestinian statehood. Either decision would have caused considerable political fallout. Not least it

¹¹⁹ Ibid., 174–5.

¹²⁰ K Roth, 'Africa: The Attacks on the International Criminal Court' (2014) LXI(2) *New York Review of Books* 32, 34.

¹²¹ See S Ratner, 'Belgium's War Crimes Statute: A Post-Mortem' (2003) 97 *American Journal of International Law* 888; S Williams, 'Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions' (2012) 75 *Modern Law Review* 368.

¹²² For an early discussion see Y Ronen, 'ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities' (2010) 8 *Journal of International Criminal Justice* 3.

¹²³ On which, see e.g. J Crawford, *The Creation of States* 2nd edn (Oxford: Oxford University Press 2006) 434–48.

¹²⁴ Bosco (n 33) 161–2.

would involve the Prosecutor asserting authority to determine statehood,¹²⁵ something that tends to be restricted to States; the UN, for example, does not claim such competence for itself. It is true that luminaries such as Alain Pellet have suggested that the Prosecutor (and the ICC) could take a narrower, functional approach to the Rome Statute and avoid the abstract question of Palestinian statehood, looking instead to whether the conditions in the Rome Statute for an Article 12(3) declaration were met.¹²⁶ However, even if this did not require statehood in the abstract (which it probably does), it might be questioned whether Palestine would reach this lower level even if such an approach were to be taken.¹²⁷ Either way, it would be naive to ignore the fact that an acceptance of the declaration by the Prosecutor would politically not be taken in such a nuanced fashion.

Authoritative voices have spoken both in favour of accepting and of rejecting the declaration, and in truth, the legal arguments were quite finely balanced.¹²⁸ The Prosecutor was being asked to determine the status of Schrödinger's cat, and would be damned if he went one way and damned if he went the other. Therefore, for a long time he simply did nothing. It took over three years, until April 2012, for the Prosecutor to issue the Solomonic judgment that it was for the political organs of the UN or the ICC's ASP to make the judgment on whether Palestine was a state, and therefore, as it stood, the prosecutor could not take the matter further.¹²⁹ This has been criticized as stymieing Palestinian attempts to engage with international law and being a pusillanimous deferral to the competence of the Security Council.¹³⁰ It is also possible, as a matter of law, that the Rome Statute does not permit 'reference out' of such issues.¹³¹ Equally, the Prosecutor had been handed a political hot potato, so it is unsurprising that the outcome was satisfactory to few. The issue has also not gone away yet, since in November 2012, by General Assembly Resolution 67/19, Palestine was accepted as a 'non-member observer State'.¹³² This probably cements Palestine's claim to statehood (at the very least it is recognition of that status by all states voting for the resolution). As such, Palestine is now entitled to make an Article 12(3) declaration.¹³³

It is not hard to have some sympathy for the Prosecutor here, in that the ICC is unlikely to emerge from any engagement with the Israel/Palestine conflict unscathed, or perhaps even intact; the political fallout would be too large. What is interesting about the politics of this situation is that the prime movers (Palestine, Israel, and the US) are

¹²⁵ Ronen (n 122) 22.

¹²⁶ A Pellet, 'The Palestinian Declaration and the Jurisdiction of the International Criminal Court' (2010) 8 *Journal of International Criminal Justice* 981.

¹²⁷ Y Shany, 'In Defence of a Functional Approach to the Interpretation of Article 12(3) of the Rome Statute' (2010) 8 *Journal of International Criminal Justice* 329 (although Shany's piece is prior to Pellet's).

¹²⁸ See Pellet (in favour), and M Shaw, 'The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law' (2011) 9 *Journal of International Criminal Justice* 301 (against).

¹²⁹ Situation in Palestine, OTP, 2 April 2012.

¹³⁰ M Kearney and J Reynolds, 'Palestine and the Politics of International Criminal Justice' in Schabas (n 36) 407, especially 426–9.

¹³¹ A Zimmermann, 'Palestine and the International Criminal Court *Quo Vadis?* Reach and Limits of Declarations under Article 12(3)' (2013) 11 *Journal of International Criminal Justice* 303, 305–6.

¹³² The vote was 138–9–41.

¹³³ Zimmermann (n 131) *passim*.

all non-Parties to the Rome Statute. As it stands, in spite of the fact that Palestine acceded to 20 human rights and humanitarian law treaties (including the 1949 Geneva Conventions),¹³⁴ it agreed not to invoke the ICC's jurisdiction over Palestinian territory during the US brokered talks. These came to an inconclusive close at the end of April 2014. Two days before this, the PLO central council included the Rome Statute as one of the treaties Palestine would seek to accede to in the future.¹³⁵ It filed its instrument of accession to the Rome Statute on 2 January 2015. The situation remains a Sword of Damocles for the Prosecutor, though.

11.3.5 Situations in other non-Party States

Insofar as when it comes to triggering the jurisdiction of the ICC over non-Party States this is the prerogative of the Security Council, it is subject to the vagaries of the politics of that body. Nowhere is this more obvious than in relation to the conflict in Syria. This conflict has been ongoing for over three years, and there have been in the vicinity of a quarter of a million deaths. There have also been credible allegations of the use of chemical weapons and threats of external military intervention by the US, the UK, and France, amongst others. Following years of calls from various NGOs,¹³⁶ and following intensive negotiations with the United States, who sought to ensure that any referring resolution excluded the Golan Heights, France, supported by 64 other countries (including the UK and the US), submitted a draft resolution to a Security Council vote in May 2014. With saddening inevitability, it was vetoed by Syria's two P5 allies, Russia and China.¹³⁷

The Secretary-General's Representative was correct when he told the members of the Council prior to the vote that

[f]or more than three years, this Council has been unable to agree on measures that could bring an end to this extraordinarily brutal war. It has been deeply damaging not only to millions of Syrian civilians, but also the entire region. If members of the Council continue to be unable to agree on a measure that could provide some accountability for the ongoing crimes, the credibility of this body and of the entire Organization will continue to suffer.¹³⁸

However, in spite of Russia and China's rhetoric in favour of the inspiration behind the resolution, and the importance of P5 unity,¹³⁹ it was clear that geopolitical interests

¹³⁴ Unlike its attempted ratification in 1989, which did not lead to it being listed as a State Party, the ICRC now includes it as a State Party.

¹³⁵ For a negative view of this see E Kontorovich, 'Israel/Palestine—The ICC's Uncharted Territory' (2013) 11 *Journal of International Criminal Justice* 979; for a rebuttal see Y Ronen, 'Israel, Palestine and the ICC—Territory Uncharted but Not Unknown' (2014) 12 *Journal of International Criminal Justice* 7.

¹³⁶ See e.g. Amnesty International, 'UN Must Refer Syria to International Criminal Court', *News Release*, 26 April 2011.

¹³⁷ UNSC Draft Res (22 May 2014) UN Doc S/2014/348. See also UNSC Meeting 7180, UN Doc S/PV/7180.

¹³⁸ Ibid., UN Doc (S/PV/7180), 2 (Mr Eliasson).

¹³⁹ Ibid., 12 (Mr Churkin (Russia)) and 13–14 (Mr Wang Min (China)).

had intervened yet again in international criminal justice, further affecting its legitimacy and giving ammunition to its critics.

11.4 Conclusion

Whether states like it or not, the ICC is now a firmly established piece of international architecture. When it comes to non-Parties to the Rome Statute, they can no longer—if they ever could—simply ignore it. In large part that is owing to the (perhaps surprising) role that has been played by the Security Council. Few would have anticipated that in 1998 it would have taken such an active stance. Whether it will continue to do so, however, is a matter of conjecture, and the failure of the Council to refer the desperate situation in Syria to the Court, alongside the decidedly ‘Cold War’ tone of the discussions (not that such idioms were ever totally absent),¹⁴⁰ shows that the Court still lives in a world in which power politics is rife. Even where the Council has seen fit to refer situations, such as Sudan and Libya, geopolitics has not been far away, and the Council is not above using the Court for its own purposes, and then leaving it to its own devices when it needs support to fulfil its mandate. In the absence of some coercive powers being granted to the Court, or support by the Council, when it comes to non-States Parties it is reliant solely on goodwill, and that is often in short supply.

¹⁴⁰ See N White and R Cryer, ‘The Security Council and the International Criminal Court: An Uneasy Relationship?’ in M C Bassiouni et al. (eds), *The Legal Regime of the International Criminal Court: Essays in Memory of Igor Blishchenko* (The Hague: Brill 2008) 455, especially 476 ff.

12

The Frog that Wanted to Be an Ox

The ICC's Approach to Immunities and Cooperation

*Dov Jacobs**

Self-conceit may lead to self-destruction

From Aesop's Fable *The Frog and the Ox*

12.1 Introduction

International law is often seen as being in flux between two logics that challenge each other. One focuses on the sovereignty of states, while the other focuses on human rights. While this view of the international legal order is to a certain extent simplistic in the way it pitches against each other in a rather Manichean way two world views, this dichotomy between human rights and sovereignty can be useful if only to explain and understand the narratives at play at the international level from a discursive point of view. Indeed, this dichotomy shapes our comprehension of the dynamics of international law and taints any discussion about its evolution.

These two logics coexist in the international legal order in ways that are far from smooth. The issue of immunity is a typical example of where these two logics clash. On the one hand, there is the traditional respect for the foreign immunity of Heads of State. On the other hand, there is the increasingly common idea that the respect of the rights of victims of gross human rights violations should trump any claim to sovereign immunity, in order to promote the 'fight against impunity'. This battle of logics has been fought in a number of judicial fora over the past decades, whether at the domestic level, as illustrated by the Pinochet cases,¹ or at the international level, most notably at the ICJ, which rendered two major judgments on the issue over ten years.²

Another battleground for this issue has been international criminal tribunals which have been set up since the beginning of the 1990s to prosecute those responsible for

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¹ On this, see N Roht-Arriaza, 'The Multiple Prosecutions of Augusto Pinochet' in E Lutz and C Reiger (eds), *Prosecuting Heads of State* (Cambridge: Cambridge University Press 2009) 77–94.

² *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment of 14 February 2002, [2002] ICJ Reports 3 ('Arrest Warrant case'); *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, Judgment of 3 February 2012, [2012] ICJ Reports 99.

international crimes in a number of situations.³ These tribunals have also on occasion been led to discuss the issue of immunity from prosecution in the context of international crimes.⁴

This chapter focuses on one narrow aspect of this general discussion on immunities and international criminal law: whether, in the context of the ICC, immunities can be an obstacle to the cooperation of states with the Court, notably in terms of arrest and surrender of suspects. In this sense, it should be noted that this chapter is at the intersection of two mostly separate questions, namely that of immunities and that of state cooperation with the ICC, and it is mainly this intersection that will be explored here, rather than the whole body of law applicable to these two areas.⁵

It should also be noted that this chapter will focus on the more problematic case of where the person being prosecuted is a national of a non-State Party. This choice is made because the situation where two States Parties are involved is quite uncontroversial. Indeed, it is generally accepted that when a state joins the ICC, it accepts that its nationals will be subject to prosecution by the Court, irrespective of official capacity as provided for in Article 27 of the Rome Statute. As a result, there seems to be agreement that a State Party could not oppose any immunity to the arrest and surrender of one of its nationals under Article 98.⁶

With this in mind, after briefly mapping the different interactions between cooperation and immunity (section 12.2), this chapter will address the preliminary question of whether the ICC can in fact exercise jurisdiction against a national of a non-State Party that might benefit from immunity under international law (section 12.3), before actually moving to the heart of the discussion and considering duties to cooperate with the ICC in such a scenario (section 12.4).

12.2 Mapping the Interaction between Immunities and Cooperation in the Rome Statute

12.2.1 The applicable law

The most relevant articles for the purposes of our discussions are Articles 27 and 98 of the Rome Statute.⁷

Article 27 relates to the ‘irrelevance of official capacity’ and provides that:

³ W Burke-White, ‘A Community of Courts: Toward a System of International Criminal Law Enforcement’ (2002–3) 24 *Michigan Journal of International Law* 1.

⁴ M Kelly, *Nowhere to Hide: Defeat of the Sovereign Immunity Defense for Crimes of Genocide and the Trials of Slobodan Milošević and Saddam Hussein* (New York: Peter Lang Publishing Inc. 2005).

⁵ On the general question of the relationship of the ICC to non-States Parties, see Cryer, Chapter 11, this volume.

⁶ For a comprehensive discussion of this issue see, D Akande, ‘International Law Immunities and the International Criminal Court’ (2004) 98 *American Journal of International* 407, 422–6. See also W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press 2010) 1040.

⁷ Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (‘ICC Statute’).

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. 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.

It should be noted that the two paragraphs of Article 27, although conceptually linked, touch upon two very different questions. The first paragraph refers to the fundamental issue of whether there can even be criminal responsibility for a person acting in an official capacity. The second paragraph relates more specifically to the question of whether, even if theoretical criminal responsibility attaches to a person acting in his/her official capacity, immunities might be an obstacle to the exercise of jurisdiction against that person.

The distinction between these two ideas has one major consequence: it means that recognizing the first, while a prerequisite for recognizing the second, does not necessarily and logically entail the second. Indeed, it should be noted that there is no conceptual obstacle to recognizing that a person may have criminal responsibility in relation to conduct performed in an official capacity, but to say that some procedural bars, such as immunities, can prevent certain courts from actually exercising jurisdiction to determine the scope of that criminal responsibility.

This claim needs to be qualified depending on whether we are talking about functional or personal immunity, the former being more problematic than the latter. Indeed, functional immunity, when read traditionally, does entail to some degree an absolute bar from prosecution for acts performed in an official capacity, even after the person leaves office. This means that functional immunity can be deemed to be more than a procedural bar to the exercise of jurisdiction and in fact, constitutes the actual removal of criminal responsibility from the person being targeted. As both are covered by the ICC Statute, however, no issue in that respect need arise in the practice of the Court.

Moving on to the second relevant provision for the purposes of our discussion, Article 98(1) provides that:

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.

The main point to be noted about this provision is that it does not list the possible obligations under international law in relation to immunity that might be an obstacle to a cooperation request. In other words, such obligations, if they exist, need to be found outside the Statute by studying the content of customary international law; for example, or specific treaty provisions that might be in place between the requesting state

and the state of origin of the person whose arrest and surrender is being sought. As a consequence, this requires the Court to enter into a discussion of general international law that can sometimes be problematic and complex, as will be seen in the following developments.

A second point relates to the procedure to be followed. First, the wording of Article 98 makes the obligation of verifying possible conflicting international law obligations relating to immunities incumbent on the Court itself. It is for the Court, before issuing the request for cooperation, to establish whether an obstacle may exist to a request for cooperation, and it is for the Court to try to obtain the waiver of immunity from the third state.

Second, in light of this and other provisions of the Statute, it is doubtful whether the Court can issue general requests for cooperation not targeted towards a specific state in a specific circumstance.⁸ Indeed, no provision of the Statute provides for a general and automatic duty to cooperate as a consequence of the issuance of an arrest warrant. Moreover, the Rome Statute lays down the conditions for a request for cooperation in the following way: ‘The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, *to any State on the territory of which that person may be found* and shall request the cooperation of that State in the arrest and surrender of such a person.’⁹ The wording of this provision, in its plain reading, implies that a request for cooperation has to be addressed to the state on the territory of which the person may be found. This reading of the Statute is in line with the wording of the Statute in relation to immunities under Article 98. Indeed, unless the judges consider that there is generally no immunity under international law for prosecution before the ICC,¹⁰ how can the Court satisfy its obligation to verify if immunities apply in a particular situation before proceeding with a request to surrender, if it sends out a general request for cooperation to all States Parties to the ICC?

12.2.2 Methodological mapping of the interaction between immunities and cooperation

With the applicable law in mind, it is now necessary to consider how it applies where questions of immunity arise in relation to cooperation requests when it concerns a national of a non-State Party.

It should be recalled that there are three ways in which this situation may arise. First, and this is the most often discussed case, is when the UNSC refers a situation to the Court in application of Article 13(b) of the Rome Statute. Indeed, according to the Statute, in case of a Security Council referral, neither of the alternative preconditions for the exercise of jurisdiction (territoriality and nationality) is applicable.¹¹ Second, even in the case of a *proprio motu* decision to open an investigation by the prosecutor¹²

⁸ D Jacobs, ‘Is Chad Really under an Obligation to Arrest Bashir?’ (*Spreading the Jam*, 21 July 2010) <<http://dovjacobs.com/2010/07/21/is-chad-really-under-an-obligation-to-arrest-bashir/>> accessed 25 August 2014.

⁹ Art 89(1) ICC Statute (emphasis added).

¹⁰ See *infra*, section 12.3.

¹¹ Art 12(2) ICC Statute.

¹² Art 13(c) ICC Statute.

or a referral by a State Party,¹³ nationals of a non-State Party might be involved if the crimes were committed on the territory of a State Party. Finally, as a sub-category of the previous one, there is the particular case of states that have not joined the Rome Statute, but have accepted the jurisdiction of the Court by lodging a 12(3) declaration.¹⁴ It now remains to be seen if these situations imply a different legal analysis.

Before entering into this casuistic analysis, it is useful to give a general idea of how this issue is approached. Indeed, a survey of both the literature and the case law shows that there are different ways of answering the question, which rely on different possible relevant criteria which can be distinguished, even if they might sometimes partially overlap. As will be discussed in more detail in the remainder of the chapter, the four main criteria are the following.

The first criterion relates to the quality of the states involved. This means that a different answer might be given to the question, depending on whether the requested state is a State Party to the Rome Statute or not, based on the application of the traditional principle of international law that a treaty can only bind the states that have signed and ratified it.

The second criterion relates to the manner in which the ICC has acquired jurisdiction. According to this approach, a distinction can be drawn between state referrals and *proprio motu* investigations on the one hand, and UNSC referrals on the other. The latter would be considered differently because of the Chapter VII authority that backs them up.

The third criterion, related to the previous two, is more generally the source of the obligation to cooperate. According to this criterion, it might make a difference to determine whether the duty to cooperate arises solely from the Rome Statute, or from an outside source, be it the Charter of the United Nations (UN Charter), customary international law, or human rights/international criminal law treaties, such as the Genocide Convention.

Finally, the fourth criterion relates to the actual content of international law in relation to official capacity. According to this criterion, the obligations to cooperate would depend on what general international law, and more particularly customary international law, has to say on the continuing relevance of immunities in the context of the prosecution of international crimes, both domestically and before international criminal tribunals.

It should be noted that giving preference to a particular criterion has the consequence that the answer to our question will be more or less unitary. For example, if the starting point is the general discussion of international law on head of state immunities, then this might apply across the board to all states, irrespective of their quality of State Party to the Rome Statute. The same holds true if an obligation to cooperate is read into a UNSC Resolution, applicable to all countries. On the other hand, if the starting point is more specifically the Rome Statute itself, then this might lead to differentiated answers depending on whether the state is a party to the treaty or not.

¹³ Art 13(a) ICC Statute.

¹⁴ More on this, see El Zeidy, Chapter 8, this volume.

With this methodological map in mind, the remainder of the chapter will address two related but separate questions: whether the ICC can in fact exercise jurisdiction over a national of a non-State Party (section 12.3) and whether this eventually entails a duty to cooperate in the arrest and surrender of that person (section 12.4).

12.3 Preliminary Question: Can the ICC Actually Exercise Jurisdiction in the First Place?

This question is important. Indeed, while there is no necessary link between the absence of recognition of official capacity under Article 27 and the recognition of official capacity under Article 98, in the sense that a person can see his official capacity denied before the Court while still benefiting from immunity from arrest and surrender by a state, the reverse is obviously not true. If the ICC is going to ask a state to arrest and surrender a national of a non-State Party, it must first be determined that the Court will actually be able to exercise jurisdiction against that individual.

An additional reason this preliminary issue is important is that, in practice, as will be seen later, a number of decisions have confused the two questions, in that discussing the jurisdictional question is in fact already paving the way for discussing the cooperation question.

There are three possible approaches to answering this question: reference to customary international law (section 12.3.1), reference to Security Council powers under Chapter VII of the UN Charter (section 12.3.2), and a textual analysis of Article 27 as simply binding on judges (section 12.3.3).

12.3.1 Reference to customary international law

As mentioned previously, the first possible justification is to go to customary international law and determine whether there might be a rule removing immunities from prosecution before an international tribunal. Establishing this would allow the Court to exercise jurisdiction against a national of a non-State Party because the latter, even if not bound by the Rome Statute, would still be bound by the customary law norm that Article 27 would merely be repeating.¹⁵

This issue was dealt with by the ICC in relation to the execution of the arrest warrant against President Omar Al-Bashir of Sudan in the context of his visits to a certain number of States Parties to the ICC.

In a December 2011 decision, a Pre-Trial Chamber decided to approach this question through the perspective of general international law, assessing ‘whether, under international law, either former or sitting Heads of States enjoy immunity in respect of proceedings before international courts’¹⁶. In order to determine this, the Pre-Trial

¹⁵ P Gaeta, ‘Does President Al Bashir Enjoy Immunity From Arrest?’ (2009) 7 *Journal of International Criminal Justice* 315, 324–5.

¹⁶ Corrigendum to Decision Pursuant to Art 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, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-139-Corr, PTC I, ICC, 12 December 2011, para. 22 (‘Malawi Decision’).

Chamber considered a certain number of examples, dating back to the First World War, where it was claimed that the official position of an individual cannot remove his criminal responsibility or provide him with immunity from prosecution. The problem with these examples is that they in fact confuse two distinct questions: (i) whether immunities can be a bar to the Court exercising jurisdiction; and (ii) whether official capacity can remove a person's criminal responsibility. As discussed previously,¹⁷ Article 27 of the Rome Statute covers and distinguishes both issues, the criminal responsibility issue being dealt with under Article 27(1) and the jurisdictional issue being dealt with under Article 27(2). In the current case, there is no debate about the fact that criminal responsibility might attach to an individual irrespective of his or her official capacity. Only the jurisdictional question is at stake here. As a consequence, most of the examples put forward by the Pre-Trial Chamber in the Malawi Decision are in fact irrelevant to the ongoing debate, as they principally relate to the defence of official capacity.¹⁸

As a result, the only example that remains relevant in the Pre-Trial Chamber's argumentation is that of the *Arrest Warrant* case at the ICJ. In that case, the ICJ, while reaffirming that personal immunities remained in operation in the context of domestic prosecutions, famously claimed that:

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council Resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in article 27, paragraph 2, 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'.¹⁹

This single paragraph of the judgment has produced a lot of discussion. A number of commentators consider that this paragraph provides a general normative assessment on the fact that immunities cannot be invoked before international tribunals.²⁰

However, 'the view that international law immunities may never be pleaded in proceedings instituted before international courts and tribunals oversimplifies the matter'²¹ and there are a number of reasons to qualify this claim.

¹⁷ *Supra*, section 12.2.1.

¹⁸ D Jacobs, 'A Sad Homage to Antonio Cassese: The ICC's Confused Pronouncements on State Compliance and Head of State Immunity' (*Spreading the Jam*, 15 December 2011) <<http://dovjacobs.com/2011/12/15/a-sad-hommage-to-antonio-cassese-the-iccs-confused-pronouncements-on-state-compliance-and-head-of-state-immunity/>> accessed 25 August 2014.

¹⁹ *Arrest Warrant* case (n 2) para. 61.

²⁰ See e.g Amnesty International, 'Bringing Power to Justice: Absence of Immunity for Heads of State before the International Criminal Court' (2010) 24; Gaeta, 'Does President Al Bashir Enjoy Immunity From Arrest?' (n 15) 322; W Schabas, 'The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?' (2008) 21 *Leiden Journal of International Law* 513, 513–14.

²¹ Akande, 'International Law Immunities and the International Criminal Court' (n 6) 416.

First, it should be recalled that this paragraph of the judgment is entirely *obiter*. Indeed, the issue was not relevant to resolving the legal question that was before the ICJ at the time, and it is essentially there as part of the judges' attempt to show that they were not advocating total impunity for alleged perpetrators of international crimes by recognizing their procedural immunity from prosecution.²²

Second, the ICJ makes no attempt to distinguish between the different legal bases for the various examples of international courts that it gives. However, it makes a difference how the tribunal is created. If it is created by a UNSC Resolution under Chapter VII of the UN Charter (as in the case of the ICTY and ICTR), one could reasonably make the argument that the removal of immunities included in the Statute might be binding on all states. On the other hand, if the tribunal is created by treaty (such as the SCSL and the ICC), one cannot just assume that the rules on the relative effect of treaties are not operational simply because we are dealing with international crimes and that a non-Party State would not be able to invoke immunities. As a result of this, before claiming that immunities are inoperative before a specific international tribunal, it must first be established '1) that the instruments creating those tribunals expressly or implicitly remove the relevant immunity and 2) that the state of the official concerned is bound by the instrument removing the immunity'²³. In other words, and coming back to the statement made by the ICJ, it can reasonably be claimed that rather than making a normative assessment on the content of international law on the issue, the judges were merely providing factual examples where international courts have removed immunities as a bar for exercising jurisdiction. This interpretation in fact finds support in the careful phrasing of the first sentence of the discussed paragraph, which mentions '*certain* international criminal courts, where they have jurisdiction'. This language is certainly not indicative of an intention to make a broad normative claim on the customary law framework applicable to immunities before international criminal courts generally.

Finally, it should be noted that the ICJ gives no indication of what would constitute an 'international criminal court' before which immunities could not be invoked as a general rule. Surely, two states which individually could not prosecute a foreign head of state should not be able to circumvent this simply by signing a treaty setting up an 'international criminal court'.²⁴ One would therefore arguably need something else to make a court truly international for the purposes of applying this alleged customary law removal of immunities. The SCSL attempted to answer this question. In the *Taylor* case, the Appeals Chamber reasoned in the following way:

It is to be observed that in carrying out its duties under its responsibility for the maintenance of international peace and security, the Security Council acts on behalf of the members of the United Nations. The Agreement between the United Nations and Sierra Leone is thus an agreement between all members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the

²² *Arrest Warrant* case (n 2) para. 60.

²³ Akande, 'International Law Immunities and the International Criminal Court' (n 6) 418.

²⁴ *Ibid.*, 417–18.

international community. The Special Court established in such circumstances is truly international.²⁵

This reasoning does not seem to rest on a particularly strong legal basis. Indeed, it is difficult to understand how the political support of the UNSC, without a concrete legal action as a consequence (such as the use of Chapter VII powers to create a tribunal), could have an effect on the legal nature of the SCSL. Moreover, 'this approach to the impact of the Council's involvement is inconsistent with the law of international organisations, and the recognition that such organisations, in particular the United Nations, have separate legal personalities'.²⁶ In general, it therefore seems difficult to determine what a 'truly international tribunal' might be, to the extent that its founding treaty would bind states not party to it.

In sum, if, despite the uncertain legal reasoning surrounding it, the argument relating to the content of customary international law is accepted, this would mean that, irrespective of the way the case was acquired, the ICC would indeed have jurisdiction over nationals of non-States Parties.

On the other hand, should this argument be rejected, the standard position would be that, in principle, Article 27 would not apply to non-State Party nationals. It would appear that the more recent case law of the ICC has moved in that direction and away from the Malawi Decision discussed previously. Indeed, in an April 2014 Decision relating to the visit of Al-Bashir to the DRC, a Pre-Trial Chamber has considered the following:

Given that the Statute is a multilateral treaty governed by the rules set out in the Vienna Convention on the Law of Treaties, the Statute cannot impose obligations on third States without their consent. Thus, the exception to the exercise of the Court's jurisdiction provided in article 27(2) of the Statute should, in principle, be confined to those States Parties who have accepted it.²⁷

It remains to be seen whether referrals made by the Security Council under Chapter VII of the UN Charter fall within the same logic.

12.3.2 Removal of immunity through UNSC referral

The second way in which the immunity of a non-State Party national might be removed is related to the specific circumstance of a Security Council referral, which was discussed in the April 2014 DRC Decision.

The uncertain minefield of unclear and unconvincing legal precedent referred to in the Malawi Decision probably explains why the DRC Decision did not venture into

²⁵ Judgment, *Taylor*, SCSL-03-01-A, AC, SCSL, 26 September 2013, paras 38–9.

²⁶ S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Oxford: Hart 2012) 276.

²⁷ Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/056-01/09-195, PTC II, ICC, 9 April 2014, para. 26 ('DRC Decision').

such territory. As mentioned previously, without even discussing the previous Malawi Decision,²⁸ it simply found that Article 27(2) could not apply to a non-State Party.²⁹

As a result of this finding, the Chamber had to identify a reason for which in this particular case immunities would not apply, despite Sudan not being a State Party to the ICC. At this point, the reasoning of the Chamber is not entirely clear. Indeed, for some reason the judges seem to shift the discussion to Article 98(1) of the Statute³⁰ and go on to claim that the fact that the situation was referred to the Court acting under Chapter VII of the UN Charter means that ‘since immunities attached to Omar Al-Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in [the UNSC] Resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities’³¹. The Chamber then concludes that ‘the SC implicitly waived the immunities granted to Omar Al-Bashir under international law and attached to his position as a Head of State’.³² While the reference to Article 98(1) is slightly confusing, because the Chamber was still discussing the application of Article 27(2) of the Statute, it is reasonable to assume that the Pre-Trial Chamber is claiming that the UNSC, acting under Chapter VII, has removed Al-Bashir’s immunity as a bar to the exercise of jurisdiction by the Court.

The reasoning of the Chamber is not entirely convincing. First, it raises the question of whether the UNSC can implicitly remove the immunity of a head of state that would normally be recognized under the normal application of international law.³³

Second, and more importantly, doubts can be raised on the whole UNSC referral mechanism and, as a result, on all possible legal consequences that might flow from it. Indeed, those who argue for the power of the Security Council to remove immunity rely on the fact that states are bound by UNSC Resolutions under Chapter VII. However, this oversimplifies things, because it puts to the side the fact that these circumstances only arise because a situation has been referred to the ICC, not in application of the UN Charter, but in application of the Rome Statute. The question therefore remains whether states which could not independently, and arguably together, remove obstacles to the exercise of jurisdiction, such as immunities, can ‘outsource’ a power they do not have to an outside organ. Indeed, technically, the UNSC is not bound by the Rome Statute and it is not in the power of a group of states to grant the UNSC, in a separate legal instrument from the UN Charter, a power that it does not have under the UN Charter. As a result, the way that the way of ICC obtained the situations of Libya and Darfur, Sudan is ultimately the Rome Statute itself, which cannot simply import the coercive powers of the UNSC in its internal framework and then claim to make it apply to all states. Consequently, from a legal perspective, states cannot any

²⁸ Which has led to criticism of this unexplained change of heart at the ICC: P Gaeta, ‘The ICC Changes its Mind on the Immunity from Arrest of President Al Bashir, But It Is Wrong Again’ (*Opinio Juris*, 23 April 2014) <<http://opiniojuris.org/2014/04/23/guest-post-icc-changes-mind-immunity-arrest-president-al-bashir-wrong/>> accessed 25 August 2014.

²⁹ DRC Decision (n 27) para. 26.

³⁰ DRC Decision (n 27) para. 27.

³¹ DRC Decision (n 27) para. 29.

³² DRC Decision (n 27) para. 29.

³³ A de Hoog and A Knottnerus, ‘ICC Issues New Decision on Al-Bashir’s Immunities—But Gets the Law Wrong... Again’ (*EJIL Talk!*, 18 April 2014) <<http://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-%E2%80%92-but-gets-the-law-wrong-again/#more-10712>> accessed 25 August 2014.

more bypass immunities under international law by referring to the UNSC in the Rome Statute than if they had granted the Queen of England, the head of FIFA, or myself the power to refer a situation to the Court.

It should be pointed out that these challenges can equally be raised in relation to the argument that takes the effect of a Security Council Resolution to the next level, by claiming that it essentially makes the state concerned akin to a party to the Rome Statute, making Article 27(2) binding on it, as well as all provisions on cooperation.³⁴

In sum, even UNSC involvement, despite the vast powers afforded to it under the UN Charter, does not entirely remove the question of the relative effect of treaties and its non-application to states not party to the Rome Statute.³⁵

However, if the solution of the DRC Decision is adopted, then it appears that there would be a distinction to be made in relation to the exercise of jurisdiction depending on whether the situation is referred by the UNSC or not. It remains to be seen whether there is an argument to be made for a unitary application of Article 27, irrespective of whether the state is a party to the Statute and of how the situation was acquired by the Court.

12.3.3 The case for just applying Article 27(2) of the Rome Statute

At the end of the day, the simplest way of dealing with this question is to consider that Article 27 of the Rome Statute does not distinguish between nationals of States Parties and nationals of non-States Parties. Moreover, judges are tasked with applying the Statute.³⁶ As a result of this, judges would simply be statutorily bound to take into account Article 27(2) of the Statute and ignore any immunity that might be an obstacle to the exercise of jurisdiction.

This approach is consistent with current practice of the Court. Indeed, Chambers are reluctant to go beyond the literal meaning of the text of the Rome Statute and refer to others sources of law for the purposes of interpretation.³⁷ More specifically in relation to immunities, this is essentially what Pre-Trial Chamber I did, in an arguably somewhat careless way, in its March 2009 Decision on the issuance of an arrest

³⁴ D Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333.

³⁵ For a different reading of the UNSC referral mechanism, see Rastan, Chapter 7, this volume, text corresponding to footnote 75. Rastan claims that the Rome Statute does not in fact give any power to the UNSC to refer a case as such, because this power is already in the possession of the UNSC. The Rome Statute only provides the tools for the ICC to function in case of such referral. While this solution is elegant and arguably less problematic from a legal point of view, it still faces a number of difficulties. First, this is not how the Rome Statute is drafted. Indeed, it seems to grant a 'power' to refer a situation in the same terms as it does for states. Second, even if one accepts this reading of the Statute, one can wonder if the power of the UNSC to create an ad hoc tribunal really implies that it can refer any case or situation to any international criminal tribunal that might be created as a separate international organization. These institutions exist outside the UN Charter framework and there is no automatic reason to believe that they can just be 'used' by the UNSC in application of their Chapter VII powers. Finally, things are not as clear-cut as presented by Rastan, to the extent that if the Rome Statute is merely acknowledging the power of the UNSC, then it should not be able to question the scope of the referral in terms, for example, of personal scope. The fact is that the Rome Statute does claim to grant a limited power of referral to the UNSC and that it can evaluate its use.

³⁶ Art 21 ICC Statute.

³⁷ See Powderly, Chapter 19, this volume.

warrant against Al-Bashir. It considered the content of the text of Article 27,³⁸ before considering that no further source of law needed to be referred to in application of Article 21 of the Statute.³⁹ In other words, Article 27 is clear and the judges are bound to apply it.⁴⁰

This reasoning has been criticized because it allegedly fails to take into account the treaty nature of Article 27, which cannot therefore as such be extended to non-States Parties without further discussion of customary international law.⁴¹ I believe this challenge ignores both the actual phrasing of Article 27 and the function of ICC judges. First, it should be noted that Article 27 is not technically addressed to states. It states what constitutes an obstacle to the exercise of jurisdiction, and in this sense, one could say that the debate has been wrongly framed as an issue of whether Sudan is ‘bound’ by Article 27 or not. That is not in fact the question. Which leads to the misunderstanding on the role of judges. They should be considered as the ‘domestic’ judges of the Rome Statute framework and have no discretion to ignore the content of this Statute, in our case the clear language of Article 27. It is another issue altogether to ask whether, by applying Article 27(2), the bench would in fact lead the ICC, as an international organization, to commit an internationally wrongful act against Sudan as a non-State Party. This may very well be the case, but it is certainly not the judges’ function to address the problem. Just as a national judge might in the application of domestic legislation lead to a violation of its state’s international obligations, an ICC judge might be compelled to do the same in application of the Rome Statute. Should this happen, the forum to solve this is however not an ICC chamber, but at the purely international level in the triggering by the non-State Party of the international responsibility of the ICC as an international organization.

In sum, this approach would mean that the ICC could exercise jurisdiction against non-State Party nationals, irrespective of the way in which the case has been brought before the Court, be it a Security Council referral, a state referral, or through the exercise of *proprio motu* powers by the prosecutor.

12.4 Is There an Obligation to Cooperate with the ICC?

Assuming that, for one or more reasons addressed previously, the Court can exercise jurisdiction in relation to officials of non-States Parties, it must now be determined whether there is an obligation for states to cooperate with the Court in arresting and surrendering such officials to the ICC.

³⁸ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-3, PTC I, ICC, 4 March 2009, para. 43.

³⁹ Ibid., para. 44.

⁴⁰ The judges also referred to the general object and purpose of the Statute to fight impunity, which in itself is not conclusive as an argument, and to the fact that the situation had been referred to the ICC by the UNSC, which is not a convincing argument without further explanation (see *infra*, section 12.3.2).

⁴¹ Gaeta, ‘Does President Al Bashir Enjoy Immunity From Arrest?’ (n 15) 323.

12.4.1 An obligation to cooperate as a consequence of the application of Article 27?

Before going into some discussion of the possible basis for removing immunities under Article 98(1), a small methodological point needs to be made. Having established that for some reason (customary law, UNSC referral) Article 27 of the Rome Statute applies to a non-State Party, it might seem easy and evident to deduce that such irrelevance of official capacity under Article 27 automatically removes all immunity-type obstacles under Article 98. The most obvious example of this logic can be found in the DRC Decision, where the Court seamlessly moves from a discussion of Article 27(2) to conclude that '[c]onsequently, there also exists no impediment at the horizontal level between the DRC and Sudan as regards the execution of the 2009 and 2010 Requests'.⁴²

This reasoning is, however, not self-evident. Indeed, even if one follows the Chambers in removing immunity as a bar to prosecution before the Court, this only concerns the relationship between the ICC and the third state. Article 98, on the other hand, has a completely different scope of application and concerns the relationship between the requested state and the third state. In this sense, while the ICC might very well have jurisdiction over nationals of a non-State Party who would normally benefit from immunity under international law, this does not mean that Article 98 might not prevent the arrest and surrender of that person. If not, there would in fact be no point in the drafters including Article 98 in the Statute at all.⁴³ As a result, it cannot be that the application of Article 27 automatically removes any immunity that might be claimed in the context of Article 98 and additional justifications need to be put forward.

To be clear, it is not argued here that the reasoning underlying the application of Article 27 to nationals of non-States Parties cannot be of some benefit to argue for the removal of immunity under Article 98. What is argued is that the applicability of Article 27 does not necessarily or logically imply the removal of immunity claims under Article 98.

12.4.2 Finding an independent basis for the removal of immunity under Article 98

It follows from the previous point that there needs to be an additional step in the reasoning in order to justify removal of immunity under Article 98. In that respect, it needs to be seen whether the reasons that can be invoked to apply Article 27 to nationals of non-States Parties can also be referred to in relation to Article 98.

12.4.2.1 Removal of immunity under customary international law

As concerns the customary international law argument, it has to be determined whether there exists a rule that removes immunities as an obstacle to the arrest of a person for the purposes of surrender to an international criminal tribunal.

⁴² DRC Decision (n 27) para. 29 (emphasis added).

⁴³ For a somewhat different view on this, see J Iverson, 'The Continuing Functions of Article 98 of the Rome Statute' (2012) 4 *Goettingen Journal of International Law* 131.

This is what the Pre-Trial Chamber attempted to do, somewhat carelessly, in the Malawi Decision. In effect, the Pre-Trial Chamber relies on the same reasoning that would justify the application of Article 27 to conclude that:

The Chamber considers that the international community's commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass. If it ever was appropriate to say so, it is certainly no longer appropriate to say that customary international law immunity applies in the present context.⁴⁴

By reasoning in this way, the Chamber essentially continues to confuse the different scopes of application of Article 27 and Article 98, the former relating to the relationship between the Court and states and the second relating to the horizontal relationship between states. Moreover, the Pre-Trial Chamber adopts a somewhat unconvincing approach to customary law, which has led some to consider that:

[t]here has already been significant criticism on how in international criminal justice customary international law sometimes tends to fall out of the sky and comes into existence by just a few strikes on the word processing software.... There is no serious analysis of state practice and *opinio iuris*, it is simply the law as the Chamber wants it to be [making it ...] one of the most poorly drafted and reasoned decisions in the ICC's history.⁴⁵

A somewhat more elegant solution, if one accepts the reasoning of the Chamber in relation to the removal of immunities under customary law for the purposes of the application of Article 27, would be to consider not that customary international law creates a different exception for the arrest and surrender of a person in order for him or her to be prosecuted before an international court, but that the principle of effectiveness implies that such a consequence should be drawn from the first exception. As explained previously, this is somewhat of a methodological shortcut, but in this case, it would certainly have been more convincing than the reasoning that the Chamber adopted.

Whichever justification one adopts, it should be noted that, as a consequence of the reliance on customary law, the duty to cooperate in the arrest and surrender of a person to be prosecuted by the Court would rest on all states, not just States Parties to the Rome Statute, even arguably, when no immunity question arises. Indeed, all states are bound by customary international law. This consequence illustrates once again the shortcomings of the reasoning of the Chamber, as it is doubtful that the drafters of the Rome Statute had such a legal consequence in mind when drafting the cooperation provisions.

⁴⁴ Malawi Decision (n 16) para. 42.

⁴⁵ G Sluiter, 'ICC's Decision on Malawi's Failure to Arrest Al Bashir Damages the Authority of the Court and Relations with the African Union' (*ilawyerBlog*, 6 March 2012) <http://www.mediafire.com/view/38a6hs1xaa3hoecl/ILawyer-2012-Sluiter-ICC's_Decision_on_Malawi's_Failure_to_Arrest_Al_Bashir_Damages_the_Authority_of_the_Court_and_Relations_with_the_AU.pdf> accessed 25 August 2015.

12.4.2.2 Removal of immunity by the UNSC

As concerns the UNSC argument, it would have to be argued that not only has the UNSC removed any obstacle to the exercise of jurisdiction by the Court over a national of a non-State Party, but also any obstacle in relation to the arrest and surrender of that person by another state. As mentioned previously, this is exactly the conclusion that the Pre-Trial Chamber reached in the DRC Decision.⁴⁶

In relation to that argument, the same challenges can be put forward as previously. For one, can the UNSC implicitly remove an immunity which is recognized by general international law? Such a removal, if allowed, would at least need to be explicit in order to be operative. In the DRC Decision, the Pre-Trial Chamber considered that ‘any other interpretation would render the SC Decision requiring that Sudan “cooperate fully” and “provide any necessary assistance to the Court” senseless’.⁴⁷ However, the judges do not explain why this would indeed be the case. The Court could very well exercise jurisdiction against other Sudanese nationals not benefiting from immunities involved in alleged crimes committed in Darfur. As pointed out by Gaeta, ‘extradition treaties are not deprived of sense simply because, as the ICJ has clarified, a state may not even circulate internationally an arrest warrant against a foreign sitting head of state or government, or ministers for foreign affairs’.⁴⁸

Second, it is even debatable whether the UNSC can in fact remove such immunity, even explicitly, in the context of the ICC. As discussed previously, the ICC situation is very different from the creation of an ad hoc tribunal, for example, where everything takes place within the internal legal framework of the UN. The Rome Statute, on the other hand, is a separate legal instrument, a multilateral treaty, that does not flow from the UN Charter. It follows that, in the context of the ICC, one still needs to establish whether the drafters of the Rome Statute were legally enabled to bypass immunities under international law by importing within the Rome Statute the powers of the UNSC under Chapter VII of the UN Charter, which is doubtful.

Should these concerns be set aside, the decision should be defended from at least one of the criticisms that has been levelled against it. Commentators have considered that the decision misunderstands the legal situation, because it discusses the question of Sudan’s duty to cooperate, which is not what Article 98 is about,⁴⁹ as well as the factual situation, because the UNSC Resolution only ‘urges’, rather than compels, states to cooperate with the Court.⁵⁰ However, these commentators are missing the point of the reasoning. What the Chamber is saying, albeit not necessarily in a crystal-clear way, is that *because* Sudan has a duty to cooperate, it has a duty to cooperate in conformity with the Rome Statute, which includes Article 27. As a consequence, immunities would not any more be an issue under Article 98(1) in the context of a request for cooperation than if the third state was indeed a State Party to the Rome Statute, which is generally accepted. In this sense, if one accepts the premises of the reasoning of the

⁴⁶ DRC Decision (n 27) para. 29.

⁴⁷ DRC Decision (n 27) para. 29.

⁴⁸ Gaeta, ‘The ICC Changes its Mind on the Immunity from Arrest of President Al Bashir, But It Is Wrong Again’ (n 28).

⁴⁹ Ibid.

⁵⁰ De Hoogh and Knottnerus (n 33).

Chamber, its conclusion (i) can indeed flow from the duty to cooperate of Sudan, and (ii) need not be concerned with what the UNSC urges other states to do, because the request for cooperation will have its source in the Rome Statute.

12.4.2.3 The literal interpretation approach and its consequences on cooperation and immunities

It remains to be seen how the situation would be resolved if Article 27 were simply applied as a binding provision by the judges, without any reference to any other outside source of international law, be it customary law or a UNSC Resolution. Two comments need to be made in relation to this.

First, it does not exclude *per se* the two previous legal arguments to be applied in such a case. Indeed, even if the source of the removal of immunity for the purposes of exercising jurisdiction is neither customary law nor a UNSC Resolution, it does not follow necessarily that the removal of immunity under Article 98 cannot flow from these sources. In this sense, the legal difficulties of these legal solutions still stand and need to be taken into account.

However, second, we believe that our preferred solution for the application of Article 27 has the added benefit of clarifying and somewhat simplifying the discussion on immunities under Article 98, by completely disconnecting the two issues. Once we unburden the conversation from elaborate and ultimately unconvincing legal developments on the customary law rules relating to immunities before international tribunals or the implicit powers of the UNSC, we are left with a very traditional question of international law: what is the status of immunities in international law for the prosecution of international crimes in inter-state relations? This question, so familiar for most international scholars, has so far been lost in the convoluted legal constructions surrounding the application of Article 98.

It is beyond the scope of this chapter to actually answer this question. It requires a careful discussion of both international law and domestic law sources relating to the prosecution of foreign nationals before the domestic courts of other states. What is important to note is that such a discussion is so far lacking, despite its importance, in the ICC case law. It is foreseeable that this will have to take place in the future, given that the Malawi Decision reasoning has been quasi-universally rejected, and that even if one accepts the DRC reasoning, it does not solve the situation where there is no UNSC Resolution. For example, with Palestine having joined the ICC and lodged a 12(3) declaration to cover events that place in Gaza during the summer 2014 military operations, and with the OTP having opened a preliminary examination in these events, we might be faced with a concrete case of arrest warrants being issued against citizens from a non-State Party (Israel) and the question of whether states would have an obligation to cooperate in their arrest and surrender in the absence of a UNSC Resolution.

12.4.3 The special case of the Genocide Convention

A related point that has been put forward is that, in the specific case of genocide charges, the duty of Sudan to cooperate with the ICC would flow not so much from

the Rome Statute, but from the Genocide Convention.⁵¹ In a nutshell, this reasoning unfolds in three steps. First, the ICC is to be considered an ‘international penal tribunal’ set up to prosecute genocide as per Article VI of the Genocide Convention. Second, State Parties to the Genocide Convention must be deemed to have accepted the jurisdiction of that Court in respect of genocide when the situation is referred by the UNSC, as a result of the binding nature of UNSC Resolutions adopted under Chapter VII. Third, and as a consequence, such states must cooperate with the ICC in application of the interpretation of the duty to cooperate read into the Genocide Convention by the ICJ in the *Genocide* case, where it found that:

[I]t is certain that once such a court has been established, Article VI obliges the Contracting Parties ‘which shall have accepted its jurisdiction’ to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory—even if the crime of which they are accused was committed outside it—and, failing prosecution of them in the parties’ own courts, that they will hand them over for trial by the competent international tribunal.⁵²

Three comments can be made in relation to this approach.

First, one can question whether the ICC falls within the ambit of the ‘international penal tribunal’ envisioned in Article VI of the Genocide Convention. Of course, on the face of it, this does seem to be the case, as the ICC has jurisdiction over the crime of genocide as defined by the Convention. Nonetheless, one can wonder whether an explicit reference to the Genocide Convention and Article VI would not be necessary to validate this. This is particularly relevant because the ICC also has jurisdiction over other crimes, such as war crimes and crimes against humanity. This could lead to quite interesting practical difficulties. Indeed, the reasoning put forward means that the obligation to cooperate with the ICC would be entirely contingent on the charging policy of the prosecutor. Should he decide to charge the same incidents as crimes against humanity rather than genocide, the duty to cooperate of a particular state would disappear. Moreover, what would happen if the genocide charges were dropped after the confirmation of charges process, for example? Would that mean that the cooperation of the state would be in violation of Article 98, at least in hindsight, and the continued detention of the person for other charges be illegal? In order to avoid that, one could imagine that if the ICC were to request cooperation of a state which is not a party to the Rome Statute on the basis of the Genocide Convention, only charges of genocide could be brought, because there is no obligation for the state to cooperate with the Court in relation to other crimes. All these unanswered questions highlight, beyond the apparent elegance of the proposed solution, the difficulty of trying to fit

⁵¹ For an overview of opinions on this issue, see the online debate which brought together leading experts on the issue (D Akande, P Gaeta, W Schabas, M Mutua, and G Sluiter) available at <<http://icc-forum.com/darfur>> accessed 25 August 2014. See also Akande, ‘The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir’s Immunities’ (n 34); and M Gillet, ‘The Call of Justice: Obligations under the Genocide Convention to Cooperate with the International Criminal Court’ (2012) 23 *Criminal Law Forum* 63.

⁵² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007 [2007] ICJ Rep 43 para. 443 (‘Genocide case’).

together two legal instruments (the Genocide Convention and the Rome Statute) drafted 50 years apart, with no attempt made by the drafters to lay down in precise legal terms their institutional relationship.

Second, even if one were to accept that the ICC does indeed correspond to the tribunal provided for in Article VI of the Genocide Convention, the question remains, what constitutes acceptance of the jurisdiction of such a tribunal? It should be recalled that in the *Genocide* case, the ICJ primarily relied on the Dayton Peace Agreement to establish that Serbia had recognized a duty to cooperate with the ICTY.⁵³ Incidentally, the Tribunal said that Serbia's membership of the UN after 2000 could provide a further basis for the obligation to cooperate,⁵⁴ but without explaining exactly how. Gillet provides such an explanation by saying that a UNSC Resolution, either creating the ICTY or referring a situation to the ICC, constitutes a collective acceptance of jurisdiction of the ICC from all members of the UN, through the operation of Articles 25 and 103 of the UN Charter.⁵⁵ Gillet concludes that 'no UN Member State is able to deny that the ICC has jurisdiction over the Darfur situation'.⁵⁶ This conclusion can, however, be challenged. Indeed, this is not the same situation as the creation of a Chapter VII ad hoc tribunal, where the source of the acceptance of jurisdiction comes from the powers granted to the UNSC by the UN Charter itself. In the case of the ICC, the Court has jurisdiction because of the Rome Statute and its Article 13(b). In other words, the only reason the UNSC can 'accept jurisdiction' of the ICC is because the ICC allows it to do so under its own constitutive document, not because the UN Charter allows it. As a result, we are faced once again with the question of the legality of the UNSC referral system. Could states, who alone or together could not force a third state to accept the jurisdiction of a tribunal established pursuant to Article VI of the Genocide Convention, bypass this obstacle by importing in the Statute of the tribunal the powers of the UNSC under the UN Charter to compel all states to cooperate? This is doubtful in my opinion.

Third, it should be mentioned that the fact that the Genocide Convention implicitly creates a duty to cooperate with an international tribunal is in itself questionable. As mentioned previously, this obligation was only implicitly read into the Genocide Convention by the ICJ. However, it should also be noted that in the case of Serbia, an explicit acceptance of a duty to cooperate was found in the Dayton Agreement,⁵⁷ so there was in fact no need for the Court to enter into a general discussion on whether such an obligation stems from the Convention or not, in the same way that it considered that the Convention implicitly also prohibited states from actually committing genocide.⁵⁸ Generally, I believe that one should be wary of reading into conventions what they do not actually say⁵⁹ through a form of teleological interpretation that is so disconnected from the actual text that it is in fact no longer an interpretative process, but a rewriting of the treaty by the judges to fit what they think should have been included in the first place. Therefore, while on a certain level one must accept that the ICJ has indeed recognized such a duty to cooperate, it is interesting to note that the

⁵³ Ibid., para. 447.

⁵⁴ Ibid.

⁵⁵ Gillet (n 51) 76.

⁵⁶ Ibid.

⁵⁷ *Genocide* case (n 52) para. 447.

⁵⁸ *Genocide* case (n 52) para. 166.

⁵⁹ D Jacobs, 'Bashir and Genocide in Sudan: Second Time Lucky for the OTP' (*Spreading the Jam*, 13 July 2010) <<http://dovjacobs.com/2010/07/13/bashir-and-genocide-in-sudan-second-time-lucky-for-the-otp/>> accessed 25 August 2014.

finding was not warranted by the facts of the case, nor necessarily sound from a methodological perspective.

12.4.4 How to analyse possible conflicting obligations of states under international law

One last point that needs to be discussed is how the Court should be expected to analyse possible conflicting obligations of states under international law. Indeed, the analysis of relevant international law norms that might come into play to determine the existence of immunities under Article 98(1) might not always provide a single answer. There might be cases where a norm of international law would recognize immunities, while another norm might remove them.

This issue arose once again in the case of Al-Bashir, where the AU has issued resolutions calling for AU states not to cooperate with the ICC in relation to the arrest and surrender of the suspect.⁶⁰ To the extent that these resolutions can be considered binding on AU states,⁶¹ the Court had to determine, even if it found that there existed reasons to remove Al-Bashir's immunity through the use of customary international law or the powers of the UNSC, that the requested state was still not barred from arresting Al-Bashir due to those resolutions. The Malawi Decision and the DRC Decision deal with this issue in different ways.

As regards the Malawi Decision, the Chamber, while taking note of the various AU Resolutions, links its relevancy to the substance of the discussion on immunities under Article 98(1): 'Therefore, the Chamber's analysis, contained below, as to how Article 98(1) of the Statute relates to the present circumstances will also address the legal viability of the African Union position relied upon by the Republic of Malawi.'⁶² While the Chamber does not return to the issue later on in the decision, one can consider that because it found that no immunities could be claimed under Article 98(1), the AU Resolutions, which relied on Article 98, were therefore not legally viable and as a consequence were irrelevant. This reasoning cannot, however, be upheld. Indeed, the ICC does not sit as a court of legality of AU Resolutions; it is neither its function nor its mandate. Irrespective of what the ICC has to say about the legal reasoning underpinning the adoption of such a resolution, the fact is that it remains in force as a binding international law obligation for AU states, and that is all that the Court is required to determine in order not to move forward with a request for cooperation under Article 98.

The DRC Decision takes a different approach and does not enter into a discussion of the legality of the AU Resolution as such. The Chamber acknowledges that there might be a conflict between the AU Resolution and the UNSC Resolution referring

⁶⁰ See Malawi Decision (n 16) fn 12 for a list of such resolutions.

⁶¹ For a discussion on this, see M Du Plessis and C Gevers, 'The Obligations of African Union States to Implement ICC Arrest Warrants' (*EJIL Talk!*, 4 February 2011) <<http://www.ejiltalk.org/the-obligation-of-african-union-states-to-implement-icc-arrest-warrants/>> accessed 25 August 2014.

⁶² Malawi Decision (n 16) para. 15.

the situation to the Court.⁶³ The judges then move on to trying to resolve this conflict by reference to the UN Charter. Noting that Article 25 of the Charter requires states to comply with UNSC Resolutions⁶⁴ and that, furthermore, Article 103 provides that UN Charter obligations should prevail over conflicting obligations under international law,⁶⁵ the Chamber concludes that '[c]onsidering that the SC, acting under Chapter VII, has implicitly lifted the immunities of Omar Al-Bashir by virtue of Resolution 1593(2005), the DRC cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary'.⁶⁶ This reasoning is equally unsatisfactory.

For one, the reference to the UN Charter is only valid from the internal point of view of the UN. The fact that the internal rules of the organization provide for a superiority of UN obligations over other international obligations does not mean that this superiority carries outside the UN legal framework into general international law. In other words, it is not because the conflict might be solved in one direction from the UN Charter perspective that it means that it is solved in the same way from the perspective of the AU, in our case. In order for the Pre-Trial Chamber to somewhat more convincingly make this argument, it would have had to find a rule *outside of the UN Charter* that would grant priority to Charter obligations over other conventional obligations. In that respect, such a rule does in fact seem to exist. Indeed, Article 30(1) of the Vienna Convention on the Law of Treaties (VCLT) provides that, '[s]ubject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs'. In other words, the VCLT makes Article 103 of the UN Charter a general rule of the law of treaties to solve possible conflicts of application between successive treaties. However, Article 30(1) does not solve everything and a number of questions would have to be resolved.⁶⁷ First, does Article 103 relate to UNSC Resolutions, rather than obligations that stem directly from the text of the UN Charter? Second, even if it does, can one say that the UN Charter and the AU Charter have the same 'subject matter'? Indeed, Article 30(1) of the VCLT only applies in this circumstance. Finally, priority of UN Charter obligations does not mean that the other obligation disappears, or that the state that would be compelled to give priority to the Charter obligations would still not face responsibility under international law for not respecting the other obligation.⁶⁸ As a result of this, even if it had an obligation to prioritize Charter obligations, a state would still be acting 'inconsistently with its obligations under international law', as provided by Article 98(1) of the Rome Statute, thus triggering its application.

⁶³ DRC Decision (n 27) para. 30.

⁶⁴ DRC Decision (n 27) para. 30.

⁶⁵ DRC Decision (n 27) para. 31.

⁶⁶ DRC Decision (n 27) para. 31.

⁶⁷ On this see generally, A Orakhelashvili, 'Article 30' in O Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties. A Commentary*, vol. 1 (Oxford–New York: Oxford University Press 2011) 780–5; J-P Cot et al., *La Charte de Nations Unies. Commentaire article par article* 3rd edn (Paris: Economica 2005) 2133–47.

⁶⁸ 'On the whole, Article 30 resembles Article 103 of the UN Charter in that the latter, while establishing a priority in case of conflict with other treaties, takes no stand on the invalidity, if any, of a conflicting treaty', M Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff Publishers 2009) 404.

Second, and more importantly, it is not for the ICC to resolve the possible tension under international law between two conflicting obligations. As mentioned previously, the ICC's evaluation does not change the fact that the AU Resolutions are still in force and still binding on AU states and that, as a consequence, enforcing the cooperation request would lead that state to violate an existing international law obligation relating to immunities.

It therefore appears that both in the Malawi Decision and the DRC Decision, the ICC has gone beyond its function. It mistakenly thought that it was the ICJ and passed judgment on the legality or relevance of international law instruments that it has no mandate to analyse. ICC Chambers, in the application of Article 98(1) of the Statute, are solely required to determine the existence of an international law obligation relating to immunities and draw a simple conclusion in that respect: the issuance or non-issuance of the cooperation request.

12.5 Conclusion

It appears from the preceding developments that while one can certainly argue that immunities are not an obstacle to the exercise of jurisdiction by the Court against nationals of non-States Parties, it does not automatically entail that such immunities have no effect on the arrest and surrender of such nationals, even by States Parties to the Rome Statute.

The chapter has highlighted a number of possible legal avenues to circumvent this obstacle, which include reference to customary international law, analysis of the powers of the UNSC, and involvement of the Genocide Convention. It turns out that all these solutions have a number of flaws that are difficult to overcome. Moreover, they avoid the question that is at the heart of the discussion, and a traditional question of international law: whether immunities are still relevant legal instruments in relations between states.

More broadly, these discussions highlight two particular frustrations of certain communities of international law, one relating specifically to immunities and the other more generally to the ICC's place in the international arena.

In relation to immunities, the more or less convincing attempts to interpret various legal sources (customary law, UNSC Resolutions) as removing immunities illustrate the tension between the world as some human rights advocates would like it to be, and the world that actually exists. Despite the fact that immunities are still very much relevant in international relations today, as shown by decisions of the ICJ, there are some who would like to wish them away when it comes to human rights violations or international crimes. While there is obviously nothing wrong with this agenda from a moral perspective, it cannot simply become law with the waving of a wand.

In relation to the ICC, the decisions discussed illustrate the frustration of the Court as an essentially powerless institution, which depends on the whim of states. It is a treaty body, constrained by the law of treaties and by the fact that a vast number of states in the world have not joined it. It is a Court with grand ambitions, without the means to make them a reality. This explains the attempt to ground the ICC's ambitions in other, more universal tools, such as the UN Charter or customary international law.

But the fact remains that the ICC cannot hope, in the current state of its development and the current framework of international law, to be more than it is. While it might be frustrated with the situation, it must accept it to a certain extent, lest this toothless ambition create too many expectations that cannot be fulfilled.

These frustrations, if unchecked, could eventually affect the ICC itself, which could become burdened rather than helped by the ambitions and expectations put into it by those who defend it. Ultimately, its fate could mirror that of the frog who aspired to become as big as the ox in Aesop's fable: 'So the Frog took a deep breath and blew as hard as he could. Just as he was going to ask the frogs if he was now as big as the ox, he burst. The frogs never forgot the lesson: self-conceit may lead to self-destruction.'⁶⁹

⁶⁹ S Barchers, *Fifty Fabulous Fables* (Portsmouth: Teacher Ideas Press 1997) 18.

PART III

PROSECUTORIAL POLICY
AND PRACTICE

13

Putting Complementarity in its Place

*Paul Seils**

13.1 Introduction

The ICC was ushered into history, buoyed on the waves of optimism and enthusiasm. Unsurprisingly, these feelings have receded with time and experience. On the one hand, it is human nature to expect too much and to criticize too readily when unrealistic expectations are not duly met. On the other hand, reasonable expectations that go unmet lead to justifiable disappointment.

Some of the ICC's perceived setbacks are simply a result of expecting a little too much from the Court and from the States Parties; some of them are self-inflicted and can be avoided with appropriate leadership, vision, and discipline in all organs of the Court; and some of them are based on wilful misunderstandings, such as the alleged persecution of the African continent.

One area where the ICC has been less effective than might have been hoped is in promoting national prosecutions.¹ This chapter will argue that there are two reasons for that. In the first place, the Court has been used largely as a tactical instrument aimed at affecting ongoing crimes or in dealing with shorter-term interests from self-referring states. The likelihood of it having an impact on approaches to national prosecutions in such circumstances is very limited. Second, even where the Court is able to act strategically with a view to promoting national action, the nature of what it can do and how it should do it is sometimes misunderstood or misapplied.

This chapter focuses on a number of recalibrations that can help to reframe expectations. To do this, we have to understand afresh the role of national prosecutions, not as a by-product, or as a gap-filler, but as the primary aim of the system created in 1998.

Before turning to the specifics of what the Office of the Prosecutor in particular might do differently in terms of policy, the discussion will be situated in the context of what we seek to gain from national prosecutions, and what kind of conditions need to obtain for them to be as meaningful as possible. In the absence of such considerations, a discussion about how the ICC might better promote them seems to be taking place in a darkened room.

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¹ On dilemmas, see D Robinson, 'Inescapable Dyads: Why the ICC Cannot Win' (2015) 28 *Leiden Journal of International Law* 323. On complementarity, see also M El Zeidy, *The Principle of Complementarity in International Criminal Law* (Leiden: Martinus Nijhoff 2008) and van der Wilt, Chapter 9; Stahn, Chapter 10; and Bekou, Chapter 48, this volume. See also P Seils, 'Making Prosecutions Work: Maximising the Limited Role of the Prosecutor' in C Stahn and M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press 2011).

13.2 Meaningful National Prosecutions

Large-scale crimes committed in the context of repression or armed conflict indicate either the rupture or destruction of the social contract.² The objectives of criminal prosecutions in such exceptional circumstances are likely to be different from the objectives of criminal prosecution in normal circumstances.³ In normal times criminal justice may have a variety of objectives: incapacitation, specific and general deterrence, retribution, restoration, rehabilitation, denunciation, positive deterrence/persuasion. Whatever combination of these goals is to be pursued, one underlying aim is to *maintain* confidence in the system of criminal justice as an efficacious means of protecting the fundamental rights and freedom of citizens. By contrast, the underlying aim of criminal justice in the context of rupture or destruction of the social contract is to *restore confidence in a broken system*.

National prosecutions in the aftermath of atrocity may have degrees of meaningfulness: at their most meaningful they will help to restore that sense of confidence in the justice system and in the idea of a rights-respecting society⁴ generally, while vindicating the rights of individually wronged victims. The less national prosecution initiatives achieve this goal, the less meaningful they become. This does not mean that, absent a coherent prosecutorial strategy, the occasional trial is bereft of value. It will mean something to the individual victims and perhaps to the perpetrator unlucky enough to be the prey in a random clutch at justice.

In broad terms, meaningful national prosecutions refer to a coherent attempt to prosecute serious crimes arising from circumstances of conflict or repression whereby a critical mass of those considered to be the most responsible are subject to criminal proceedings. These proceedings must be based on a transparent process aimed not only at securing convictions, but also at demonstrating that the justice system is able to work fairly and efficiently in protecting the fundamental rights of citizens.

This definition raises a number of complex issues whose resolution will depend on contingent circumstances. Who might be considered the most responsible and what constitutes a critical mass cannot be ascertained in the abstract. The identification of those ‘most responsible’⁵ may depend on the role played by paramilitary or military

² For a more detailed statement of this position see P Seils, ‘Restoring Civic Trust through Transitional Justice’ in J Almqvist and C Esposito (eds), *The Role of Courts in Transitional Justice* (New York: Routledge 2013).

³ G O’Donnell et al. (eds), *Transitions from Authoritarian Rule: Comparative Perspectives* (Baltimore: Johns Hopkins University Press 1986); and N Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington: USIP 1995); P de Grieff, ‘Theorizing Transitional Justice’ in M Williams et al. (eds), *Transitional Justice* (New York: New York University Press 2012).

⁴ The discussion of any causal link between accountability measures and the achievement of democracy is beyond the scope of this chapter. Such a link has, however, been claimed, see K Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: W.W. Norton & Company 2011).

⁵ The decision to prosecute those deemed ‘most responsible’ is a policy matter. International law norms have not been established thus far to the effect that the underlying obligations of conduct requiring criminal investigation of war crimes, crimes against humanity, and genocide would be discharged by prosecution of a group of persons selected under such a criterion. It is also far from clear that such a norm would be desirable: see the discussion in S Kemp, ‘Alternative Justice Mechanisms, Compliance

commanders in the planning and execution of acts within a criminal enterprise; it may encompass key social and political actors who sustained and supported parties in their criminal acts, either with the intention of doing so or in the knowledge of the intentions of those whom they supported.⁶

How many people should be prosecuted will depend not only on resources, but also on a commitment to go beyond the token.⁷ Such gestures carried out in good faith can contribute to a renewed confidence and should not be dismissed out of hand, but national processes should be aiming for something more significant. This is true not only because of the effect it would have on public confidence in institutions, but also because of the expectation arising from pre-existing national and international obligations to apply the criminal law and the right to a remedy.⁸

There is a predictable counter-argument to this idealized notion of prosecutions at their most meaningful. It can be said that this is to hope for too much in circumstances of widespread criminality and weak justice systems. The alternative is to argue that we must simply do what we can, accepting that while far from perfect, it is still better than nothing.

The ‘something is better than nothing’ argument is always tempting to accept. Why would it not be better to make sure at least one senior officer responsible for crimes against humanity is prosecuted, even if all the rest go free? (There will still be those who argue that ‘nothing’ is not the alternative, but other social responses are both available and preferable. This is to ignore the legal requirement in international law that serious crimes require a criminal law response.⁹ It also misunderstands the relationship between various responses, mistaking them as merely substitutes rather than a process bringing inherent and autonomous values.)

The idealized notion of meaningful prosecutions mentioned here should not be understood as proposing that the best be the enemy of the good. Rather, it is an invitation to think beyond the minimal, to understand better the context, challenges, and opportunities that states and societies face in dealing with a legacy of widespread human rights violations and international crimes. It is an invitation to think critically about issues of timing, selection, prioritization, and scale and to not pretend that these are the same kinds of decisions that are made in everyday circumstances by

and Fragmentation of International Law’ in L van den Herik and C Stahn (eds), *Fragmentation and Diversification of International Criminal Law* (Leiden: Martinus Nijhoff 2012), 268 *et seq.*

⁶ See the useful collection of essays, M Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases* 2nd edn (Oslo: Torkel Opsahl Academic EPublisher), at <www.fichl.org/fileadmin/fichl/documents/FICHL_4_Second_Edition_web.pdf>. See also Seils on selection and prioritization in Colombia at <<http://ictj.org/es/publication/propuesta-de-criterios-de-selección-y-priorización-para-la-ley-de-justicia-y-paz-en>> accessed 26 June 2014. The approach to the subjective element and modes of liability will also vary in national systems. See E van Sliedregt, *Criminal Responsibility in International Law* (Oxford: Oxford University Press 2012); M Badar, *The Concept of Mens Rea in International Criminal Law* (Oxford: Hart Publishing 2013).

⁷ The obligations of conduct of course require prosecution only where there is sufficient evidence. Further considerations of prosecutorial discretion will also be relevant depending on the laws and practices of the jurisdiction in question.

⁸ H van der Wilt and S Lyngdorff, ‘Procedural Obligations under the European Convention on Human Rights: Useful Guidelines for the Assessment of “Unwillingness” and “Inability” in the Context of the Complementarity Principle’ (2009) 9 *International Criminal Law Review* 39.

⁹ Kemp (n 5).

prosecutors the world over. These are exceptional challenges in times of fundamental importance for reshaping the relationship of trust between citizens and the institutions that protect and guarantee their rights.

13.2.1 Policy objectives in criminal justice

International justice advocates sometimes rely rather uncritically on the idea of deterrence as the objective of criminal punishment. It is refreshing, therefore, that the Trial Chamber in the Katanga Decision notes deterrence and expression of social disapproval as two important objectives.¹⁰ There is of course a significant degree of scepticism about the ideas of deterrence in general and there needs to be much greater analysis of its relevance in the context of the international crimes of concern to the ICC.¹¹ For the sake of brevity it is submitted that in the context of post-repression and post-conflict national prosecutions, the most significant policy objective of criminal justice should be understood in terms of the affirmation of social values, close to the notion of expression of social disapproval mentioned by the Trial Chamber in Katanga.¹² Various versions of the objective of punishment approximate towards this idea. They do not deny the possibility of other objectives but seek to avoid unnecessary reductivism. The basic notion is that criminal justice forms part of a broader context, a deliberative discourse, between citizens and their institutions. Criminal justice is not the only means by which to secure compliance with social and legal norms, nor necessarily the principal one, but it is an important one. The social disapproval expressed in solemn judgment by the Court and the punishment imposed contribute to a wider network of influences that requires adherence to accepted social and legal norms. In this sense the idea of persuasion rather than deterrence is suggested as a better description of the effect of punishment.¹³

This fundamentally expressivist approach best captures the role criminal justice can play in helping to restore confidence in the system as a whole. It is modest both in the sense that it recognizes that justice plays one part among many other social and political dynamics and in the way that it does not make extravagant claims for deterrence.¹⁴

¹⁰ See Décision Relative à la Peine (Art 76 du Statut), *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3484, TC II, ICC, 23 May 2014, para. 38: ‘Elle considère que la peine a donc deux fonctions importantes: le châtiment d'une part, c'est-à-dire l'expression de la réprobation sociale qui entoure l'acte criminel et son auteur et qui est aussi une manière de reconnaître le préjudice et les souffrances causées aux victimes; la dissuasion d'autre part, dont l'objectif est de détourner de leur projet d'éventuels candidats à la perpétration de crimes similaires.’

¹¹ P Roberts, ‘For Criminology in International Criminal Justice’ (2003) 1 *Journal of International Criminal Justice* 315, and J Alvarez, ‘Crimes of State/Crimes of Hate: Lessons from Rwanda’ (1999) 24 *Yale Journal of International Law* 365; M Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press 2007); J Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press 2002).

¹² See e.g. A Duff, *Trials and Punishments* (Cambridge: Cambridge University Press 1986), 233–62; P De Greiff, ‘Deliberative Democracy and Punishment’ (2002) 5 *Buffalo Criminal Law Review* 373.

¹³ See De Greiff (n 12).

¹⁴ For example, some scholars argue that the important thing about deterrence is the certainty of punishment more than its severity. See D Nagin and G Pogarsky, ‘Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence’ (2001) 39 *Criminology* 865. For a general survey of literature on deterrence see V Wright, ‘Deterrence in Criminal Justice.

What is it that the ICC can do to promote meaningful national prosecutions? At its best the ICC will contribute to making national authorities do more to meet their established obligations to investigate and prosecute serious crimes so that those efforts do indeed help to contribute to restored confidence in national institutions. Where ICC action or threat of action leads to ad hoc or piecemeal approaches that appear designed to keep the Court at bay, rather than a *bona fide* attempt to restore confidence in the system, the Court may well have played a role but it will be for a less meaningful outcome.

13.2.2 Referrals and the limits on national efforts

The ICC currently has eight investigations ongoing. Two arise from UN Security Council referrals, four from self-referrals, and two from *proprio motu* investigations. One of these (Ivory Coast) arises from Article 12(3) declarations and in that sense bears similarities to a self-referral in that the prosecutor was effectively invited to act.

Security Council referrals are the closest the Rome Statute¹⁵ allows to imposing a primacy regime, but in fact there is still an opportunity for national authorities to demonstrate willingness and an ability to act genuinely. In the Darfur referral the OTP took two months to open the investigation having sought detailed information to assess the Special Courts set up by the Sudan authorities.¹⁶ The same was clearly not done in Libya.¹⁷

In the case of self-referrals, states by definition are intimating that they do not intend to act and in effect are ceding jurisdiction to the ICC. There is a common misuse of the term complementarity: it is sometimes said that we should seek to promote complementarity when we actually mean promote national prosecutions. Complementarity means the opposite—the ICC acting in place of national prosecutions. In this sense, nothing promotes complementarity quite like a referral.

While UNSC and state referrals indicate the presumption or reality that the ICC will act in place of national authorities, the role of the Court in catalysing national efforts is not necessarily closed. However, referrals combined with the policy position of the Court that only a handful of cases will be dealt with by the Court creates a very self-limiting environment in terms of the ICC promoting national prosecutions.

It is obvious that the place where the Court can exercise the greatest influence on national prosecutions is under preliminary examinations. However, preliminary examination is very much the poor relation in both resource and policy terms. The elements that attract the greatest interest of criticism and comment of the ICC relate to the proceedings it is carrying out. This is natural enough in terms of what makes news

Evaluating Certainty vs. Severity of Punishment, Sentencing Project (2012)' <<http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf>> accessed 11 September 2014.

¹⁵ Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute').

¹⁶ The UNSC referral was received on 31 March 2005 and the decision to initiate an investigation was made on 1 June, two months later.

¹⁷ The UNSC referral was made on 26 February 2011. The decision to initiate an investigation was made on 3 March 2011, five days later.

and what can be commented upon, but it is looking at the wrong part of the equation in terms of promoting national action.

The ICC has been full of surprises. It is said that self-referrals were not anticipated during the negotiations but they have been the biggest source of business for the Court. It was anticipated there would be no Security Council referrals but not only have there been two, but one saw a unanimous Council vote. We have only now seen a referral by State (Comoros) in the way that the drafters primarily expected one to occur.

These referrals (self-referrals by the UNSC) are rightly seen as partly tactical and partly instrumentalizing the Court. Some referrals are made in better faith than others. Whatever the motivation behind them, we can see that they have generated investigations where the focus of attention has been much less on what the Court can do to promote national prosecutions than on what the Court is doing itself on prosecutions. In order to assess what the ICC can really do well to promote national prosecutions, we have to learn that the short answer is that it will have very little to do with what it does in its own courtrooms. When complementarity is in action, it means that national prosecutions are not working. If we want national prosecutions to work, the focus has to be on what the ICC can do better to leverage those outcomes, but also on what all other key parties can best do.¹⁸

13.2.3 Conditions for national prosecutions

The struggle against impunity that developed in the last three decades of the twentieth century reflects the experience that very few people responsible for serious violations and crimes were being held accountable for their actions before criminal courts. We categorize the reason for this into a lack of political willingness or capacity. On the other hand, the struggle against impunity over the last 40 years has made considerable headway. The creation of the ICTY and ICTR is seen by many as the beginning of the proof of this tendency, and the arrival of the ICC as its crowning moment.

In an international sense all of that may be true, but the struggle for justice at the national level had been fought long and hard, and perhaps with most success in Latin America, although with at least one notable experience from Ethiopia also worth serious analysis.¹⁹

¹⁸ This of course reflects the ICC's first Prosecutor's remarks in his inaugural address that having no cases would be a sign of success. The fact that many people criticized this absolutely correct understanding of the complementarity principle indicates that many still had a journey to go in internalizing the concept.

¹⁹ See F Tiba, 'The Mengistu Genocide Trial in Ethiopia' (2007) 5 *Journal of International Criminal Justice* 513; The Ethiopian Red Terror Documentation and Research Center at <<http://ertdrc.com/index/cms/34>> accessed 11 September 2014, and Ethiopia: Report of the Office of the Special Prosecutor, USIP (1994) <<http://www.usip.org/sites/default/files/Ethiopia-Report.pdf>> accessed 11 September 2014. The circumstances in Ethiopia were significantly different from those experienced in Latin America. Unlike almost any other situation in Africa the incoming government had a profound resolve to see criminal justice as part of the core response to the Red Terror. While it was like Argentina in the sense of government commitment, it had neither the resources nor NGO support. The initial planning suggested trials would take one year. In the end, the Mengistu trial itself took 12 years and the entire proceedings of the Office took 17 years. Over 1,600 people were prosecuted. While there were many procedural and resource challenges, the experience stands alone as an attempt to use the normal criminal procedures to prosecute those responsible for serious crimes. The focus on Latin American examples is not intended

It is beyond the scope of this chapter to rehearse the developments in Argentina, Chile, Peru, Uruguay, Guatemala,²⁰ and to some extent in Colombia that demonstrate the significant inroads against impunity that have been made. A good deal of this has to do with the important influence of the IACtHR in its jurisprudence on the duty to ensure respect for protected rights and to provide an effective remedy.²¹ Significantly, the cases that gave rise to that jurisprudence depended on victims and civil society groups making the petitions in the first place.

The routes in each country have varied considerably, as have the results, but it is reasonable to say that in a regional sense the experience from Latin America is instructive in terms of understanding what kinds of conditions appear to make criminal justice more likely at the national level.

A number of generalizations can be made. Broadly speaking, all of the countries in the region that have seen some kind of attempt to bring the most responsible to justice have been dealing with the aftermath of an ideological conflict or repressive government. Second, there has been a critical mass of sufficiently educated activists to articulate the demand for justice and there is a sufficiently strong point of reference or solidarity that makes this sector able to survive the resistance of the forces of impunity. Third, that demand for justice takes place and has significant resonance in the social and political discourse of the country. In that sense, the demand for justice is rooted in a social context. Fourth, those engaged in the pursuit of justice have the logistical and economic means to coordinate and communicate.

The points made relate largely to the actions and capacity of civil society. In this sense, civil society means something significantly broader than human rights organizations. It refers to social movements, churches, professional bodies' organizations, trade unions, as well as victim groups. In some countries the national institutions played a willing part sooner rather than later. But, however broad civil society is and however active national institutions are, they depended massively on the indefatigable efforts of victims, survivors, and other activists.

to minimize the possible relevance of the Ethiopian example, but is premised on the sense that reliance on the Ethiopian will to prosecute was genuinely exceptional. No country has replicated the number or longevity of that effort.

²⁰ For a general review of Latin America's experiences see N Roht-Arriaza (ed.), 'Digest of Latin American Jurisprudence on International Crimes, Due Process of Law Foundation, Washington D.C. (2010)' <<http://www.dplf.org/en/resources/digest-latin-american-jurisprudence-international-crimes-vol-i>>, accessed 26 May 2014; Almqvist and Espósito (n 2). For reviews of Argentina's experience, see e.g. P Parenti, 'The Prosecution of International Crimes in Argentina' (2010) 10 *International Criminal Law Review* 491; L Mallinder, 'The Ongoing Quest for Truth and Justice: Enacting and Annulling Argentina's Amnesty Laws', Working Paper Series Beyond Legalism: Amnesties, Transitions and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast (2009), 17; P Engstrom and G Pereira, 'From Amnesty to Accountability: The Ebb and Flow in Search for Justice in Argentina' in F Lessa and L Payne (eds), *Amnesty in the Age of Human Rights Accountability. Comparative and International Perspectives* (Cambridge: Cambridge University Press 2012) 108.

²¹ See *Velazquez Rodriguez v Honduras* (Judgment), Inter-American Court of Human Rights Series C No. 4 (29 July 1988); *Barrios Altos v Peru* (Judgment), Inter-American Court of Human Rights Series C No. 15 (14 March 2001); *Almonacid v Chile* (Judgment), Inter-American Court of Human Rights Series C No. 15 (26 September 2006). Note the IACtHR developments were essentially following the lines established in the first cases before the Human Rights Committee under the Optional Protocol to

For the most part, the idea of national prosecutions taking place and making a difference to society's perception of itself as rights-respecting is likely to require a coalescence of many factors. A good number of those factors are more or less directly linked to questions of social and economic development. The idea of restoring trust in the justice system implies that the system existed to some substantial degree before. It conveys at least a sense of structure and institutionality, even if those structures and institutions were abusive in the past. The idea of restoring trust in justice and the rule of law speaks to a certain level of expectation about social and political accountability.

In cases where the elements outlined are not sufficiently present, we are presented with some very hard questions about exactly what we expect of national criminal proceedings: Are they worth pursuing at all? If so, when? And if not now, what should be done in the meantime? Expecting the ICC to catalyse national prosecutions where these elements are significantly absent is perhaps to expect too much.

13.2.4 The role of civil society

The reconstruction of the social contract cannot be left to politicians and technocrats alone. Criminal justice plays a key part in reconstruction of the contract. It has been tempting to think that since the creation of the ICC we can focus on the technical aspects that drive criminal prosecutions—better planning, mapping, and selection, better training, better software and databases.²² All of these may be important, but, even if successfully implemented, may well be insufficient. If we are to be honest about the lasting value of criminal justice in many of the societies we are concerned with, we must recognize that the institutions themselves, even if minded to, are unlikely to be able to get the job done on their own. In many cases the institutions will need significant assistance doing what should be done. But that is how institutionality and accountability develop.

The danger that needs to be avoided in current discourse about promoting national prosecutions is focusing on the technical to the exclusion of the social and the political. The pursuit of meaningful prosecutions needs civil society in its broadest sense to be empowered and encouraged to play an active role in demanding justice and holding institutions and perpetrators to account.

Prosecution initiatives that are seen as responding to international pressure more than a genuinely rooted demand in the social and political discourse of the country will in all likelihood not give rise to meaningful prosecutions in the sense set out at the beginning of this chapter.

Of course, if the sustainability and meaningfulness of the process depends on the development of the civil society, several more difficult questions arise. To what extent is it legitimate to create demand for justice? Should serious efforts wait until that demand exists and is a genuine part of the socio-political discourse?

the International Covenant on Civil and Political Rights (signed 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

²² For an overview of what types of differential approaches are needed in the prosecution of serious crimes (e.g. system crimes, organized crimes), see P Seils and M Wierda (principal authors), 'Rule-of-Law Tools for Post-Conflict States. Prosecution Initiatives', Office of the United Nations High Commissioner

As regards the supply–demand conundrum, there are ethical and practical issues at play, but we know from experience that in many cases individuals and communities that have suffered have little or no awareness of their rights or of the duties of government. Providing information is an essential part of creating fair market conditions, even in the supply and demand for the vindication of human rights. It is not only appropriate, but an essential part of the development of a renewed social contract that citizens understand their rights and their relationship with government anew. Some will argue this is no more than supply-side justice initiatives. It is, however, hard to see why making such information available would be unacceptable.

As regards how long one should wait, no general rule can be made. Recent examples of pushing the justice agenda perhaps prematurely have been seen in Syria. It is hard to see that the basic conditions for meaningful conditions exist there.²³ In the DRC the development of civil society in these areas is a massive challenge. It is also true that in countries where the poverty is so pronounced, investment in one area can quickly turn when a new issue becomes the subject of interest. Assistance providers should avoid the tendency to cherry-pick programmes with high short-term success rates, leaving the difficult but necessary programmes frequently marginalized or untouched.²⁴

It is not suggested that civil society has to reach some notional level of excellence before national prosecution initiatives can take place. Rather, it is important to recognize that unless the desire for justice is rooted in some significant way in the agenda of a critical mass of civil society, the prospects of meaningful processes are reduced.

13.2.5 Transitions, timing, and the interests of justice

The issue of timing has also come up in the Libyan situation where the Government has argued that, in part, because it is a country in transition, some consideration should be given to the reality of its circumstances.

The Appeals Chamber's findings are interesting in this regard.²⁵ One has to remember that in the case of Libya, a decision to open the investigation was made within

for Human Rights (2005) <<http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>> accessed 11 September.

²³ See P Seils, 'Towards a Transitional Justice Strategy for Syria', ICTJ (2013) <<http://ictj.org/publication/towards-transitional-justice-strategy-syria>>, accessed 24 June 2014.

²⁴ See P Collier, *The Bottom Billion* (New York: Oxford University Press 2008) 184, offering a criticism of aid agencies that applies equally here.

²⁵ See Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi', *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-547-Red, AC, ICC, 21 May 2014, para. 165: 'The Appeals Chamber accepts that there may be national legislation in existence or other impediments to a State being able to either disclose to the Court the progress of its investigations, or to take all the necessary steps to investigate. In this case, Libya has asserted, *inter alia*, that it is a State in transition; it also asserts that it was prevented from disclosing to the Court evidence as to the investigations it was undertaking as a result of article 59 of its Code of Criminal Procedure, which it submits required it to maintain information as to investigations confidential; and it asserts that the appointment of a new Prosecutor-General was significant, therefore justifying more time. While accepting the reality that these situations can arise, the Appeals Chamber nevertheless considers that a State cannot expect that such issues will automatically affect admissibility proceedings; on the contrary, such issues should in principle be raised with the Prosecutor directly (prior to instigating admissibility proceedings), with a view to advising her as to the

five days of the referral by the UN Security Council. Thereafter, there was a material change in circumstances with the overthrow of the Gaddafi regime. The incoming revolutionary government clearly intended to prosecute, but needed time to overcome the logistical and legal hurdles that it claimed existed.

The Chamber suggests that rather than making the conditions on the ground part of an admissibility challenge, it would have been better for Libya to discuss the issue with the prosecutor before challenging admissibility and for the prosecutor to determine whether it was appropriate in the circumstances to proceed at that time.

It is not entirely clear from the Chamber's Decision what steps it anticipated the prosecutor might take. If a discussion had been entered into between Libya and the prosecutor and the prosecutor had been persuaded that Libya was entitled to more time to develop its proceedings, what power under the Rome Statute would she invoke if she were to consider it 'sensible' not to proceed at that time?

It would appear that the only avenue open to her, having begun the proceedings, would be to seek to stop them under the interests of justice provisions in Article 53. In the instant case, the prosecutor had already determined there was a sufficient legal and factual basis to proceed and that the case was admissible. It would appear, therefore, that when the Chamber suggests an 'appropriateness' test, it could only be in terms of the interests of justice.

This opens up a new area of inquiry in the interests of justice debate. It is not an issue of peace versus justice (or at least not necessarily), but it seems to indicate that where there is a *prima facie* commitment to investigate and prosecute, the OTP should be open to consideration of arguments that allow a state with jurisdiction to develop the relevant means to carry out effective prosecutions.

13.2.6 The role of the international community

In recent years, and especially since the Kampala Review Conference in June 2010, there have been a number of initiatives that sought to make national prosecutions more of a reality. These included various research exercises and publications by the Open Society Justice Initiative,²⁶ a toolkit published by the European Union,²⁷ and the 'Greentree Process'—a series of high-level meetings over three years convened by

steps the State is taking, any impediments to those steps and allowing her to reach sensible decisions as to whether or not, in the circumstances, it is appropriate for her, at that time, to pursue a case, pending the progress of investigations by the State. It is, in principle, not the place for such issues to be raised with a Chamber in the context of admissibility proceedings.'

²⁶ See e.g. its study on DRC, Uganda, and Kenya: E Witte, 'Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya', Open Society Foundations (2011) <<http://www.opensocietyfoundations.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf>> accessed 11 September 2014.

²⁷ Joint Staff Working Document on Advancing the Principle of Complementarity, High Representative of the European Union for Foreign Affairs and Security Policy (2013) <<http://www.eidhr.eu/files/dmfile/ICCToolkit.pdf>> accessed 11 September 2014.

the International Center for Transitional Justice with the ICC focal points on complementarity, Denmark and South Africa, and with Sweden.²⁸

One common theme in all of these efforts, and in particular in the Greentree meetings, was to try to find a way in which international development actors could play a more direct role in supporting national prosecution efforts. There is still a great deal of work to be done in this regard. At the end of that process many important commitments were made, but there was still something of a communication gap between justice actors on the international stage and development actors. This is not to say development actors are not doing more than they have in the past to support national justice efforts.²⁹ They almost certainly are. But there is a need for greater dialogue and frankness about the challenges both groups face.

As has been suggested, efforts made with national prosecutions that do not at the same time empower and encourage civil society in a broad sense to play an active role are likely to be of limited value in the longer term. Development actors have a key role in both articulating this idea and helping to make it a reality.

Similarly, development actors have in some sense a broader vision than justice actors. They are less likely to be persuaded that justice must be done now, regardless of the political and social risks, and thus can provide an important contribution to the debate. The ICC requires that there be no unjustified delay in bringing prosecutions, but how is the idea of justified delay to be best understood in a fragile society? Should time be given to develop civil society and justice institutions so that meaningful national prosecutions have a greater chance of happening, or should the ICC proceed with a handful of cases regardless of the impact on social and political stability or the opportunity costs for that society in trying to create genuinely accountable institutions?

National prosecution efforts have to harness the energy of civil society and be cognizant of the challenges. International development actors can contribute to both, but greater progress can be made in targeted assistance to civil society actors on the justice front. This can go from basic awareness trainings to funding embedded mentors in organizations to assist in sophisticated strategic litigation initiatives.

This section has sought to illustrate that making national prosecutions a meaningful reality depends significantly on civil society and international actors besides the ICC. The tactical use of the ICC so far has limited the role it can play in promoting national prosecutions. The following section considers what approaches and adjustments to the way the OTP works might help the office maximize its limited role in promoting national prosecutions.

²⁸ Three reports from 2010, 2011, and 2012 can be found respectively at <<http://www.ictj.org/sites/default/files/ICTJ-Global-Complementarity-Greentree-2010-English.pdf>> accessed 11 September 2014 <<http://www.ictj.org/sites/default/files/ICTJ-Global-Greentree-Two-Synthesis-Report-2011.pdf>> accessed 11 September 2014, and <<http://www.ictj.org/sites/default/files/ICTJ-Report-Greentree-III-Synthesis-ENG-2012.pdf>> accessed 11 September 2014.

²⁹ World Development Report. Conflict, Security, and Development, The World Bank (2011).

13.3 The Role of the Office of the Prosecutor in Catalysing National Proceedings

13.3.1 A review of the original position

The early days of the OTP were characterized by a well-intentioned commitment to transparency, evidenced by a series of significant policy papers. The first of these was an outline of a general policy approach.³⁰ It noted that it was likely that the Court would only ever be able to handle a small number of cases in any given situation; that it would focus (generally) on what it considered to be the persons most responsible for relevant crimes; and that it would seek to find ways to contribute meaningfully to ensure that those not addressed by the Court would be brought to justice at the national level.

In that paper, the OTP was not only aware of its very limited reach, but was also making clear the policy consequences that followed. It may have been the wisest option at the time, but does it remain so, or should a different approach be taken?

A new approach is suggested here. Having opened an investigation the OTP should say that it will bring as many cases as it feels necessary in the absence of action by the state. In this way the OTP might do more to promote action instead of serving notice from the beginning of its limited engagement. One difficulty of the approach taken so far is that national authorities may feel (indeed might have been given reason to believe) that they need only prosecute a small handful of cases to stave off possible ICC action. This entirely undermines the kind of impact the principle of complementarity was intended to have. Looking around the states where investigations have been opened by the ICC there is precious little indication of serious attempts to investigate other crimes at the national level. It is not possible to say that the reason so little has happened in terms of national prosecutions is as a result of the basic policy position to date, but it is possible to say that the position has not had a significant impact on catalysing national proceedings.

For example, there are many reasons for the failure of the DRC justice system to take serious and systematic steps to prosecute those most responsible for crimes, but for over a decade its parliament has failed to pass a bill implementing the Rome Statute, thus making more real the possibility of systematic national prosecutions. Aware that the OTP's gaze was apparently never going to extend beyond a handful of cases, the OTP's leverage on parliament has been minimal.

In Kenya the national authorities were given ample notice that the OTP would investigate if nothing was done at the local level. Given the focus of investigations on the most responsible, this was understood to mean that initial investigations had to go to the very top as a way of rendering the ICC case inadmissible.

As things turned out, the Kenyan authorities were not willing to adopt such an approach (or any approach at all, in fact). At one point the state argued that it was under no obligation to go after the most responsible in the first place and was pursuing

³⁰ Paper on some policy issues before the OTP, September 2013.

a ‘bottom up’ strategy, although it was not possible to detect any genuine proof of that.³¹

A different outcome might have been possible if the understanding of what the Court might do was cast more broadly. Essentially that message has to be that the Office is not necessarily focusing on five or six perpetrators. Rather it is saying that it will act in respect of any case that it considers of sufficient gravity that has not been addressed by the national authorities.

In Kenya—as in any other state—this might have had three effects. First, it would afford a certain degree of latitude to national authorities to exercise some discretion in the sequencing or timing of specific prosecutions; second, it would give national authorities the encouragement to devise a genuine process aimed at mapping, selecting, and prioritizing cases that were part of a genuine strategy aimed at helping to restore trust in the national justice system; and third, a comprehensive strategy would more persuasively meet a state’s international obligations to provide an effective remedy to the victims of serious crimes.

It may be argued that such an approach would simply invite stalling tactics, but this need not be so. It would be a matter for the prosecutor to assess whether the strategy was reasonable in the circumstances. The role of the Office would be to catalyse a genuine systemic response, not simply promote a few prosecutions aimed at keeping it at bay.

Advocates of justice often invoke the Sword of Damocles as a threat hanging over the head of perpetrators, but it is not an adequate image for the ICC and the idea of complementarity. What the ICC has to promote is serious and systemic national prosecutions, not token and symbolic ones. To have the desired impact, its threat is not to prosecute the occasional individual that states cannot or will not deal with: its threat has to be that it will step in wherever the state has failed to develop a sufficiently serious attempt to address the scale of crimes that have been committed.

13.3.1.1 Making the most of preliminary examination

It has been gratifying to see the OTP move away from an earlier position that considered an idea of ‘situational gravity’ prior to the opening of an investigation to an assessment of potential cases.³²

In its earliest days the OTP indicated that since it was not possible to know what specific cases would be brought at the point of opening an investigation, the Office

³¹ Application on Behalf of the Government of the Republic of Kenya Pursuant to Art 19 of the ICC Statute, *Ruto et al., Situation in the Republic of Kenya*, ICC-01/09-01/11-19, PTC II, ICC, 31 March 2011, para. 34: ‘The investigations against low level perpetrators are the foundation for extending investigations to senior leaders associated with the ODM and PNU for the most serious incidents (as explained below [footnote omitted]). Many international courts have used a “bottom up” approach in investigating the most serious violations, it being very difficult to start an investigation at the highest levels without a sound knowledge of the underlying crimes.’

³² For a more detailed treatment of this issue see Seils (n 1) 992–7. The approach suggested was significantly adopted by the Pre-Trial Chamber in the decision authorizing the opening of an investigation.

would not consider the gravity of a given case at that point but would rather assess whether the situation as a whole was of sufficient gravity to justify investigation.

There were two problems with this approach. The first was that the statute appeared to require a different test. Article 53(1) asks whether a case is or would be admissible. It does not ask whether the situation as a whole is of sufficient gravity. It talks only about the admissibility and gravity of a case. The second problem was that by stating it was not possible to know enough about specific cases at the point of opening an investigation, the Office was both ignoring part of its own experience and imposing on itself an unhelpful glass ceiling.

It has been understood from 2005 that the concept of a case embraces suspects, incidents, and conduct.³³ Since the test for opening an investigation talks partly about determining whether there is a reasonable basis to believe that a crime within the jurisdiction of the court has been committed, the OTP for some time appeared to indicate that this was the only issue it was really concerned with at this point. Having established that there was a reasonable basis to believe that such crimes had been committed, it was not at that point concerned with establishing who may have been responsible in terms of potential suspects, or indeed specifying conduct. The focus was very much on alleged incidents.

Such an approach, therefore, answered only one part of the issues raised by Article 53(1). Besides this determination, the Office was also required to establish that the case is or would be admissible. In order to answer that question the Office would need to have a sufficiently clear sense not only of the alleged incidents of potential interest, but also of the potential accused and their related conduct.

Of course, in situations where there was no indication of any incidents having been investigated at the national level, the OTP would have been able to determine admissibility simply on the basis of national inactivity.³⁴ On the other hand, even in the face of that inactivity, they would have been entitled to go further, developing information to establish what might constitute a potential case before the ICC.

Positive as the shift to consideration of potential cases has been, there may be more room to develop the practice as a means of catalysing national activity. This would require a limited rethinking of the OTP's approach to developing hypotheses for investigation.

13.3.1.2 Efficient hypotheses and opportunities during preliminary examination

In complex investigations the development of hypotheses can be one of the most important and difficult arts. Complex investigations require the development of evidence that will show connections between selected suspects, incidents, and conduct. The initial hypothesis is developed on the assessment of relatively untested

³³ Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-8-US-Corr, PTC I, ICC, 24 February 2006. See also R Rastan, 'What Is a "Case" for the Purpose of the Rome Statute?' (2008) 19 *Criminal Law Forum* 435.

³⁴ See D Robinson, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 *Criminal Law Forum* 67.

information, and each subsequent hypothesis is arrived at by evaluating the information gathered, and determining whether the hypothesis has been proved, needs revision, or has been disproved.

There is debate about at what point in an investigation it makes most sense to develop detailed hypotheses. Doing it too soon can mean a premature exclusion of important leads; doing it too late can lead to inefficient use of resources, wasted time, and demotivation of staff. It is impossible in the abstract to state what the best course of action is. It will always depend on the quality of the information available in any given case and the skill and experience of the investigation team and its leader.

It would be a mistake to fetishize the moment of hypothesis formulation into something more than it needs to be. What is clear, however, is that there is no inherent harm in talking about the process of preliminary examination as an opportunity for the formulation of preliminary or initial hypotheses. The value of the hypothesis at the preliminary examination stage will of course be limited, but it may serve a number of purposes.

By clarifying that the OTP is entitled at this stage of proceedings to collect sufficient information to ascertain not only that incidents constituting crimes were committed, but also on who may have been responsible as a result of their actions in connection with the incident, allows the Office to reimagine the scope and reach of its inquiries while still not straying into the field of investigation. The difference between preliminary examination and investigation might be usefully distinguished at this stage as the difference between the development of initial hypotheses and the testing of those.

Such an approach makes three significant differences:

- i. It provides a workable distinction between preliminary examination and investigation. One of the reasons the OTP initially felt disinclined to go beyond a situational assessment to case assessment was due to a fear that the Pre-Trial Chamber would consider they had undertaken unauthorized investigative activity. The formulation of initial hypotheses in preliminary examination would clearly still be limited to untested information but as long as the process does not involve putting the information developed to any testing through interviews with witnesses, it can be legitimately argued that no investigation is yet being conducted. The moment information is tested through any interrogatory process it can be said that the process has moved into an investigative domain (subject to Rule 48 of the RPE).
- ii. The development of initial hypotheses allows for greater focus when investigations begin. If from the outset the process of preliminary examination was seen as the development of potential cases through formulating initial hypotheses, once an investigation was opened the OTP would be potentially in a stronger position to allocate resources and identify areas of particular interest. While the initial hypothesis is just that, it would still be an advance on analysis that seeks only to establish that crimes within the jurisdiction of the court were committed.
- iii. Third and most importantly, in light of the preceding discussion, if states are aware that the process of preliminary examination is aimed at developing initial

hypotheses in relation to a potentially broad number of cases in any given situation, the OTP can transmit a more powerful message to national authorities that it is not engaged in a token prosecution of a few high-level perpetrators but that it has analysed information and is in a position to investigate many more cases. Whether it would make sense for the OTP to share any of the details of the preliminary analysis would depend on the circumstances, but in general the national authorities will be as able to develop the same kind of analysis as the OTP. States will be in possession of the information or will be able to be helped by advisers, perhaps from outside the country, to get the information.³⁵

13.4 Technical Analysis of National Proceedings

The OTP's rigorous and accurate analysis of national proceedings is an essential element of the complementarity principle. States must be sure that if their processes are not genuine, the ICC will detect it and act on it. This is how it can catalyse not just token responses but systemic responses. The situation of States Parties' forces active in Iraq provides one example.

13.4.1 UK forces in Iraq

Regarding allegations against UK forces in Iraq, on 9 February 2006 the prosecutor issued a letter indicating the following:

- i. That there was a reasonable basis to believe unlawful killing and serious abuse of prisoners had occurred while in custody or under the control of UK forces.
- ii. That the incidents in question seemed to relate to less than 20 alleged victims.
- iii. That these numbers fell short of the required gravity threshold.
- iv. That in any event all the incidents appeared to be the subject of national investigations.

In February 2006 this may have been true, but in the years that followed information about the number of incidents of alleged killings and mistreatment increased. In addition, the information on the quality of national proceedings indicated ever more reasons for doubting the genuineness of significant aspects of the proceedings.

The High Court Decision issued by Lord Justice Scott Baker on 2 October 2009 relates to allegations arising from the military operation known as Danny Boy.³⁶ It was alleged that members of the British Army had killed or mistreated prisoners taken on

³⁵ What is required at this stage to develop initial hypotheses is information about alleged incidents and alleged perpetrators. That information will come either from direct complaints made by victims or their relatives and friends, or through some form of data collection processes, often by local NGOs. In this sense the information is almost always well known and available. The degree of expertise needed to develop an effective mapping process of such information will depend on the context, but to the extent that it is needed, it is probably best for the OTP to keep the relationship at arm's length and allow whatever technical help is thought necessary to be provided by others.

³⁶ *R (Al-Sweady) v The Secretary of State for Defence* [2009] EWHC 2387 (Admin) [Judgment].

14 May 2004. Iraqi nationals claimed that of 20 bodies recovered from the battlefield by the British forces, not all were dead and that at least 1 was murdered in custody. Others, they claimed, were tortured or mistreated.

The judgment of the Court upon a judicial review application paints a damning picture of all aspects of the system put in place by the national authorities to investigate the matters in question.³⁷ The Secretary of State for Defence is criticized in plain terms for his role in failing to ensure adequate systems leading to the failure to disclose vital information on a serial basis. The Government's lawyers are deemed to have manifestly failed in their duty as officers of the Court in meeting their duties of disclosure.³⁸ More damning still is the Court's assessment of the senior official of the Royal Military Police in charge of the initial investigation into the alleged incidents. In short, the Court found him to be entirely unreliable as a witness and urged any future court taking testimony from him to treat it with the greatest caution. Significantly, the Court found that the officer in question, Colonel Dudley Giles, had lied about the initial proceedings and concluded that the investigations carried out had been anything but proficient or thorough.³⁹

An objective reader of the judgment cannot but come to the view that not only was the initial investigation manifestly below the reasonable standards to be expected in relation to the obligations of conduct in this regard,⁴⁰ but the actions of the Secretary of State and the government's solicitors limited the prospects of any further information about the incident ever coming to light.⁴¹

Perhaps the most notorious case arising from the allegations against UK forces relates to that of Mr Baha Moussa and another eight persons detained by British forces. Mr Moussa died as a result of injuries sustained while in custody. The autopsy indicated over 93 injuries to his body. A military investigation led to the trial of six soldiers. One was convicted and five were acquitted. The guilty man was sentenced to one year in jail in respect of failing to discharge his duties, not in respect of murder or manslaughter.⁴²

In 2008 a public inquiry was ordered which heard from 250 witnesses and led to the army admitting that human rights had been breached. A second inquiry was established under Sir William Gage in 2010. After years of struggle by relatives of alleged victims, a judicial inquiry reported in September 2011 that serious abuse had occurred by British soldiers in respect of Mr Moussa and several other prisoners. It found that there were systemic failures throughout the army system, and that the commanding officer should clearly have known what was happening to Mr Moussa long before he died.

³⁷ Ibid., paras 63–5.

³⁸ Ibid., paras 30–44.

³⁹ Ibid., paras 45–60.

⁴⁰ See van der Wilt and Lyngdorff (n 8).

⁴¹ As a result of the High Court decision a public inquiry has been established. It allegedly has cost over £20 million and heard testimony over 160 days. What is less clear is whether new criminal prosecutions are likely to be initiated and the degree to which earlier decisions make new proceedings legally or practically impossible.

⁴² *R v Payne, Mendonca and Others* [2006]; see also 'UK Soldiers Cleared of Iraq Abuse', *BBC News*, 14 February 2007.

Another judgment arising from the Baha Moussa incident from the Court of Appeal on 22 November 2011 notes the mechanisms established to carry out investigations into alleged systemic abuse of Iraqi prisoners failed to meet the required standards of impartiality.⁴³ The specific appeal related to the creation by the UK Government of an Iraqi Historical Allegations Team (IHAT) announced in Parliament on 1 March 2010. The Court of Appeal concluded that the mechanisms in question, since it required investigations to be carried out by a party that could have been culpable for acts of omission in respect of the treatment of prisoners, could not satisfy the test of perceived impartiality.

As a result of the 2008 inquiry into the Baha Moussa case, and the High Court Decision in the Al Sweady/Danny Boy case in 2009, it has been public knowledge that serious incidents occurred regarding allegations of at least two murders and serious abuse of multiple detainees. It has been at least arguable that the military justice system charged with investigating the incidents was not conducting genuine inquiries into the meaning of Article 17 of the Rome Statute. As a result of flawed investigations and multiple subsequent inquiries, the UK government set up a process to carry out investigations which the Court of Appeal found to lack the necessary impartiality for the job.⁴⁴

Looking at the example of Iraq, a number of questions arise for the OTP. In the case of *Abu Garda*, the Court has determined that an alleged attack on ten AU peacekeepers met the threshold of sufficient gravity, notwithstanding that the attack was not conducted on a large scale or as part of a policy.⁴⁵ In the light of that case, is the OTP minded to review its initial determination of February 2006, that the cases of abuse of detainees in Iraq do not meet the gravity threshold as it then indicated? In particular, does the OTP take the view that alleged serious abuse and killing of detainees by a belligerent occupying force would meets its criterion of ‘impact’ in terms of its gravity assessment?

In addition, public information since at least 2011 has indicated that as many as 140 individuals from Iraq have suffered alleged serious mistreatment. Even if the two cases of Al Sweady et al. and Baha Moussa et al. do not, for some reason, meet the gravity threshold, would they in combination with the other 140 cases meet the gravity threshold?

Lawyers for the Iraqi prisoners brought information to the OTP in January 2014 asking for an investigation to be opened. The OTP indicated that it was proceeding with a preliminary examination of the matter. It is reasonable to ask why, in the light of information publicly available since at least October 2009, the Office did not take a more proactive approach in seeking further information on the conduct of national proceedings.⁴⁶

⁴³ *R (oao) Moussa and The Secretary of State and another* [2011] EWCA Civ 1344.

⁴⁴ Ibid., paras 34–49.

⁴⁵ Decision on the Confirmation of Charges, *Abu Garda, Situation in Darfur, Sudan*, ICC-02/05-02/09-243-Red, PTC I, ICC, 8 February 2010, para. 34.

⁴⁶ In fact, the author had publicly raised the issue of a new examination being necessary in the Iraq situation in 2011. See Seils (n 1) 995–6.

13.4.2 Colombia

The OTP has concluded that it is satisfied that the state has investigated alleged violations by the Armed Revolutionary Forces of Colombia, better known as FARC. It notes that convictions exist in relation to some 218 cases, although almost all of these are convictions *in absentia*. The Office has indicated on several occasions that the only issue of concern now is the sentence imposed on the convicted men when they are apprehended.⁴⁷

It is not obvious from the reports issued by the Office that it has been able to inquire into the quality of the proceedings that gave rise to the convictions, and whether or not they can be relied upon as proceedings that met international standards of due process or whether they were in some sense fundamentally unsound.

As a matter of law it is not an easy issue to determine how much relevance the Office should place on the quality of national proceedings from a human rights point of view. Article 17 is not constructed with due process guarantees at the forefront. It is constructed with a view to ensuring that proceedings do not shield the guilty. It is not clear that the Court is either required to or in a good position to ascertain the quality of national proceedings from a human rights point of view. However, it seems relatively uncontroversial that to insist upon an appropriately serious sentence being imposed in respect of proceedings that have not been analysed for their integrity or seriousness raises some doubts about the contribution the Office is making to the struggle against impunity at the national level.

Perhaps more significant than the FARC cases are those allegations relating to extra-judicial executions carried out by the military. The OTP said in November 2012 that it would be focusing on these cases as a priority⁴⁸ and that it hoped to see cases involving the most responsible being brought. The same message was transmitted to the Colombian authorities in September 2008.⁴⁹ While several hundreds of cases have been brought and convictions with heavy sentences imposed, almost no cases have been brought in respect of those who could reasonably be considered either as among the most responsible as perpetrators, indirect co-perpetrators, or having command responsibility. Six years on since the initial warnings were given to the Colombian authorities on a very specific basis, it is unclear what explains the OTP's continued patience on this matter.

One final issue of interest is the question of punishment. The OTP has intervened in Colombia to argue that a sentence that could be regarded as grossly inadequate would be taken as an indication that the proceedings were not genuine.⁵⁰ The OTP wrote directly to the Constitutional Court which was at that point deliberating on a challenge to a constitutional amendment. There may be some who see this as a positive step by the Office—an example of what many people continue to refer to as positive complementarity.

⁴⁷ See Situation in Colombia, Interim Report, OTP (2012), para. 1601.

⁴⁸ Ibid., paras 8–10 and especially para. 196.

⁴⁹ The author was involved in transmitting the message.

⁵⁰ See D Sánchez, 'Una "Carta Bomba"', *Semana*, 17 August 2013.

The OTP has had the Colombian situation under analysis since 2004 but has never opened an investigation. To write directly to the Constitutional Court during its deliberations when the Office was neither a party to the proceedings nor where an investigation had been opened is an extraordinary intervention. One could have no objection to the Office entering into discussions or making its views known to its normal counterparts in the Colombian Government, but a direct communication to the Constitutional Court might be deemed questionable.

Leaving aside the doubts of a procedural nature, the substantive issue is also important. To what extent does the issue of punishment figure as a criterion of genuineness? Of course, an entire chapter could be devoted to the issue and only a few brief points can be made here.

The OTP notes in its letter to the Court that the question raises novel matters but argues that a reading of Article 17(2)(a) and 17(2)(c) provides a basis to argue that the OTP can have regard to the nature of punishment to determine the issue of admissibility.

The argument under Article 17(2)(a) requires that the provision in the statute that refers to proceedings designed to shield the accused from criminal responsibility is given a broader meaning than the ordinary words imply. The determination of criminal responsibility is normally understood as the finding of guilt or innocence. The question of punishment is normally considered a separate issue. That an inadequate sentence could be understood as a proceeding designed to shield the accused from criminal responsibility seems to extend the meaning of that phrase unnaturally.

There is a clear difference between conviction and punishment. The practice of expunging criminal records after a period of time is an indication that the record of a finding of guilt—i.e. the determination of criminal responsibility—is seen as something intrinsically valuable and important, separate from punishment. It is an inappropriate extension of meaning to suggest the determination of guilt also addresses the issue of appropriate punishment.

Article 17(2)(c) provides that in order to determine unwillingness it would have to be shown that proceedings were not being conducted independently or impartially and that they were being conducted, in the circumstances, in a manner inconsistent with an attempt to bring the person to justice.

This is a complex provision, but two things are immediately noticeable. The first is that the Article focuses on the quality of proceedings—that is, the specific investigation and/or trial that would be under scrutiny. Second, the provision requires that two tests are met—insufficient independence or impartiality first, and second, that the proceedings were not conducted with an intent to bring the accused to justice.

In the Colombian context, the discussion centres on an amendment to the Constitution known as the Legal Framework for Peace. It concerns the legal changes deemed necessary to facilitate the agreement of FARC and the state to end the current conflict. If the peace process were successful, in accordance with the proposed amendment a law would then be passed to provide for the criminal prosecution of relevant groups. This mirrors what happened under Law 975 which dealt predominantly with demobilized paramilitaries and Law 1424 which addressed the rank and file not included under Law 975. Justice officials from prosecutors to judges would be required

to apply that law, as they have applied Law 975 and Law 1424. If the prosecutors and judges act as Congress intends and apply the law without favouring one side or the other in the proceedings, it is not easy to see how the ‘proceedings’ will be viewed as lacking in independence. They may well be applying a law that provides sentences with which the OTP disagrees, but that is a separate issue from acting with a lack of independence or impartiality. In short, the drafting of Article 17(2) does not appear to give the OTP the entry point it desires to question the legislation that might be drafted.

It should be understood that if a state drafts a law that precludes proceedings themselves, such as an amnesty law, then the ICC will of course be able to instigate proceedings. It is much less clear, however, on what basis a case would be admissible before the ICC simply on the basis of the penalties provided under national law. As indicated, the consideration of proceedings is specific: on its face, it does not invite scrutiny of legislation. The first question that must be asked is whether the officials in question are acting with a lack of independence or impartiality in those proceedings. Applying the law as it is drafted is not an indication of a lack of independence or a lack of impartiality. Given the foregoing, it is not necessary to ask what is meant to by the phrase ‘with the intent to bring to justice’, but this concept does raise wider policy concerns regarding the peace process as a whole. It might be argued that a more reflective view was called for in the context of the current negotiations. It is notable, for example, that in the recent case of *El Mozote* before the IACtHR, a separate opinion by Judge Garcia-Sayan noted that all previous Inter-American jurisprudence on the issue of amnesties had not been concerned with the challenges presented by the simultaneous pursuit of peace and justice.

In this context, it is necessary to devise ways to process those accused of committing serious crimes such as the ones mentioned, in the understanding that a negotiated peace process attempts to ensure that the combatants choose peace and submit to justice. Thus, for example, in the difficult exercise of weighing and the complex search for this equilibrium, routes towards alternative or suspended sentences could be designed and implemented; but, without losing sight of the fact that this may vary substantially according to both the degree of responsibility for serious crimes and the extent to which responsibility is acknowledged and information is provided about what happened. This may give rise to important differences between the ‘perpetrators’ and those who performed functions of high command and gave the orders.⁵¹

A similar point could be made in the case of Colombia: the pursuit of peace necessarily renders a degree of complexity to questions of punishment that would not normally be present. The jurisprudence that has emerged on these issues, and is cited by the OTP, was not concerned with the question of the pursuits of justice and peace.

It should be noted that promoting better analysis of these issues is not to argue against the idea that it is in the interests of justice to prosecute the most serious

⁵¹ Concurring Opinion of Judge Diego García-Sayán, *The Massacres of El Mozote and Nearby Places v El Salvador* (Judgment), Inter-American Court of Human Rights Series C No. 252 (25 October 2012), para. 30.

criminals of the FARC. Neither does it suggest that the treatment for one actor in the conflict should apply to all. The only justification for providing a lesser sentence for FARC members would be that it was necessary to secure a peace deal and the demobilization and reintegration of FARC into Colombian society. These forces have remained beyond the reach of the state for 50 years, so an agreement that it submits its members to the criminal justice system seems necessary. It is submitted that the same cannot be said, however, of members of the Colombian military accused of killing civilians. There is no justificatory argument that requires a deal on sentencing to be struck with parties who, far from being beyond the law, are state employees tasked as its ultimate guarantors.

Finally, it is worth noting that Article 80 of the Rome Statute was drafted to ensure that states could apply the national penalties they saw fit, regardless of the provisions on sentencing in the Statute.⁵² It was drafted with a view to giving comfort to states who had and wanted to keep the possibility of applying the death penalty, but it recognizes the rights of states to establish their penalties as they see fit. It is far from clear that the provisions of Article 17(2)(a) and (c) entitle the OTP of the Court to bring national penalties under their purview to determine willingness.

13.5 Steps for the OTP

In order to make better use of its powers to catalyse national prosecutions, the OTP should consider the following three steps:

- i. It should change the position set out in its first policy paper in which it indicated that it will be likely only to ever focus on a very few cases in any given situation. Instead it should create a sense of creative ambiguity by stating that it will keep situations under investigation until it is satisfied that the state with jurisdiction has taken reasonable steps to address cases that might justify further action by the Court.
- ii. The Office should develop or make more explicit the way in which it seeks to use the phase of preliminary examination. It should be used to identify potential cases for prosecution in a preliminary fashion, and not to assess a misplaced notion of 'situational gravity'. The division between what constitutes preliminary examination and what constitutes investigation should be understood as a division between the information assessed in the development of preliminary hypotheses and the work undertaken to test, evaluate, and develop new hypotheses in the course of investigation. This would have a considerable impact on the way states watching preliminary examination would measure their own responses.

⁵² See R Fife, 'Article 80 Non-Prejudice to National Application of Penalties and National Laws' in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court—Observers' Notes, Article by Article* 2nd edn (München: C H Beck 2008) 1443.

- iii. The OTP should take a more assertive stand on the analysis of national proceedings, demonstrating that it will carry out its role without fear or favour, with the appropriate levels of skill and supported by adequate resources.

13.6 Conclusions

The previous section provided specific conclusions regarding OTP actions and policy. More broadly this chapter has sought to argue three things. First, that there is a limited amount the ICC and the OTP in particular can do in promoting national prosecutions; second, that it may be appropriate to revisit some earlier policy positions and practices and to amend these with a view to doing more with its limited capacity to promote national prosecutions; and third, to highlight the fact that most of the heavy lifting on national prosecutions will be done by civil society in the countries involved and by international assistance to them and national institutions. Those efforts should be directed not simply at doing what the ICC would otherwise step in and do, but at the creation of suitably robust processes capable of making a difference to the way citizens see their national justice system.

The need for joined-up discussions and awareness between civil societies, international donors and supporters, and the ICC remains as important as ever. The objective is for the ICC to contribute not only to occasional prosecutions but to restored justice systems capable of protecting human rights and worth trusting. This requires both technical amendments to policy and practice as well as a refreshed understanding of the kind of role it can play along with the other parties essential to this noble goal.

Investigative Management, Strategies, and Techniques of the ICC's OTP

Susana SáCouto and Katherine Cleary Thompson***

14.1 Introduction

The ICC has issued warrants of arrest or summonses to appear against more than 30 individuals charged with committing genocide, crimes against humanity, and/or war crimes. A number of these individuals have appeared before the Court—either voluntarily or following apprehension and transfer to ICC custody—for purposes of participating in a hearing before a Pre-Trial Chamber to determine whether the prosecution's charges should be confirmed and the case sent to trial.¹ Specifically, pursuant to Article 61 of the Rome Statute, the confirmation of charges process requires that the Pre-Trial Chamber determine whether the prosecution has presented 'sufficient evidence to establish substantial grounds to believe' that the individual is responsible for the charges contained in the warrant of arrest or summons to appear.² While the Pre-Trial Chambers have confirmed charges against the majority of individuals appearing before the Court thus far, they have declined to confirm the charges against several suspects, meaning that the prosecution has failed to convince the Court that there are 'substantial grounds to believe' the charges against a significant number of the individuals who have appeared before it.³ In addition, in

* Many of the findings and recommendations contained in this chapter were first published by the War Crimes Research Office ('WCRO') in an October 2012 report entitled 'Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor'. The full report, which is the 16th report issued as part of the WCRO's ICC Legal Analysis and Education Project, is available at <<http://www.wcl.american.edu/warcrimes/icc/documents/ICCReport16.pdf>> accessed 29 May 2013.

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¹ Many individuals remain at large or are currently being held by the authorities of a state. Two warrants of arrest have been terminated after a determination by the Pre-Trial Chamber that the accused was deceased. See Decision to Terminate the Proceedings against Raska Lukwiya, Kony et al., *Situation in Uganda*, ICC-02/04-01/05-248, PTC II, ICC, 11 July 2007; Decision to Terminate the Case against Muammar Mohammed Abu Minyar Gaddafi, Gaddafi et al., *Situation in Libya*, ICC-01/11-01/11-28, PTC I, ICC, 22 November 2011.

² Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('Rome Statute').

³ See Decision on the Confirmation of Charges, *Abu Garda, Situation in Darfur, Sudan*, ICC-02/05-02/09-243-Red, PTC I, ICC, 8 February 2010 (declining to confirm the charges against Mr Abu Garda); Decision on the Confirmation of Charges, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-465-Red, PTC I, ICC, 16 December 2011 (declining to confirm the charges against Mr Mbarushimana); Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*,

one case, the Pre-Trial Chamber issued a decision adjourning the proceedings to allow the prosecutor ‘to consider providing further evidence or conducting further investigation with respect to all charges’ after determining that the evidence submitted at the initial confirmation hearing was insufficient.⁴ Even in those cases that have survived the confirmation hearing, the Pre-Trial Chamber has occasionally dropped charges due to a lack of evidence⁵ and the Prosecutor has withdrawn charges altogether in at least two cases after determining that there was insufficient evidence to establish a conviction.⁶ Finally, of the cases in which a Trial Chamber has rendered a judgment to date, one resulted in acquittal due to insufficient evidence,⁷ while the others resulted in a conviction on a limited set of charges.⁸ Significantly, in one of the cases resulting in conviction, the Chamber determined that the evidence provided by [a] series of prosecution witnesses could not ‘safely be relied on’ as a result of the fact that the OTP inappropriately delegated its ‘investigative responsibilities’ to intermediaries.⁹

We recognize that the challenges of conducting international criminal investigations are legion, given investigators’ restricted access to evidence, either due to the

ICC-01/09-01/11-373, PTC II, ICC, 23 January 2012 (confirming the charges against Mssrs Ruto and Sang, but declining to confirm the charges against Mr Kosgey); Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Muthaura, Kenyatta and Ali, Situation in the Republic of Kenya*, ICC-01/09-02/11-382-Red, PTC II, ICC, 23 January 2012 (confirming the charges against Mssrs Muthaura and Kenyatta, but declining to confirm the charges against Mr Ali).

⁴ Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Art 61(7)(c)(i) of the Rome Statute, *Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-432, PTC I, ICC, 3 June 2013, 22.

⁵ For instance, in the *Katanga and Ngudjolo* case, while the Pre-Trial Chamber confirmed charges of rape and sexual slavery as war crimes and crimes against humanity, it declined to confirm the charge of outrages upon personal dignity as a war crime, which was based in part on the allegation that a woman ‘was stripped and forced to parade half naked in front’ of combatants belonging to the militia led by the accused. Decision on the Confirmation of Charges, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-717, PTC I, ICC, 30 September 2008, para. 366. Similarly, in the *Muthaura, Kenyatta and Ali* case, while the Pre-Trial Chamber confirmed the charge of rape as a crime against humanity in relation to events occurring in two locales, in its decision issuing a summons to appear, the Chamber had significantly narrowed the ‘geographic scope’ of the alleged rape charges because, as summarized by the Women’s Initiatives for Gender Justice, the prosecution failed to ‘provide evidence of...the individual criminal responsibility of [the three accused] for gender-based crimes committed in other locations’. Women’s Initiatives for Gender Justice, ‘Gender Report Card on the International Criminal Court’ (2011) 126.

⁶ See Decision on the withdrawal of charges against Mr Muthaura, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-696, TC V, ICC, 18 March 2013, para. 7. The prosecution based its decision to withdraw the charges against Mr Muthaura on, *inter alia*, the fact that there were ‘post-confirmation developments with respect to a critical witness against Mr Muthaura, who recanted a significant part of his incriminating evidence after the confirmation decision was issued, and who admitted accepting bribes from persons allegedly holding themselves out as representatives of both accused’. Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-687, OTP, ICC, 11 March 2013, para. 7. See also Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, *Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11, OTP, ICC, 5 December 2014.

⁷ See Judgment Pursuant to Art 74 of the Statute, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-3, TC II, ICC, 18 December 2012 (‘Ngudjolo Judgment’).

⁸ See *infra* (n 54) and accompanying text.

⁹ Judgment Pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012, paras 482–3 (‘Lubanga Judgment’); Jugement Rendu en Application de l’Art 74 du Statut, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436, TCII, ICC, 7 March 2014.

passage of time and/or uncooperative governments; international institutions' lack of enforcement powers; cultural and linguistic barriers to interviewing witnesses; persistent security concerns; the overwhelming scale of the crimes under investigation; and the fact that those working in international institutions hail from different legal traditions and thus are likely to have different views on appropriate investigative policies and practices.¹⁰ We also appreciate that, despite these challenges, the OTP has achieved substantial successes in a short period of time, as evidenced most strikingly by the recent conviction of its first accused and the issuance of warrants and summonses involving a wide range of charges for war crimes, crimes against humanity, and genocide against multiple suspects across eight situations.¹¹ Finally, we acknowledge that, in its Draft Strategic Plan for 2013–15, the OTP explained that '[d]uring its initial years, [the Office] tested different approaches by relying on the diverse experience of staff members who came from different professional backgrounds', and that it is currently 'review[ing] and improv[ing] its practices and standards based on its experiences' and 'analysing the Court's decisions in relation to [the OTP's] investigative practices to determine whether further changes to its investigative strategies and [standards] are required'.¹² In support of that effort, this chapter examines some of the potentially problematic aspects of the Office's investigative practices that have been identified by the judges of the Court and outside observers to date and offers recommendations that we hope will contribute to improving the OTP's investigative practices, thereby helping to build a stronger OTP.

In terms of methodology, we wish to highlight from the outset that, although we did conduct interviews with former and current ICC personnel and other experts, we have chosen to limit our analysis primarily to facts and findings that are supported by the public record.¹³ We would also like to point out that, while we have included references to the stated policies and practices of the OTP and the Office's response to criticisms highlighted in this report to the extent such information is publicly available,

¹⁰ See e.g. H Fujiwara and S Parmentier, 'Investigations' in L Reydams et al. (eds), *International Prosecutors* (Oxford: Oxford University Press 2012) 573–5; M Bergsmo and M Keegan, 'Case Preparation for the International Criminal Tribunal for the Former Yugoslavia' in *Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers* (Oslo: Norwegian Institute of Human Rights 2008) 6–9; M Keegan, 'The Preparation of Cases for the ICTY' (1997) 7 *Transnational Law and Contemporary Problems* 119, 120–5; S Brammertz, 'International Criminal Tribunals and Conducting International Investigations, Presentation Delivered at the Max Planck Institute' (July 2009) 7.

¹¹ In the context of the ICC, the Court's operations are divided into two broad categories: 'situations' and 'cases'. According to Pre-Trial Chamber I, 'situations' are 'generally defined in terms of temporal, territorial and in some cases personal parameters' and 'entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such'. Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *Situation in the Democratic Republic of Congo*, ICC-01/04-tEN-Corr, PTC I, ICC, 17 January 2006, para. 65. In other words, the 'situation' refers to the operations of the ICC designed to determine whether crimes have been committed within a given country that should be investigated by the Prosecutor. By contrast, 'cases' are defined as 'specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects' and entail 'proceedings that take place after the issuance of a warrant of arrest or a summons to appear'. *Ibid.*

¹² International Criminal Court, Office of the Prosecutor, Draft Strategic Plan: 2013–15, 3 April 2013 (on file with authors).

¹³ This is consistent with the approach adopted by the WCRO in all of the reports written as part of the ICC Legal Analysis and Education Project.

the fact is that information regarding the investigative process of any prosecution's office is understandably sensitive and, thus, public information available from the OTP on this subject is limited.

14.2 Organization and Administration of the OTP

14.2.1 Issues relating to the organization and administration of the OTP

As set forth in the Regulations of the OTP, the OTP is comprised of three divisions: the Prosecution Division;¹⁴ the Investigation Division;¹⁵ and the Jurisdiction, Complementarity, and Cooperation Division (JCCD).¹⁶ The Prosecution Division is led by the deputy prosecutor,¹⁷ while both the Investigations Division and the JCCD are led by a Head of Division.¹⁸ In addition, the Office has an Executive Committee (Ex Com), 'composed of the Prosecutor and the Heads of the three Divisions of the Office',¹⁹ which 'shall provide advice to the Prosecutor, be responsible for the development and adoption of the strategies, policies and budget of the Office, provide strategic guidance on all the activities of the Office and coordinate them'.²⁰ Finally, each division has a 'coordinator'. The Investigations Coordinator is responsible for ensuring that 'OTP investigations are conducted in compliance with the OTP Operational [M]anual and Ex Com instructions and provid[ing] advice on how to improve the quality of the investigations',²¹ whereas the Prosecution Coordinator 'oversees the

¹⁴ Regulation 5 Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, 23 April 2009 ('ICC Regulations of the Office of the Prosecutor'). The Prosecution Division is responsible for: '(a) the provision of legal advice on issues likely to arise during investigations and which may impact on future litigation; (b) the preparation of litigation strategies within the context of the trial team for the consideration and approval of [the Executive Committee] and their subsequent implementation before the Chambers of the Court; (c) the conduct of prosecutions including litigation before the Chambers of the Court; and (d) coordination and cooperation with the Registry, when required, on trial related issues'. Ibid., Regulation 9.

¹⁵ The Investigations Division is responsible for the following: '(a) the preparation of the necessary security plans and protection policies for each case to ensure the safety and well-being of victims, witnesses, Office staff, and persons at risk on account of their interaction with the Court, in adherence with good practices and in cooperation and coordination with the Registry, when required, on matters relating to protection and support; (b) the provision of investigative expertise and support; (c) the preparation and coordination of field deployment of Office staff; and (d) the provision of factual crime analysis and the analysis of information and evidence, in support of preliminary examinations and evaluations, investigations and prosecutions'. Ibid., Regulation 8.

¹⁶ JCCD is responsible for the following: '(a) the preliminary examination and evaluation of information pursuant to articles 15 and 53, paragraph 1 [of the Rome Statute] and rules 48 and 104 and the preparation of reports and recommendations to assist the Prosecutor in determining whether there is a reasonable basis to proceed with an investigation; (b) the provision of analysis and legal advice to [the Executive Committee] on issues of jurisdiction and admissibility at all stages of investigations and proceedings; (c) the provision of legal advice to [the Executive Committee] on cooperation, the coordination and transmission of requests for cooperation made by the Office under Part 9 of the Statute, the negotiation of agreements and arrangements pursuant to article 54, paragraph 3 [of the Rome Statute]; and (d) the coordination of cooperation and information-sharing networks'. Ibid., Regulation 7.

¹⁷ See ICC website, Structure of the Court: Office of the Prosecutor <<http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/>> accessed 29 May 2013.

¹⁸ Ibid.

¹⁹ Regulation 4(1) ICC Regulations of the Office of the Prosecutor (n 14).

²⁰ Ibid., Regulation 4(2).

²¹ ICC, Vacancy Announcement No. 1150EE-PO, 31 January 2012 <https://jobs.icc-cpi.int/sap/bc/webdynpro/sap/hrrcf_a_posting_apply?PARAM=cG9zdF9pbN0X2d1aWQ9RTEzMTYyMTcxOEYy

substantive legal work and joint teams, and reviews and approves all pleadings before filing'.²² The JCCD Coordinator 'assists with the management of the Division and coordinates with the Investigations and Prosecution Coordinators'.²³ Since the creation of the position of Divisional Coordinators, the Coordinators have also been included in Ex Com consultations.²⁴

Regulation 32 of the Regulations of the OTP provides that a 'joint team', composed of staff from each of the three divisions within the OTP, 'shall be formed upon a decision to proceed with an investigation in a situation, for the purpose of conducting the investigation'.²⁵ Regulation 32 further specifies that '[e]ach joint team shall regularly report its progress and activities to the Ex Com in order to receive strategic guidance'.²⁶

The respective roles of the joint teams and the Ex Com were further explained in testimony provided by the lead investigator in the *Katanga and Ngudjolo* case, who testified at the request of the Trial Chamber regarding the 'conditions under which the investigation' in that case took place,²⁷ as well as her experiences as an OTP investigator generally.²⁸ Specifically, the investigator, who testified under a pseudonym, stated:

The joint team is a concept in which the OTP conducts its investigations. It means that investigators, prosecutors and cooperation staff, we all work together from the very beginning of an investigation. The leadership of the joint team is comprised of the investigation team leader, a senior trial lawyer and an international cooperation adviser... Decisions in the joint team are taken jointly.²⁹

The *Katanga and Ngudjolo* investigator went on to suggest that the leadership of the joint team is deeply involved in shaping the course of the investigations:

The decisions on whom to interview [during the course of an investigation], they need to be discussed with the leadership of the joint team. So, of course, the whole joint team and its members meet regularly to discuss the way forward and potential sources and in the course of that discussion there can be disagreements and differences in view but, ultimately, it is the joint team that decides whom to interview and which sources to exploit.³⁰

NDRGMUI2MDcwMDFCNzgzQjQ4QUEmY2FuZF90eXBIPUVYVA%3D%3D&sap-client=100&sap-language=EN> accessed 29 May 2013.

²² G Townsend, 'Structure and Management' in L Reydams et al. (eds), *International Prosecutors* (Oxford: Oxford University Press 2012) 290. In the organizational chart of the OTP, the post of Prosecution Coordinator is situated within the Prosecution Division of the Office. See e.g. ICC, Proposed Programme Budget for 2012 of the International Criminal Court, ICC-ASP/10/10, 21 July 2011, 25.

²³ Email between the authors of the report and Olivia Swaak-Goldman, Head of the International Relations Task Force of the OTP's JCCD (11 October 2012).

²⁴ Ibid. ²⁵ Regulation 32(1)–(2) ICC Regulations of the Office of the Prosecutor (n 14).

²⁶ Ibid., Regulation 32(4).

²⁷ Transcript, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-T-81-Red-ENG, TC II, ICC, 25 November 2009, 5:9–5:10.

²⁸ See generally *ibid.*

²⁹ Ibid., 7:4–7:9. See also *ibid.* 29:17–29:19 ('We need to coordinate with each other when activities happen. It is—what is important to understand, that all decisions are made jointly with the three parts of the joint team').

³⁰ Ibid., 30:21–30:25.

Finally, she explained that, where there is disagreement among the members of the joint team, ‘the decision will go to... senior management’,³¹ namely the Ex Com.³²

This ‘joint team’ model stands in contrast to the organizational approach used at the ICTY, where teams have been headed by a single senior attorney, who is ultimately accountable to the chief prosecutor but who has broad autonomy to make decisions regarding the direction of the investigation and the case more generally.³³

14.2.2 Recommendations relating to the organization and administration of the OTP

With regard to the structure of ‘joint teams’, it is not altogether clear that the tripartite decision-making structure is an improvement on the ICTY model, under which a single Senior Trial Attorney had the authority, *inter alia*, to provide ‘direction and focus to the investigation’.³⁴ As Gregory Townsend has observed, the ICC’s ‘joint team concept perpetuates “a division between the Divisions”, as opposed to ‘unifying the authority in a lead prosecutor assigned to a case (as do other tribunals)?³⁵ This division may turn out to be ‘natural and unproblematic’, but only ‘to the extent there is adequate coordination in practice and the guidance from the senior lawyers is followed’.³⁶ Otherwise, in the words of one OTP staff member interviewed by Townsend, the perpetuation of the division ‘can produce bad results’.³⁷ Indeed, other OTP staff members interviewed by Townsend outright criticized the joint team concept on the grounds that it ‘divides authority, requires consensus throughout, and can subject all decisions to a difficult interpersonal dynamic, likening it to a three-headed dragon’.³⁸ Furthermore, the need for three leaders to reach consensus on all or almost all decisions is likely to result in inefficiencies in the conduct of the investigation. More generally, it has been observed that ‘[m]anagement is... one of the most underdeveloped areas of the OTP, with poor results obtained in internal surveys’,³⁹ suggesting that the current leadership structure is not being well received by the staff.

³¹ Ibid., 30:10–30:11.

³² Ibid., 31:1–31:8. Note, however, that the investigator also testified that she could not remember any ‘substantive [disagreement] within [her] joint team that would have been taken up to the [E]xecutive [C]ommittee’ over the course of the investigation. Ibid., 44:1–44:7.

³³ See e.g. Townsend (n 22) 237 (explaining the role of Senior Trial Attorneys at the ICTY and noting that, as of 2001, ‘[a] Senior Trial Attorney was assigned to a case once an investigation had been approved’, giving ‘direction and focus to the investigation’); Bergsmo and Keegan (n 10) 6 ([At the ICTY,] [t]he senior lawyer on the team is the lawyer who works most closely with the case from the beginning of the investigation through the trial. That lawyer is responsible for the daily legal supervision during the entire case preparation process and normally drafts the indictment, drawing on the other lawyer(s) in the team. The leader of the team will normally be responsible, in consultation with the team legal adviser, for the preparation of a statement of facts or similar summary of the evidence which accompanies the draft indictment through the internal OTP review process and the submission to the confirming judge’). Note that, in several instances in this report, we compare the practices of the ICC OTP to those of the ICTY OTP, without mentioning the practice of other international criminal bodies. This is not to imply that the ICTY is the only other institution worth examining, but rather a product of the fact that public information regarding the investigative processes of all international criminal bodies is scarce, and the ICTY is the one institution about which we were able to find relevant information in the public record.

³⁴ Townsend (n 22) 237.

³⁵ Ibid., 292.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid. (citing ‘[s]tatements of anonymous ICC OTP [Investigation Division] and [Prosecution Division] Staff Members’).

³⁹ Ibid., 293.

We understand that, pursuant to the current OTP Operational Manual, which is not public, the representative of each division in the joint team takes lead responsibility on issues within his or her respective sphere of competence. According to Olivia Swaak-Goldman, Head of the International Relations Task Force of the OTP's JCCD, this development means 'that the leadership of the joint team should be thought of primarily as a coordination process to ensure all relevant expertise from each division is brought to bear on an issue, rather than a forum for creating gridlock or inefficiencies'.⁴⁰ Swaak-Goldman also explained that the 'creation of Divisional Coordinators who provide standardised guidance on operational issues to all joint teams further facilitates the process of harmonisation across the OTP'.⁴¹ Nevertheless, because it may not always be clear which decisions fall within a division's sphere of competence, we recommend that day-to-day decisions be placed in the hands of a single member of the team, most likely a single trial attorney, who would be ultimately accountable to the prosecutor. Importantly, the Ex Com would continue to play a role in providing 'strategic guidance' to the joint teams,⁴² and would also maintain its role in approving the joint teams' initial case hypotheses and the plans developed pursuant to those hypotheses, as well as any adjustments to the hypotheses and related plans over time. In addition, the Divisional Coordinators would continue to supervise the work of the joint teams, ensuring that issues within each division's area of expertise are being appropriately handled by the team. However, having a single leader at the team level would obviate the need for agreement on issues that may be seen to fall within more than one division's competence, thereby likely reducing inefficiency and avoiding the 'difficult interpersonal dynamic' at the decision-making level described.

14.3 Size and Composition of Investigation Teams

14.3.1 Issues relating to the size and composition of investigation teams

In the *Lubanga* case, the lead investigator, Bernard Lavigne, provided testimony relating to both the size and the composition of the first team to undertake an investigation in the DRC. Mr Lavigne testified that he had at most 12 people working under him and that he had always deemed this number to be 'insufficient'.⁴³ Notably, however, the first DRC investigation team was not unusually small. Indeed, in the OTP's proposed 2012 budget, the Office requested just 44 professional staff members for the 'Investigations Teams' section of the Investigations Division, which would need to be dispersed among the eight situations in which the Court was active at the time.⁴⁴

⁴⁰ Email between the authors of the report and Olivia Swaak-Goldman, Head of the International Relations Task Force of the OTP's JCCD (11 October 2012).

⁴¹ Ibid.

⁴² Regulation 32 ICC Regulations of the Office of the Prosecutor (n 14).

⁴³ Transcript, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-Rule68Deposition-Red2-ENG WT, TC I, ICC, 16 November 2010, 16 ('Lubanga, 16 November 2010 Transcript').

⁴⁴ See Proposed Programme Budget for 2012 of the International Criminal Court (n 22) 47. As a general matter, the proposed budget does not break down how many investigators would be assigned to each situation, but it does indicate that in 2011, the Libya investigative team consisted of ten professional-level staff members and one general services assistant, and that the team would maintain the same composition

Observers have stated that the ICC's first prosecutor purposefully adopted a 'small team' approach to investigations⁴⁵ as part of his stated strategy of carrying out 'short investigations'⁴⁶ with the aim of 'present[ing] expeditious and focused cases'.⁴⁷ This strategy has been defended on the ground that, as a practical matter, the resources of the OTP are finite and, in the words of the former Director of the JCCD, the Office 'need[s] a good selection and cannot investigate hundreds of similar incidents'.⁴⁸ The policy also reflects a conscious departure from the practice of the ad hoc ICTY and ICTR, which have been criticized for moving too slowly and, in some instances, bringing unnecessarily complex cases.⁴⁹ However, it appears that the policy of conducting expedited investigations with a limited number of investigators has led to certain problems.⁵⁰ For instance, according to a 2008 article published by the Institute for War and Peace Reporting, former ICC investigators working in Uganda, the DRC, and Sudan complained that, '[b]ecause they arrive in the country already focused on gathering evidence of a particular set of crimes, committed in specific locations and on specific dates... other atrocities are often overlooked'.⁵¹ Furthermore, '[e]ven when

in 2012. Ibid., 45. Specifically, in 2011 the Libya team consisted of one team leader (P-4), two investigators (P-3), five associate investigators (P-2), two assistant investigators (P-1), and one information management assistant (GS-OL). Ibid.

⁴⁵ A de Waal and J Flint, 'Case Closed: A Prosecutor without Borders', *World Affairs*, Spring 2009. See also International Federation for Human Rights ('FIDH'), 'The Office of the Prosecutor of the ICC—9 Years On', December 2011, 21 ('Pursuant to the policy of focused investigations, the Prosecutor decided at the outset that he would only need small investigation teams.); M Wierda and A Triolo, 'Resources' in L Reydams et al. (eds), *International Prosecutors* (Oxford: Oxford University Press 2012) 143 ('The ICC OTP [has] pursued a policy of targeted investigations through small teams, which meant that fewer resources went into investigations than at other tribunals.); P Kambale, 'The ICC and Lubanga: Missed Opportunities', *Possible Futures*, 16 March 2012 (discussing Moreno Ocampo's 'vision of light-touch investigations' in the Ituri region of the DRC, which involved a small team of investigators carrying out 'a short and focused investigation').

⁴⁶ International Criminal Court, Office of the Prosecutor, Prosecutorial Strategy: 2009–12, February 2010, para. 20. See also International Criminal Court, Office of the Prosecutor, 'Report on the Activities Performed During the First Three Years (June 2003–June 2006)', 12 September 2006, 15–16 (reporting that, in Uganda, a 'small team of investigators in a short time was able to focus its efforts on collecting the information necessary to link the crimes under investigation to those most responsible').

⁴⁷ See Report on the Activities Performed During the First Three Years (June 2003–June 2006) (n 46) 8. See also International Criminal Court, Office of the Prosecutor, Report on Prosecutorial Strategy, 14 September 2006, 5 ('The second principle guiding the Prosecutorial Strategy is that of focused investigations and prosecutions').

⁴⁸ K Glassborow, 'ICC Investigative Strategy Under Fire', Institute for War and Peace Reporting, 27 October 2008.

⁴⁹ See e.g. FIDH, 'The Office of the Prosecutor of the ICC—9 Years On' (n 45) 10 (explaining that Moreno Ocampo 'wanted to avoid long proceedings like those of the [ICTY and ICTR], which had sought to conduct exhaustive investigations in order to demonstrate the guilt of the accused'); Glassborow (n 48) (quoting the former Director of the Jurisdiction, Complementarity, and Compliance Division of the OTP as saying that the 'the ICC ha[d] learned lessons from cases at the international war crimes tribunals that came before it, like the trial of former Serbian president Slobodan Milošević at the [ICTY]', noting that it took the ICTY 'six years to prepare three separate indictments against Milošević, covering crimes committed in Bosnia, Croatia and Kosovo over the course of almost a decade' and that the 'accused died four years into the trial, before a judgement could be passed').

⁵⁰ See Wierda and Triolo (n 45) 144 (noting that the strategy of pursuing targeted investigations through small teams has been defended, in part, on grounds of 'cost-effectiveness', but that the strategy 'has also had its critics, who believe that this approach has been detrimental to both the scope and quality of investigations in ICC cases').

⁵¹ Glassborow (n 48). See also E Baylis, 'Outsourcing Investigations', Legal Studies Research Paper Series, Working Paper No. 2010–20 (September 2009) 133 ('The [ICC OTP] investigators focus from

investigators stumble across evidence of other crimes not on their initial list', they 'lack the time to investigate these properly, meaning that the alleged perpetrators are less likely to be charged'.⁵² Thus, for example, investigators working on the first DRC investigation stated that, 'given more time and control in their investigation, they could have produced evidence to ground war crimes charges against [Thomas] Lubanga for killings and rapes, in addition to the child soldiers charge'.⁵³ It should be noted here that, according to a filing submitted by the prosecution in the *Lubanga* case, the OTP did initially plan to continue investigating Mr Lubanga in an effort to potentially add charges to the case after the arrest of the accused, but, as of June 2006, 'the ability of the [OTP] to investigate in the DRC, and in particular in the area of Ituri, [was] significantly limited by the security conditions in the region and the impact of the upcoming election period on these conditions'.⁵⁴ Nevertheless, the statements by the investigators suggest that investigations were being curtailed for reasons other than security concerns alone. Hence, while security issues and the overwhelming scale of atrocities may curtail the OTP's ability to investigate in certain circumstances, the question remains whether the OTP could be conducting more extensive investigations where possible. For instance, in the *Ruto and Sang* case, participating victims claimed that the OTP failed to conduct sufficient investigations into the eyewitness accounts of the victims of the post-election violence in Kenya and did not perform adequate on-site investigations, leading to a disconnect between the prosecution's case and the victims' experiences.⁵⁵ In particular, 126 of the victims who were authorized to participate in the confirmation proceedings in that case informed the Pre-Trial Chamber that they had never been interviewed by the OTP, nor were they aware of anyone else living in their locality who had been interviewed, and none was aware that the OTP had conducted on-site investigations in their localities.⁵⁶

The 'small team' approach may also have negative effects on staff retention, as investigators hired by the OTP may begin to feel overstretched. Indeed, in a September 2008 letter from Human Rights Watch to the OTP's Ex Com concerning the Office's 'management practices',⁵⁷ the NGO observed that '[m]any experienced investigators [had] left the OTP since 2005', due in part to 'burn out' resulting from the fact that there were 'simply not enough of them to handle the rigorous demands for conducting investigations'.⁵⁸ Obviously, it is important for the OTP to retain qualified investigators

the beginning on a predetermined set of incidents and suspects in a particular time frame, rather than exploring the situation comprehensively').

⁵² Glassborow (n 48). See also Kambale (n 45) ('The investigative teams assigned to the Ituri situation were too undersized and too short-term to generate [a] good analysis of the intricately entangled criminal activities in this bloody part of Congo').

⁵³ Baylis (n 51) 136. Note that in other cases brought by the OTP to date, the charges have been much broader.

⁵⁴ Prosecutor's Information on Further Investigation, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-170, OTP, ICC, 28 June 2006, paras 2 and 7, fn 18.

⁵⁵ Request by the Victims' Representative for Authorization to Make a Further Written Submission on the Views and Concerns of the Victims, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-367, Victims' Representative, 9 November 2011, paras 9–10.

⁵⁶ Ibid., para. 10.

⁵⁷ Human Rights Watch, Letter to the Executive Committee of the Office of the Prosecutor (15 September 2008) 1.

⁵⁸ Ibid. See also Human Rights Watch, 'Courting History: The Landmark International Criminal Court's First Years' (July 2008) 48 (reiterating the same message regarding 'burn out' on the part of ICC investigators).

over time, not only to ensure the continuity of particular investigations, but also to add to the level of experience of the investigative staff and build up the institutional knowledge of the Office.⁵⁹ Finally, unduly restricting the size of the investigative team may force the OTP into the position of over-reliance on secondary source information.⁶⁰

In terms of the composition of the first investigative team in the DRC, lead investigator Lavigne observed that, in his opinion, his team should have been comprised strictly of people who had 'a police background', but that '[i]t was decided...that people with more varied backgrounds should also be recruited', including 'former members of [NGOs] who could provide better open-mindedness to enable the other team members not to limit themselves to their police backgrounds'.⁶¹ According to Mr Lavigne, this approach 'may have had a negative impact on the quality of the work'.⁶² On the other hand, experience at the ICTY has demonstrated that '[i]nvestigating serious violations of international humanitarian law requires a multi-disciplinary approach, and requires operational teams of specialists who bring together a range of skills and capabilities'.⁶³

14.3.2 Recommendations relating to the size and composition of investigation teams

As discussed in the previous section, while the first prosecutor's 'small team' approach to investigations has its benefits, there are many potential drawbacks to minimizing the size of investigative teams. Thus, although the make-up of any given investigation team will depend on the nature and demands of a particular investigation, the OTP may want to reconsider its 'small team' approach and recruit more investigators.⁶⁴ Additional investigators could be used to increase the size of each investigative team, and/or to increase the number of teams per situation. Notably, by contrast to the small teams at the ICC to date, investigative teams at the ICTY consisted of up to 20 members,⁶⁵ and there were up to ten separate teams operational at

⁵⁹ See e.g. Townsend (n 22) 317 ('All international prosecutors' offices have faced human resources challenges. In terms of management, having quality staff working in unison is critical for these offices to function effectively. Recruiting and retaining highly skilled staff should be a priority') (emphasis added).

⁶⁰ For a discussion of problems arising out of the prosecution's over-reliance on secondary sources, see WCRO (n *) 73–8.

⁶¹ Lubanga, 16 November 2010 Transcript (n 43) 16–17. Subsequently, Mr Lavigne explained that his team was comprised of investigators from various NGOs, including Amnesty International in Africa and the Belgium chapter of Lawyers Without Borders, the ICTY, and the United Nations Mission in the Democratic Republic of Congo (MONUC), among others. See Transcript, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, TC I, ICC, 17 November 2010, 42. The team also included a Congolese national that acted as a country expert and adviser to the other OTP investigation team members. *Lubanga*, 16 November 2010 Transcript (n 43) 18.

⁶² Lubanga, 16 November 2010 Transcript (n 43) 16–17.

⁶³ ICTY and United Nations Interregional Crime and Justice Research Institute ('UNICRI'), ICTY Manual on Developed Practices (2009) 12.

⁶⁴ Several outside observers of the Court have made a similar recommendation. See e.g. Human Rights Watch, 'Courting History' (n 58) 48 (noting that 'it may be necessary to deploy more investigators at the outset to ensure that investigations are sufficiently comprehensive'); FIDH, 'The ICC, 2002–12: 10 years, 10 Recommendations for an Efficient and Independent International Criminal Court', 15 June 2012, 3 ('[T]he policy of limiting the size of the investigation teams should be revised to recruit professional investigators').

⁶⁵ Bergsmo and Keegan (n 10) 6.

a given time,⁶⁶ even though the geographic jurisdiction of the Tribunal was limited to the territories of the former Yugoslavia.⁶⁷

Of course, expanding the number of investigators at the ICC will require greater resources. Importantly, as demonstrated by Table 14.1, which is based on budget estimates submitted by the OTP for the years 2007 through 2013, the number of professional staff⁶⁸ members employed in the ‘Investigation Teams’ sub-division of the OTP has *decreased* since 2007, despite the increase in the number of situations in which the Court is active.

Table 14.1 Budget Estimates OTP 2007-2013

Proposed Budget Fiscal Year	Number of Situations at the Time of the Budget Proposal	Number of Professional Staff Requested for Investigation Teams
2007	4 ⁶⁹	52 ⁷⁰
2008	4 ⁷¹	41 ⁷²
2009	4 ⁷³	44 ⁷⁴
2010	4 ⁷⁵	45 ⁷⁶
2011	5 ⁷⁷	46 ⁷⁸
2012	6 ⁷⁹	44 ⁸⁰
2013	7 ⁸¹	46 ⁸²

⁶⁶ See e.g. ICTY, Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, A/54/187, S/1999/846 (31 July 1999) para. 126 (“Ten investigation teams, including a team established in 1998 dedicated to looking into the events in Kosovo, are responsible for conducting criminal investigations and gathering evidence in the former Yugoslavia in order to bring indictments against those responsible for violations of international humanitarian law”).

⁶⁷ See Art 1 Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993, as amended 7 July 2009) (“The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute”).

⁶⁸ Professional staff refers to employees classified as ‘P-1’ and above. See e.g. International Criminal Court, Proposed Programme Budget for 2007 of the International Criminal Court, ICC-ASP/5/9, 22 August 2006, 55.

⁶⁹ Uganda (29 January 2004), DRC (19 April 2004), Darfur (31 March 2005), CAR (7 January 2005).

⁷⁰ Proposed Programme Budget for 2007 of the ICC (n 68) 55. ⁷¹ See (n 69).

⁷² ICC, Proposed Programme Budget for 2008 of the ICC, ICC-ASP/6/8, 25 July 2007, n 43.

⁷³ See (n 69).

⁷⁴ ICC, Proposed Programme Budget for 2009 of the International Criminal Court, ICC-ASP/7/9, 29 July 2008, 46.

⁷⁵ See (n 69).

⁷⁶ ICC, Proposed Programme Budget for 2010 of the International Criminal Court, ICC-ASP/8/10, 30 July 2009, 48.

⁷⁷ Uganda (29 January 2004), DRC (19 April 2004), Darfur (31 March 2005), CAR (7 January 2005), Kenya (31 March 2010).

⁷⁸ ICC, Proposed Programme Budget for 2011 of the International Criminal Court, ICC-ASP/9/10, 2 August 2010, 49.

⁷⁹ Uganda (29 January 2004), DRC (19 April 2004), Darfur (31 March 2005), CAR (7 January 2005), Kenya (31 March 2010), Libya (26 February 2011).

⁸⁰ Proposed Programme Budget for 2012 of the International Criminal Court (n 22) 47.

⁸¹ Uganda (29 January 2004), DRC (19 April 2004), Darfur (31 March 2005), CAR (7 January 2005), Kenya (31 March 2010), Libya (26 February 2011), Côte d’Ivoire (3 October 2011).

⁸² ICC, Proposed Programme Budget for 2013 of the International Criminal Court, ICC-ASP/11/10, 16 August 2012, 55.

Table 14.1 also demonstrates that the OTP has largely resisted requesting resources from the ASP⁸³ for additional staff members for the Investigation Teams. Indeed, this seems to have been a point of pride for the Office, which has insisted that its ‘lean and flexible joint investigation and trial teams’ enable the Office ‘to perform more investigations and prosecutions simultaneously, with the same number of staff’.⁸⁴ Given a number of States Parties’ desire for a ‘zero-growth’ budget,⁸⁵ this approach has no doubt been welcomed by the ASP. However, critics have charged that it may lead to a situation in which the OTP is able to do less and less in each situation ‘to square demand with limited resources’ where ‘just the opposite is required’.⁸⁶ Hence, assuming that the OTP maintains or even expands the number of investigations it is performing in the future, it will likely need to seek greater resources for its investigative teams. The United Nations Security Council’s practice of referring situations to the Court without providing resources to support the Court’s work in those situations makes increased funding even more critical.⁸⁷

In terms of the composition of the investigation teams, it seems that, Mr Lavigne’s complaints notwithstanding, the ICC has taken the right approach in recruiting members of the investigation team from varied backgrounds, instead of relying strictly on those with experience in law enforcement. Indeed, as stated earlier, experience at the ICTY has demonstrated that it is best to employ a multi-disciplinary approach when investigating serious international crimes.⁸⁸ Thus, the ICTY Manual on Developed Practices states that, ‘in addition to investigators with a traditional police background,

⁸³ The ASP to the Rome Statute ‘consider[s] and decide[s] the budget for the Court’. Art 112(2)(d) Rome Statute.

⁸⁴ ICC, Second Status Report on the Court’s Investigations into Efficiency Measures, ICC-ASP/8/30, 4 November 2009, 2.

⁸⁵ See e.g. R Corey-Boulet, ‘Concern Over ICC Funding’, *Inter Press Service*, 28 September 2011 (noting that, ‘[e]ven before the [Court’s 2012 budget] proposal was submitted’, ‘key donors were issuing calls for zero growth in the court’s budget’); B Evans-Pritchard, ‘Mali Case Throws Spotlight on ICC Budget Constraints’, Institute for War and Peace Reporting, 6 August 2012 (‘For the past two years, the signatory states that decide the budget have adopted a policy of zero growth for the court, insisting that it free up funds by making cuts in “non-core” areas’).

⁸⁶ Townsend (n 22) 293. See also R Hamilton, ‘Closing ICC Investigations: A Second Bite at the Cherry for Complementarity?’, Human Rights Programme Research Working Paper Series (May 2012) 2 ([A] core challenge facing the [C]ourt’s second prosecutor...will be to align the OTP’s workload with its resources); Human Rights Watch, ‘Unfinished Business: Closing Gaps in the Selection of ICC Cases’ (15 September 2011) 1 (‘As Moreno-Ocampo prepares to leave office and hand over to a new prosecutor, states parties must confront the challenge of equipping the ICC to meet heightened expectations. As the court is asked to take on more situations, there is a risk that the ICC and its prosecutor will increasingly “hollow out” the court’s approach to its situations under investigation. That is, the ICC may take on more situations, but do less and less in each situation to square demand with limited resources—especially in difficult economic times’).

⁸⁷ See United Nations Security Council Resolution 1593, S/RES/1593 (2005) para. 7 (‘[The Security Council] [r]ecognizes that none of the expenses incurred in connection with the referral [of the situation in Darfur] including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute Voluntarily’); United Nations Security Council Resolution 1970, S/RES/1970 (2011) para. 8 (‘[The Security Council] [r]ecognizes that none of the expenses incurred in connection with the referral [of the situation in Libya], including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily’).

⁸⁸ See (n 63) *et seq.* and accompanying text.

teams require the services of military, criminal and political analysts, historians, demographers, forensic specialists and linguists', noting that '[a]ll groups of investigators can learn from each other'.⁸⁹ Of course, there are different ways of implementing a multi-disciplinary approach. For instance, the investigative teams proper might be composed primarily of those with police backgrounds, who are then advised by experts in matters relating to politics, culture, linguistics, etc., or the investigators themselves may be drawn from a variety of backgrounds. The most important point in terms of composition seems to be that the OTP must prioritize the recruitment and retention of *experienced* investigators, including those with specific experience investigating international crimes and those experienced in questioning difficult witnesses. As Human Rights Watch has observed:

By 'experienced' investigator, we mean an individual who not only has knowledge of the country situation under investigation but who also has a background in conducting investigations in different contexts (such as working in a national police force). Experienced investigators generally have better developed instincts, which can improve both the quality and efficiency of investigations overall. For instance, experienced investigators can more quickly identify and pursue leads linking crimes committed on the ground to senior officials who ordered them. Further, experienced investigators can help to mentor junior investigations staff, which can help strengthen the office's investigations over the longer term.⁹⁰

Indeed, the importance of qualified, experienced investigators cannot be overstated. As the ICTY observed in its first annual report to the United Nations, 'the success of the Tribunal as a whole depends very much on the calibre of the investigative staff of the Office of the Prosecutor'.⁹¹ While '[h]aving experienced and well-qualified prosecutors is important', the report continues, 'they can present cases to the Tribunal only based on the evidence gathered by the investigative staff', meaning that, '[i]f the prosecution evidence is not thorough and complete, or is insufficiently prepared, then the risk of prosecution failure is high'.⁹²

Another option relating to the composition of investigation teams that may improve investigations is to hire nationals of the country being investigated and/or persons willing to be permanently located in the situation country or a neighbouring country for the duration of the investigation. Presently, members of the investigation team are all based in The Hague,⁹³ and thus are required to undertake repeated, short-term missions to the situation country to perform investigations. For instance, in the ten months following the opening of the investigation in Uganda in July 2004, OTP investigators conducted over 50 missions in the field.⁹⁴ Similarly, between July 2004 and September 2006, members of the OTP investigating the situation in Sudan conducted 'more than' 50 missions to 15 different countries, including three to Sudan.⁹⁵ According to Mr Lavigne, the lead

⁸⁹ ICTY and UNICRI, *ICTY Manual on Developed Practices* (n 63) 12.

⁹⁰ Human Rights Watch, 'Courting History' (n 58) 48.

⁹¹ ICTY, First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, A/49/342, S/1994/1007 (28 July 1994) para. 144.

⁹² Ibid.

⁹³ Human Rights Watch, 'Courting History' (n 58) 54.

⁹⁴ Report on the Activities Performed During the First Three Years (June 2003–June 2006) (n 46) 15.

⁹⁵ Ibid., 3, 19.

investigator on the first DRC investigation, investigators working on his team only spent on average of ten days in the field, on a rotating basis, which made it difficult to interview witnesses.⁹⁶ Research conducted by Human Rights Watch into the investigative practices of the OTP supports this claim. According to the organization:

The opportunities for Hague-based investigators to interact and develop strong contacts with witnesses are limited in number and timeframe. The sometimes precarious security situation in each of the countries under investigation and the resulting restrictions on travel and movement mean that these opportunities may be limited further. Moreover, even when key witnesses agree to a specified time to meet with investigators, circumstances may change, rendering them unavailable by the time that the Hague-based members of the investigative teams travel to the field. Additional field missions may be required, adding to the already-rigorous travel schedule of investigative team members. This can lead to delays in investigations overall.⁹⁷

Again, this state of affairs may be improved if at least a portion of the OTP's investigative team were located in the situation country on a permanent or semi-permanent basis. Of course, this may not always be possible due to security concerns and will have to be evaluated on a case-by-case basis. In addition, the Office will need to be cautious about potential bias, be it real or perceived, when engaging local actors as part of its investigation team.

14.4 Evaluating the Sufficiency of Evidence

14.4.1 Issues relating to evaluating the sufficiency of evidence

As set forth in the Introduction to this chapter, the Pre-Trial Chambers of the ICC have declined to confirm charges brought against nearly one-third, or approximately 28.6%, of the individuals who have undergone the confirmation process at the Court, leading to the dismissal of the cases against those individuals.⁹⁸ Notably, this is a substantially higher rate of dismissal than the acquittal rate seen at other international criminal bodies following a full trial,⁹⁹ even though the burden of proof at

⁹⁶ Lubanga Judgment (n 9) para. 165; Lubanga, 16 November 2010 Transcript (n 43) 75.

⁹⁷ Human Rights Watch, 'Courting History' (n 58) 55–6.

⁹⁸ See (n 3) and accompanying text. Note that, '[w]here the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence'. Art 61(8) Rome Statute. However, to date, the OTP has not attempted to obtain confirmation of any of the charges dismissed by the PTC pursuant to this provision. This figure does not include the confirmation proceedings against Laurent Gbagbo, whose confirmation proceedings have been adjourned at the time of writing pending further investigation. See (n 4).

⁹⁹ For instance, in 2013, the ICTY had acquitted 18 individuals and convicted 69 individuals, while cases against 13 accused had been transferred to national jurisdictions and cases against 36 accused had been terminated either because the accused died or because the indictment has been withdrawn. See ICTY website, Key Figures <<http://www.icty.org/sections/TheCases/KeyFigures>> accessed 5 June 2013. This amounts to a 13% acquittal rate. At the ICTR 12 people had been acquitted and 46 had been convicted, while cases against four accused had been transferred to national jurisdictions and cases against four others had been terminated due to the death of the accused or a withdrawal of the indictment. See ICTR website, Status of Cases <<http://www.unictr.org/Cases/tabid/204/Default.aspx>> accessed 5 June 2013. This amounts to an acquittal rate of 18%. Neither the Special Court for Sierra Leone nor the Extraordinary Chambers in the Courts of Cambodia have acquitted a single accused.

trial—beyond a reasonable doubt—is higher than the burden at the confirmation stage. One possible explanation for this is that the Pre-Trial Chambers have been too strict in evaluating whether the OTP has presented sufficient evidence to establish substantial grounds to believe the charges. Indeed, in the *Mbarushimana* case, one of the three judges on the Pre-Trial Chamber dissented from the decision, declining to confirm any of the charges against the accused, saying that the majority's findings were 'based on an incorrect application of the standard of "substantial grounds to believe"'.¹⁰⁰ Note, however, that the Appeals Chamber upheld the *Mbarushimana* majority's approach to evaluating the evidence at the confirmation stage of proceedings.¹⁰¹ Another possible explanation is that the Office has simply moved too quickly in bringing its case before the judges, relying on the fact that it need only establish 'reasonable grounds to believe' to secure an arrest warrant or summons to appear¹⁰² and 'substantial grounds to believe' to move the case to trial following a confirmation hearing.¹⁰³ On the one hand, proceeding in this fashion has some obvious benefits. As the Open Society Justice Initiative's Alison Cole explains:

[I]t may be argued that the prosecutor must move swiftly and submit evidence to the judges as soon as each threshold is met at each successive stage in the legal proceedings. Under such an approach, the investigations continue through to the commencement of trial, with the prosecution only required to obtain the *de minimis* evidence required to prove each standard of proof, namely 'reasonable grounds to believe' for an arrest warrant, 'substantial grounds to believe' for confirmation of the charges, and 'beyond reasonable doubt' for trial. This approach to evidence collection has had the benefit of saving resources in the face of increased budgetary cuts. Additionally, there is the benefit of not delaying proceedings as a result of matters which can encumber an international court based outside the country where the alleged crimes took place, where violent conflict often continues during investigations.¹⁰⁴

Furthermore, once a suspect is in custody, moving forward with the confirmation proceedings before the investigation is complete may be necessary to comply with the Rome Statute's mandate that the confirmation hearing be held 'within a reasonable time after the person's surrender or voluntary appearance before the Court'¹⁰⁵ and

¹⁰⁰ Dissenting Opinion of Judge Sanji Mmasenono Monageng, Decision on the Confirmation of Charges, *Mbarushimana* (n 3) para. 2.

¹⁰¹ See 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', *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-514, AC, ICC, 30 May 2012. The Prosecution had challenged the majority's approach by appealing two issues relating to its evaluation of the evidence, namely: 'a. "Whether the correct standard of proof in the context of Article 61 allows the Chamber to deny confirmation of charges supported by the Prosecution evidence, by resolving inferences, credibility doubts and perceived inconsistencies against the Prosecution and thereby preventing it from presenting its case at trial"; and b. "whether a proper interpretation of the scope and nature of a confirmation hearing, as defined by Article 61, allows the Pre-Trial Chamber to evaluate the credibility and consistency of witness interviews, summaries and statements without the opportunity to examine the witnesses that would be possible at trial"'; *ibid.*, para. 16. The Appeals Chamber dismissed both grounds of appeal. See *ibid.*, paras 37–49.

¹⁰² Art 58(1) Rome Statute.

¹⁰³ *Ibid.*, Art 61(5).

¹⁰⁴ A Cole, 'Moreno-Ocampo's End of Term Report from ICC Judges: Could Do Better', *The Guardian*, 6 June 2012.

¹⁰⁵ Art 61(1) Rome Statute.

with the accused right to ‘be tried without undue delay’.¹⁰⁶ In addition, as discussed above, there is considerable pressure on the OTP—from within the Court, from situation countries, and from the broader international community—to produce results quickly. Finally, the Office may impose a level of pressure on itself to move forward rapidly in line with its stated principle of ‘maximiz[ing] the impact of the activities of the Office’ in a way that promotes the Court’s goals of ending impunity and preventing future crimes,¹⁰⁷ particularly in situations of ongoing conflict.

However, as evidenced by the decisions of the Court refusing to confirm either all or some of the charges against a number of suspects, the judges of various Pre-Trial Chambers are not satisfied with the sufficiency of the evidence being put forward by the prosecution at the confirmation stage. In fact, in a number of cases, judges have not only declined to confirm the charges set forth by the prosecution, but have openly expressed dissatisfaction with the prosecution’s approach to the gathering of evidence in the case. For instance, in the *Abu Garda* case, in which the Pre-Trial Chamber unanimously declined to confirm any of the charges based on the lack of evidence,¹⁰⁸ Judge Cuno Tarfusser found it necessary to include a Separate Opinion in which he wrote that the ‘lacunae and shortcomings exposed by the mere factual assessment of the evidence’ presented by the prosecution were ‘so basic and fundamental’ that the Chamber should have completely refrained from analysing the ‘legal issues pertaining to the merits of the case’.¹⁰⁹ On a more general level, in the two cases brought to date arising from the Kenya situation, Judge Hans-Peter Kaul, who dissented from the decision of the majority in each case confirming the charges against two of the three suspects, dedicated a portion of his dissent to ‘clarify[ing] and summaris[ing] [his] views and expectations with regard to’ the OTP’s approach to investigations.¹¹⁰ Specifically, Judge Kaul highlighted the fact that Article 54(1) of the Rome Statute requires that the prosecutor, ‘[i]n order to establish the truth...investigate incriminating and exonerating circumstances equally’,¹¹¹ and suggested that any investigation that ‘*de facto* is aiming, in a first phase, (only) at gathering enough evidence to reach the “sufficiency standard” required at the confirmation stage’¹¹² would fail to meet the Article 54(1) requirement. Moreover, such a limited investigation would, in Kaul’s opinion, ‘probably’ lead ‘to problems and difficulties not only for an effective and successful prosecution but also for the work of the Chamber concerned and for the Court in general’.¹¹³ Indeed, Judge Kaul expressed his view ‘that such an approach,

¹⁰⁶ Ibid., Art 67(1)(c).

¹⁰⁷ Prosecutorial Strategy: 2009–12 (n 46) para. 23.

¹⁰⁸ See generally Decision on the Confirmation of Charges, *Abu Garda* (n 3).

¹⁰⁹ Separate Opinion of Judge Tuno Carfusser, Decision on the Confirmation of Charges, *Abu Garda* (n 3) para. 3.

¹¹⁰ Dissenting Opinion by Judge Hans-Peter Kaul, Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Ruto, Kosgey and Sang* (n 3) para. 43; Dissenting Opinion by Judge Hans-Peter Kaul, Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Muthaura, Kenyatta and Ali* (n 3) para. 48.

¹¹¹ Dissenting Opinion by Judge Hans-Peter Kaul, *Ruto, Kosgey and Sang* (n 110) para. 44 (quoting Art 54(1)(a) Rome Statute); Dissenting Opinion by Judge Hans-Peter Kaul, *Muthaura, Kenyatta and Ali* (n 110) para. 49 (quoting Art 54(1)(a) Rome Statute).

¹¹² Dissenting Opinion by Judge Hans-Peter Kaul, *Ruto, Kosgey and Sang* (n 110) para. 47; Dissenting Opinion by Judge Hans-Peter Kaul, *Muthaura, Kenyatta and Ali* (n 110) para. 52.

¹¹³ Dissenting Opinion by Judge Hans-Peter Kaul, *Ruto, Kosgey and Sang* (n 110) para. 47; Dissenting Opinion by Judge Hans-Peter Kaul, *Muthaura, Kenyatta and Ali* (n 110) para. 52.

as tempting as it might be for the Prosecutor, would be risky, if not irresponsible: if after the confirmation of the charges it turns out [to be] impossible to gather further evidence to attain the decisive threshold of “beyond reasonable doubt”, the case in question may become very difficult or may eventually collapse at trial, then with many serious consequences, including for the entire Court and the victims who have placed great hopes in this institution.¹¹⁴ Thus, Judge Kaul concluded that it is the ‘duty of the Prosecutor to conduct any investigation *ab initio* as effectively as possible with the unequivocal aim to assemble as expeditiously as possible relevant and convincing evidence which will enable ultimately the Trial Chamber to consider whether criminal responsibility is proven “beyond reasonable doubt”’.¹¹⁵

Most recently, in *Mbarushimana*, the majority of the Pre-Trial Chamber criticized the OTP for including vague charges against the accused without evidence to back up those charges, suggesting that the OTP was hoping to continue investigating after the charges were confirmed.¹¹⁶ Specifically, the Chamber expressed ‘concern’ at what it characterized as an ‘attempt on the part of the Prosecution to keep the parameters of its case as broad and general as possible, without providing any reasons as to why [certain charges were not pleaded with greater specificity] and without providing any evidence to support the existence of broader charges, seemingly in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure [governing amendments to the charges].’¹¹⁷ It went on to stress that the ‘Prosecution must know the scope of its case, as well as the material facts underlying the charges that it seeks to prove, and must be in possession of evidence necessary to prove those charges to the requisite level *in advance of the confirmation hearing*.¹¹⁸ This finding was supported by the Appeals Chamber in its decision upholding the Pre-Trial Chamber’s Decision declining to confirm the charges, in which the Appeals Chamber held that ‘the investigation should largely be completed at the stage of the confirmation of charges hearing’.¹¹⁹ The majority of the *Mbarushimana* Pre-Trial Chamber also determined that, with regard to those allegations that were pleaded with sufficient specificity, the prosecution failed to supply

¹¹⁴ Dissenting Opinion by Judge Hans-Peter Kaul, *Ruto, Kosgey and Sang* (n 110) para. 47; Dissenting Opinion by Judge Hans-Peter Kaul, *Muthaura, Kenyatta and Ali* (n 110) para. 52.

¹¹⁵ Dissenting Opinion by Judge Hans-Peter Kaul, *Ruto, Kosgey and Sang* (n 110) para. 48; Dissenting Opinion by Judge Hans-Peter Kaul, *Muthaura, Kenyatta and Ali* (n 110) para. 53.

¹¹⁶ Decision on the Confirmation of Charges, *Mbarushimana* (n 3) paras 81–2, 110. As noted, one of the three Judges on the Pre-Trial Chamber dissented from the decision declining to confirm any of the charges against the accused, saying that the majority’s findings were based on an incorrect application of the standard of ‘substantial grounds to believe’. Dissenting Opinion of Judge Sanji Mmasenono Monageng, Decision on the Confirmation of Charges, *Mbarushimana* (n 3) para. 2.

¹¹⁷ Ibid., para. 82. See also *ibid.*, para. 110 ([T]he Chamber wishes to highlight that the charges and the statements of facts in the DCC have been articulated in such vague terms that the Chamber had serious difficulties in determining, or could not determine at all, the factual ambit of a number of the charges). Art 61(9) Rome Statute provides as follows: ‘After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.’

¹¹⁸ Decision on the Confirmation of Charges, *Mbarushimana* (n 3) para. 82 (emphasis added).

¹¹⁹ 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’, *Mbarushimana* (n 101) para. 44.

adequate evidence in support of the charges, noting that in a number of instances, the prosecution either provided *no evidence* to support particular elements of the charged crime,¹²⁰ or relied on a single witness who was unable to provide relevant details¹²¹ or anonymous hearsay statements not substantiated by other evidence.¹²²

14.4.2 Recommendations relating to evaluating the sufficiency of evidence

The decisions discussed in the previous section suggest that, at least in some cases, the prosecution may need to postpone moving forward with a case until more thorough investigations have been conducted. Under some circumstances, this may necessitate seeking a postponement of the confirmation hearings, which the prosecution is authorized to do under the ICC's Rules of Procedure and Evidence,¹²³ subject to the requirement mentioned earlier that the confirmation hearing be held within a 'reasonable time' after the arrest or appearance of a suspect.¹²⁴ Absent extraordinary circumstances,¹²⁵ however, a better solution would be for the ICC prosecutor to adopt a policy similar to that applied by the prosecutor of the ICTY, which has held that '[i]deally a case should be ready for trial before an indictment is issued', meaning 'it should be the object of the Prosecutor's investigation to gather all necessary evidence *before any charges are brought*'.¹²⁶ While the prosecution is obviously not required to present all

¹²⁰ See e.g. Decision on the Confirmation of Charges, *Mbarushimana* (n 3) para. 134 ('The Prosecution does not specifically allege that the acts relied on to support the charge of mutilation were carried out [REDACTED] was still alive and no evidence is provided to support the view that he was mutilated before, as opposed to after, he was killed. Accordingly, the Chamber is not satisfied that there is sufficient evidence establishing substantial grounds to believe that the crime of mutilation under either article 8(2)(c)(I)-2 or 8(2)(e)(xi)-1 of the Statute was committed by FDLR soldiers in Busurungi and surrounding villages in March 2009'); *ibid.*, para. 135 ('No evidence was provided to the Chamber in relation to an attack against the civilian population in Busurungi on or about 28 April 2009'); *ibid.*, paras 204-5 (noting that, although the prosecution alleged that the war crime of torture was committed in the village of Malembe in August 2009, 'no evidence of torture being committed during the attack on Malembe was provided to the Chamber').

¹²¹ For instance, although the prosecution charged Mbarushimana with the war crime of attacking civilians in the village of Busurungi in late January 2009, the only evidence provided to support that the attack took place was the statement of one witness, who 'mentioned an attack on Busurungi around January or February 2009, but... did not provide any further details in relation to this attack'; *ibid.*, paras 130-1. See also *ibid.*, paras 204-6 (noting that the only evidence put forward by the Prosecution in support of the charge that the war crime of rape was committed in the village of Malembe in August 2009 was a statement from a single witness who 'mention[ed] that sexual violence *might* have been perpetrated in Malembe, without giving any further concrete information') (emphasis in original).

¹²² See *ibid.*, para. 117 (rejecting the prosecution's allegations that the accused bore responsibility for war crimes committed in the villages of Malembe and Busheke in late January 2009 because, '[i]n both cases the Prosecution relied only on a single UN or Human Rights Watch Report' to support the allegations, without providing 'any other evidence in order for the Chamber to ascertain the truthfulness and/or authenticity of those allegations', and in both cases the reports were themselves based on information from anonymous sources). For more on the *Mbarushimana* Pre-Trial Chamber's treatment of anonymous hearsay evidence, see WCRO, 'Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor' (n *) 75-6.

¹²³ Rule 121(7) Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, 3-10 September 2002 (First Session of the Assembly of States Parties), part II.A (adopted and entered into force 9 September 2002).

¹²⁴ Art 61(1) Rome Statute.

¹²⁵ Such circumstances may include the possibility of losing a unique opportunity to apprehend the suspect, which may cause the Prosecution to seek an arrest warrant before completing its investigation.

¹²⁶ ICTY and UNICRI, ICTY Manual on Developed Practices (n 63) 35.

of its evidence at the early stages of proceedings against a suspect, this approach would avoid unnecessary delays in holding the confirmation proceedings and ensure that the OTP is able to satisfy the Pre-Trial Chamber judges that it has met the standards required for the case to move to trial. At the same time, while conducting the investigation in stages may have the ‘benefit of saving resources’ in the short term,¹²⁷ in the long term it will be far more efficient if the Office initiates only those cases that it believes, from the start of the process, will lead to successful convictions. Completing an investigation against a suspect prior to seeking a warrant of arrest or summons to appear will also encourage compliance with Article 54(1)(a) of the Rome Statute, which, as discussed, requires that the prosecution ‘investigate incriminating and exonerating circumstances equally’.¹²⁸ Indeed, even absent the requirement in Article 54(1)(a) that the prosecutor investigate both sides of a matter, it is simply a matter of best practice that the prosecutor be aware of any weaknesses in the case before moving forward. Lastly, despite the pressure on the OTP to move expeditiously in addressing the most serious crimes of concern to the international community, the credibility of the Office—and of the Court—will be greatly improved if the prosecution is seen to be limiting its cases to those supported by the necessary evidence. Thus, while Moreno Ocampo had promised early in his term that the ICC would deliver swift justice,¹²⁹ a focus on securing convictions, rather than on moving rapidly, would likely have had longer-term benefits for the Court.¹³⁰

Of course, the ICC Appeals Chamber has held that the prosecution need not fully complete its investigation prior to the start of the confirmation proceedings in a case,¹³¹ and we are not suggesting that the prosecution should be precluded from using evidence obtained after the charges have been confirmed. In fact, we recognize that certain witnesses—particularly insider witnesses—often need to be cultivated and may be more likely to come forward with information that is useful to the prosecution after perceiving that the case is progressing in court. However, as a policy matter, the prosecution should aim to complete as much of its investigation as possible before bringing a case before the Court. Interestingly, this is the stated policy of the OTP, as expressed in its 2006 and 2009 reports on prosecutorial strategy.¹³² Nevertheless, the Trial Chamber presiding over the *Kenyatta* case noted that ‘at least 24

¹²⁷ See (n 104) and accompanying text.

¹²⁸ Art 54(1)(a) Rome Statute.

¹²⁹ J Bravin, ‘Justice Delayed for Global Court, Ugandan Rebels Prove Tough Test; African Politics, Tactical Fights, Hamper Chief Prosecutor; No Trial Date in Sight: Who Will Arrest Mr Kony?’, *Wall Street Journal*, 8 June 2006. See also (n 46) *et seq.* and accompanying text (discussing the first Prosecutor’s stated strategy of carrying out ‘short investigations’ with the aim of ‘present[ing] expeditious and focused cases’).

¹³⁰ Cf. De Waal and Flint (n 45) (observing that Moreno Ocampo ‘had set trial dates before his case was ready’ because he was ‘preoccupied with the wrong court—that of public opinion’).

¹³¹ Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-568, AC, ICC, 13 October 2006, para. 54. Specifically, the Appeals Chamber held that, ‘ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing’, but that ‘this is not a requirement of the Statute’; *ibid*.

¹³² See Prosecutorial Strategy: 2009–12 (n 46) para. 21 (explaining that the policy of the Office is to ‘submit to the Chambers a request for an arrest warrant or summons to appear, based on the evidence collected, when the Office is nearly trial-ready, thus contributing to efficient Court proceedings’).

of the prosecution's 31 fact witnesses were interviewed for the first time after the Confirmation Hearing' and 'a large quantity of documentary evidence appears to have been collected post[-]confirmation and to have been disclosed at a late stage'.¹³³ More broadly, the prosecution's inability to confirm any of the charges against four of the 15 suspects appearing before the Court suggests that its stated policy of completing as much of its investigation as possible prior to confirmation is not being implemented as a practical matter.

Another measure that may help to expose potential weaknesses in the prosecution's case and ensure that all necessary investigative steps have been undertaken before the OTP seeks an arrest warrant or summons to appear would be to implement a rigorous and formal 'peer review' process within the OTP similar to that used at the ICTY. Specifically, at least in the early years of its operation, the ICTY's OTP had a practice of internally reviewing draft indictments, before the case was ever presented to a judge, and even before the indictment was shared with the chief and deputy chief prosecutors,¹³⁴ for the purpose of 'eliminating factually or legally deficient charges'.¹³⁵ All staff members working in the OTP—including lawyers, investigators, and analysts¹³⁶—would be invited to participate in the review, which looked at the draft indictment and any supporting material.¹³⁷ According to one description of the process written by two former legal advisers to the ICTY OTP, '[a]s many as 20–25 lawyers, who ha[d] been provided with and reviewed the relevant material, [could] participate in such reviews, which tend[ed] to be very thorough and [could] sometimes last several days'.¹³⁸ Following the assessment, those participating in the review would draft a full report of their conclusions, which sometimes included both a majority and a minority opinion.¹³⁹ Significantly, '[i]n most cases', a 'number of changes [were] made in the draft indictment following the review',¹⁴⁰ suggesting that the review process was critical to uncovering important weaknesses in the majority of instances before the case was filed. Furthermore, according to Richard Goldstone, the first Chief Prosecutor of the ICTY, the fact that this review was carried out before the indictment was presented to the chief and deputy chief prosecutors meant that the heads of the office could 'themselves review the indictment with fresh minds and without having become involved during the earlier processes'.¹⁴¹ We understand

¹³³ Decision on defence application pursuant to Art 64(4) and related requests, *Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-728, TC V, ICC, 26 April 2013, para. 122.

¹³⁴ Email between the authors of the report and Richard Goldstone, former Chief Prosecutor of the ICTY (5 September 2012).

¹³⁵ Bergsmo and Keegan (n 10) 11. See also J-R Ruez, 'The ICTY Investigations' in I Delpla et al. (eds), *Investigating Srebrenica: Institutions, Facts, Responsibilities* (New York/Oxford: Berghahn Books 2012) 35 (in which the lead ICTY investigator of the Srebrenica massacre explains that the Prosecutor's office would hold an 'indictment review meeting' in order to 'determine which indictments should be brought before the court', noting that 'the least charges against individuals [were] relentlessly debated' at these meetings, as the Prosecutor had 'no intention of embarking on trials that [were] lost before they beg[a]n').

¹³⁶ Email between the authors of the report and Richard Goldstone, former Chief Prosecutor of the ICTY (5 September 2012).

¹³⁷ Bergsmo and Keegan (n 10) 11. ¹³⁸ Ibid.

¹³⁹ Email between the authors of the report and Richard Goldstone, former Chief Prosecutor of the ICTY (5 September 2012).

¹⁴⁰ Bergsmo and Keegan (n 10) 11.

¹⁴¹ Email between the authors of the report and Richard Goldstone, former Chief Prosecutor of the ICTY (5 September 2012).

that the ICC OTP has, since its first case, ‘instituted a practice of internal peer review that involves colleagues from other teams as well as the Legal Advisory Section in critically evaluating the evidence and/or the presentation of arguments at critical phases of the proceedings, such as before the confirmation of charges proceeding or the opening of trial’.¹⁴² However, it is not clear that this process occurs routinely or on a mandatory basis, and, in any event, the process does not appear to take place until the confirmation of charges proceedings. Thus, we recommend that the OTP adopt a policy of routinely conducting rigorous reviews with colleagues from other teams much earlier in the process, ideally before an arrest warrant request is made.

Finally, the OTP’s evaluation of the sufficiency of its evidence in a given case may be strengthened if, where possible, investigators were to interview the suspect(s) in the case during the investigation. Indeed, the Trial Chamber presiding over the *Katanga and Ngudjolo* case stated in its judgment acquitting Mr Ngudjolo based on an insufficiency of evidence that ‘it would have been expedient...for a statement to be taken from the Accused during the investigation stage’, explaining that Mr Ngudjolo ‘opted to testify as a witness under oath at the end of the trial, when he was in possession of all the testimony received during the proceedings’ and that the ‘uniqueness of his testimony at the ultimate stage of the hearing failed to provide the Chamber with the opportunity to collate his testimony with prior testimonies, which would have proven invaluable’.¹⁴³ While nothing in the Rome Statute or Rules of Procedure and Evidence requires the prosecution to interview suspects, the Rome Statute does contemplate the possibility of such questioning and provides a number of rights to the suspect in the event he or she is interviewed by the OTP.¹⁴⁴ Of course, neither the prosecution nor the Chamber has the power to compel any individual, including the target of a case, to speak with the prosecutor, so this will only be an option where the suspect voluntarily agrees to submit to questioning by the OTP. Furthermore, there may be instances where the OTP simply cannot access the suspect or where other strategic considerations render such an investigation undesirable.

¹⁴² Email between the authors of the report and Olivia Swaak-Goldman, Head of the International Relations Task Force of the OTP’s JCCD (11 October 2012).

¹⁴³ *Ngudjolo* Judgment (n 7) para. 120.

¹⁴⁴ See Art 55(2) Rome Statute ('Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned: (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court; (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence; (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel'). Note that the ICTY Prosecutor chose to interview the suspects '[d]uring some investigations'. ICTY website, About the ICTY: Office of the Prosecutor: Investigations <<http://www.icty.org/sid/97>> accessed 29 May 2013. Unfortunately, the factors that the ICTY OTP considered in determining whether to conduct such interviews do not appear to be publicly available.

14.5 Conclusion

As set forth in the Introduction, the purpose of this chapter has been to examine some of the potentially problematic aspects of the manner in which the OTP has managed and carried out its investigations to date and offer recommendations that may improve the investigative process going forward. While we recognize that investigating international crimes is enormously challenging, and that the ICC's OTP has achieved a great deal in its first decade of operation, we hope that the recommendations contained in this chapter will contribute to an even stronger Office going forward.

The Selection of Situations and Cases by the OTP of the ICC

Fabricio Guariglia and Emeric Rogier***

15.1 Introductory Remarks

The selection of situations and cases for investigation and prosecution in the context of international crimes is a thorny issue that has haunted all criminal jurisdictions to date: how to select from hundreds of instances of brutal victimization, each of them demanding restoration and accountability in equal terms; how to determine who, within a huge spectrum of individuals involved in those crimes, from foot soldier to general, from municipal leader to prime minister, should be singled out for prosecution. In the reign of radical evil,¹ is there truly room for pragmatic considerations and for attempts to maximize, in a utilitarian calculus, the positive impact of a confined number of investigations and prosecutions? Or rather, should a Kantian approach prevail, and thus all efforts be exhausted to ensure that every single instance of victimization and every single perpetrator is adequately dealt with? These questions are not new. Yet, they are still debated, over and over again, each time a new effort aimed at ensuring accountability, be it national or international, starts taking shape.

The manner in which any jurisdiction approaches this complex matter can have serious consequences and adversely affect its legitimacy and legacy. The selectivity of the post Second World War prosecutions at Nuremberg and Tokyo is frequently stressed in negative terms, including the well-known allegations of victor's justice and complete impunity of the Allies.² In the case of the Tokyo International Military Tribunal, the criticism of the Tribunal's selectivity was first formulated in the scathing dissents of some of its very own judges.³

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¹ Carlos Santiago Nino refers to the Kantian concept of 'radical evil' (offences against human dignity so widespread, persistent, and organized that normal moral assessment seems inappropriate) in the context of massive human rights violations. See C Nino, *Radical Evil on Trial* (New Haven, London: Yale University Press 1996) Introduction, vii.

² For a more balanced discussion of this aspect of the Nuremberg legacy, see M Kelly and T McCormack, 'Contributions of the Nuremberg Trial to the Subsequent Development of International law' in D Blumenthal and T McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (Leiden: Martinus Nijhoff 2008) 101.

³ See R Cryer, *Prosecuting International Crimes* (Cambridge: Cambridge University Press 2005) 43–8.

One could contend that in the case of the International Military Tribunals of Nuremberg and Tokyo the critical discussion surrounding the selection of the cases that were ultimately brought to justice was inextricably linked to the particular genesis of those Tribunals and its consequences in terms of their legitimacy. However, the vexing questions of if and how selectivity should take place can also affect jurisdictions that are far less problematic in terms of legitimacy, such as the UN-established ad hoc Tribunals. The ICTY—where a rich discussion took place as to the types of cases on which the Tribunal should focus its limited resources (the so-called big fish versus small fish debate, triggered by the arguably low level of first perpetrators to be indicted, such as Dusko Tadić or Drazen Erdemović)—provides a clear example.⁴ The underlying philosophical question has been: should prosecutions before international tribunals focus on those at the top of the decision-making process, or should they also include individuals situated in lower positions, and even executioners?

The rationale behind the affirmative answer to the first limb of the question would be that cases brought against those individuals located at the superior echelons present a higher ‘aggregate value’. Those at the top of the system are the ones that ‘control the anonymous will of its components’;⁵ accordingly, *who* pulls the trigger is not that important, since executioners are merely replaceable parts. In addition, it has been stated that the prosecution of those in leadership positions will normally provide a ‘broader narrative’, and tell ‘a broader story’ about the crimes and their context than the prosecution of a low-level perpetrator.⁶ Hence, the argument could be properly made that ‘minor offences’ and ‘minor roles’ should not be prosecuted, or at least not by international jurisdictions, and should be left for national authorities instead. From this viewpoint, the criticism of the ICTY’s initial prosecutions would appear to be correct.

However, a number of arguments can be and have been offered in reply. First, it can be argued that within the universe of international crimes there is no such thing as ‘minor crimes’ and ‘minor roles’. A single event in the Milošević Kosovo indictment, the massacre of Racak, involved the execution of over 40 civilians—an incident that would be viewed by all jurisdictions in the world as extremely grave. Erdemović, a perpetrator located at the lowest echelons of the chain of command, killed around 200 people under his own admission.⁷ Under this competing logic, any jurisdiction dealing with crimes of this scale should refrain from getting entangled in superficial numeric calculations and overly simplistic divisions of roles, when reality shows that gravity is widespread and that all individuals involved play important roles that enable the commission of the crimes. In addition, the perpetration of low-level perpetrators can ‘bring home’ the ‘daily aspect of the abstract narrative of ethnic cleansing’, explaining how ordinary people participated in killing and brutalizing their fellow human beings,⁸ thus making visible in a powerful way the macro-criminality of genocide, war crimes, or crimes against humanity, which otherwise may end up being

⁴ See P Akhavan, ‘Justice in The Hague, Peace in the Former Yugoslavia?’ (1998) 20 *Human Rights Quarterly* 777.

⁵ In the words used by the Argentine Court of Appeals for the Federal District of Buenos Aires in the *Juntas* trial judgment, applying a theory of co-perpetration by means to hold the commanders criminally responsible; reprinted in (1988) 8 *Human Rights Law Journal* 415–17.

⁶ Akhavan (n 4) 778–9.

⁷ Judgment, *Erdemović*, IT-96-22-A, AC, ICTY, 7 October 1997.

⁸ Akhavan (n 4) 780.

perceived by the general public as something akin to a natural catastrophe, a non-human event.⁹ It may be precisely in cases involving low and mid-level perpetrators that criminal prosecutions are particularly adequate to enable the transformation of a cog in a wheel back into a human being.¹⁰

The proposition that will be defended here is that any justice system that wishes to adequately deal with international crimes should first be aware of its limitations and avoid unrealistic expectations. The beneficial effects of criminal prosecutions for gross violations of international humanitarian law and human rights law—which include providing ‘great occasions for social deliberation and for collective examination of the moral values underlying public institutions’,¹¹ and perforating the dominant narratives created by the groups involved in the crimes and shattering the accompanying ‘states of denial’ by which societies refuse to accept even the very existence of the crimes¹²—can be otherwise jeopardized. Pretending that no choices will be made, i.e. that no case will be prioritized while others are deferred or even sidelined, is not only dishonest, but also inefficient: such a position merely masks the unavoidable and ‘unofficial’ selection processes, thereby effectively precluding the formulation of transparent criteria and the scrutiny of the manner in which those criteria are applied in practice. As one commentator puts it, the question is not ‘whether selective prosecution should occur, as it is essentially impossible that it does not, but when selective prosecution is unacceptable’.¹³

But the ICC’s particular features imply that selectivity is not confined to the selection of *cases*, understood as confined episodes of victimization, for investigation and prosecution, but before that, to the selection of entire *situations*—a term that has been understood as denoting the ‘situation of crisis’ during which crimes under the jurisdiction of the Court are committed.¹⁴ This poses additional and unique challenges to the Court, and to the OTP in particular, which will be discussed in the next section.

⁹ For a discussion of the need—and the limitations—of the criminal justice system to translate this macro-criminality into tangible instances of human conduct, see H Jäger, ‘Betrachtungen zum Eichmann-Prozeß’ (1962) 45 *Monatsschrift für Kriminologie und Strafrechtsreform* 73–83.

¹⁰ H Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin 1992) 289. A valid question, however, is whether in the case of low-level perpetrators at least some of the same goals cannot be achieved through mechanisms other than the criminal process; see for instance the community reconciliation in Timor-Leste, and the reintegration of perpetrators of past wrongs into their communities, which successfully involved 1,371 perpetrators (for a report, go to <<http://www.ictj.org/static/TimorCAVR.English/09-Community-Reconciliation.pdf>> accessed 10 August 2014).

¹¹ Nino (n 1) 131.

¹² The term is taken from the homonymous book by Stanley Cohen. As Cohen explains, within the elementary forms of denial there are those which operate as collective defence mechanisms developed to cope with guilt, including the creation of myths and the adoption of unspoken arrangements for concerted or strategic ignorance. See S Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Maiden, MA: Blackwell Publishers 2001) Chapter 1, ‘The elementary forms of denial’.

¹³ Cryer (n 3) 192, noting that even in those systems where the principle of mandatory prosecution (*Legalitätsprinzip*) prevails, there is recognition that processing all cases is simply not possible.

¹⁴ On the definition and scope of the term ‘situation’ see R Rastan, ‘The Jurisdictional Scope of Situations before the International Criminal Court (2012) 23 *Criminal Law Forum* 1.

15.2 The Selection of Situations by the OTP

The ICC, contrary to the ad hoc tribunals, is a permanent court, which aspires to universality. As such, it has to select situations where to exercise jurisdiction. In ten years, the number of States Parties has increased from 60 to 123, i.e. the territorial jurisdiction of the ICC has expanded by 100%. It means that two states out of three are States Parties. A number of important states in terms of population and international weight are missing, but the ‘playing field’ is wide and difficult enough for a selection inevitably to occur—and for this selection inevitably to raise criticisms. It is the OTP that operates this selection, to a large extent, and it is the driving force behind the process, which is inherently controversial; and because of its nature, the organ in charge of it inevitably focuses criticisms. For instance, ten years after the beginning of its practical life, the ICC and the OTP are criticized for having opened investigations in Africa only, which does not fit well with the universal vocation of the Court.¹⁵

The fact that these criticisms emerged in a certain political context and some of them were put forward by the very same persons targeted by the ICC prosecutions does not mean they should be treated lightly. These criticisms go to the heart of the legitimacy of the institution.

The paragraphs that follow will seek to explain how the selection process functions in practice—the so-called preliminary examinations—and why the outcome so far has been what it is, and will outline some prospects for the future.¹⁶

15.2.1 The process

The OTP is in charge of selecting situations but is not a free rider. The Statute has set clear criteria governing the process, and once these criteria are met, the duty of the Prosecutor is to proceed. S/he has limited discretion not do so, and is subject to scrutiny. If s/he assesses that the criteria are met to investigate on his/her own volition, s/he has first to seek authorization and his/her decision will be reviewed.¹⁷ If s/he decides not to act upon a referral, her/his decision may also be subject to review, which is mandatory if the decision not to investigate is reached on the basis of the ‘interests of justice’ (Article 53(1)(c) and (3)(b)).

There is a wide variety of situations; each is unique and may be brought to the prosecutor’s attention through any of the so-called triggering mechanisms. Regardless of the channel though which the situation reaches the OTP, the same principles and criteria are applied.

¹⁵ See Schabas, Chapter 16, this volume.

¹⁶ The process and criteria governing preliminary examinations are explained in detail in the November 2013 OTP Policy Paper on preliminary examinations <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Pages/draft%20policy%20paper%20on%20preliminary%20examinations.aspx> accessed 10 August 2014.

¹⁷ On the scope of the Prosecutor’s *proprio motu* powers, see F Guariglia, ‘*Proprio Motu* Powers of the Prosecutor to Commence Investigations’ in A Zidar and O Bekou (eds), *Contemporary Challenges for the International Criminal Court* (London: British Institute of International and Comparative Law 2014) 93 *et seq.*

As will be discussed in more detail in the following section, the OTP is guided in this process by the principles of independence, impartiality, objectivity, and non-discrimination. The Office is well aware that a politicized decision to proceed or not to proceed would be inconsistent with the law, would adversely impact on the legitimacy of the institution, and ultimately would be a recipe for failure. Cases brought for political reasons are bound to fail. Still, the Office may be subject to pressures from multiple sides: for instance, NGOs which consider that a situation is ripe for investigation, and concerned states which consider that it is not, unless an investigation is seen as a convenient means to marginalize opponents or troublemakers. Some states may attempt to lobby against the opening of a preliminary examination, or the opening of an investigation; others may attempt to lobby against the closure of a preliminary examination. However, in all cases, and regardless of the pressures, the Office has to make an independent and objective assessment of the Rome Statute criteria: jurisdiction, admissibility, and interests of justice.

15.2.2 Outcome

In a little over a decade, the Office has opened 22 preliminary examinations. Contrary to the belief that preliminary examinations never end, 12 were actually completed, with eight leading to an investigation and four to a decision not to proceed; ten are ongoing. The controversial fact is that this process has led to opening investigations in African countries only. How can this reality for which the ICC has been so criticized, and often disingenuously, be explained? Let us look at the facts.

First, let us discuss the eight preliminary examinations that led to the opening of an investigation.

It is acknowledged that most of the situations were referred by states themselves or by the UNSC, but this does not suffice to explain why a positive decision was reached. The OTP has to make its own evaluation, and in the referrals mentioned here it reached a positive decision on the basis of its own assessment. The questions are therefore: Was it wrong in some instances? Was there any decision made without the requisite reasonable basis? The answers to these questions are negative. Ultimately, Chambers of the Court have concurred with the OTP assessment that a situation had to be opened, with the Kenya and Côte d'Ivoire situations being clear examples of this.

The OTP could perhaps be criticized for taking its decisions too late or too quickly, but the decisions made were in any event consistent with the OTP's duties under the Statute.

Second, what can be said about the decisions not to proceed, such as with Iraq, Korea, Palestine, or Venezuela? The fact that all of those situations were outside Africa could be portrayed as reflective of a biased policy decision by the former prosecutor to focus on African countries and avoid getting involved in politically complex situations. This, however, would be a groundless and speculative assumption. In each of those four situations, there were clear legal grounds to reach the conclusion that one or more of the Article 53(1) criteria were not met: preconditions for jurisdiction were initially not met in the Palestinian case because Palestine was not recognized as a state in the UN at the time;¹⁸

¹⁸ See the OTP decision, Situation in Palestine, 3 April 2012 <<http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>> accessed 10 August 2014. On 16 January 2015, the Prosecutor opened a preliminary examination. See OTP Press Release, ICC-OTP-20150116-PR1083, 16 January 2015. For analysis, see Chapter 8 (El Zeidy) in this volume.

subject matter jurisdiction was not met in Korea¹⁹ and Venezuela,²⁰ and gravity was not met in Iraq.²¹ In any case, the decisions could be revisited on the basis of new facts or evidence, which is actually happening. For instance, the Office has received new communications and information on alleged crimes committed by UK forces in Iraq, and has subsequently reopened a preliminary examination into this situation and the situation in Palestine.²²

Third, what about the ongoing preliminary examinations? At the time of writing this chapter there are ten ongoing preliminary examinations involving three different continents. In 2014 the Office opened a new preliminary examination in Ukraine²³ and also one in CAR, since a new situation has occurred which warranted this step being taken.²⁴

The geographic variety of situations under preliminary examination is illustrative of the fact that the ICC-OTP is actually not focusing on Africa, even though this may not be sufficient to persuade sceptical minds. Paradoxically, the OTP was also criticized for examining certain situations for too long, as if it was dragging its feet to open an investigation. This requires some explanation.

A preliminary examination can indeed take time. This is due to a number of factors:

- Establishing subject-matter jurisdiction, i.e. the effective commission of crimes within the jurisdiction of the Court in the situation in question, requires some time. This can be especially challenging when potential information providers are not forthcoming due to security, disclosure, or political concerns. The powers of the Office at the preliminary examination stage are also limited. The Office is therefore dependent on information provided to it. It can and should seek to verify information, and can request additional information but cannot collect directly from victims or witnesses in the field. Additionally, some situations are extremely complex, involving

¹⁹ See the OTP's Situation in the Republic of Korea: Art 5 Report, June 2014 <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-cdnp/korea/Pages/article-5-report.aspx> accessed 10 August 2014.

²⁰ See the OTP's response to communications received concerning Venezuela, 9 February 2006 <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-cdnp/venezuela/Pages/otp%20letter%20to%20senders%20reply%20on%20venezuela.aspx> accessed 10 August 2014.

²¹ See the OTP's response to communications received concerning Iraq, 9 February 2006 <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/iraq/Pages/otp%20letter%20to%20senders%20reply%20on%20iraq.aspx> accessed 10 August 2014.

²² See the Prosecutor's statement, 'Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq', 13 May 2014 <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-iraq-13-05-2014.aspx> accessed 10 August 2014. On Palestine, see above (n 18).

²³ See the OTP's statement of April 2014 <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/ukraine/Pages/ukraine.aspx> accessed 10 August 2014.

²⁴ See Statement of the Prosecutor of the ICC, Fatou Bensouda, on opening a new preliminary examination in Central African Republic, 7 February 2014 <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-07-02-2014.aspx> accessed 10 August 2010.

multiple crimes, multiple sub-situations, and waves of violence (e.g. Nigeria, Honduras).

- Assessing complementarity can also take time. The complementarity assessment must factor in differing views and analysis, including those put forward by states and NGOs. The OTP approach has been to promote complementarity on the basis of a proper assessment of what is really taking place at the national level. For this, OTP will collate and analyse the different views expressed—for instance, it will request from NGOs examples of cases allegedly not genuinely prosecuted, and from states, examples of cases where the national authorities are purportedly doing a proper job. It is acknowledged that in some cases states may fulfil their investigative or prosecutorial duties primarily to keep the ICC at bay, or, at the other end of the spectrum, to prepare a dossier for the ICC. One could call this negative complementarity. The role of the Office is to scrutinize these processes, reach proper conclusions, and press the relevant domestic authorities to conduct a genuine investigation or prosecution.
- If the policy is not to open an investigation when there are reasonable prospects that the state(s) vested with jurisdiction will perform adequate investigations and/or prosecutions, then it is only natural that in appropriate instances, the Office may decide to give states the time that they need. This is a positive development, to the extent that it bolsters justice delivered within the same situation, reduces the impunity gap, and allows for a process of national justice. If, for instance, the Kenyan authorities had availed themselves of the opportunity offered by the OTP to commence their own investigations and proceedings,²⁵ there would not have been a need for an exercise of *proprio motu* powers by the OTP in the situation.

Therefore, there are proper reasons to explain why, if the selection of situations has so far led to opening investigations in Africa only, this is not the product of a deliberate choice by the OTP. Some will nonetheless argue that it was the OTP's presumed sponsors, the states, or, worse even, the UNSC that seized the ICC. Hence, this section of the chapter will conclude with some observations on triggering mechanisms.

15.2.3 Observations on triggering mechanisms

Does the specific triggering mechanism make a difference in terms of opening an investigation? In other words, is a situation that has been referred to the ICC more likely to be investigated than a situation brought to the prosecutor's attention through Article 15 communications?

Some clarifications are required here: first, it would be wrong to argue that communications never lead to anything or are not followed through, or that the Office received more than 10,000 communications in the last decade (this is correct) and not

²⁵ See notably Agreed Minutes of Meeting of 3 July 2009 between the ICC Prosecutor and the Delegation of the Kenyan Government <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-cpi/kenya/Pages/agreed%20minutes%20of%20meeting%20of%203%20july%202009%20between%20the%20icc%20prosecutor%20and%20the%20dele.aspx> accessed 10 August 2014.

a single one led to an investigation. True, the Office continues to receive a large number of communications that are manifestly outside ICC, and those are dismissed. It is also true that in the ordinary course of events, a single communication will not be enough to trigger an investigation because it will fail to constitute a reasonable basis as such. However, all relevant communications contribute to the Office's overall information in relation to, and understanding of, a given situation. Furthermore, the OTP has used twice in the past its *proprio motu* powers on the basis of, *inter alia*, Article 15 communications received (Kenya and Côte d'Ivoire). Even in the case of referrals, the OTP usually seeks additional information before making a decision, and therefore a determination of reasonable basis usually includes Article 15 communications. So communications are considered and used, especially when they allege and document the commission of crimes actually falling within the ICC jurisdiction.

Irrespective of the triggering mechanism, the test remains the same: a reasonable basis to proceed (Article 53(1)). However, in the case of a referral, there is an expectation that the OTP will proceed unless contrary criteria are met. This is due to practical reasons: a situation is usually not referred without reasons underlying the referral as well as supporting material being provided. Further, cooperation is in principle forthcoming, which helps to expedite the process. Of course, referrals can be opportunistic, and/or driven by political expediency rather than a strong sense of justice. But this does not detract from the fact that every referral is an opportunity to do justice. Further, the Prosecutor is referred a situation, and not specific individuals or specific crimes, and will decide independently which cases to pursue. Thus, the Prosecutor and her Office cannot be easily instrumentalized.

However, it is recognized that despite the prosecutor's ability to resist instrumentalization, the fact that referrals by states or the UNSC may be politically motivated can impact on the credibility of the OTP and the Court: when the OTP does not receive a referral from the UNSC that would seem warranted, it is not blamed for this, but that fact is seen as evidence of its dependence on great powers. When the OTP does receive and accept a self-referral from a politically motivated state, it may be seen as colluding with this state and consenting to manipulation. The use of self-referrals, a mechanism that, although perfectly compatible with the Statute, was not really expected when it was drafted,²⁶ has also fuelled the debate about the political utilization of the ICC.

Finally, it may happen, in the future, that the Prosecutor decides not to act upon a referral, and this decision may also be portrayed as a political one. It is important to note, however, that in such a case the decision not to proceed can be subject to review upon request from the referring state or even *proprio motu* if the conclusion is that an investigation would not serve the interests of justice. This enables the Pre-Trial Chamber to assess whether the decision was consistent with the Statute (Article 53(3)).

Once the OTP decides to open an investigation, the focus shifts to the cases that should be brought forward for prosecution. As already advanced, here again, selectivity is unavoidable. The question then becomes what criteria and procedures guide OTP in this task, and this will be discussed in the next section.

²⁶ For a discussion, see D Robinson, 'The Controversy over Territorial State Referrals and Reflections on ICL Discourse' (2011) 9 *Journal of International Criminal Justice* 355.

15.3 The Selection of Cases by the OTP

15.3.1 Governing principles

If, as discussed, the question of which cases should be singled out for prosecution and under which criteria is always a central one, in the ICC it becomes particularly critical due to the global nature of the Court (which implies the existence of multiple situations, each containing hundreds or even thousands of potential individual cases) and its necessarily finite resources. The OTP has developed the following guiding principles for the purposes of selecting cases for prosecution:²⁷

- *Independence:* In accordance with its duties under Article 42(1), the OTP acts independently, and members of the Office ‘shall not seek or act on instructions from any external source’. However, the duty of independence goes beyond simply not seeking or acting on instructions. It also means that the selection process is not influenced by the presumed wishes of any external source, the importance of the cooperation of any particular party, or the quality of cooperation provided. The selection process is conducted exclusively on the available information and evidence and in accordance with the Statute criteria and the policies of the Office.²⁸
- *Impartiality:* The concept of impartiality is most frequently applied with respect to judges, but it is also a relevant principle in the context of case selection by the OTP. In situations involving multiple groups with potential responsibilities, the OTP conducts its selection analysis in a non-partisan manner, applying the same methodology and standards for all groups. In the view of the OTP, impartiality or even-handedness does not mean ‘equivalence of blame’ or that all groups must be prosecuted regardless of the evidence. It means that the Office will apply the same methods, the same criteria, and the same thresholds for all groups in determining whether the level of criminality meets the thresholds warranting investigation or prosecution. Thus, impartiality may in fact require different outcomes for different groups, if some groups did not commit crimes or their crimes do not meet the thresholds to warrant prosecution before the Court. The relevant consideration is that OTP strives to follow a coherent rule, whereby like cases are treated alike.²⁹
- *Objectivity:* The OTP will investigate and consider incriminating and exonerating circumstances equally, in order to establish the truth (Article 54(1)(b)). This

²⁷ The following section closely follows a draft paper on selection criteria which the OTP distributed in July 2006 in the course of a meeting with NGO representatives, as well as the more recent November 2013 Policy Paper on preliminary examinations, referred to in (n 16). While the latter effectively subsumes the prohibition of adverse discrimination into ‘impartiality’ (see para. 28 and n 15), the criterion is left in this article for case selection, since it seems to be anchored in existing international case law (see the ICTY Appeals Chamber *Delalić* ruling quoted at n 30).

²⁸ The word ‘information’ refers to selection processes for the opening of an investigation under Art 53(1) of the Rome Statute. The word ‘evidence’ is used to refer to cases addressed under Art 53(2).

²⁹ To use a measure for legitimacy at the international level proposed by Thomas Franck, quoted by Cryer (n 3) 196.

means, for example, that an initial hypothesis that a particular person or group warranted prosecution may be rejected after investigation. The policy of the OTP is to apply this principle during the pre-investigation phase of situation selection as well as in the course of an investigation; thus the OTP will consider any factors either supporting or undermining a reasonable basis to proceed with investigation.

- *Non-discrimination:* The principle of non-discrimination flows from, and is subsumed by, the principles of impartiality and objectivity. It is nonetheless worth highlighting that the selection process of the OTP does not draw any adverse distinction founded on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth, or other status (Article 21(3)). Under a leading case in international criminal law (the so-called *Ćelebić* case), the ICTY Appeals Chamber stated that the prosecution's discretion to determine whom to prosecute must remain undisturbed, except where it can be demonstrated that there are unlawful or improper motives for prosecution, including discriminatory ones.³⁰

15.3.2 When to move forward?

Gravity is an overarching consideration as a critical admissibility factor which must be analysed before any decision to investigate or to prosecute is made. Although any crime falling within the jurisdiction of the Court is a serious matter, the Statute (Articles 53(1)(b) and (2)(b), and 17(1)(d)) clearly foresees and requires an additional consideration of 'gravity'. Thus, even where subject matter jurisdiction is satisfied, it must still be determined whether the case is of sufficient gravity 'to justify further action by the Court'.³¹ The gravity requirement is also reflected in Article 8(1), which is not part of the definition of war crimes, but rather an indication that the Court should focus in particular on war crimes 'when committed as part of a plan or policy or as part of a large scale commission of such crimes'.³²

The OTP has expressly declined to open an investigation on the basis of individual communications due to lack of gravity (Iraq report, noting that the conduct attributed to nationals of the relevant State Party included no more than 20 victims counted)³³

³⁰ Judgment, *Delalić et al. (Ćelebić case)*, IT-96-21-A, AC, ICTY, 20 February 2001, para. 611.

³¹ Whereas Art 53(1) refers to admissibility of 'the case', it appears that the article is simply following the wording of Art 17. At the stage of initiating an investigation, there is not yet a 'case'. Hence, in the view of the OTP, it is necessary to consider the situation in a generalized manner, taking into account the likely set of cases that would arise from investigation of the situation.

³² Given that Art 8(1) uses the term 'in particular', the Office has concluded that there is scope to consider other war crimes in exceptional circumstances; for example, where an isolated war crime results in a large number of victims or some other great impact.

³³ Update on Communications Received by the Prosecutor, 10 February 2006 <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statements/Pages/update%20on%20communications%20received%20by%20the%20prosecutor.aspx> accessed 10 August 2014; Annex 1: Iraq Response <http://www.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> accessed 10 August 2014.

and has made it clear that it intends to intervene only in relation to situations and cases that meet a certain threshold of gravity, consistent with the letter and the spirit of the Statute. Factors that the OTP will consider when analysing gravity include the *scale* of the crimes, the *nature* of the crimes, and the *manner* of their commission. In this context, ‘scale’ means more than just numbers, and may include consideration of temporal or geographical intensity. As to the nature of the crimes, the OTP recognizes that all crimes under the Statute are very serious. Nonetheless, in practice it has highlighted some crimes of particular concern, thus far including killing, rape, and child conscription. The OTP also considers other particularly aggravating aspects in the manner of commission of the crimes. This may include particular cruelty, crimes against particularly defenceless victims, crimes involving discrimination on grounds referred to in Article 21(3), or abuse of *de jure* or *de facto* power (e.g. the responsibility to protect).³⁴ The OTP considers as relevant factors whether the crimes deliberately targeted civilians, vulnerable groups, or persons involved in a humanitarian assistance or peacekeeping mission, as well as crimes intended to obstruct justice (particularly those targeting ICC witnesses or staff) and crimes committed with intent to spread terror.³⁵ Recently, the OTP has adopted a new Policy Paper on Sexual and Gender-Based Crimes (June 2014), which emphasizes the gravity of sexual and gender-based crimes, and includes a commitment to pay particular attention to the commission of these crimes and to undertake effective investigations and prosecutions in relation to them.³⁶ Finally, the OTP has clarified that the geographic location of the crimes is not a factor that it will take into account.

These are simply factors to be considered; none is a fixed requirement. The OTP’s position is that no fixed weight should be assigned to the criteria, but rather a judgment will have to be reached on the facts and circumstances of each situation.

Where the available information provides a reasonable basis to believe that one or more crimes within the jurisdiction of the Court have been committed, the next step is to consider *admissibility*. There are two aspects to admissibility: gravity and complementarity. The Statute does not stipulate any mandatory sequence in the consideration of gravity and complementarity, but the prosecutor must be satisfied as to admissibility on both counts (gravity and complementarity) before proceeding further.

15.3.3 Who must be prosecuted?

Whereas the assessment of gravity during the situation selection phase is necessarily general, at the case selection phase one must look at the gravity of a particular ‘case’ in question.³⁷ Since a case comprises both crimes and perpetrators, the ‘gravity of the

³⁴ Similar aggravating factors are provided for in Rule 145 for the purposes of determining the appropriate sentence; Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, 3–10 September 2002 (First Session of the ASP), part II.A (adopted and entered into force 9 September 2002) (‘ICC RPE’). For a wider discussion on gravity and the relevance of sentencing factors, see American University, War Crimes Research Office, The Gravity Threshold of the International Criminal Court, March 2008, 39–42.

³⁵ Rule 145(2) ICC RPE; Art 8(2)(b)(iii), Art 70 Rome Statute.

³⁶ Policy Paper on Sexual and Gender-Based Crimes, OTP, ICC, June 2014 <<http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes-June-2014.pdf>> accessed 10 August 2014.

³⁷ On the notion of ‘case’, see R Rastan, ‘What is a “Case” for the Purpose of the Rome Statute?’ (2008) 19 *Criminal Law Forum* 435.

case' includes both the *gravity of the crimes* and the *extent of responsibility of the perpetrator*. With respect to the gravity of the crimes, the OTP considers the same factors as discussed previously.

With respect to the extent of individual responsibility, the OTP first developed its 'most responsible persons' policy, whereby first and foremost those situated at the highest echelons of responsibility will be the ones singled out for prosecution, such as those persons holding leadership positions.³⁸ However, the OTP also considered moving down the chain, for instance, if required for the successful prosecution of persons situated at the highest positions.³⁹ Who belongs to the category of 'most responsible persons' is a question that is dealt with through thorough analysis of all available evidence, and not one that can be properly answered *ex ante*. In this sense, it must be stressed that the selection of cases is an evidence-driven process, also governed by the principle of objectivity.

In its June 2012–15 Strategic Plan, however, the Office announced that it was rethinking this approach, considering limitations in investigative possibilities and/or lack of cooperation. It left open the possibility of building up prosecutions starting with cases against mid and high-level perpetrators before reaching those 'most responsible'. It also stated that it would 'consider prosecuting lower level perpetrators where their conduct has been particularly grave and has acquired extensive notoriety'.⁴⁰

Finally, it must be clarified that while the original policy of the OTP was to focus on the persons most responsible, the view of the OTP is that the *legal* threshold of admissibility is not as stringent as the *policy* threshold of 'persons most responsible'. Otherwise, the admissibility threshold would become a permanent legal barrier providing permanent *ex ante* impunity to entire classes of perpetrators, and enabling perpetrators to bring legal challenges demanding evidence showing that they are not only guilty but the most guilty.⁴¹

15.3.4 What crimes to prosecute?

In an effort to foster expeditious trials, OTP will bring compact charges, focusing on a confined universe of incidents. The charges chosen will constitute, whenever possible, a representative sample of the most prominent forms of victimization in the field. However, because the OTP often works in ongoing conflicts, it will frequently be necessary to take into account security of witnesses and ICC staff, protection of victims, and access to available evidence. For example, if interviewing witnesses from

³⁸ Paper on some policy issues before the Office of the Prosecutor, OTP, ICC, September 2003, 6–7.

³⁹ Ibid., 7.

⁴⁰ Strategic Plan June 2012–15, OTP, ICC, 11 October 2013, para. 22 <<http://www.icc-cpi.int/en-menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf>> accessed 10 August 2014. On the concept of 'notorious perpetrators' see F Guariglia, ‘“Those Most Responsible” versus International Sex Crimes: Competing Prosecution Themes?’ in M Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes* (Beijing: Torkel Opsahl Academic EPublisher 2012) 50 *et seq.*

⁴¹ For a wider discussion, see War Crimes Research Office (n 34) 25–57, including an analysis of Pre-Trial Chamber I's stringent approach to the gravity threshold provided for in Art 17(1)(d).

one incident site would put those witnesses at risk, whereas witnesses from another site involving a comparable incident can be interviewed without such risk, the OTP may prefer the latter.

If necessary in the particular circumstances of the case, the OTP may follow a *sequential* approach, investigating specific cases within a situation one after another rather than all at once. At the same time, the OTP's new Strategic Plan (2012–15) has abandoned the notion of 'focused investigation' and embraced 'the principle of in-depth, open-ended investigations while maintaining focus to avoid over-expanding the investigations at the expense of efficiency'.⁴²

15.3.5 Briefly: when not to prosecute?

The initial factors that must be determined under Article 53(2) concern the legal or factual basis to seek a warrant or a summons, and the admissibility of the case. If the OTP has satisfied itself that those factors are met, it is still necessary to assess the 'interests of justice', within the terms of Article 53(2)(c). The OTP has made public a policy paper clarifying its approach to this concept,⁴³ which emphasizes four guiding principles: (i) that the exercise of discretion under Article 53(1)(c) and (2)(c) is *exceptional* in nature and that there is a presumption in favour of investigation and prosecution if all legal factors described in Article 53 are met; (ii) that the criteria for the exercise of such discretion will be guided by the object and purpose of the Statute (the prevention of serious crimes of concern to the international community through ending impunity); (iii) that there is a difference between interests of justice and interests of peace, and that the latter falls within the mandate of institutions other than the OTP; and (iv) finally, that OTP is under a duty to notify the Pre-Trial Chamber of any decision not to investigate or prosecute in the interests of justice.⁴⁴ To date, no such decision has been made in any of the existing situations.

15.3.6 Judicial review of the exercise of prosecutorial discretion

Whereas the fact that under specific circumstances the OTP's exercise of discretion is subject to judicial review has never been the subject of any controversy, the trigger and scope of such review have been debated.⁴⁵ Two important decisions from Pre-Trial Chamber I have provided clarity as to the manner in which the judicial review mechanism enshrined in Article 53(2) should be interpreted: the Chamber rejected invitations to interpret affirmative decisions from the OTP pertaining to the persons being prosecuted and the selected charges related to crimes within the DRC situation

⁴² OTP Strategic Plan June 2012–15 (n 40) para. 23

⁴³ September 2007.

⁴⁴ See Policy Paper on the Interests of Justice, OTP, ICC, September 2007 <http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf> accessed 10 August 2014.

⁴⁵ See, for instance, the exchange between the OTP and Pre-Trial Chamber II in December 2005–early January 2006, in particular Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Art 53, *Kony et al., Situation in Uganda*, ICC-02/04-01/05-68, PTC II, ICC, 2 December 2005; and OTP Submission Providing Information on Status of the Investigation in Anticipation of the Status Conference to be Held on 13 January 2006, *Kony et al., Situation in Uganda*, ICC-02/04-01/05-76, OTC, ICC, 11 January 2006.

as tacit decisions not to investigate or not to prosecute other persons or other crimes. The Chamber noted that no negative decision under Article 53(2) had been made in the DRC situation, and that, on the contrary, the OTP was prosecuting a person at that time and further investigations in the DRC situation were ongoing.⁴⁶ In short, the Chamber refused to engage in an exercise of ‘judicial creation’ of a non-existent Article 53(2)(c) Decision, triggered by third-party disagreement with the prosecutorial choices made by the OTP.

So as long as OTP *is* prosecuting in a situation under investigation, and no negative decision has been reached under Article 53(2) (for instance, deciding not to charge a co-perpetrator due to his or her ill-health, and claiming that the ‘interests of justice’ support this decision), the review foreseen in Article 53(3) is not triggered. Mere disagreements as to where the prosecutor is focusing her investigative and prosecutorial efforts fall squarely outside the scope of judicial review under the Statute. In the event of a prosecutor exercising discretion on the basis of manifestly impermissible criteria or otherwise infringing his or her duties under the Statute, other control mechanisms may come into play: a prosecution motivated on discriminatory grounds may be terminated by the judges as an abuse of process, for instance. Similarly, the ASP may conclude that an egregious and deliberate failure to investigate or prosecute serious conduct clearly falling within the jurisdiction of the Court with no apparent or arguable justification evidences the existence of grounds for removal under Article 46.

15.4 Conclusions

The selection of situations or, to put it in different terms, the decision to open an investigation in a given situation, is a complex one, which covers multiple factors under the Statute. The decision can be subject to criticism, and portrayed as a political one, even if the facts fail to support the accusation. Unfounded attacks can be fuelled by multiple biases and also by basic ignorance of the Court’s legal framework and the Office’s policies and procedures. The best thing the Office can do in such circumstances is to scrupulously apply the Rome Statute and be transparent in its decision-making process. The publication of the OTP paper on preliminary examination, and the commitment to publish reports to explain the reasons to open or not to open an investigation in the situations concerned follow this logic and seek to enhance the transparency of the process.

Similarly, it is clear that when we speak of selection of cases within the universe of international crimes we are referring to extremely complex choices. The OTP is and will continue to be faced with a number of dilemmas and must make difficult, and at times probably unpopular but also unavoidable, decisions. The question of who must

⁴⁶ See Decision on the requests of the Legal Representative for Victims VPRS 1 to VPRS 6 regarding ‘Prosecutor’s Information on Further Investigation’, *Situation in the Democratic Republic of the Congo*, ICC-01/04-399, PTC I, ICC, 26 September 2007, at 5; and Decision on the Request Submitted Pursuant to Rule 103(1) of the Rules of Procedure and Evidence, *Situation in the Democratic Republic of the Congo*, ICC-01/04-373, PTC I, ICC, 17 August 2007, para. 5. Pre-Trial Chamber I noted that no negative decision under Art 53(2) had been made in the DRC situation and that, on the contrary, the Office was prosecuting a person at that time and further investigations into the DRC situation were ongoing.

be prosecuted internationally is inherently controversial, and any determination is bound to cause at least a degree of disappointment. However, it should be clear that the ICC as a whole can only offer a measure of justice, and that there must be adequate responses developed by the international community to deal with those perpetrators and crimes that the ICC cannot tackle.⁴⁷ This is a natural consequence of the ICC as a Court of last resort, but also a distinctive feature of the emerging system of international criminal justice, which requires that national authorities, the international community, and the Court work together in pursuing the common goal of putting an end to impunity for the most serious crimes.

⁴⁷ Paper on some policy issues before the OTP (n 38) 3.

16

Selecting Situations and Cases

William A. Schabas OC MRIA*

16.1 Introduction

In domestic legal systems, there is a presumption that all serious crimes against the person will be investigated and prosecuted, subject to limited exceptions and special rules, such as immunities of diplomats and officials of foreign states and the exclusion of minors and the insane. In some countries, upon receiving information about a possible offence, the prosecutorial authorities are under a legal obligation to proceed. Depending upon the legal culture and traditions, there may be a degree of discretion in identifying the charges. Some countries permit the prosecutor to, in effect, negotiate a reduction in the crimes in the indictment in exchange for the cooperation of the accused person and, in some cases, a guilty plea.

The international system of criminal prosecution distinguishes itself from national justice mechanisms by its extreme selectivity. Although it has sometimes been argued in the academic literature, not very convincingly, that Article 15 of the Rome Statute¹ imposes an obligation upon the prosecutor to proceed with a preliminary investigation upon the receipt of sufficient information about a crime within the subject-matter jurisdiction,² in practice the ICC is brought to bear in only a fraction of possible cases. More than a decade of practice indicates that when it undertakes to deal with a ‘situation’ the Court only actually takes cases against a small handful of alleged perpetrators. Sometimes they may be presented as the central or leading personalities in a conflict, as was the case with Joseph Kony and his associates in Uganda. But this is not always the case, and often relatively secondary personalities within the overall situation may find themselves targeted by the Court. It does not make sense to claim there is a legal obligation to prosecute but that it can be satisfied if only a few suspects are brought to book.

Responsibility for the selection of situations and of cases at the ICC lies primarily with the prosecutor. The Statute provides little guidance beyond the indication that jurisdiction must exist and the case or potential case should be admissible. The legal framework is completed with somewhat more detailed but still very vague provisions in the Regulations of the OTP. The real problem is rarely one of incompatibility with

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¹ Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute').

² M Bergsmo and J Pejic, 'Article 15' in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court—Observers' Notes, Article by Article* 2nd edn (München: C H Beck 2008) 581–93, at 589; M Bergsmo and P Kruger, 'Article 53' in *ibid.*, 1065–76, at 1068.

the Statute and the Regulations. It is that there are scores of situations and tens of thousands of cases that appear to fulfil the requirements but that are never addressed. It is difficult to account for their absence from the list of situations before the Court.

16.2 Distinguishing Situations and Cases

Selection is involved with respect both to ‘situations’ and to ‘cases’. There are important distinctions between the two concepts, both of which feature in the Statute itself. The Rome Statute uses the term ‘situation’ in the context of ‘referral’. According to Article 13, the Court may exercise its jurisdiction over a ‘situation’ for which the Court has jurisdiction and in which crimes contemplated by the Statute appear to have been committed to the extent it has been ‘referred’ to the prosecutor by a State Party or by the Security Council. With respect to referral of situations by a State Party, the Statute specifies, in Article 14, that the purpose of referral is to request the prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

There have been two referrals of ‘situations’ by the Security Council, the first of ‘the situation in Darfur since 1 July 2002’³ and the second of ‘the situation in the Libyan Arab Jamahiriya since 15 February 2011’.⁴ There have been five referrals of ‘situations’ by States Parties: ‘the situation concerning the Lord’s Resistance Army’ by Uganda, in December 2003,⁵ ‘the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002’ by the DRC;⁶ ‘the situation of crimes within the jurisdiction of the Court committed anywhere on the territory of the Central African Republic since 1 July 2002’ by the CAR;⁷ ‘la situation au Mali depuis le mois de janvier 2012’ by Mali;⁸ and the ‘31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip’ by Comoros.⁹

The prosecutor is empowered to proceed with an investigation if a situation has been referred to the Court by the Security Council or by a State Party, in accordance with Articles 13 and 14 of the Statute. The prosecutor may also proceed with an

³ UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593, operative para. 1.

⁴ UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970, operative para. 1.

⁵ ‘President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC’, *ICC Press Release*, 29 January 2004. The Prosecutor subsequently formulated the referral as ‘the situation concerning Northern Uganda: ‘Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda’, *ICC Press Release*, 29 July 2004. He informed the government of Uganda of his conclusion that ‘the scope of the referral encompasses all crimes committed in Northern Uganda in the context of the ongoing conflict involving the LRA’ and proceeded on that basis: Warrant of Arrest for Vincent Otti, *Otti, Situation in Uganda*, ICC-02/04-01/05-54, PTC II, ICC, 8 July 2005, para. 31. See also the statement of the Prosecutor of 14 October 2005 where he noted that Uganda had accepted the position taken by the OTP on the scope of the referral.

⁶ ‘Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo’, *ICC Press Release*, 19 April 2004.

⁷ ‘Prosecutor Receives Referral Concerning Central African Republic’, *ICC Press Release*, 7 January 2005.

⁸ Letter from Malick Coulibaly, Minister of Justice and *Garde des Sceaux*, Republic of Mali, 13 July 2012.

⁹ This was subsequently reformulated as ‘the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia’ by the Presidency when it assigned the matter to Pre-Trial Chamber I.

investigation in the absence of such referral but only to the extent that this is authorized by the Pre-Trial Chamber, in accordance with Article 15(3). The Statute indicates that the Pre-Trial Chamber determines whether or not ‘the case appears to fall within the jurisdiction of the Court’, suggesting that the prosecutor requests authorization to investigate a ‘case’ rather than a ‘situation’. Nevertheless, practice at the Court indicates that the request by the prosecutor and the authorization by the Court concern a ‘situation’.¹⁰ The prosecutor has made two such requests. In the first, he sought authorization of an investigation into ‘the situation in the Republic of Kenya in relation to the post-election violence of 2007–2008’.¹¹ The Pre-Trial Chamber authorized an investigation into ‘the situation [on the territory of] the Republic of Kenya in relation to crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009’.¹² In the second, the prosecutor requested authorization of an investigation with respect to ‘the Republic of Côte d’Ivoire in relation to post-election violence in the period following 28 November 2010’.¹³ The Pre-Trial Chamber authorized an investigation in ‘Côte d’Ivoire with respect to crimes within the jurisdiction of the Court committed since 28 November 2010’, adding that the authorization extended to ‘continuing crimes that may be committed in the future insofar as they are part of the context of the ongoing situation in Côte d’Ivoire’.¹⁴ The Rules of Procedure and Evidence also indicate that the prosecutor’s request under Article 15 concerns a ‘situation’.¹⁵

Within the ‘situation’ there may be one or more ‘cases’. A situation cannot exist without any cases (although there should be ‘potential cases’), but the opposite does not seem possible. A ‘case’ must always be part of a ‘situation’. The Court has explained that prosecutions proceed in stages that ‘begin with a “situation” and end with a concrete “case”, where one or more suspects have been identified for the purpose of prosecution’.¹⁶ The many references to a ‘case’ in the Statute confirm that at this stage of the proceedings there is one or more identifiable suspect or defendant. The line between a ‘situation’ and a ‘case’ does not have precise boundaries, however, to the extent that there is no sense defining a ‘situation’ in the absence of some indication that there are ‘potential cases’ involving the individual accused.¹⁷ The ‘potential case’ starts to become a ‘case’ in the course of an investigation. The process is completed with the issuance of an arrest warrant or a summons to appear. Nevertheless, once defined by the arrest warrant or the summons to appear, the description of the ‘case’ continues to evolve. The prosecutor may modify its scope in preparation for the confirmation hearing, the Pre-Trial Chamber may redefine the ‘case’ in its decision following the

¹⁰ Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, ICC, 31 March 2010 (‘Kenya authorization decision’), paras 40–8.

¹¹ Ibid., para. 2. ¹² Ibid., paras 201–11.

¹³ Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d’Ivoire, *Situation in the Republic of Côte d’Ivoire*, ICC-02/11-14, PTC III, ICC, 3 October 2011 (‘Côte d’Ivoire authorization decision’), para. 2.

¹⁴ Ibid., para. 212.

¹⁵ Rule 49(2) of the ICC Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, part II.A (‘ICC RPE’).

¹⁶ Kenya authorization decision (n 10) para. 41. ¹⁷ Ibid., para. 50.

confirmation hearing, and the Trial Chamber may make further changes including modification of the charges pursuant to Regulation 55.

Although the Statute does not make any such distinction, it does not seem unreasonable to think of situations within situations. As a general rule, the situations before the Court concern conflicts between armed groups or formations such as political parties. These groups and parties may be seen to constitute, in a sense, distinct 'situations'. For example, in 2005 the prosecutor obtained arrest warrants within the situation in Uganda against five leaders of the rebel LRA. At a status conference the following year, the prosecutor told the Court that his Office did not intend to seek further warrants for past crimes with respect to the LRA, but he confirmed that inquiries and analysis were ongoing regarding other groups, notably the UPDF.¹⁸ But in the report on performance submitted to the ASP the following year, the prosecutor said that the investigation in Uganda was completed.¹⁹

16.3 Selection of Situations

Perhaps the most distinctive difference between the ICC and its predecessor international criminal tribunal is in the selection of situations. The Court is the first international criminal tribunals with the power to select its situations, at least in the broad sense of a geographic region with a temporal scope. By contrast with the ICC, at all of the previous international criminal tribunals neither the prosecutor nor the judges played any real role in the selection of situations.

The initial proposal for an ICC, comprised within Article 227 of the Treaty of Versailles, set out both the situation and the case. It was to try 'William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties'. The tribunal was never actually established, but had it been created, the prosecutor and the judges would have been left with little discretion. The 'situation' might have been described as 'responsibility for World War I'. It was identified and defined by the parties to the Treaty of Versailles. In effect, the provision was dictated to vanquished Germany by the victorious delegates at the Paris Peace Conference.

The International Military Tribunal, established pursuant to the London Agreement, was the first such institution to actually operate. A treaty negotiated by the four occupying powers, although later ratified by several other states, the London Agreement defined the situation as 'the major war criminals of the European Axis', regardless of the geographic location of the crimes.²⁰ The temporal scope of the jurisdiction was not specified, although the definition of crimes against humanity recognized the possibility of punishing acts perpetrated 'before or during the war'.²¹ There seemed to have

¹⁸ OTP Submission Providing Information on Status of the Investigation in Anticipation of the Status Conference to be Held on 13 January 2006, *Situation in Uganda*, ICC-02/04-01/05-76, PTC II, ICC, 11 January 2006, paras 6–7.

¹⁹ Report on programme performance of the ICC for the year 2006, ICC-ASP/6/3, 30 May 2007, 20.

²⁰ Art 1 of the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) (adopted and entered into force 8 August 1945) 82 UNTS 279.

²¹ Ibid., Art 6(c).

been no need to specify the war to which the Charter referred. The provisions of the Charter of the International Military Tribunal for the Far East were very similar. The situation was defined as 'the major war criminals in the Far East'²² and 'Far Eastern war criminals'.²³

These rather vague and somewhat ambiguous provisions did not appear to concern those who created the two Tribunals, probably because they were confident that they firmly controlled the prosecutors who were assigned to identify the cases within each of the two 'situations'. In practice, the IMT was directed at Nazi perpetrators alone, despite the fact that there was much evidence that some of the crimes over which the Tribunal exercised jurisdiction had also been perpetrated by those who established the institution. War crimes and other atrocities perpetrated by the victors, ranging from the Katyń massacre, the sinking of merchant ships by submarines without warning, and the dreadful bombings of cities in Germany and Japan, including the nuclear destruction of Hiroshima and Nagasaki, and the more quotidian breaches of international law associated with brutal armed combat such as murdering prisoners or the issuance of orders not to take them, were not addressed as part of post-war accountability and they remain largely unpunished to this day.²⁴ At the Tokyo Tribunal the Indian judge, Radhabinod Pal, openly challenged the one-sided nature of the proceedings in his lengthy dissenting opinion.²⁵

When the ad hoc tribunals for the former Yugoslavia and Rwanda were set up in the early 1990s, there was considerable praise for them as an improvement upon the Nuremberg and Tokyo tribunals in terms of their independence from political authorities. While this may be true with respect to the independence of the prosecutors, there was no real difference in terms of selection of the situation. In 1945 it was the major victorious powers, whereas in 1993 and 1994 it was the Security Council; in other words, more or less the same small group of states. At the ICTY, the situation was defined as 'serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991',²⁶ while at the Rwanda tribunal it was 'genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994'.²⁷ In some respects, the 'situations' at the ad hoc tribunals were defined more precisely than they had been in 1945, perhaps because those who established them understood that they might less easily control the decisions made by the prosecutors given their enhanced level of independence. Both statutes provided that the prosecutors 'shall not seek or receive instructions from any Government or from any other source'.²⁸

²² Ibid., Art 1. ²³ Ibid., Art 5.

²⁴ For an exception, see *Kononov v Latvia* App no. 36376/04 (ECtHR Grand Chamber, 17 May 2010).

²⁵ N Boister and R Cryer (eds), *Documents on the Tokyo International Military Tribunal* (Oxford: Oxford University Press 2008) 811–930.

²⁶ Art 1 Statute of the ICTY, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, Annex ('ICTY Statute').

²⁷ Art 1 Statute of the ICTR, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Annex ('ICTR Statute').

²⁸ Art 16(2) ICTY Statute; Art 15(2) ICTR Statute.

The initial draft statutes of the ICC prepared by the ILC did not allow the prosecutor any discretion in the selection of situations.²⁹ The jurisdiction of the Court was to be triggered by referral of a State Party or the Security Council. Not only did the prosecutor have no authority to initiate prosecutions in the absence of a request or referral by a State Party or the Security Council, but also the prosecutor had no discretion to refuse to proceed when such requests or referrals were properly formulated. One of the most radical changes to the draft of the ILC that appears in the final version of the Rome Statute is the recognition of discretion in the prosecutor with respect to the selection of situations. This manifests itself in two ways: the prosecutor may select situations acting *proprio motu* and in the absence of referral by a State Party or the Security Council; or the prosecutor may refuse to proceed with situations that are referred by a State Party or the Security Council. In both circumstances, the prosecutor's decision is subject to a degree of judicial review by a Pre-Trial Chamber.

In the course of the first decade of judicial activity by the ICC, the prosecutor has exercised discretion to proceed *proprio motu* with respect to two situations. In both, the Pre-Trial Chamber granted the prosecutor's request for authorization to proceed. All of the other active situations before the Court have resulted from referrals by States Parties or by the Security Council. Because the prosecutor proceeded in these situations without objection or contestation by those who referred them, there has been no judicial review of prosecutorial discretion. Nevertheless, the formal decision by the prosecutor in each of these referred situations is an important and distinct procedural step.³⁰ It constitutes the exercise of the prosecutor's discretion in the selection of situations.

It should therefore be evident that the crucial decision with respect to the selection of situations lies with the prosecutor. Without her agreement it is almost impossible for a prosecution to proceed, even if this is formally requested by a State Party or the Security Council. Article 53 of the Statute provides for a form of judicial review should the prosecutor exercise discretion not to proceed. Although there are no decisions based upon this provision, it seems reasonable to presume that the Pre-Trial Chamber would apply an approach similar to that adopted when it has authorized the prosecutor to proceed pursuant to Article 15 because the criteria are essentially the same. The two decisions applying Article 15 manifest a very cautious and minimalist approach to the Pre-Trial Chamber.³¹ Judges have shown a great reluctance to intervene in the exercise of discretion by the prosecutor in the selection of situations.

It may seem surprising that given this extraordinary power of the prosecutor, in sharp contrast with the path taken at all of the preceding international criminal tribunals, the Rome Statute and its subsidiary instruments provide virtually no guidance

²⁹ Report of the ILC on the work of its forty-sixth session, 2 May–22 July 1994, UN Doc A/CN.4/SER.A/1994/Add.1 (Part 2) in (1994) 2 *Yearbook of the International Law Commission* 15, 15–73.

³⁰ A Alamuddin, 'The Role of the Security Council in Stopping and Starting Cases at the International Criminal Court: Problems of Principle and Practice' in A Zidar and O Bekou (eds), *Contemporary Challenges for the International Criminal Court* (London: British Institute of International and Comparative Law 2014) 103–30, 119.

³¹ Kenya authorization decision (n 10) paras 17–18; *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Côte d'Ivoire authorization decision (n 13).

to the prosecutor as to how she is to exercise this discretion. Of course, the Statute sets out the conditions for jurisdiction and admissibility, and these must be observed by the prosecutor in selecting situations. The prosecutor considers these factors as part of the ‘preliminary examination’ that precedes a decision to proceed with a situation. Nevertheless, neither the Statute nor the Rules of Procedure and Evidence offer any direction about the criteria to be applied other than those relevant to jurisdiction and admissibility.

Before the first prosecutor of the Court took office, lawyers in the OTP prepared draft Regulations that attempted to codify the process by which ‘situations’ would be selected. These draft regulations naively approached the matter of selection of situations in a manner that suggested the prosecutor would proceed with everything that was admissible. There was to be a complex procedure, involving ‘evaluation teams’ and a ‘draft investigation plan’, leading to a decision by the prosecutor. Nevertheless, nothing indicated the grounds on which the prosecutor would make the determination. There was an intriguing reference to his or her ‘inherent powers’. But the prosecutor did not adopt the draft. Years later, a new and much streamlined version of the Regulations was proclaimed, setting out the following procedure, applicable to ‘situations’ that result from Security Council or State Party referral (Article 53(1)) or from the initiative of the prosecutor acting *proprio motu* (Article 15(3)):

Regulation 29. Initiation of an investigation or prosecution

1. In acting under article 15, paragraph 3, or article 53, paragraph 1, the Office shall produce an internal report analysing the seriousness of the information and considering the factors set out in article 53, paragraph 1 (a) to (c), namely issues of jurisdiction, admissibility (including gravity), as well as the interests of justice, pursuant to rules 48 and 104. The report shall be accompanied by a recommendation on whether there is a reasonable basis to initiate an investigation.
2. In order to assess the gravity of the crimes allegedly committed in the situation the Office shall consider various factors including their scale, nature, manner of commission, and impact.
3. Based on the report, the Prosecutor shall determine whether there is a reasonable basis to proceed with an investigation.³²

This text of Regulation 29 really does nothing more than refer back to the criteria for jurisdiction and admissibility. In addition, reference is made to the ‘interests of justice’, a ground on which the prosecutor may base a decision not to proceed in the case of Security Council or State Party referral.

Finally, some indications about criteria for the selection of situations may be gleaned from statements about policy issued by the OTP. In 2006 the OTP circulated a draft paper entitled ‘Criteria for selection of situations and cases’. There was some recognition that choices would have to be made because of the available resources. The document said the policy of the Office was ‘to respond to serious situations, while maximising the use of its available resources. The Office works in a cycle, reallocating resources upon completion of an investigation of a situation to commence an

³² Regulation 29 of the Regulations of the OTP, ICC-BD/05-01-09, 23 April 2009.

investigation of the next situation deemed to be the most appropriate for investigation'. There was no discussion about how the situation 'deemed to be the most appropriate for investigation' was to be identified. Very little distinction was made between principles applicable to the selection of situations and those for the selection of cases. Although the prioritization of the resources issue was considered only with respect to situations rather than cases, its relevance in both contexts seems obvious. Aside from the reference to available resources, the 2006 paper appeared to be premised largely on the postulate that *all* eligible situations would be acted upon. To the extent that the document acknowledged a role for prosecutorial discretion, this was mainly in the application of the 'gravity' criterion and, to a lesser extent, complementarity.

In November 2013 the prosecutor released a 'Policy Paper on Preliminary Examinations'. The paradigm had changed because the OTP was no longer speaking of the 'selection' of situations as well as of cases. Possibly this was prompted by a desire to downplay the role of discretion in the selection of situations. The 2013 document largely reprised the statements from 2006, although it did not include the text about prioritization of resources. Nowhere does the 2013 document suggest that the prosecutor makes a selection from among the eligible situations.

Regulation 29 combined with the Statute is adequate to frame the actions of the prosecutor to the extent that there is a presumption that all situations where the criteria of jurisdiction and admissibility are met will be taken up by the prosecutor. But this does not seem to be the case. Although the prosecutor has indicated that consideration is being given to a number of situations in various parts of the world, those that have actually been selected have been confined to the continent of Africa. This has subjected the Court to much criticism, and it has been at a loss to explain why the only situations on the planet that meet the criteria in Regulation 29 are confined to such a limited geographic region.

Those who defend the African orientation of the work of the Court often point to the fact that it was African states themselves that referred several of the situations. This explanation does not take into account the fact that the prosecutor is not at all bound to proceed on the basis of referrals. Yet in practice, the prosecutor has shown great deference to referrals from States Parties and the Security Council. The legal requirement that the prosecutor agree that there is a reasonable basis to proceed with an investigation in the case of such referrals is applied in a rather automatic and perfunctory manner. The result is that States Parties and the Security Council have tended to set the priorities of the Court. Given that the prosecutor must consent to such referrals, she has for all practical purposes accepted this state of affairs. Invoking the referrals by States Parties as an explanation for the selection of situations confined to the African continent is therefore not an adequate explanation.

The prosecutor addressed the issue of selection of situations in February 2006 in a statement concerning communications he had received with respect to the conduct of foreign troops in Iraq. 'While, in a general sense, any crime within the jurisdiction of the Court is "grave", the Statute requires an additional threshold of gravity even where the subject-matter jurisdiction is satisfied', he wrote. In this respect, the prosecutor said that a 'key consideration is the number of victims of particularly serious crimes, such as wilful killing or rape'. He added that a situation involving four to 12 victims

of wilful killing and a limited number of victims of inhuman treatment was not sufficiently serious, offering by way of comparison situations involving displacement of more than five million people and situations featuring hundreds or thousands of serious crimes.³³ These remarks were put into some perspective only a few weeks later when the prosecutor began proceedings in the case that would constitute the first trial before the Court. It involved a small number of victims of child soldier recruitment, without any allegation of wilful killing or rape. Still later, when confidential American diplomatic communications entered the public sphere, it was reported that the prosecutor had much earlier assured officials of the United States that he would not pursue complaints about the invasion of Iraq.³⁴

When the Pre-Trial Chambers deliberated on the two requests by the prosecutor for authorization to proceed with an investigation, they addressed themselves to issues associated with the exercise of prosecutorial discretion. Both Pre-Trial Chambers invoked the bugbear of ‘politicization’.³⁵ The prevailing view, it seems, is that the purpose of the judicial review of the prosecutor’s application for authorization to proceed with an investigation is to avoid, reduce, or minimize ‘politicization’. However, the examination by the Pre-Trial Chambers was confined to the formal criteria of jurisdiction and admissibility. It did not address politicization, nor is it at all clear how it could have done so even if the Chambers had the inclination. In particular, it would require evidence that there was a total absence of other eligible situations or else an indication that if they were present, they were not as serious as those for which the prosecutor was seeking authorization. There was no defendant at the authorization hearing, and the prosecutor certainly was not going to produce the evidence of politicization.

The independent prosecutor of the ICC was meant to be an improvement on the ‘politicized’ selectivity of the earlier institutions, where ‘situations’ were designated by the major military and political powers. But selectivity has not disappeared, and the decisions about selection are still being made. These decisions are often portrayed as the result of the application of objective criteria. But although it is not too difficult to explain with objective criteria the justification with respect to situations where the prosecutor chooses to act, the same cannot be said for the situations that are not selected. On a few occasions, notably situations in Iraq, Venezuela, and Palestine, the prosecutor has attempted to justify a decision to remain inactive. With respect to others, the prosecutor has said the matter is under ‘preliminary examination’. Some situations appear to linger in the purgatory of preliminary examination for many years. Such determinations by the prosecutor are only acceptable to the extent that the reasoning and the explanations are convincing. But this is not always the case.

³³ L Moreno-Ocampo, Letter concerning communication on the situation in Iraq, The Hague, 9 February 2006.

³⁴ D Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (New York: Oxford University Press 2014) 88.

³⁵ Kenya authorization decision (n 10) paras 17–18; Judge Fernandez de Gurmendi’s separate and partially dissenting opinion to the Decision Pursuant to Art 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, *Situation in the Republic of Côte d’Ivoire*, ICC-02/11-15, PTC III, ICC, 3 October 2011, para. 16.

An example of an unconvincing attempt at explanation can be seen in the prosecutor's reluctance to proceed with the situation in Palestine. In 2009 the Palestinian Authority formulated a declaration attributing jurisdiction to the Court over the territory of Palestine, in accordance with Article 12(3) of the Rome Statute. A preliminary issue was whether Palestine could be considered a 'state' within the scope of Article 12(3). The prosecutor undertook a lengthy consultation with stakeholders and experts only to declare, after more than three years, that it was actually not for the prosecutor to make such a determination. He said this was a matter for either the General Assembly of the United Nations or the ASP. The ASP did not appear to agree and the matter was not taken up at its next meeting. In November 2012 the General Assembly recognized Palestine as a non-member observer state.³⁶ Operative paragraph 1 of the resolution '[r]eaffirms the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967'. Since the adoption of the resolution, the prosecutor has taken the view that a new declaration is required and, furthermore, that Palestine can only give jurisdiction to the Court for the period subsequent to the resolution. However, in adopting the resolution the General Assembly did not create the state of Palestine. It only confirmed its status as a state whose existence it 'reaffirmed'. The General Assembly Resolution is a relevant fact that can assist the prosecutor in deciding whether Palestine is a state and from what point in time. However, the prosecutor was wrong to say he did not have the authority to make such a determination. The validity of the declaration under Article 12(3) is a legal question, it is a jurisdictional fact, and it falls to the prosecutor in the first place to decide whether the situation in Palestine can be triggered. Subsequently, whether or not jurisdiction has been given to the Court by a state may be examined by the Pre-Trial Chamber in proceedings under Article 15(3), and it may eventually be contested by an accused person at the appropriate stage in the trial.

Although reasonable people can disagree on many of the issues surrounding Palestine's declaration recognizing the jurisdiction of the Court, the treatment by the prosecutor leaves the distinct impression that there is a lack of enthusiasm about investigating violations of the Statute on the territory of Palestine. The prosecutor will have to present a much more rigorous legal analysis if she expects to make a compelling case that only objective factors are involved.

Ultimately, such decisions taken by the prosecutor are fraught with an element of subjectivity. The prosecutor and her advisers are influenced by their own personal views of the world, and of the issues, wars, conflicts, and crises that are important to them, for reasons that they themselves may or may not entirely understand or be in a position to explain. After all, they are only human, like all the rest of us. But they are unlike the members of the Security Council, who at least represent governments that are in one way or another accountable to their own people. The process by which the Security Council identifies situations, be it for ad hoc prosecution or referral to the ICC, is in some sense more transparent than the rather opaque determinations by the prosecutor. When these important decisions about the priorities of such a large institution are left to a single individual who acts on the basis of a vague legal framework

³⁶ Status of Palestine in the United Nations, UNGA Res 67/19 (4 December 2012) UN Doc A/RES/67/19.

and uncertain parameters, the institution remains vulnerable to charges of political selectivity.

The reluctance to acknowledge that political determinations influence the prosecutor's own selection of situations can be seen in the process of identifying candidates for the job. In the 2012 election of the prosecutor, the search committee of the ASP prepared a short list of four candidates all of whom had remarkably similar profiles.³⁷ The four had spent years working on prosecutorial teams at various ad hoc criminal tribunals as well as, in some cases, at the Court itself. They were experienced professionals with proven abilities in the management of complex international trials. The Search Committee largely based its conclusions on Article 42(3) of the Rome Statute, where it is stated that the prosecutor should have 'extensive practical experience in the trial or prosecution of criminal cases'. The short list might well have been different, however, if the job description had recognized the importance of political judgment in the selection of situations. It is of interest to note that three of the greatest international prosecutors, Robert Jackson, Richard Goldstone, and Louise Arbour, would not qualify under the strict application of this provision followed by the Search Committee.

The better course of action may be to admit the political dimension involved in the selection of situations by the prosecutor, and perhaps even to embrace it. Then, of course, the validity of the process depends upon how prosecutorial choices are greeted within the global 'community'. The prosecutor might enhance the credibility of her choices by open consultations with a group of advisers, a *comité des sages*. But even such a body, were it to be truly representative of various forces and interests in the world, would have trouble reaching consensus. It is difficult to reach unanimity with respect to the difficult decisions in hard cases. For example, a decision to proceed in Palestine will be warmly welcomed in certain parts of the world, including Africa, where it will be understood as a welcome departure from the inordinate focus on that continent. However, in other parts of the planet it will provoke anger and opposition.

16.4 Selecting Cases

Once the situation has been selected, the task of the prosecutor in identifying cases for prosecution is more familiar in the sense that the process is rather similar to that of the earlier international criminal tribunals. At Nuremberg, for example, the situation was defined by the four-power London conference, but the prosecutors were left with considerable latitude in the choice of whom to prosecute and for what. They received limited guidance from the Charter of the IMT. The accused were to be 'major war criminals' who had 'act[ed] in the interests of the European Axis countries'. Selection of the accused was made by the Committee for the Investigation and Prosecution of Major War Criminals composed of the four chief prosecutors, each appointed by one of the member governments, in accordance with Article 14 of the Charter. There were some disagreements within the Committee regarding both the identity of the accused

³⁷ Report of the Search Committee for the Position of the Prosecutor of the International Criminal Court, ICC-ASP/10/INF.2, 1 December 2011.

and the crimes with which they were charged. For example, when Gustav Krupp was found to be *non compos mentis* and therefore unfit to stand trial, the British did not agree that he should be replaced by his son, and the judges, who had to approve the amendment, concurred.³⁸ Both the British and the American prosecutors were opposed to charging the accused with responsibility for the Katyń forest massacre, but they eventually backed down when the Soviets insisted.³⁹ There was never any suggestion that the prosecutors were to act with independence of their governments. There is much evidence that they received instructions on various matters from their capitals on the issues that arose. Robert Jackson's deputy, William J Donovan, had been head of the principal United States intelligence agency and was placed on the prosecutorial team in order to ensure that the indictments did not include leading Nazis to whom the Americans had promised immunity.⁴⁰ The Soviets had a 'Special Government Commission for Directing the Nuremberg Trials', chaired by Andrey Vyshinsky, which gave instructions to their prosecutor on matters such as the handling of Katyń.⁴¹

The guarantee of prosecutorial independence in the statutes of the ad hoc tribunals was praised as a significant improvement over Nuremberg. The first operational Prosecutor of the ICTY, Richard Goldstone, has reported how the United Nations Secretary-General admonished him for failing to consult before seeking indictments of Bosnian Serb leaders Radovan Karadžić and Ratko Mladić.⁴² Nevertheless, there has been a huge amount of 'political' contact by the prosecutors of the ad hoc tribunals,⁴³ something that would be unthinkable for their counterparts at the national level. Although there is formal recognition of prosecutorial independence in the statutes of the ad hoc tribunals, the substantive features that should ensure this are not very well entrenched. For example, the relatively short length of the term of the prosecutors does not contribute in a positive sense to independence. Nor are the grounds and mechanisms for dismissal adequately codified.

As the work of the ad hoc tribunals evolved over time, there were evident changes in the selection of cases. Lower-level offenders had predominated in the early years of the ICTY. This may have been simply because of available opportunities, although the OTP claimed that it was strategic. The theory was that a pyramid would be constructed, starting with low-end perpetrators and building upon that until trials could take place of those at the top.⁴⁴ When the Security Council imposed a completion

³⁸ (1948) 2 IMT 20–21. On the Alfried Krupp trial, see case no. 58, Law Reports of Trials of War Criminals, United Nations War Crimes Commission Vol. X (London 1949).

³⁹ S Alderman, 'Negotiating on War Crimes' in R Dennett and J Johnson, *Negotiating with the Russians* (New York: World Peace Foundation 1951) 49–100, 96–7.

⁴⁰ K von Linjen, *Allen Dulles, the OSS, and Nazi War Criminals: The Dynamics of Selective Prosecution* (Cambridge: Cambridge University Press 2013); M Salter, *Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg: Controversies Regarding the Role of the Office of Strategic Services* (Abingdon: Routledge-Cavendish 2007).

⁴¹ For some of the documents, see A Cienciala et al. (eds), *Katyń, A Crime without Punishment* (New Haven: Yale University Press 2007) 326–9.

⁴² R Goldstone, *For Humanity, Reflections of a War Crimes Investigator* (New Haven: Yale University Press 2000) 102–3.

⁴³ In addition to Goldstone's memoir, see C Del Ponte, *Madam Prosecutor* (New York: Other Press 2008).

⁴⁴ See e.g. H Stuart and M Simons, *The Prosecutor and the Judge* (Amsterdam: Pallas Publications 2010) 53.

strategy on the Tribunal, the Plenary of judges amended the Rules of Procedure and Evidence so as to impose the requirement, as a condition of issuance of an indictment, that it ‘concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal’.⁴⁵

Ethnicity was central to the prosecutions at both the Yugoslavia and Rwanda Tribunals. There were regular complaints, from various quarters, that in this respect the prosecutors were not balanced in the selection of cases. For example, the prosecutor of the ICTR was regularly accused of neglecting Tutsi perpetrators of crimes against humanity following the genocide late in the year 1994.⁴⁶ By contrast, at the ICTY, defendants were identified with each of the various ethnic groups in the conflict. But this did not really resolve the debate, because each group complained that it had been unfairly targeted for prosecution, and that too few of the ‘other’ group were accused. When unexpectedly the prosecutor of the Yugoslavia Tribunal found she had jurisdiction over NATO bombing activities she took the unusual step of publishing a report indicating why she had decided not to proceed with charges.⁴⁷

Other factors relevant to the selection of cases at the ad hoc tribunals included the crimes that could be charged. In 1999 a judge of the Tribunal refused to confirm a genocide charge against an accused who had murdered the Prime Minister and several Belgian soldiers; he would only authorize counts of war crimes and crimes against humanity. The prosecutor, Louise Arbour, chose to withdraw the case. It seemed she considered that prosecuting charges other than genocide was a distraction from the Tribunal’s mission. Her application to withdraw said ‘the judicial proceedings instituted by the prosecutor should be within the framework of a global policy aimed at shedding light on the events that occurred in Rwanda in 1994 and highlighting the complete landscape of the criminal acts perpetrated at the time, and that such objective would not be achieved through the prosecution of a single count indictment the factual elements of which relate solely to the murders of the former Prime Minister and ten UNAMIR Belgian soldiers’.⁴⁸

At the ICC, the prosecutor has very broad discretion in the selection of cases for prosecution once the situation has been triggered. The formal requirements of jurisdiction and admissibility apply, as they do for the situation. Beyond that, the prosecutor has a very free hand. In contrast with the selection of situations, where there is a claim that all situations that meet the tests in the Statute will be investigated, there is no pretence that all cases will be prosecuted. As the OTP stated in a draft document issued in 2006, ‘[i]t is not possible to prosecute all perpetrators or all crimes, which typically would number in the thousands. The investigation process must produce a limited number of particularly serious cases for presentation before the Court’.⁴⁹

⁴⁵ Rule 28(A) ICTY Rules of Procedure and Evidence, UN Doc IT/32/Rev. 30, 6 April 2004.

⁴⁶ Kenneth Roth to Hassan Jallow, 14 August 2009. See also ‘Rwanda: Tribunal Risks Supporting “Victor’s Justice”: Tribunal Should Vigorously Pursue Crimes of Rwandan Patriotic Front’, *Human Rights Watch*, 1 June 2009.

⁴⁷ A Colangelo, ‘Manipulating International Criminal Procedure: The Decision of the ICTY Office of the Independent Prosecutor not to Investigate NATO Bombing in the former Yugoslavia’ (2003) 97 *Northwestern University Law Review* 1393.

⁴⁸ Decision on the Prosecutor’s Motion to Withdraw the Indictment, *Ntuyahaga*, ICTR-98-40-T, TC I, ICTR, 18 March 1999.

⁴⁹ OTP, Draft Criteria for selection of situations and cases, June 2006, 9.

A Pre-trial Chamber refused one of the first arrest warrant applicants on the grounds that the alleged perpetrator was not a ‘senior leader’ and that as a result the case would be inadmissible because it was not of ‘sufficient gravity’, a term employed in Article 17 of the Statute.⁵⁰ The Appeals Chamber disagreed, overturning the Pre-Trial Chamber. ‘The predictable exclusion of many perpetrators on the grounds proposed by the Pre-Trial Chamber could severely hamper the preventive, or deterrent, role of the Court which is a cornerstone of the creation of the International Criminal Court, by announcing that any perpetrators other than those at the very top are automatically excluded from the exercise of the jurisdiction of the Court,’ it said.⁵¹ Judge Giorgos Pikis, who sat on the Appeals Chamber and who penned a separate opinion, wrote later that the gravity threshold would only apply to a case where ‘the criminality of the accused must be wholly peripheral to the commission of the offence bordering the *de minimis* rule’.⁵²

The selection of cases is addressed in specific provisions of the Regulations of the OTP.

Regulation 33. Selection of cases within a situation

The Office shall review the information analysed during preliminary examination and evaluation and shall collect the necessary information and evidence in order to identify the most serious crimes committed within the situation. In selecting potential cases within the situation, the Office shall consider the factors set out in article 53, paragraph 1 (a) to (c) in order to assess issues of jurisdiction, admissibility (including gravity), as well as the interests of justice.

The Regulations provide immense detail about many features of prosecutorial activity. The utterly laconic Regulation 33 is quite striking in this respect. It provides no explanation as to how the prosecutor is to separate those that proceed from those that do not from the cases that meet the requirements of the Statute. One explanation might be that the prosecutor actually seeks arrest warrants for every single case that fulfils the criteria of jurisdiction and admissibility within a situation. But this is so far from reality as to deserve no serious consideration. Moreover, there have been many declarations by the prosecutor that indicate a process of selection of cases from among a larger group of ‘potential cases’. For example, in a policy paper issued in 2003, the OTP said it ‘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’.⁵³ In reports to the Security Council on the conduct of proceedings pursuant to referrals by that body, the prosecutor has confirmed the focus on persons ‘who appear to bear the greatest criminal responsibility’.

⁵⁰ Decision on the Prosecutor’s Application for Warrants of Arrest, Art 58, *Ntaganda, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-20-Anx2, PTC I, ICC, 10 February 2006.

⁵¹ Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, *Situation in the Democratic Republic of the Congo*, ICC-01/04-169, AC, ICC, 13 July 2006, para. 74.

⁵² G. Pikis, *The Rome Statute for the International Criminal Court* (Leiden: Martinus Nijhoff 2010) 59.

⁵³ Paper on Some Policy Issues before the Office of the Prosecutor, September 2003, 7.

for crimes committed in the situation.⁵⁴ How this is to be determined is not, however, addressed in the Regulations or in any other normative instrument.

Indications about criteria for selecting cases within a situation have also been provided by statements and documents issued by the OTP. A book chapter authored by a senior official in the Office, based on such policy papers, signals four ‘governing principles’ that figure in the selection of cases: independence, impartiality, objectivity, and non-discrimination. It emphasizes the role of the gravity criterion. More generally, it seems to avoid a formulaic approach, recognizing that there is a considerable degree of subjectivity involved in the choices. After discussing the various factors to be considered, it says that ‘none of them are rigid requirements’.⁵⁵

In the 2013 Policy Paper on Preliminary Examinations, the OTP confronted the issue of selectivity with respect to the different parties to a conflict. This is an issue that has haunted international criminal justice since Nuremberg. According to the Policy Paper, the principle of impartiality in selection decisions ‘does not mean an “equivalence of blame” between different persons and groups within a situation, or that the Office must necessarily prosecute all sides, in order to balance-off perceptions of bias’. Rather, the OTP is required ‘to focus its efforts objectively on those most responsible for the most serious crimes within the situation in a consistent manner, irrespective of the States or parties involved or the person(s) or group(s) concerned’.⁵⁶

To the extent that ‘gravity’ has become very much the focus of discretionary determinations, it is of interest to consider the origins of this notion within the Rome Statute system. It seems that in about 2005 an apple fell on the prosecutor’s head, rather like Isaac Newton when he discovered the law of gravity. Before then, little serious attention was paid to the issue of gravity. This can be seen not only in the *travaux préparatoires* of the Statute but also in early academic commentary. For example, the authoritative two-volume commentary on the *Rome Statute*, edited by Antonio Cassese, Paola Gaeta, and John Jones, is essentially silent on the issue of ‘gravity’ in its consideration of admissibility. The word ‘gravity’ does not even appear in the index to the commentary, either on its own or as a sub-category under the rubric of ‘admissibility’, in striking contrast with the word ‘complementarity’, which consumes the best part of a page in the index.⁵⁷ The chapters in the commentary on admissibility consider the issue of gravity as if it was synonymous with complementarity.⁵⁸ The discussion of ‘gravity’ in the first edition of the commentary edited by Otto Triffterer consists of two terse and uninformative paragraphs.⁵⁹ The subject is entirely absent in the consideration of admissibility in the commentary by Eric David.⁶⁰ Many other

⁵⁴ See also UNSC Meeting 6528, UN Doc S/PV.6528, 4.

⁵⁵ F Guariglia, ‘The Selection of Cases by the Office of the Prosecutor of the International Criminal Court’ in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff 2009) 209–17.

⁵⁶ Policy Paper on Preliminary Examinations, Office of the Prosecutor, November 2013, para. 66.

⁵⁷ A Cassese et al. (eds), *The Rome Statute of the International Criminal Court, A Commentary* (Oxford: Oxford University Press 2002) 1946.

⁵⁸ Ibid., 667–731; also G Turone, ‘Powers and Duties of the Prosecutor’ in *ibid.*, 1137–80, at 1153–4.

⁵⁹ S Williams, ‘Article 17’ in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden Baden: Nomos 1999) 383–94, at 393; M Bergsmo and P Kruger, ‘Article 53’ in *ibid.*, 701–14, 708–9.

⁶⁰ É David, *La cour pénale internationale* (2005) 313 *Receuil des cours* 325, at 248–51.

academic commentators, including the undersigned,⁶¹ in early writings on the Court treated the issue of admissibility as if it was synonymous with complementarity, completely overlooking the issue of gravity. Of course, gravity has since taken on considerable importance and this is reflected in more recent scholarly writing.⁶² Gravity provides the prosecutor with a seemingly objective but ultimately an extraordinarily subjective standard.

16.5 Conclusion

The Rome Statute distinguishes between situations and cases. However, there is a certain degree of blurring because situations are in fact a collection of cases, or potential cases. Furthermore, the central criteria invoked by the prosecutor in identifying both situations and cases are very much the same. They consist of jurisdiction and admissibility, with a modest nod towards the very nebulous notion of 'interests of justice'. The various policy statements emanating from the OTP tend to suggest a quite different vision of the two notions, however. The prosecutor treats the selection of situations as if it is a primarily objective determination. Once the criteria are fulfilled, the prosecutor claims that she will proceed more or less automatically. There is no suggestion in any policy statements that discretion is involved. Yet the impression that the official policy does not correspond to the reality is widespread.

By contrast, when the selection of cases is involved there is no reluctance to admit the importance of discretion. The prosecutor would be the first to concede that as a general rule she will proceed with only a small number of cases within a given situation. There is an interesting issue here that has not yet led to any litigation or dispute. It concerns the number of prosecutions that are required for the Prosecutor to fulfil the situation in an adequate manner. In the case of situations that result from referrals by the Security Council or a State Party, it is not inconceivable that one or the other might complain to the Pre-Trial Chamber not about the prosecutor's inactivity, but rather about the sufficiency of her activity.

Further attention needs to be given to the inconsistency in the prosecutor's position, whereby selection of a situation is more or less mandatory once the objective criteria are met yet selection of cases is not. Nothing in the Statute suggests why this should be the case. If the principle of accountability for serious crimes requires prosecutorial activity in all situations that meet the objective criteria, then why does it not also insist upon the uncompromising prosecution of all potential suspects, rather than a selection of a few candidates alleged to be among 'the most responsible'? How can prosecution of a situation be mandatory under the Statute and yet only a handful of

⁶¹ W Schabas, *Introduction to the International Criminal Court* (Cambridge: Cambridge University Press 2001); W Schabas, *Introduction to the International Criminal Court* 2nd edn (Cambridge: Cambridge University Press 2004).

⁶² E.g. M De Guzman, 'The International Criminal Court's Gravity Jurisprudence at Ten' (2013) 12 *Washington University Global Studies Review* 474; R Murphy, 'Gravity Issues and the International Criminal Court' (2006) 17 *Criminal Law Forum* 294; M El Zeidy, 'The Gravity Threshold Under the Statute of the International Criminal Court' (2008) 19 *Criminal Law Forum* 35; S Williams and W Schabas, 'Article 17' in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court—Observers' Notes, Article by Article* 2nd edn (München: C H Beck 2008) 605–26.

trials be satisfactory to address the matter? The flaw in the analysis of the OTP is that in reality, a great deal of discretion is involved in the selection both of situations and of cases. There cannot be a strict obligation for the former yet broad latitude for the latter. However, it is easier and more palatable to explain why a small number of suspects in Kenya, Uganda, or Côte d'Ivoire are being prosecuted than to justify why a small number of countries in Central Africa are the object of the Court's energies. There is a great reluctance to admit that the identification of situations also involves an inevitable degree of subjectivity and discretion.

Paul Seils, who worked for several years as a senior adviser to the prosecutor of the ICC, has written that 'the matter of selection cannot be regarded as a science, but nor is it so unattached to principle to be nothing more than artistic intuition: if anything it might be considered a craft, based on guiding principles but sufficiently flexible to address the infinite variety of factual scenarios that will present themselves'.⁶³ This is about as candid a description as can be found from someone who has worked on the inside of the Court. Surely many practitioners at the OTP have convinced themselves that the determinations they make are both objective and fair, and there is no doubt that they are acting in good faith. But on the outside, the process of selection looks less like a craft and a bit too much like sleight of hand.

⁶³ P Seils, 'The Selection and Prioritization of Cases by the Office of the Prosecutor of the ICC' in M Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Oslo: Torkel Opsahl Academic EPublisher 2010) 69–78, at 73.

Accountability of International Prosecutors

*Jenia Iontcheva Turner**

17.1 Introduction

The dilemma of holding prosecutors accountable while ensuring their independence was at the centre of the debates surrounding the establishment of the ICC.¹ The drafters of the Rome Statute for the ICC understood that the Court would be handling cases with significant political implications and yet working with limited resources and no independent enforcement capacity. To enhance prosecutors' ability to operate successfully in this environment, the drafters enshrined prosecutorial independence into the Statute and gave prosecutors significant discretion over charging and investigation decisions. At the same time, drafters worried that ICC prosecutors were not sufficiently accountable to anyone. This led to the decision to give judges and the Assembly of States Parties (ASP) limited authority to oversee prosecutorial actions.

The concern about accountability initially focused on prosecutors' decisions about which situations to investigate, which persons to indict, and what charges to bring. But as the ICC began proceedings in its first case, *Prosecutor v Lubanga (Lubanga)*, it soon confronted prosecutorial errors and misconduct relating to procedural matters—e.g., the duties to disclose potentially exculpatory evidence, to follow court orders, and to comply with human rights law in the gathering of evidence.² The Trial Chamber attempted to fashion a response. But its reaction was at times too drastic and threatened to derail the proceedings in *Lubanga*. The Court's predicament revived debates about the trade-offs between prosecutorial accountability and other legitimate goals

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¹ See M Bergsmo and F Harhoff, 'Article 42' in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* 2nd edn (Oxford/München: Hart/Beck 2008) 972; J Wouters et al., 'The International Criminal Court's Office of the Prosecutor: Navigating Between Independence and Accountability?' in J Doria et al. (eds), *The Legal Regime of the ICC: Essays in Honour of Prof. I. P. Blyshchenko* (Leiden: Brill 2009) 345, 349–51. These debates reflect a difference in civil-law and common-law approaches to prosecutorial accountability. Whereas common-law countries tend to emphasize the importance of democratic accountability for prosecutors, civil-law countries place a greater value on political independence and emphasize instead bureaucratic forms of accountability for prosecutors. See e.g. M Tonry, 'Prosecutors and Politics in a Comparative Perspective' (2012) 41 *Crime and Justice* 1; R Wright and M Miller, 'The Worldwide Accountability Deficit for Prosecutors' (2010) 67 *Washington and Lee Law Review* 1587, 1590.

² See Decision on the consequences of non-disclosure of exculpatory materials covered by Art 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, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1401, TC I, ICC, 13 June 2008, para. 95.

of the international criminal justice system. Over time, judges came to acknowledge that sweeping remedies, while protecting the defendant's right to a fair trial, may disproportionately harm other important public values, including deterrence, retribution, and the establishment of an accurate historical record.³

As prosecutorial failings surfaced, some also called for stronger non-judicial mechanisms to police the process. The ASP created its own subsidiary body, the Independent Oversight Mechanism (IOM), to investigate misconduct among prosecutors. But the Assembly's intervention was seen by many as compromising the principle of prosecutorial independence and creating the risk that politics would influence disciplinary decisions. The Office of the Prosecutor (OTP) insisted that the Statute entrusted it—and not the Assembly—with the primary responsibility to police misconduct among its members.⁴

This debate highlights the need for a more comprehensive evaluation of existing and proposed mechanisms of ensuring prosecutorial accountability at the ICC. These include internal bureaucratic controls within the OTP, judicial intervention, and disciplinary measures by the ASP, the IOM, and national or international bar associations. Internal controls are critical and should be developed further, but they are not a sufficient response to the problem of misconduct. External mechanisms remain an important backstop, which can also promote the development of stronger and more effective internal oversight.

Among the several external mechanisms, judges remain best situated to police prosecutorial misconduct, at least in the near future. But judicial remedies are not a perfect solution—they are often too blunt and may provide a windfall to defendants at the expense of legitimate interests of international criminal justice. Judges also do not have the resources to investigate every alleged ethical violation or misconduct by prosecutors. In the long term, the ICC must develop a broad disciplinary framework that makes greater use of non-judicial mechanisms of accountability, such as the ASP, the IOM, and perhaps an international professional association such as the International Association of Prosecutors. These organizations offer distinct types of accountability—along political, administrative, and professional dimensions—which could serve as an important complement to judicial remedies and sanctions.

Prosecutorial conduct can also be influenced more subtly through informal sanctions by fellow prosecutors, defence attorneys, and judges. Because the ICC is a diverse community with fewer shared norms and fewer repeat interactions between the lawyers and judges, the effect of informal sanctions by professional peers is likely to be somewhat less meaningful at the international than at the national or local level. For several reasons, however, it is nonetheless important to discuss informal sanctions. They are imposed quickly and efficiently, without the need for an extensive investigation into the circumstances surrounding the misconduct. They are also less likely to frustrate the ability of the ICC to continue proceedings in the case affected by the misconduct. Over time, as the ICC legal community becomes more established, they are also likely to be a more potent and useful complement to formal sanctions.⁵

In addition to punishing misconduct after it occurs, the ICC must strengthen its preventive programmes in this area. As a critical step in that direction, the OTP has

³ See section 17.4.

⁴ See section 17.6.1.

⁵ See section 17.6.3.

recently adopted a Code of Conduct for its members.⁶ The Office has also committed to developing more regular training programmes concerning professional conduct and instituting more rigorous internal oversight for line prosecutors.⁷ To the extent that the Office falls behind in this task, ICC judges can provide encouragement, both formally and informally. Two recent decisions in *Prosecutor v Kenyatta (Kenyatta)*, one calling on the OTP to adopt a Code of Conduct and another urging the Office to change its methods of reviewing documents for disclosure, suggest that judges are willing to take on this important responsibility.⁸

Within the first ten years of the Court's existence, judges have taken firm measures in policing procedural violations by prosecutors. They have affirmed the Court's commitment to the rule of law and fair trials, while remaining sensitive to competing interests of international criminal justice. The ICC must do more to develop non-judicial mechanisms to police prosecutorial misconduct, and the debate surrounding the establishment of the IOM suggests that such mechanisms must be structured in a way that preserves the independence and effectiveness of ICC prosecutors. As judicial and non-judicial mechanisms of accountability develop, it is also important to establish guidelines to coordinate among them.

17.2 Balancing Accountability and Effectiveness

The Rome Statute proclaims that the ICC's central mission is 'to put an end to impunity for the perpetrators of [international crimes] and thus to contribute to the prevention of such crimes'.⁹ Retribution and deterrence are therefore central goals of the Court. But like other international criminal courts, the ICC also strives to achieve broader goals, such as producing an accurate record of the events it adjudicates.¹⁰ The Court also pursues expressive and didactic goals, aiming to model a commitment to human rights and the rule of law for national jurisdictions to follow.¹¹

International prosecutors play an essential role in helping the ICC accomplish these goals. They select the cases and charges that they believe would best advance

⁶ See section 17.6.4. ⁷ Ibid. ⁸ Ibid.

⁹ Preamble of the Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute').

¹⁰ E.g. Sentencing Judgment, *Nikolić*, IT-02-60/1-S, TCI, ICTY, 2 December 2003, para. 60; Sentencing Judgment, *Obrenović*, IT-02-60/2-S, TCI, ICTY, 10 December 2003, para. 19; Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence', *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-568, AC, ICC, 13 October 2006, paras 50–2; see also L Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven and London: Yale University Press 2005) 257–61; S Ford, 'A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms' (2012) 45 *Vanderbilt Journal of Transnational Law* 405, 472–5.

¹¹ E.g. M Damaška, Keynote Address at the Concluding Conference of the International Criminal Procedure Expert Framework: General Rules and Principles of International Criminal Procedure (27 October 2011) (on file with author); M DeGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 *Michigan Journal of International Law* 265, 312–17; T Meron, 'Procedural Evolution at the ICTY' (2004) 2 *Journal of International Criminal Justice* 520, 524; J Ohlin, 'A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 77, 82–3, 103.

the Court's objectives, and they conduct the investigations necessary to support the cases in court. Because of their considerable discretion in the process, international prosecutors are considered 'the driving force of all international criminal tribunals'.¹²

While ICC prosecutors have ample legal discretion to select cases and charges, they remain constrained by the intensely political environment in which they operate. The crimes within the Court's jurisdiction typically concern powerful political or military actors who are likely to resist investigations. Domestic authorities are (by definition under the Statute's admissibility requirements) unwilling or unable to prosecute the cases that are presented to the Court. Yet because ICC prosecutors have no independent law enforcement capacity, they depend heavily on these same domestic authorities for investigations. At the same time, ICC prosecutors operate with limited resources drawn from member state contributions, and they 'must, as a matter of necessity, be extremely selective in deciding which cases to investigate'.¹³ This challenging environment demands not merely legal acumen, but also a great deal of diplomatic savvy on the part of international prosecutors.¹⁴

Understanding this political background, the framers of the ICC inscribed the value of prosecutorial independence into the Statute. Article 42 provides that the 'Office of the prosecutor shall act independently as a separate organ of the Court' and that its members 'shall not seek or act on instructions from any external source'.¹⁵ The drafters of the ICC Statute viewed these guarantees of prosecutorial independence as an essential precondition for the Court's ability to accomplish its various goals. Freedom from political interference would allow prosecutors to pursue cases impartially, based above all on legal merit, and would thus ensure the long-term political legitimacy of the Court.¹⁶

At the same time, ICC framers understood that prosecutorial discretion must be controlled at least to some degree in order to prevent abuse and injustice.¹⁷ In domestic systems, prosecutors are held accountable through a variety of external mechanisms, including the democratic process, professional discipline boards, civil service disciplinary frameworks, and judicial supervision.¹⁸ Several of these mechanisms are either unavailable or only minimally available at the international level. ICC prosecutors are not embedded in a broader democratic political system, they are not members of an international bar association (sometimes not even a national bar association¹⁹), and they are not part of a civil service hierarchy that extends beyond the Court. The drafters of the ICC Statute therefore had to experiment with new models of prosecutorial accountability and to rely more heavily on judicial supervision than might be

¹² L Côté, 'Independence and Impartiality' in L Reydams et al. (eds), *International Prosecutors* (Oxford: Oxford University Press 2012) 319, 321.

¹³ L Arbour, 'Progress and Challenges in International Criminal Justice' (1997) 21 *Fordham International Law Journal* 531; see also R Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (New York: Cambridge University Press 2005); DeGuzman (n 11) 268–9.

¹⁴ Côté (n 12) 322; see also C del Ponte and C Sudetic, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (New York: Other Press 2009).

¹⁵ Art 42 ICC Statute.

¹⁶ See Côté (n 12) 322.

¹⁷ F Mégrét, 'Accountability and Ethics' in L Reydams et al. (eds), *International Prosecutors* (Oxford: Oxford University Press 2012) 416, 418.

¹⁸ Wright and Miller (n 1) 1600–9; Tonry (n 1).

¹⁹ See text accompanying n 108.

expected in a domestic criminal justice system. At the same time, some state representatives wanted to include some type of political check on the prosecution, and this led them to entrust the ASP—a political body composed of ICC member state representatives and possessing quasi-legislative functions—with a limited power to discipline prosecutors for serious misconduct.

Both judicial and political oversight of prosecutorial actions at the ICC must contend with the dilemma between accountability and effectiveness. Judges can respond to prosecutorial misconduct with powerful sanctions and remedies, including dismissals, retrials, and the exclusion of evidence, which could effectively end a case. Through the imposition of such remedies, judges can affirm the ICC's commitment to the rule of law and fair trials.²⁰ At the same time, case-determinative remedies inflict serious costs on other objectives of international criminal justice, including the Court's primary goal of preventing impunity for international crimes. Judicial oversight must grapple with the tension between these goals.

Likewise, political oversight by the ASP can come into conflict with prosecutorial independence. Most obviously, this can occur when the Assembly launches an investigation into prosecutorial actions in order to interfere with a prosecution that Assembly members oppose on political grounds. Even when such blatant manipulation is not at issue, regular inquiries into prosecutorial activity can undercut legitimate prosecutorial efforts. A prosecutor who has to account for each and every one of his acts can quickly cease to be effective.²¹ Prosecutors who are routinely forced to respond to inquiries must divert scarce time and resources away from their work of developing and presenting cases. More broadly, the prospect of investigations can deter certain socially desirable actions by prosecutors and diminish the zeal with which they pursue cases. The Court cannot tolerate arbitrariness and injustice by prosecutors, but at the same time, accountability must not 'be so pervasive as to defeat the purpose of having an independent Prosecutor'.²²

17.3 Internal Oversight

Relying on the Rome Statute's provisions on prosecutorial independence, the OTP has argued that internal oversight is the most appropriate means of regulating its staff. In support of this position, the Office has referred to the general provision that its staff members should act independently and not on external instructions, as well as to Article 42(2), which vests the prosecutor with 'full authority over the management and administration of the Office, including the staff, facilities and other resources thereof'.²³ The ICC Staff Rules and Regulations likewise contemplate that members of the OTP would be disciplined for 'unsatisfactory conduct' primarily through an internal administrative process.²⁴ Unsatisfactory conduct is broadly defined and

²⁰ J Turner, 'Policing International Prosecutors' (2013) 45 *New York University Journal of International Law and Politics* 175, 205–6.

²¹ Mégret (n 17) 418.

²² Ibid.

²³ Art 42(2) ICC Statute.

²⁴ Art X Staff Regulations, ICC-ASP/2/Res.2, 8–12 September 2003 (Second Session of the Assembly of States Parties ('ASP')); Rule 110.1, Staff Rules of the International Criminal Court, ICC-ASP/4/3, 28 November–3 December 2005 (Fourth Session of the ASP); Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, *Kenyatta, Situation in the Republic of Kenya*,

includes ‘failure to observe the standards of conduct expected of an international civil servant’.²⁵

Administrative sanctions imposed within the OTP are most likely to be effective in addressing individual misconduct by line prosecutors. At the domestic level, internal discipline is already used widely to police prosecutors in civil-law countries and is increasingly seen as key to reducing prosecutorial misconduct in the United States.²⁶ Internal sanctions work well because they are imposed directly on those prosecutors responsible for the violations and take the form of punishments that prosecutors care about—for example, salary reductions, suspensions, demotions, and even termination of employment. If imposed consistently, such punishments send a clear message about the importance of following the rules of the court. In addition, internal mechanisms such as training and oversight programmes play a critical role in preventing misconduct in the first place.²⁷ In all these ways, the OTP can take concrete and effective measures to foster a culture of respect for the rule of law among its staff.

The Office already appears to have a hierarchical structure with clear lines of control and several levels of oversight, which would indicate the basic infrastructure for internal oversight is present.²⁸ But anecdotal accounts also suggest that the Office could do more to train and regularly audit its personnel in proper investigative and disclosure procedures. The recent failure to identify and disclose potentially exculpatory evidence in the *Kenyatta* case confirms these accounts.²⁹ As others have argued persuasively, it is also important for the Office to promulgate a detailed Code of Conduct to guide its prosecutors.³⁰

ICC-01/09-02/11-747, TC V(B), ICC, 31 May 2013, para. 12 (‘As the Staff Regulations make clear, the authority to impose disciplinary measures on Prosecution staff for misconduct lies primarily with the Prosecutor.’). Allegations of unsatisfactory conduct are to be reviewed by a Disciplinary Board, which consists of one member appointed by the Prosecutor, one by the Registrar, and one by the staff representative body. Rule 110.3, Staff Rules of the ICC. The Board’s decision is not binding on the Prosecutor, however. The Prosecutor also has the authority to summarily dismiss staff members for serious misconduct, but the summary dismissal may still be reviewed by the Board. *Ibid.*, Rule 110.8.

²⁵ Rule 110.1 Staff Rules of the ICC.

²⁶ For discussion of proposed or current internal policies used to regulate prosecutors in various offices across the world, see D Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (New York: Oxford University Press 2002) 128–32; R Barkow, ‘Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law’ (2009) 61 *Stanford Law Review* 869, 895–905; S Bibas, ‘Prosecutorial Regulation Versus Prosecutorial Accountability’ (2009) 157 *University of Pennsylvania Law Review* 959, 996–1015; M Coleman et al., ‘Assessing the Role of the Independent Oversight Mechanism in Enhancing the Efficiency and Economy of the ICC’ (Universiteit Utrecht, August 2011) <<http://www.iilj.org/newsandevents/documents/IOMFinalPapersPublishedinOTPWebSite.pdf>> last accessed 31 July 2014, 56; E Luna and M Wade, ‘Prosecutors as Judges’ (2010) 67 *Washington and Lee Law Review* 1413, 1478–9; J Whitman, ‘Equality in Criminal Law: The Two Divergent Western Roads’ (2009) 1 *Journal of Legal Analysis* 119, 139.

²⁷ See section 17.6.4.

²⁸ Important management decisions are handled first by the head of the respective division, then by the Executive Committee, and then by the Prosecutor. G Townsend, ‘Structure and Management’ in L Reydams et al. (eds), *International Prosecutors* (Oxford: Oxford University Press 2012) 171, 287. Despite this formal hierarchy, some in the OTP have complained that ‘OTP’s management and management culture is lacking’. *Ibid.* 293.

²⁹ Decision on defence application pursuant to Art 64(4) and related requests, *Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-728, TC V, ICC, 26 April 2013, paras 93–4.

³⁰ M Markovic, ‘The ICC Prosecutor’s Missing Code of Conduct’ (2011) 47 *Texas International Law Journal* 201. The OTP has, however, issued regulations that cover many questions pertaining to professional conduct. See Regulations of the OTP, ICC-BD/05-01-09, 23 April 2009. It is also revising its

Responding to these concerns, the Office recently adopted a Code of Conduct.³¹ It also commissioned a study to examine its supervision practices and has committed to reform in this area.³² Finally, the Office has pledged to institute more regular and comprehensive training programmes for its members.³³ By strengthening its internal review mechanisms, the Office can bolster its argument that external investigations, such as those by the IOM, should be limited. Credible internal discipline will also generally help improve the Office's reputation with judges and with the international community. Maintaining a strong reputation with these two constituencies is critical to ICC prosecutors' ability to function effectively.

Even an effective internal oversight programme does not entirely eliminate the need for external monitoring, however. First, internal discipline will not work when the violation of the rules is condoned or ignored by supervisors. The main violations that occurred in the Court's first case, *Prosecutor v Lubanga*, did not concern errant line prosecutors, but involved a fundamental disagreement between the OTP and the judges about how to interpret the Rome Statute. In cases where the defendant has been seriously harmed by the misconduct, moreover, internal discipline will typically not be sufficient to repair the injury. While in-house efforts have a role to play, it remains critical for the ICC itself to develop a robust approach to policing prosecutorial misconduct.

17.4 Judicial Oversight

The ICC Statute vests judges with the primary authority to police prosecutorial conduct that may harm the integrity of the proceedings. In response to misconduct, judges can exclude evidence, order compensation to the accused, give warnings to the prosecution, impose fines, and interdict prosecutors from the courtroom.³⁴ Over time, the Court has developed several other responses to misconduct by relying on its 'inherent' powers, its authority to ensure the fairness of the trial, and its duty to ensure that the Statute's provisions are read in conformity with human rights law.³⁵ These

policies and Operations Manual and planning to 'clarify operational processes, reporting lines, and responsibilities'. Townsend (n 28) 294.

³¹ ICC, OTP, Code of Conduct for the OTP (5 September 2013).

³² ICC, OTP, Strategic Plan, June 2012–15, at 33, paras 77–84 (11 October 2013).

³³ Ibid., paras 74, 57.

³⁴ Arts 69(7), 71, and 85 ICC Statute. The Court can also exercise jurisdiction over offences against the administration of justice under Art 70, but it is not entirely clear from the Statute and the Rules who would investigate and prosecute such offences when the suspected offender is a member of the OTP. Ibid., Art 70; compare Prosecution's Observations on Art 70 of the Rome Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2716, OTP, ICC, 1 April 2011 (prosecution brief arguing that the prosecution is exclusively responsible for prosecuting such offences) with Observations de la Défense sur la mise en oeuvre de l'Article 70, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2715, Defence of Thomas Lubanga Dyilo, 1 April 2011 (arguing that when the prosecution has a conflict of interest, the Trial Chamber can ask the Registrar to appoint an amicus curiae to conduct the prosecution).

³⁵ See Decision on Defence Application Pursuant to Art 64(4) and Related Requests, *Kenyatta* (n 29) paras 89–90; Decision on the consequences of non-disclosure of exculpatory materials covered by Art 54(3)(e) agreements, *Lubanga* (n 2) para. 17; Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Art 19(2)(a) of the Statute of 3 October 2006, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-772, AC, ICC, 14 December 2006, para. 37.

include conditional and unconditional stays of the proceedings, orders to release the accused, and adverse inferences from the evidence.³⁶ They even extend to prophylactic measures, such as orders for the OTP to implement specific measures to prevent misconduct from recurring.³⁷

The Court has also gradually shifted its approach from one that focuses strictly on the prejudice to the defendant and the integrity of the proceedings to one that considers broader competing interests in determining the appropriate remedies for misconduct. The first two decisions in which the Court took a more absolutist approach to remedies concerned the failure to disclose potentially exculpatory evidence before trial and the refusal to obey court orders to disclose the identity of an intermediary who had worked for the prosecution.

In *Lubanga*, several months before trial, prosecutors informed the Trial Chamber that they had discovered more than 200 documents containing potentially exculpatory evidence or evidence material to the defence.³⁸ Prosecutors maintained that they could not disclose the documents to either the defence or the Chamber, because the documents had been obtained under confidentiality agreements. The sources that had supplied the documents to the prosecution—the United Nations and several NGOs—had refused to grant consent for any disclosure, even to the Court.³⁹ Prosecutors maintained that they were acting in good faith and had repeatedly tried to obtain consent to disclose the documents.⁴⁰ While acknowledging that the prosecution was acting in good faith, the Trial Chamber emphasized that the prosecution had violated the accused's fundamental right of access to exculpatory evidence. By collecting much of its evidence under broad confidentiality agreements, which prevented even the Trial Chamber from reviewing the evidence in camera, the prosecution laid the foundation for the conflict between confidentiality and disclosure.⁴¹ Because the judges could not ensure a fair trial without first reviewing the evidence to determine its materiality, they decided to stay the proceedings indefinitely and order the release of the defendant.⁴²

After an intervention by the Appeals Chamber and a change of course by information providers, who finally consented to the disclosure of the documents to the Trial Chamber, the proceedings resumed.⁴³ Soon after the trial began, however, the

³⁶ Decision on the consequences of non-disclosure of exculpatory materials covered by Art 54(3)(e) agreements, *Lubanga* (n 2) para. 17; Judgment on the appeal of the Prosecutor against the Decision of Trial Chamber I entitled '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', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1486, AC, ICC, 21 October 2008, paras 41, 55; Redacted Decision on the 'Defence Application Seeking a Permanent Stay of the Proceedings', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2690-Red2, TC I, ICC, 7 March 2011, para. 212.

³⁷ Decision on Defence Application Pursuant to Art 64(4) and Related Requests, *Kenyatta* (n 29) paras 89–90, 97.

³⁸ Decision on the consequences of non-disclosure of exculpatory materials covered by Art 54(3)(e) agreements, *Lubanga* (n 2) para. 17.

³⁹ *Ibid.*, para. 64.

⁴⁰ *Ibid.*, para. 17.

⁴¹ *Ibid.*, para. 75.

⁴² Decision on the release of Thomas Lubanga Dyilo, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1418, TC I, ICC, 2 July 2008, para. 30.

⁴³ Reasons for Oral Decision lifting the stay of proceedings, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1644, TC I, ICC, 23 January 2009, para. 13. The prosecution obtained the consent after assuring the providers that the Chamber would treat the documents as

Lubanga Trial Chamber imposed a second stay of the proceedings.⁴⁴ The prosecution had deliberately refused to comply with the Chamber's order to release the identity of an intermediary whom the prosecution had used to contact witnesses in the DRC.⁴⁵ The prosecution argued that it could not comply with the order because disclosure of the person's identity might jeopardize his safety and would conflict with the prosecution's duty to protect witnesses.⁴⁶ The Trial Chamber noted, however, that it had ordered the disclosure of the person's identity only after consulting the ICC's Victims and Witnesses Unit about the necessary protective measures.⁴⁷ The prosecution's deliberate refusal to follow the court order meant that the prosecutor declined 'to be "checked" by the Chamber'.⁴⁸ The Chamber concluded that there was no realistic prospect of a fair trial under the circumstances, so it again stayed the proceedings and ordered the release of the defendant.⁴⁹

In both *Lubanga* Decisions, the combination of the stay and order to release, if actually implemented, would have effectively ended the case. If the defendant had in fact been released, it would have been unlikely that the Court could regain custody of him. The judges suggested in passing that they were aware of the potential significant costs of their orders—to the international community, which created the ICC to punish and deter international crimes; to victims, who would not receive a remedy for the wrongs they suffered; and to the Court's own goal of uncovering the truth.⁵⁰ But the judges deliberately chose to set aside these competing social and legal interests and instead focused solely on the seriousness of the procedural violation.⁵¹ They refused to consider whether less burdensome remedies might be available to address the misconduct, and by effectively dismissing the case, opted for what one might call an absolutist approach to remedies.⁵²

While these first two decisions by the *Lubanga* Trial Chamber might suggest that the Court would take a very strict and uncompromising line on prosecutorial misconduct, more recent pronouncements by both Trial and Appeals Chambers indicate that the Court is adopting a more measured approach. When the Appeals Chamber reviewed the first decision to stay the proceedings in *Lubanga*, for example, it recognized the need to leave open the possibility for the trial to proceed. The Appeals Chamber recharacterized the stay as 'conditional' and reversed the order to release the

confidential (an assurance that the Chamber had given much earlier in the process and before the initial stay) and after promising that it would take all protective measures necessary, including withdrawal of the charges, in the event the Appeals Chamber were to order the disclosure of documents without the providers' consent. R Rastan, 'Review of ICC Jurisprudence 2008' (2009) 7 *Northwestern Journal of International Human Rights* 261, 275–6 fn. 42.

⁴⁴ Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2517-Red, TC I, ICC, 8 July 2010.

⁴⁵ Ibid., para. 31.

⁴⁶ Ibid., paras 13–16.

⁴⁷ Ibid., paras 12–17.

⁴⁸ Ibid., para. 31.

⁴⁹ Ibid.

⁵⁰ Decision on the consequences of non-disclosure of exculpatory materials covered by Art 54(3)(e) agreement, *Lubanga* (n 2) para. 95.

⁵¹ Ibid.

⁵² See M Khosla, 'Proportionality: An Assault on Human Rights?: A Reply' (2010) 8 *International Journal of Constitutional Law* 298 (contrasting balancing and absolutist approaches to human rights).

defendant.⁵³ The re-categorization of the stay allowed the Court to reach the merits of the case once the prosecution was able to obtain consent to disclose the documents to the Chamber.⁵⁴

The Appeals Chamber embraced the balancing approach more openly two years later, when it overturned the second stay of proceedings in *Lubanga*. It held that the Trial Chamber should first consider less drastic measures, such as sanctions against the prosecutor, before ordering a stay of the proceedings.⁵⁵ Because an indefinite stay of proceedings imposes significant costs on the ICC's ability to fulfil all of its purposes, it should be used only in the last resort. In concluding that a stay was not appropriate under the circumstances, the Appeals Chamber expressly considered the interests of victims and of the international community 'to see justice done', as well as the interest of the accused in a final decision on the merits.⁵⁶

Since then, Trial Chambers in several cases have rejected defence motions to stay the proceedings and have emphasized the need to seek less costly corrective measures.⁵⁷ In *Lubanga*, for example, the defence requested a permanent stay to remedy several prosecutorial failures, including the failure to verify certain witness statements and the failure to supervise several intermediaries who had allegedly bribed prosecution witnesses.⁵⁸ The Trial Chamber concluded that even if these allegations of misconduct were true, a remedy less drastic than a stay could cure the prejudice at issue. At the conclusion of the case, the Trial Chamber would review the instances in which the prosecution might have been submitting unreliable evidence, and it would weigh or exclude evidence as necessary.⁵⁹ In deciding whether to impose a stay, the Chamber noted that it 'must weigh the nature of the alleged abuse of process against the fact that

⁵³ Judgment on the appeal of the Prosecutor against the Decision of Trial Chamber I entitled 'Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Art 54(3)(e) Agreements', *Lubanga* (n 36) paras 4–5; Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the Release of Thomas Lubanga Dyilo', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1487, AC, ICC, 21 October 2008, paras 44–5.

⁵⁴ The prosecution obtained the consent after assuring the providers that the Chamber would treat the documents as confidential (an assurance that the Chamber had given much earlier in the process and before the initial stay) and after promising that it would take all protective measures necessary, including withdrawal of the charges, in the event the Appeals Chamber were to order the disclosure of documents without the providers' consent. Rastan (n 43) 275–6, fn. 42. Reasons for Oral Decision lifting the stay of proceedings, *Lubanga* (n 43) para. 13.

⁵⁵ 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 the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively Stay Proceedings Pending Further Consultations with the VWU', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2582, 8 October 2010, para. 61.

⁵⁶ *Ibid.*, para. 60.

⁵⁷ Redacted Decision on the 'Defence Application Seeking a Permanent Stay of the Proceedings', *Lubanga* (n 36) para. 197; Decision on Defence Application Pursuant to Art 64(4) and Related Requests, *Kenyatta* (n 29) paras 77–8 (reviewing more recent cases and concluding that '[i]t is clear from the more recent jurisprudence of the Court that not every violation of fair trial rights will justify the imposition of a stay (conditional or unconditional) of the proceedings and that this is an exceptional remedy to be applied as a last resort').

⁵⁸ Redacted Decision on the 'Defence Application Seeking a Permanent Stay of the Proceedings', *Lubanga* (n 36) para. 196.

⁵⁹ *Ibid.*, para. 204.

only the most serious crimes of concern for the international community as a whole fall under the jurisdiction of the Court'.⁶⁰

The Trial Chamber applied a similar balancing approach to remedies in *Kenyatta*.⁶¹ In that case, the prosecution failed to disclose a potentially exculpatory witness statement until after the hearing to confirm the charges had concluded. The omission resulted from a deficient review system within the OTP where 'persons without knowledge of the overall state of the evidence against the accused, or at a minimum the overall evidence provided by the witness concerned', reviewed documents for disclosure.⁶² The defence therefore received the document only after it had requested the prosecution to provide more information about it.⁶³

The Trial Chamber noted that the prosecution's failure to turn over the document was 'a cause for serious concern, both in terms of the integrity of the proceedings and the rights of Mr Kenyatta'.⁶⁴ But it noted that the document was ultimately disclosed before trial, even if belatedly. The Chamber also emphasized that there was no evidence of bad faith on the part of the prosecution and that the prejudice caused by the late disclosure could be cured at trial, where the defence would be able to challenge the credibility of the evidence.⁶⁵ For these reasons, the Chamber concluded that it would be disproportionate to stay the proceedings.⁶⁶ Instead, the Chamber reprimanded the prosecution and required it to conduct a complete review of its case file and 'certify to the court that it has done so in order to ensure that no other materials in its possession that ought to have been disclosed to the Defense, are left undisclosed'.⁶⁷ The Chamber stressed that it expected the prosecution, 'if it had not already done so, to make appropriate changes to its internal procedures'.⁶⁸ While imposing relatively mild sanctions on the prosecution—a mere reprimand—the Chamber left open the possibility that the sanctions might escalate if a similar disclosure problem were uncovered as the case progressed.⁶⁹

This most recent decision concerning prosecutorial misconduct illustrates three positive developments in the Court's approach towards prosecutorial misconduct. First, it confirms the Court's commitment to policing prosecutors for errors and misconduct. As in earlier decisions in *Lubanga* and *Katanga*, ICC judges have actively assumed the responsibility to address procedural violations by prosecutors and have not deferred disciplinary questions to internal mechanisms within the OTP or to

⁶⁰ Ibid., para. 195.

⁶¹ Ibid., para. 189. Although a stay guarantees the enforcement of fundamental rights, it also has significant costs: 'It brings proceedings to a halt, potentially frustrating the objective of the trial of delivering justice in a particular case as well as affecting the broader purposes expressed in the preamble to the Rome Statute'. Ibid., para. 165.

⁶² Decision on Defence Application Pursuant to Art 64(4) and Related Requests, *Kenyatta* (n 29) para. 93. Even though other prosecutors from the Office conducted further interviews with the witness, requested authorization from a Judge to withhold the affidavit, and reviewed the evidence provided by the witness when preparing for the confirmation hearing, no one noticed the potentially exculpatory nature of the statement. Ibid.

⁶³ Ibid., para. 94.

⁶⁴ Ibid., para. 95.

⁶⁵ Ibid., para. 96.

⁶⁶ Ibid., para. 97.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ ICC Trial Chambers have also taken different approaches to the remedy of excluding evidence—in some cases using a balancing approach and in other cases using an absolutist approach. For a more detailed discussion of these two different approaches to excluding evidence, see Turner (n 20) 192–4, 199–203.

the ASP. Given the current weakness of these other mechanisms, judicial activism in addressing misconduct is generally a positive development, even when it occasionally results in overly burdensome remedies.

Second, the *Kenyatta* Decision builds on the line of cases that have adopted a structured balancing approach to remedies. Following this approach, the Trial Chamber acknowledges that providing relief to defendants, while important for vindicating fair trial rights, can impair the Court's ability to achieve other goals, such as punishing international crimes and compiling an accurate historical record.⁷⁰ The Court is transparent and forthright about the considerations that motivate its decision, allowing a more fruitful debate about its merits.⁷¹ Significantly, by enumerating the specific factors that guide its balancing analysis, the *Kenyatta* Chamber is providing much-needed structure and predictability to the balancing approach developed in earlier ICC Decisions.⁷²

Finally, the *Kenyatta* Decision further expands the range of remedies and sanctions for prosecutorial misconduct. The Court had previously done so on several occasions by reading broadly its authority to ensure the fairness of the proceedings and its duty to interpret the Rome Statute consistently with international human rights. By reprimanding prosecutors and threatening more serious sanctions unless prosecutors implement a specific plan to reform their disclosure practices, the *Kenyatta* Chamber has further diversified the remedies available to the Court. As the Court adds to the palette of remedies and sanctions provided under the Statute, it helps to ensure that it can offer more proportionate and targeted responses to misconduct. Going forward, the Court can build on this record and introduce two important additional remedies, sentence reductions and dismissals of select counts, which have been used effectively in other international criminal tribunals and a number of national jurisdictions. These remedies have the virtue of allowing the trial to proceed non the merits, while still effectively punishing errant prosecutors and vindicating individual rights.⁷³

These first decisions by ICC Chambers have shown that, in many cases, judges are both legally and practically well situated to respond to prosecutorial misconduct. They are often the first witnesses to misconduct and are able to address it promptly and directly. At the same time, judges do not have unlimited time or resources to investigate and sanction prosecutorial misconduct. Their investigative capacity is especially likely to be insufficient when it comes to systemic misconduct by the OTP or when

⁷⁰ Turner (n 20) 204–9. But cf. K Pitcher, ‘Addressing Violations of International Criminal Procedure’ in D Abels et al. (eds), *Dialectiek van Nationaal en Internationaal Strafrecht* (Den Haag: Boom Juridische uitgevers 2013) 257–308.

⁷¹ Turner (n 20) 211–12.

⁷² The early decisions on prosecutorial misconduct offer some indication of what factors may be relevant. These include the prejudice to the defendant’s rights, the culpability of the Prosecutor, and the level of involvement by the prosecution. The Court can build on these to establish a clear framework for responses to misconduct. Turner (n 20) 246–56.

⁷³ Ibid., 215–37. The Court could also broaden the use of sanctions, such as fines and interdiction, to respond to misconduct. Ibid., 232–8. In *Kenyatta*, the Trial Chamber referred to its ‘broad discretionary powers to ensure a fair trial’ as a basis for imposing sanctions for breaches of its orders even when the breach did not occur during the proceedings, as Art 71, pertaining to sanctions, appears to require. Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, *Kenyatta* (n 24) para. 14.

the misconduct does not directly threaten the integrity of the proceedings. This is one reason why additional political and administrative measures remain necessary to police prosecutorial misconduct adequately. In addition, even when judges are able to impose remedies that effectively punish misconduct, these remedies are often too blunt and may interfere with other goals of the international criminal justice, including the goal to punish and deter international crimes effectively. Judicial mechanisms therefore remain an imperfect response to prosecutorial misconduct, and political and administrative mechanisms are still necessary to address misconduct effectively.

17.5 Political Oversight

Political accountability of prosecutors is a common feature of domestic criminal justice systems. Common-law countries have applied it as a check on prosecutorial discretion for a long time, and civil-law countries occasionally use it to supplement bureaucratic mechanisms of accountability.⁷⁴ Yet the idea of holding prosecutors accountable through political institutions remains controversial at the ICC. Commentators fear that oversight by a political body such as the ASP would undermine the ability of prosecutors to accomplish their tasks impartially and effectively. The concern is that the political implications of cases are often too immense—and the prosecutorial role in them too central—to allow for disinterested action by Assembly delegates when it comes to policing prosecutors.

While these concerns are not entirely without merit, the ICC Statute explicitly provides for Assembly oversight in several provisions concerning the appointment, removal, and discipline of the prosecutor and deputy prosecutor and provisions concerning the management of the OTP.⁷⁵ In addition to textual support for Assembly oversight, there is also a policy argument for it. Given the frequently mentioned ‘democratic deficit’ of the ICC, some level of oversight by the Assembly may help the Court gain a measure of political legitimacy (at least with those member states that see political accountability of prosecutors as a virtue).⁷⁶ Finally, even if the concerns about political interference by the Assembly are valid as a theoretical matter, they are not likely to be borne out regularly in practice. The Assembly’s disciplinary powers are already legally and practically so circumscribed that we are more likely to see a problem of insufficient discipline rather than overzealous inquiries for political ends.

The ASP can act by majority to elect, remove, or discipline the ICC prosecutor and deputy prosecutor. Disciplinary measures range from reprimands to fines and removal. The Assembly can remove the prosecutor and deputy prosecutor for gross negligence in the performance of their duties, for knowingly acting in contravention of their duties, and for serious misconduct that is ‘incompatible with official

⁷⁴ Wright and Miller (n 1) 1590–1.

⁷⁵ Arts 46, 47, and 112 ICC Statute.

⁷⁶ See A Greenawalt, ‘Justice without Politics? Prosecutorial Discretion and the International Criminal Court’ (2007) 39 *New York University Journal of International Law and Politics* 583, 657; A Marston Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 *American Journal of International Law* 510, 535. For an analysis of the different attitudes towards political accountability of prosecutors in civil-law and common-law countries, see D Brown, ‘Law, Democracy, and Structures of Adjudication’ (manuscript on file with author); Tonry (n 1).

functions, and causes or is likely to cause serious harm to the proper administration of justice before the Court or the proper internal functioning of the Court'.⁷⁷ The Assembly can fine or also reprimand the prosecutor and deputy prosecutor for less serious misconduct that 'causes or is likely to cause harm to the proper administration of justice before the Court or the proper internal functioning of the Court'.⁷⁸ As an example, repeatedly 'failing to comply with or ignoring requests made by the presiding judge or by the Presidency in the exercise of their lawful authority' qualifies as such misconduct.⁷⁹

The broad language of these provisions lends some credence to the concern that the Assembly may use discipline for political reasons (for example, when a majority of states believes that a prosecutor is mishandling a sensitive case). But a layer of procedural constraints sharply limits the odds of misuse. First, any complaint about prosecutorial misconduct must be transmitted to the Presidency of the Court before it is sent to the Assembly for consideration. A board of three judges reviews the complaints and sets aside anonymous or manifestly unfounded complaints.⁸⁰ Only after such complaints are filtered out does the Presidency forward the remaining ones to the Assembly.⁸¹

It is still theoretically possible that complaints that are not 'manifestly unfounded', but are also not entirely legitimate, can be used to harass top prosecutors and frustrate their work.⁸² Yet other statutory provisions set additional limits on Assembly intervention in most cases of misconduct. First, measures by the Assembly can be imposed only on the prosecutor and the deputy prosecutor. At least for now, judicial responses remain the only external source of accountability for line prosecutors.⁸³ Even with respect to misconduct by the two top prosecutors, the Assembly's ability to respond is procedurally constrained. The Assembly meets regularly only once a year, and during that sole meeting it must decide on a number of important budgetary and management questions pertaining to the Court as a whole. The Assembly is not likely to devote its limited time to disciplinary measures except in extraordinary cases. Disciplinary measures also require an absolute majority vote in the ASP, which is a high threshold

⁷⁷ Art 46 ICC Statute; Rule 24(1)(a) Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, 3–10 September 2002 (First Session of the ASP), part II.A (adopted and entered into force 9 September 2002) ('ICC Rules of Procedure and Evidence'). An example of serious misconduct is the disclosure of information that the Prosecutor has acquired in the course of her duties or on a matter which is under consideration by the Court 'where such disclosure is seriously prejudicial to the judicial proceedings or to any person'. Rule 24(1)(a)(i) ICC Rules of Procedure and Evidence. The other two examples involve serious misconduct for personal benefit. Specifically, '(ii) Concealing information or circumstances of a nature sufficiently serious to have precluded him or her from holding office'; and '(iii) Abuse of judicial office in order to obtain unwarranted favourable treatment from any authorities, officials or professionals'.

⁷⁸ Art 47 ICC Statute; Rule 25 ICC Rules of Procedure and Evidence.

⁷⁹ Rule 25(a) ICC Rules of Procedure and Evidence.

⁸⁰ Rule 26 ICC Rules of Procedure and Evidence; Regulation 120 Regulations of the Court, ICC-BD/01-03-11, 26 May 2004, as amended on 2 November 2011 ('Regulations of the Court').

⁸¹ Regulation 121(2) Regulations of the Court.

⁸² The limited experience of the Court so far contradicts such concerns, however. In a controversial case concerning allegations that the former ICC Prosecutor, Luis Moreno Ocampo, had committed sexual assault, the panel of Judges found that the complaint was 'manifestly unfounded' although not malicious. Mégret (n 17) 480.

⁸³ Once the IOM becomes functional, it will also provide such external oversight. See section 17.6.1.

to cross.⁸⁴ Under these procedural constraints, the Assembly is likely to address only egregious misconduct by top prosecutors. The more realistic prospect is therefore that the Assembly would provide weak oversight, and judicial oversight will remain the backstop for most instances of prosecutorial misconduct.

Although the Assembly is not likely to discipline prosecutorial misconduct frequently, its authority to do so overlaps to some degree with judicial authority to police prosecutorial misconduct. To ensure that the Assembly and judges use their disciplinary powers efficiently, it is important to delineate more clearly when each body should intervene. In determining how to divide responsibility for different types of misconduct, the ICC may consider the following three factors: (i) the relative expertise of each body in investigating the specific type of misconduct at hand; (ii) the relative ability of each body, with respect to the type of misconduct at issue, to impose sanctions that effectively punish misconduct, affirm the rule of law, and promote fair trials; (iii) the relative burden that judicial and Assembly interventions might impose on the ability of the ICC to accomplish its central purposes, such as preventing impunity for international crimes and ascertaining the truth about the crimes.

With respect to the last factor—the cost of the measures imposed—reprimands and fines by the Assembly fare relatively well. Reprimands and fines do not alter the result of judicial proceedings and do not directly undermine the goals of punishing international crimes and uncovering the truth. In many cases, therefore, they represent a superior alternative to judicial remedies that disrupt the course of the case, such as a stay of proceedings, dismissal, or exclusion of evidence. On the other hand, reprimands and fines provide no concrete relief for violations of individual rights, and the Assembly is not well suited to determining when such a violation has occurred. Accordingly, a reprimand or fine by the Assembly would not be a useful substitute for judicial remedies when the violation at issue has harmed individual rights. They would be more appropriate for violations that have not prejudiced individual rights, yet are significant or pervasive enough to warrant a response.

The Court could also refer to the Assembly cases of misconduct that have affected individual rights or the integrity of the proceedings and for which the Court has already imposed some remedies. Because remedies are costly, the Court could impose more measured remedies but then refer a case for further discipline by the Assembly (at least where the misconduct can be attributed to the prosecutor or deputy prosecutor). The judicial referral could help overcome the procedural hurdles to Assembly action and reduce the risk of politicization. At the same time, by combining milder judicial remedies with Assembly sanctions, the Court could achieve the desired punitive effect at a lesser cost to the proceedings on the merits.⁸⁵

⁸⁴ The ASP can call special sessions by a vote of a third of its members or on the initiative of its Bureau, but this adds yet another procedural threshold. Art 112(6) ICC Statute.

⁸⁵ Milder remedies may include a sentence reduction, adverse evidentiary inference, or reprimand. Even when combined with Assembly sanctions, however, these remedies would not be appropriate when prosecutorial misconduct has undermined confidence in the verdict. See Turner (n 20) 182.

17.6 Administrative and Professional Oversight

17.6.1 IOM

Perhaps in recognition of its limited practical ability to discipline prosecutors directly, the ASP recently created an IOM to investigate misconduct by prosecutors, judges, court staff, and contractors retained by the court.⁸⁶ The IOM is not yet fully operational but is expected to begin work in the near future. The IOM would have the power to investigate misconduct by prosecutors and recommend disciplinary measures to the OTP.⁸⁷ Where criminal conduct is suspected, it could recommend that the Court refer the matter to the relevant national authorities.⁸⁸ Misconduct is interpreted very broadly and includes ‘any act or omission...in violation of [the staff member’s] obligations to the Court pursuant to the Rome Statute and its implementing instruments, Staff and Financial Regulations and Rules, relevant administrative issuances and contractual agreements, as appropriate’.⁸⁹ It does not, however, include offences against the administration of justice, such as presenting false testimony and interfering with witness testimony, which are covered by Article 70 of the ICC Statute and remain subject to prosecution by the OTP and trial by the Court.⁹⁰

The IOM is presented by the Assembly as an independent administrative body that would hold ICC prosecutors to account in order to ensure the effective functioning of the Court. The Assembly grounded its authority to establish the IOM on two provisions of the Rome Statute. Article 112(2)(2) provides that the Assembly ‘shall...provide management oversight to...the Prosecutor...regarding the administration of the Court’.⁹¹ To do so, under Article 112(4), ‘the Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy’.⁹²

The OTP has objected to the Assembly’s competence to establish the IOM and has argued that IOM investigations into prosecutorial misconduct would interfere with

⁸⁶ The ASP established the Mechanism under Art 112(4) of the ICC Statute, which provides that: ‘The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy’. Art 112(4) ICC Statute. Some commentators have questioned whether the authority to discipline a wide range of prosecutorial misconduct can be based on this grant of competence to enhance the ‘efficiency and economy’ of the Court. The Proposed Independent Oversight Mechanism for the International Criminal Court, Invited Experts on Oversight Question (*UCLA Law Forum*, May–September 2011) <<http://uclalawforum.com/home>> accessed 31 July 2014 (contribution by Nicholas Cowdery).

⁸⁷ Establishment of an Independent Oversight Mechanism, ICC-ASP/8/Res.1, 26 November 2009 (Seventh Plenary Meeting of the ASP), para. 6(d). In a more recent resolution, adopted as this book chapter was going through the editing process, the ASP expanded the IOM’s function to include unscheduled inspections of ‘any premises or processes’ of the Court, as requested by the Bureau of the ASP. Independent Oversight Mechanism, ICC-ASP/12/Res.6, 27 November 2013 (12th Plenary Meeting of the ASP) Annex, para. 6. The new functions will also include ‘evaluation of any programme, project or policy as requested by the Assembly or Bureau’. Ibid., para. 16.

⁸⁸ Independent Oversight Mechanism, ICC-ASP/12/Res.6 (n 87) para. 41.

⁸⁹ Ibid., para. 28, fn. 4. ⁹⁰ Ibid., para. 30. ⁹¹ Art 112(2)(2) ICC Statute.

⁹² Art 112(4) ICC Statute.

the principle of prosecutorial independence enshrined in Article 42 of the Rome Statute.⁹³ According to the OTP, if an external body such as the IOM were to ‘instruct’ or demand cooperation from prosecutorial staff without the consent of the prosecutor, it would violate the Rome Statute’s language that prosecutors ‘shall not seek or act on instructions from any external source’.⁹⁴ Because the Statute also provides that the prosecutor has ‘full authority over the management and administration of the Office, including the staff, facilities and other resources thereof’, the prosecutor has argued that he enjoys ‘full and unfettered administrative independence’ to investigate and discipline his own staff.⁹⁵

In view of the prosecutor’s objections, the ASP revised the IOM’s procedures twice. The first amendment provided that whenever the ICC prosecutor and the IOM disagree as to whether investigations of prosecutorial staff should proceed, an independent third party would be brought in to resolve the dispute.⁹⁶ If the third party determined that the investigation might undermine prosecutorial independence, the investigation would be suspended. Even after this amendment was adopted, however, concerns remained that the IOM’s investigations could be used by the Assembly to interfere with the independence of the ICC prosecutor.⁹⁷ Commentators suggested that States Parties unhappy with the charging decisions of the prosecutor might use the IOM to harass the OTP, prevent the Office from devoting full attention to prosecutions, and place pressure on the prosecutor to change her policies.⁹⁸ To some degree, these concerns were accommodated through the recourse to an independent third party and the requirement that investigations be conducted ‘with strict regard for fairness and due process for all concerned’.⁹⁹ But it was still unclear what exact procedures the IOM would adopt to ensure due process and confidentiality, and how independent the third-party arbiter would in fact be (since it would be appointed by the AASP, some observers worried that its independence may not be entirely assured).¹⁰⁰

In its most recent session, the Assembly revised the IOM procedures once more. This time, it provided that the IOM must notify the prosecutor of any pending investigation of a staff member and then consult with the prosecutor within five working days of the notification, ‘in order to avoid any negative impact on on-going investigative, prosecutorial and judicial activities resulting from the proposed investigation’.¹⁰¹ If following the consultation, the prosecutor continues to believe that the proposed

⁹³ Art 42 ICC Statute (providing that ‘[t]he Office of the Prosecutor shall act independently as a separate organ of the Court’ and that ‘[a] member of the Office shall not seek or act on instructions from any external source’).

⁹⁴ Report of the Bureau on the IOM, ICC-ASP/9/31, 29 November 2010, para. 44.

⁹⁵ Ibid. The submissions to the Bureau on this issue were signed by then-Prosecutor Luis Moreno Ocampo. The most recent Strategic Plan of the OTP suggests that the new Prosecutor, Fatou Bensouda, similarly insists on maintaining the independence of the Office in disciplinary matters. Strategic Plan (n 32) 33, para. 85.

⁹⁶ IOM, ICC-ASP/9/Res.5, 10 December 2010 (Fifth Plenary Meeting of the ASP) Annex, paras 20–5.

⁹⁷ See The Proposed Independent Oversight Mechanism for the International Criminal Court (n 86) (contributions by José Alvarez, Nicholas Cowdery, and Harmen van der Wilt) (discussing how IOM could interfere with the operation of the ICC Prosecutor’s Office).

⁹⁸ Ibid. (contribution by Harmen van der Wilt); Coleman et al. (n 26) 51.

⁹⁹ IOM, ICC-ASP/9/Res.5 (n 96) para. 27. ¹⁰⁰ Coleman et al. (n 26) 6.

¹⁰¹ IOM, ICC-ASP/12/Res.6 (n 87) Annex, para. 34.

investigation is outside the mandate of the IOM, the prosecutor can report its concerns to the Bureau and then seek a determination from the Presidency of the ICC.¹⁰² The President of the Court will be assisted by three judges in issuing a final and binding judgment on this matter.

The most recent amendment minimizes the risk that the IOM would interfere with legitimate prosecutorial actions. In an earlier writing on this topic, I had proposed that IOM procedures be revised to require that any complaints about prosecutorial misconduct relating to investigative and trial work be referred or at least vetted by ICC judges.¹⁰³ Such a mechanism already exists with respect to complaints of misconduct transmitted to the Assembly for disciplinary measures under Article 46. I therefore argued that the same mechanism for complaints to the IOM would be practical and consistent with the existing legal framework. The judicial referral mechanism could prevent politically motivated investigations of prosecutors from occurring, but would still allow valid complaints to be investigated by the IOM. The 2013 Assembly Resolution provides for a similar judicial check on IOM inquiries, but it requires the prosecutor to trigger the procedure by seeking a determination from the Presidency.¹⁰⁴ This new procedure appears to strike a good balance between the need to preserve prosecutorial independence and yet ensure accountability.

Even if the judicial referral mechanism addresses the concern about the IOM's potential politicization, another problem remains. The current structure of the IOM includes only four staff members. It was increased from the earlier provision for only two members, but the mandate of the IOM was also extended to cover inspections and evaluation of ICC programmes more broadly.¹⁰⁵ Given that the IOM is supposed to inspect and evaluate ICC programmes and then also investigate complaints concerning prosecutors, judges, the Registrar, staff members of the Court, and contractors, a four-member office seems inadequate for the task. Unless the IOM's capacity is expanded, the Mechanism is likely to have only a limited role to play in monitoring ICC prosecutors. In addition to these resource constraints, as noted earlier, the IOM is also legally limited to investigate misconduct other than offences against the administration of justice.¹⁰⁶ Therefore, the real problem with the IOM may be that it would provide insufficient rather than overzealous scrutiny of prosecutorial misconduct.

In light of its currently limited resources, the IOM would do best to direct its efforts to cases where it is likely to have the most impact and where other sanctions and remedies are insufficient. For example, the IOM could usefully investigate complaints alleging that prosecutors knowingly or purposefully engaged in misconduct, but the defendant was not directly or seriously harmed. Similarly, investigations would be helpful where the prejudice to an individual defendant is minor, but there is a pattern of misconduct by the OTP. In such cases, the Court may be reluctant to impose any meaningful remedies, because the harm to an individual defendant is small. Action by the IOM would therefore be critical to holding prosecutors accountable and deterring future violations. As with disciplinary measures by the Assembly, it would be useful

¹⁰² Ibid., para. 35.

¹⁰³ Turner (n 20) 243–4.

¹⁰⁴ IOM, ICC-ASP/12/Res.6 (n 87) para. 35.

¹⁰⁵ Ibid., para. 4.

¹⁰⁶ Ibid., para. 30.

to delineate the instances in which IOM action would be more beneficial than judicial intervention.

17.6.2 Bar associations

Because of the various shortcomings of discipline by the ASP and the IOM, some have suggested that bar associations could be used to regulate international prosecutors. Bar associations have the authority to investigate and discipline prosecutorial misconduct in common-law systems, and at least in theory, they offer a fair and efficient way to handle misconduct. They are composed of prosecutors' professional peers and can draw on members' legal expertise to address questions of misconduct competently; they are generally seen as neutral and apolitical bodies; and their disciplinary measures have no direct effect on the outcome of ongoing cases. But as commentary on bar discipline at the domestic level has shown, in practice, such discipline is rarely imposed, and it has failed to constrain prosecutorial misconduct effectively.¹⁰⁷

At the ICC, regulation by bar authorities is even less likely to work, for several reasons. First, ICC prosecutors are not required to be members of a national bar association, and at least some current prosecutors appear to lack such membership.¹⁰⁸ Unless the OTP begins requiring membership as a matter of policy, local bar associations could not offer comprehensive regulation. A bar membership requirement is not likely to be forthcoming, however, because prosecutors from civil-law countries are typically not regulated through their bar associations. They are seen as organs of the Court and members of the civil service, on par with judges, and are disciplined either through internal administrative measures, or, for more serious violations, by civil-service tribunals.¹⁰⁹

Another potential problem is that national bar associations may not always apply their codes of conduct extraterritorially.¹¹⁰ Even when rules do apply across borders, national bar authorities would be reluctant to conduct expensive and logically challenging investigations of misconduct abroad.¹¹¹ If national authorities are already failing in their duties to discipline prosecutorial misconduct at home, it appears implausible that they would consider inquiries into misconduct at the ICC a high priority.

¹⁰⁷ D Keenan et al., 'The Myth of Prosecutorial Accountability after *Connick v Thompson*: Why Existing Professional Responsibility Measures Cannot Protect against Prosecutorial Misconduct' (2011) 121 *Yale Law Journal Online* 203 <<http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/volume-121>> accessed 31 July 2014; F Zacharias, 'The Professional Discipline of Prosecutors' (2001) 79 *North Carolina Law Review* 721; see also J Maute, 'Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?' (2008) *Journal of the Professional Lawyer* 53, 73–6.

¹⁰⁸ Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, *Kenyatta* (n 24).

¹⁰⁹ Luna and Wade (n 26) 1474–9; Turner (n 20) 238.

¹¹⁰ Bar Standards Board, Code of Conduct, Annexe A: The International Practising Rules R.2 <<https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/annexes-to-the-code/annexe-a-the-international-practising-rules-red-european-lawyers-rules>> accessed 31 July 2014. But see Rule 8.5(a) Model Rules of Professional Conduct ('A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs').

¹¹¹ See C Rogers, 'Lawyers without Borders' (2009) 30 *University of Pennsylvania Journal of International Law* 1035, 1083.

Even if we were to assume that some enforcement by local authorities would occur, another problem remains. As debates about witness proofing, *ex parte* contacts, and cross-examination at the ICCs have shown, norms of conduct still differ significantly across jurisdictions. Depending on the choice-of-law rules applied by local bar associations, ICC prosecutors may be subject to different norms of conduct, creating a problem of inconsistent treatment. In fact, even if the choice-of-law rules consistently directed national bar associations to apply ICC rules,¹¹² a problem of expertise in interpreting and applying these rules would likely arise. Moreover, choice-of-law provisions typically do not apply to procedural and evidentiary matters, so the problem of different treatment would still remain to a certain degree.

In response to these concerns, some have suggested that an international professional body, such as the International Association of Prosecutors ('IAP' or 'Association'), ought to play a more central role in sanctioning ICC prosecutors.¹¹³ But at least at present, the IAP has not assumed any disciplinary role and has limited itself to drafting a model Code of Conduct for ICC prosecutors.¹¹⁴ It is not at all clear that relevant actors at the ICC would wish to see a more active role for the Association. The ASP decided to create an IOM under its own auspices instead of entrusting the IAP with the task of disciplining prosecutors.

Requiring international prosecutors to join an international association such as the IAP and giving it investigative authority over prosecutorial misconduct would have certain benefits. Regulation by an international association would provide greater uniformity in the standards governing prosecutorial actions compared to regulation by national bar associations. Compared to oversight by the IOM and the ASP, it would also present a lesser risk that disciplinary measures would be used for political ends. Finally, the Association would draw on the expertise of prosecutors from different legal systems, including some with international experience, ensuring that discipline is imposed with a good understanding of the context in which international prosecutors operate.

Despite these potential benefits of IAP oversight, it is not likely to be the optimal means of accountability for prosecutors at the ICC in the foreseeable future. The Association is not an organ of the Court, and it might be difficult to reconcile its oversight functions with the Rome Statute. The creation of the IOM further reduces the appeal of transforming the IAP into a regulatory body for ICC prosecutors. Regulation by both the IAP and the IOM would be duplicative and inefficient. In choosing between the two oversight mechanisms, ICC prosecutors would likely prefer the IAP because of its perceived neutrality, expertise, and distance from the ASP. But the Assembly would prefer to rely on the mechanism it has already created, and it is not clear that the Rome

¹¹² Rule 8.5(b)(1) Model Rules of Professional Conduct ('[F]or conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise').

¹¹³ Mégret (n 17) 465; see also J Stewart, 'New Thoughts about Barayagwiza: Reactions to Policing International Prosecutors' (*Opinio Juris*, 5 April 2013) <<http://opiniojuris.org/2013/04/05/nyu-jilp-symposium-new-thoughts-about-barayagwiza-reactions-to-policing-international-prosecutors>> accessed 31 July 2014.

¹¹⁴ Markovic (n 30) 205.

Statute gives the OTP the authority to override that preference. Finally, some civil-law prosecutors working at the ICC, who identify above all as organs of the Court, might be reluctant to be regulated by an external professional association. For all these reasons, the IAP is unlikely to take on disciplinary duties with respect to ICC prosecutors, at least in the foreseeable future.

17.6.3 Informal sanctions

A less obvious mechanism of regulating the conduct of international prosecutors includes informal sanctions by other prosecutors, defence attorneys, and judges.¹¹⁵ Such sanctions can be imposed promptly and efficiently, as they do not require an extensive information-gathering process or an elaborate procedure before judgment.¹¹⁶ While they are milder in effect than most formal sanctions, informal measures are likely to be imposed more frequently because they are relatively economical. The speed with which they can be levied adds to their deterrent effect. Such sanctions are especially effective in tight-knit legal communities, in which lawyering norms are broadly shared and prosecutors' careers depend heavily on their reputation with peers.¹¹⁷

At least at present, informal sanctions are less likely to be a significant source of regulation at the ICC. The ICC's legal community is both very diverse and transient, and consensus on governing professional norms has yet to emerge. But because social norms are likely to become more influential as the ICC matures, it is important to examine their potential usefulness in policing prosecutorial actions.

A great deal of informal regulation is likely to occur within the OTP itself. Conversations in the corridor and discussions over lunch can help impart codes of professional conduct.¹¹⁸ By virtue of their experience and status, senior prosecutors can set standards particularly effectively, and this type of peer assessment can work well in cases where the errors result from inexperience or incompetence. Like formal internal sanctions, however, informal regulation within the OTP is less apt to address systemic misconduct. Such misconduct becomes pervasive precisely because it is condoned or at least neglected by leaders of the Office, so internal regulation—whether formal or informal—is likely to be ineffectual in such cases.

¹¹⁵ For a discussion of the role of informal sanctions in a domestic setting, see e.g. B Green and F Zacharias, 'Regulating Federal Prosecutors' Ethics' (2002) 55 *Vanderbilt Law Review* 381, 405, 472 (discussing informal sanctions by judges); K Levine and R Wright, 'Prosecution in 3-D' (2012) 102 *Journal of Criminal Law and Criminology* 1119 (discussing informal instruction by fellow prosecutors); D Brown, 'Criminal Procedure Entitlements, Professionalism, and Lawyering Norms' (2000) 61 *Ohio State Law Journal* 801, 812 (discussing the limited ability of defence attorneys to impose informal sanctions on prosecutors).

¹¹⁶ See B Wendel, 'Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities' (2001) 54 *Vanderbilt Law Review* 1955.

¹¹⁷ *Ibid.*, 2042.

¹¹⁸ Levine and Wright (n 115) 1122; cf. E Baylis, 'Function and Dysfunction in Post-Conflict Justice Knowledge Networks and Communities' 37–42 (unpublished manuscript, on file with author) (discussing the active exchange of information about legal norms among professionals working for international criminal courts and tribunals).

Defence attorneys can also indirectly influence prosecutorial conduct through informal channels. They may, for example, spread negative gossip about prosecutors whom they perceive as overly aggressive or unprofessional, and they may refuse to cooperate on scheduling requests, deadline extensions, and procedural waivers.¹¹⁹ But as in the domestic setting, international criminal defence attorneys have no significant leverage over the outcome of cases or over formal sanctions on prosecutors, and this limits their ability to apply informal pressure on prosecutors. The influence of defence attorneys is likely to be minimal for other reasons as well. At least at this time, personal interaction between defence and prosecution lawyers at the ICC tends to be limited to the courtroom. While prosecutors frequently interact socially with one another, with prosecutors from other international tribunals, and with members of the Chambers, they do not tend to socialize as often with defence attorneys.¹²⁰ Defence attorneys are in The Hague only part-time, since they have to attend to other cases in their domestic practice; professional divisions likely further diminish social interactions with prosecutors. Even dealings within the Court are frequently limited to one case, reducing the ‘repeat-player’ effect that may lead prosecutors to cooperate with defence attorneys in domestic settings.¹²¹ Finally, ICC prosecutors rarely trade places with international criminal defence attorneys during their professional career. This further reduces their incentives to maintain friendly relations with the defence. For all these reasons, defence attorneys are not well situated to influence prosecutors informally. In many cases, defence attorneys may also not even attempt to apply any social pressure on prosecutors. Defence attorneys are ethically bound to place their clients’ interests first, and they may perceive that the risk of antagonizing prosecutors conflicts with the duty to serve their clients in a particular case.¹²²

ICC judges are likely to be more effective in sanctioning prosecutors informally. They can admonish a prosecutor off the record, relate improper conduct to a prosecutor’s superior, make scheduling decisions inconvenient to the misbehaving prosecutor, demand additional written submissions from prosecutors who act unprofessionally, and make the courtroom experience of a prosecutor unpleasant in various other ways.¹²³ Because ICC judges in general wield broad authority over the outcome of a case (to a greater degree than judges in common-law jurisdictions, for example¹²⁴) and because they can impose formal sanctions for misconduct, their informal reprimands

¹¹⁹ See Brown (n 115) 812.

¹²⁰ See e.g. Baylis (n 118) 66–7; J McMorrow, ‘Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY’ (2007) 30 *Boston College International and Comparative Law Review* 139, 151–3 (reviewing the isolation of ICTY defence attorneys from prosecutors and judges and concluding that ‘[t]he disparate legal backgrounds of the legal actors at the ICTY and the need for strict separation of functions means that socialization...does not appear to be a strong source of norms at the ICTY’).

¹²¹ See J Jackson and Y M’Boge, ‘The Effect of Legal Culture on the Development of International Evidentiary Practice: From the “Robing Room” to the “Melting Pot”’ (2013) 26 *Leiden Journal of International Law* 947, 967–8.

¹²² Brown (n 115) 843–4.

¹²³ P Margulies, ‘Above Contempt? Regulating Government Overreaching in Terrorism Cases’ (2005) 34 *Southwestern University Law Review* 449; Green and Zacharias (n 115) 472.

¹²⁴ See e.g. J Turner, ‘Legal Ethics in International Criminal Defense’ (2010) 10 *Chicago Journal of International Law* 685, 704–5.

are likely to be taken seriously by ICC prosecutors. Judges at the ICC have shown that they are eager to use both formal and informal means to encourage prosecutors to adopt certain standards of professional conduct, although it is too early to assess the effectiveness of these sanctions.¹²⁵

Judges' ability to apply informal sanctions is not unlimited, however. The effect of such sanctions is likely to be felt primarily by the individual prosecutor working on the case. Informal sanctions are not publicized and for that reason would not be the optimal means of addressing a pattern of misconduct in the OTP.¹²⁶ Moreover, the ICC is generally a 'far less structured social system' than a domestic criminal justice community.¹²⁷ Both prosecutors and judges are typically at the ICC for only a short time. Judges' terms are limited to nine years.¹²⁸ Prosecutors frequently work on only one ICC case and then return either to domestic practice or move on to a different international institution.¹²⁹ As international court practitioners themselves have commented, this reduces the pressure on them to please judges.¹³⁰ A bad reputation internationally does not necessarily '[trickle] down into a domestic practice that is separate in geography, community, and law'.¹³¹

More broadly, until a more solid consensus develops on the applicable norms of professional conduct at the ICC, informal sanctions are likely to remain a weak constraint on prosecutorial actions. Unlike in local legal communities, where 'internalized standards of professional conduct...are written in the hearts and minds of each lawyer', ICC lawyers come from diverse legal traditions and cultures and do not yet share a common understanding of professional norms.¹³² The lack of a formal Code of Conduct for prosecutors and the rapid turnover of lawyers and judges at the ICC also contribute to the problem. In the near future, therefore, the ICC will have to continue to rely primarily on formal rules and methods of policing misconduct. But as the ICC develops its own set of identifiable and harmonized ethical norms and expectations, informal sanctioning will become a more potent source of regulating prosecutorial conduct, as it has been in domestic settings.

17.6.4 Preventive measures

While the discussion so far has focused on measures responding to misconduct after the fact, the ICC can also benefit from developing structures that prevent misconduct

¹²⁵ At the ICTY, Chambers concluded that they did not have jurisdiction to develop a prosecutorial Code of Conduct, but they sought at least indirectly to encourage the Prosecutor to adopt certain standards. Mégret (n 17) 460. ICTY Judges generally used their informal sanctioning powers broadly to encourage the development of norms of attorney conduct. See McMorrow (n 120). At the ICC, judges have read their own powers to ensure the fairness and integrity of the proceedings more broadly and have imposed certain rules of professional conduct on prosecutors. Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, *Kenyatta* (n 24); Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1049, TC I, ICC, 30 November 2007.

¹²⁶ Green and Zacharias (n 115) 472.

¹²⁷ Mégret (n 17) 419; see also Stewart (n 113).

¹²⁸ Art 36 ICC Statute.

¹²⁹ Jackson and M'Boge (n 121) 967–8.

¹³⁰ Ibid., 967–9.

¹³¹ Stewart (n 113).

¹³² Wendel (n 116) 1960, citing G Hazard, Jr et al., *The Law and Ethics of Lawyering* 3rd edn (Foundation Press 1999) 19–20.

from occurring in the first place. An important element of prevention is the establishment of a set of shared norms of professional conduct. Commentators had long argued that the prosecutor must adopt a Code of Conduct to guide its prosecutors.¹³³ In both common-law and civil-law systems, formal rules and codes of ethics serve as a critical *ex ante* constraint on prosecutorial actions.¹³⁴ They are even more necessary in a pluralist legal culture such as the ICC, where wide disagreement about the applicable norms persists. The formulation of a Code of Conduct could help deter misconduct before the fact and ensure fair punishment after misconduct occurs.

For more than ten years, however, the Office had failed to promulgate such a Code, even though similar Codes were adopted for defence attorneys, victim's representatives, and judges. The Office argued that the Rules of the Court, Staff Rules, and the OTP Operations Manual provide sufficient guidance for prosecutors. In September 2013, the Office finally adopted a Code of Conduct, perhaps in response to a judicial nudge. In May 2013, acting under its authority to ensure a fair trial, the Trial Chamber in *Kenyatta* ordered the prosecution to follow several provisions of the Code of Professional Conduct for counsel, which formally applies only to defence counsel, counsel for states, *amici curiae*, and counsel or legal representatives for victims and witnesses.¹³⁵ The Chamber acknowledged that its order is limited only to the case before it and that only the OTP can promulgate a more broadly applicable Code of Conduct for ICC prosecutors. While it was limited to one case, the Chamber's Decision to impose the defence Code of Conduct provisions to prosecutors in *Kenyatta* sent a clear signal that greater ethical regulation of ICC prosecutors is needed. The adoption of the Code of Conduct for the OTP helps address this concern and is a positive development towards accountability and transparency.

The OTP can do more to prevent misconduct by adopting additional training and monitoring programmes for its lawyers. These features—‘training, articulated standards, internal review of individual decisions and writing-based processes’—are a staple of civil-law systems’ accountability frameworks for prosecutors, and they are increasingly being considered by common-law systems as a means of preventing misconduct.¹³⁶ They help reduce misconduct not only by clarifying the applicable rules, but also by ‘strengthen[ing] the concept of the prosecutor’s job as a neutral quasi-judicial officer’ rather than a partisan advocate.¹³⁷

The OTP has not clarified what training and internal review programmes it has put in place to prevent misconduct, and the recent failure to disclose potentially exculpatory evidence in *Kenyatta* exposed certain flaws in its internal processes.¹³⁸ But the most recent Strategic Plan unveiled by the prosecutor in October 2013 suggests that the new prosecutor, Fatou Bensouda, is aware of the need to address this problem and is taking steps in that direction. The Plan sets out a concrete goal of revising training programmes and evidence disclosure practices, and it avows that the Office will pay

¹³³ Markovic (n 30).

¹³⁴ Wright and Miller (n 1) 1601.

¹³⁵ Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, *Kenyatta* (n 24) paras 13–16.

¹³⁶ Wright and Miller (n 1) 1604.

¹³⁷ Ibid.

¹³⁸ Decision on Defence Application Pursuant to Art 64(4) and Related Requests, *Kenyatta* (n 29) paras 93–4.

'increased attention to proper performance management and an increased provision of training'.¹³⁹ If the Office fails to follow through on these commitments to prevent misconduct, judges can again use their sanctioning powers to encourage the Office to adopt specific compliance programmes.¹⁴⁰ Given the high cost of imposing remedies for misconduct after the fact, it is critical for the Court to develop more effective prophylactic measures.

17.7 Conclusion

Soon after the ICC encountered prosecutorial errors and misconduct in its first case, it became clear that the Court could not rely exclusively on the OTP to oversee the conduct of its members. In an important early accomplishment, ICC judges asserted an active role in sanctioning prosecutorial misconduct, imposing bold and sometimes drastic remedies. These early decisions were an important expression of the Court's commitment to the rule of law and fair trial rights. Over time, however, the Court recognized that remedies must be calibrated in order to account for other important goals of the international criminal justice system, such as retribution, deterrence, and the establishment of an accurate historical record. Trial and Appeals Chambers began relying on a balancing approach to remedies and articulated some of the factors that would guide it.

Going forward, the ICC will undoubtedly continue to rely greatly on judicial intervention to address prosecutorial misconduct. Judges are often the first to observe ethical and procedural violations by prosecutors, and they have the legal authority to impose sanctions and remedies to ensure the fairness and integrity of the proceedings.¹⁴¹ But judicial remedies can be too blunt and interfere with the legitimate interests of the ICC in completing proceedings on the merits. Conversely, remedies can be too narrow; they often respond merely to the specific instance of misconduct before the Court and may not be well suited to addressing systemic violations. Commentators have therefore begun turning their attention to other mechanisms that could provide more comprehensive oversight of prosecutorial actions. These include the ASP, the IOM, bar associations, and the OTP itself.

These mechanisms have the potential to address systematic violations by the OTP without imposing undue burdens on ongoing judicial proceedings. Yet they also carry distinct risks. Internal oversight is not likely to correct violations that are tolerated, explicitly or implicitly, by the leadership of the OTP. Discipline by the Assembly and the IOM, on the other hand, can be misused for political reasons. More broadly, the multiplication of oversight mechanisms may lead to duplicative and inefficient inquiries, which impose unnecessary burdens on prosecutors, calling them to account too frequently and distracting them from their primary tasks of investigating and prosecuting international crimes. Conversely, the diffusion of regulatory responsibility may

¹³⁹ Strategic Plan (n 32) paras 74 and 57. The Plan describes various additional steps that can be taken to 'maintain a professional office with specific attention to performance management and measurement'. *Ibid.*, paras 77–84.

¹⁴⁰ *Ibid.*, para. 97.

¹⁴¹ Mégret (n 17) 459; McMorrow (n 120) 171.

undermine efforts to hold prosecutors accountable, as each institution presumes that another will respond to an instance of misconduct.¹⁴²

To avoid these risks and ensure that the system functions effectively, the Court could develop mechanisms to coordinate the tasks of judicial, political, and administrative authorities.¹⁴³ The Court could draft a protocol that outlines when judges should take the lead in sanctioning misconduct and when they should refer cases for investigation and discipline to the Assembly, the IOM, or the OTP. As discussed earlier, the Court may adopt a presumption that judges focus on misconduct that prejudices the defendant or the integrity of the proceedings, while non-judicial mechanisms address other cases. In some cases of systemic misconduct, both a judicial and an administrative response may be necessary. When investigations of misconduct are undertaken by the Assembly or the IOM, a procedure that relies on judicial referrals can help minimize the risk of politicization. As foreseen in the ICC Statute, the OTP would likely continue to have the primary responsibility to prevent misconduct—by drafting a Code of Conduct, instituting more regular training sessions, and improving its system of internal supervision. But judges may use their disciplinary powers to prompt the OTP to take additional preventive steps when there is evidence that existing measures are inadequate. As the ICC's accountability framework matures, the Court will be well-served by a coordinated approach that is led by the judges, yet assisted by other authorities, such as the ASP, the IOM, and the OTP.

¹⁴² B Green, 'Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?' (1995) 8 *Saint Thomas Law Review* 69, 91–2.

¹⁴³ Ibid., 93.

PART IV

THE ICC AND ITS APPLICABLE LAW

18

Article 21 and the Hierarchy of Sources of Law before the ICC

*Gilbert Bitti**

18.1 Introduction

The Rome Statute ('Statute') of the ICC (or Court)¹, adopted on 17 July 1998,² contains an interesting Article 21 entitled 'Applicable law', which provides:

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

This is a very interesting article for many reasons: its very existence, the specificity and complexity of its content, the hierarchy or one should better say the multiplicity of hierarchies it establishes, and, last but not least, what it mandates the Court to do.³

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¹ Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001, and 16 January 2002. Officially: Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute').

² The Statute entered into force on 1 July 2002.

³ On this very last point, see the contribution of J Powderly in this volume, Chapter 19—'The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function: Reflections on Sources of Law and Interpretative Technique'. Whereas Powderly seems to consider that the 'creativity of the bench' should be preserved for the benefit of the 'progressive development of international criminal law',

Indeed, there is no article on applicable law in (i) the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 ('Nuremberg Tribunal'),⁴ (ii) the Charter of the International Military Tribunal for the Far East in its original version of 19 January 1946 or its amended version of 26 April 1946 ('Tokyo Tribunal'),⁵ or (iii) the Statutes of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ('ICTY') and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ('ICTR'), adopted by the Security Council ('SC') of the United Nations ('UN') respectively on 27 May 1993⁶ and 8 November 1994.⁷

The same is true for the 'mixed' or 'internationalized' Tribunals; indeed, neither the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the SCSL nor the Statute of the Court annexed to the said Agreement contains an article on applicable law.⁸ The same applies to both the Law on the Establishment of the ECCC (or 'Khmer Rouge Tribunal') for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea in its amended version dated 27 October 2004 and the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, signed on 6 June 2003 at Phnom Penh.⁹ Finally, there is no article on applicable law in the Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon ('Lebanon Tribunal') annexed to Resolution 1757 (2007) adopted on 30 May 2007 by the UNSC, although the Statute of the Lebanon Tribunal (which is also attached to Resolution 1757 (2007)) contains a Section I entitled 'Jurisdiction and applicable law'. Article 2 within that section deals with 'Applicable criminal law', but refers only to the applicability (subject to the provisions of the Statute) of some provisions of the Lebanese Criminal Code and Articles 6 and 7 of the

this author considers that the existence of Art 21 is an incredible improvement in comparison with the absence of any guidance on applicable law in the Statutes of the ad hoc Tribunals. 'Judicial creativity', whether at the national or international level, should have strict limits established by law.

⁴ Charter of the International Military Tribunal, Annex to the Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis (signed 8 August 1945, entered into force 8 August 1945) 82 UNTS 279.

⁵ See J Pritchard (ed.), *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East with an Authoritative Commentary and Comprehensive Guide* vol. II (New York: Edwin Mellen 1998).

⁶ Statute of the ICTY, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, Annex ('ICTY Statute').

⁷ Statute of the ICTR, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Annex ('ICTR Statute').

⁸ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a SCSL (signed 16 January 2002, entered into force 12 April 2002) 2178 UNTS 137 ('SCSL Statute').

⁹ All legal texts relating to the ECCC are available at <<http://www.eccc.gov.kh/en>> accessed 25 August 2014.

Lebanese Law of 11 January 1958 on ‘increasing the penalties for sedition, civil war and interfaith struggle’.

The authors of the Statute have been far more ambitious or simply cautious. This is understandable since the ICC is a permanent court with a far-reaching jurisdiction. More interestingly, they did not follow the sources of international law described in Article 38 of Statute of the ICJ.

An article on applicable law was already included in the successive drafts presented by the ILC in 1993¹⁰ and 1994.¹¹ It is interesting to observe that, at that time, the ILC draft article on applicable law was limited to what is today paragraph 1 of Article 21 of the Statute and no reference was made to ‘internationally recognized human rights’. Unlike the present Article 21 of the Statute, the ILC draft article did not seem to establish a hierarchy between the different sources of law, following the precedent of Article 38 of the ICJ Statute which contains a list of the sources of international law without establishing a hierarchy between them.

Therefore, it is striking that the negotiations¹² have introduced a hierarchy between the different sources of law, or one should better say ‘a multiplicity of hierarchies’, making the Statute closer to domestic criminal law, something which must be seen as an improvement of international criminal law. Indeed, traditionally ‘international law is not as clear as domestic law in listing the order of constitutional authority’.¹³ Another aspect which makes the applicable law before the Court closer to national law is the level of precision of the Statute and the fact that both the Statute and the Rules of Procedure and Evidence (‘Rules’), contrary to the ICTY and ICTR (‘ad hoc Tribunals’), ‘escape judicial control’.¹⁴ This is ‘meant to provide procedural certainty to the parties and participants and to limit judicial discretion’.¹⁵

There is a hierarchy between the different formal sources of law described in Article 21(1), combined with a hierarchy between formal sources of law and the material source of law¹⁶ described in Article 21(3), namely ‘internationally recognized human

¹⁰ Report of the International Law Commission on the Work of its Forty-Fifth Session (3 May–23 July 1993) UN Doc A/48/10, 111. The text of Art 28, entitled ‘Applicable law’, read as follows: ‘The Court shall apply: (a) this Statute; (b) applicable treaties and the rules and principles of general international law; and (c) as a subsidiary source, any applicable rule of national law.’

¹¹ Report of the International Law Commission on the Work of its Forty-Sixth Session (2 May–22 July 1994) UN Doc A/49/10, 103. The text of Art 33, entitled ‘Applicable law’, read as follows: ‘The Court shall apply: (a) this Statute; (b) applicable treaties and the principles and rules of general international law; and (c) to the extent applicable, any rule of national law.’

¹² In this respect, see the proposals contained in the Report of the Preparatory Committee on the Establishment of an International Criminal Court vol. II (Compilation of proposals), UN Doc A/51/22, 104.

¹³ M Shaw, *International Law* 6th edn (Cambridge: Cambridge University Press 2008) 123.

¹⁴ A Pellet, ‘Applicable Law’ in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court, A Commentary* (Oxford: Oxford University Press 2002) 1064: ‘[...] not only is the Court’s procedure very largely framed by the Statute (i.e. established *ne varietur* in reality), but the RPE [Rules of Procedure and Evidence] also escape judicial control, in accordance, it is true, with the internal legal tradition of most countries, but in contradiction with habitual international practice’.

¹⁵ Separate Opinion of Judge René Blattmann to the Decision on the Defence Request to Reconsider the ‘Order on Numbering of Evidence’ of 12 May 2010, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2707, TC I, ICC, 30 March 2011, para. 7.

¹⁶ On the distinction between formal sources of law and material sources of law in Art 21, see Pellet (n 14) 1051.

rights', together with a hierarchy between the different sources of law described in Article 21(1)(a). To make things more complex, Article 21 refers both to internal sources of law, which could be referred to also as the 'proper law of the ICC'¹⁷ and external sources of law.

18.2 Internal Sources of Law

The internal sources of law are comprised of two very different bodies of law: legal texts on the one hand, which the Court has to apply and which are based on a very delicate hierarchy, and on the other hand, the jurisprudence of the ICC itself, which is a non-binding source of law.

18.2.1 The applicable legal texts and their hierarchy

Within those applicable legal texts, we will distinguish the 'main' legal texts, i.e. those expressly mentioned in Article 21(1)(a), and the 'supplementary' legal texts which are part of the applicable law before the Court under Article 21(1)(a) because the main legal texts mandate the drawing up of such supplementary texts.

18.2.1.1 *The main legal texts*

In accordance with Article 21(1)(a), the Court shall apply in the first place the Statute, the Elements of Crimes and its Rules.¹⁸

The pivotal issue of the applicable law relied upon by the participants in the proceedings has proved to be controversial since the very start of the jurisprudence of the Court. Indeed, Article 21 should provide an exhaustive list of sources of applicable law before the Court: in other words, all legal arguments presented by the participants before the Court and all decisions issued by the Court should be based on the sources of law mentioned in that article.¹⁹ It is to be recalled in this respect that ICC Chambers initially affirmed the supremacy of the Statute and the Rules.

Already, in a decision issued on 9 March 2005,²⁰ Pre-Trial Chamber I declined to consider the submissions made by the Prosecutor on the basis that 'the Prosecutor's concerns in relation to the convening of the status conference should have been raised

¹⁷ Id.

¹⁸ Rules of Procedure and Evidence, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A (adopted and entered into force 9 September 2002) ('ICC RPE').

¹⁹ Regulation 23 of the Regulations of the Court, ICC-BD/01-03-11, 26 May 2004 (Adopted by the Judges of the Court), as amended on 14 June and 14 November 2007 and 2 November 2011, which describes the content of documents presented to the Court by participants in the proceedings, obliges the latter to state, 'as far as practicable, (...) (d) all relevant legal and factual issues, including details of the articles, rules, regulations or other applicable law relied upon' ('ICC Regulations of the Court').

²⁰ Decision on the Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference, *Situation in the Democratic Republic of the Congo*, ICC-01/04-11, PTC I, ICC, 9 March 2005.

in accordance with the procedural mechanism provided for in the Rome Statute, the Rules of Procedure and Evidence and the Regulations of the Court'.

The Chamber reminded the prosecutor that the only procedural remedy was the one provided for in the Statute, namely a request for leave to appeal under Article 82(1)(d) of the Statute, and concluded therefore that there was no procedural basis for the filing of a so-called Prosecutor's position. Indeed, the Prosecutor had tried to present his 'position', which was in reality his opposition to a decision issued by Pre-Trial Chamber I convening a status conference with the Prosecutor concerning the investigation in the situation of the DRC. There was no legal basis in the Statute or the Rules allowing the Prosecutor, or any other participant, to present such a document to a Chamber, a document which was in fact a statement by the Prosecutor presenting his disagreement in relation to a decision taken by the Chamber.

This happened again before Pre-Trial Chamber II,²¹ assigned with the situation in Uganda, which followed the decision issued by Pre-Trial Chamber I:

The Chamber wished to point out in this context that neither the Statute nor the Rules of Procedure and Evidence allow participants to communicate positions on chamber decisions to the Chamber and to have them filed as part of the record of the proceedings. Participants in proceedings before the Court must comply with the procedures provided for in the Statute and the Rules when making submissions to the Chamber. They cannot freely choose the form in which they present their views to the Chamber. Compliance with procedural requirement is necessary, in order to preserve the integrity and transparency of Court proceedings. A 'position' is not a procedural remedy under the Statute. If the Prosecutor wished to make submissions to the Chamber, which shall be part of the official Court record, such submissions must be presented in the form of a proper judicial motion.

This original strong stance shown by ICC Chambers in favour of the Statute and Rules contrasts with more recent jurisprudence where some dissenting judges have started to express concern about what they perceive as a 'creative interpretation'²² of the Statute by their colleagues leading to an 'inappropriate arrogation of the legislative function by the judiciary'. In this particular instance the majority of the Appeals Chamber came to the conclusion that Article 63 of the Statute, which clearly states that the accused 'shall be present' during his or her trial, still gave discretion to the Trial Chamber to allow an accused not to be present during his or her trial.²³ Furthermore, a Trial Chamber has recently used the notion of 'implied powers' in order to subpoena

²¹ Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, *Kony et al., Situation in Uganda*, ICC-02/04-01/05-60, PTC II, ICC, 28 October 2005, para. 13.

²² Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Ušacka to Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1066, AC, ICC, 25 October 2013, para. 11.

²³ Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1066, AC, ICC, 25 October 2013.

witnesses and request a state to compel them to appear before the Court against the clear wording of Article 93(1)(e) of the Statute, which only refers to the ‘voluntary’ appearance of witnesses.²⁴

If the Statute and the Rules shall be applied in ‘the first place’, there is, however, a hierarchy within the hierarchy and the Statute prevails over the Rules in accordance with Article 51(5) of the Statute. In addition, the ASP, when adopting the Rules in 2002, decided to attach the following explanatory note:

The Rules of Procedure and Evidence are an instrument for the application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases. In elaborating the Rules of Procedure and Evidence, care has been taken to avoid rephrasing and, to the extent possible, repeating the provisions of the Statute. Direct references to the Statute have been included in the Rules, where appropriate, in order to emphasize the relationship between the Rules and the Rome Statute, as provided in Article 51, in particular, paragraphs 4 and 5.

In all cases, the Rules of Procedure and Evidence should be read in conjunction with and subject to the provisions of the Statute.

The Rules of Procedure and Evidence of the International Criminal Court do not affect the procedural rules for any national court or legal system for the purpose of national proceedings.

This originally very strong stance of the ASP in favour of the Statute supremacy, which found its origin in the unwillingness to allow the United States of America to use the Rules as a tool to increase the scope of Article 98(2) of the Statute to prevent any American citizen from being surrendered to the Court, contrasts with the attitude of this same Assembly ten years later, with the adoption first of Rule 132bis in 2012 and then of Rules 134bis, ter, and quarter in 2013.

Rule 132bis, which introduces a single judge for the preparation of the trial, was proposed by the judges acting by absolute majority,²⁵ in accordance with Article 51(2)(b) of the Statute, and was adopted by consensus without modification by the ASP,²⁶ although some delegations expressed concerns as to its compatibility with the Statute during the discussions prior to its adoption. Rule 132bis seems indeed to be in contradiction with Article 39 of the Statute. The designation of a single judge was foreseen in the Statute solely for the Pre-Trial Chamber,²⁷ not for the Trial Chamber. Moreover, Article 39(2)(b)(ii) states unequivocally that the ‘functions of the Trial Chamber shall be carried out by three judges of the Trial Division’. Finally, Article 64(3)(a) of the

²⁴ Decision on Prosecutor’s Application for Witness Summonses and Resulting Request for State Party Cooperation, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1274-Corr2, TC V(A), ICC, 17 April 2014; see also Dissenting opinion of Judge Herrera Carbuccia on the ‘Decision on Prosecutor’s Application for Witness Summonses and Resulting Request for State Party Cooperation’, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1274-Anx, TC V(A), ICC, 29 April 2014, para. 21.

²⁵ Report of the Study Group on Governance on Rule 132 bis of the Rules of procedure and Evidence, ICC-ASP/11/41, 1 November 2012 (Eleventh Session of the Assembly of States Parties).

²⁶ Amendment of the Rules of Procedure and Evidence, ICC-ASP/11/Res 2, 21 November 2012 (Adopted at the Eighth Plenary Meeting of the ASP), new Rule 132 bis entitled ‘Designation of a Judge for the Preparation of the Trial’.

²⁷ See Arts 39(2)(b)(iii) and 57(2) ICC Statute.

Statute was found to be a sufficient legal basis for such a rule, although this Article only refers to the functions of the Trial Chamber and does not address in any way its composition, contrary to Article 39(2)(b)(ii) of the Statute. It was therefore simply not possible to institute such a single judge at trial without a prior modification of Article 39 of the Statute: such a modification was possible under the simplified scheme of Article 122 of the Statute which only requires that the amendment be adopted by the ASP (a two-thirds majority of States Parties is required), without any subsequent ratification by the States Parties to the Statute. It is to be noted that Rule 132bis has for the moment not been used by ICC Trial Chambers. It may be that its application will be challenged by participants in the proceedings due to its incompatibility with Article 39(2)(b)(ii) of the Statute.

In 2013 the ASP adopted²⁸ three new rules²⁹ which seem to be difficult to reconcile with the Statute. Those new rules were adopted only a few weeks after the ICC Appeals Chamber issued its contested 25 October 2013 judgment,³⁰ allowing in some circumstances an accused to be absent from his or her trial. Although the interpretation adopted by the majority of the Appeals Chamber was criticized by the two judges of the minority as not respecting the clear wording of Article 63 of the Statute, which requires the presence of the accused during the trial, the ASP adopted the Appeals Chamber interpretation of Article 63 in a new Rule 134ter but went even further in a new Rule 134quarter; this last Rule allows an accused who is 'mandated to fulfil extraordinary public duties at the highest national level' to be excused from being present at his or her trial even if the restrictive conditions set forth in Rule 134ter are not met. It is the first time that ICC jurisprudence, which is a non-binding source of law in accordance with Article 21(2) of the Statute, has developed so rapidly into a binding source of law under Article 21(1)(a) of the Statute as part of the Rules.

In accordance with Article 51(4) of the Statute, the 'Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with the Statute'. According to one author,³¹ this will have the effect that 'when Rules are proposed, it will doubtless be expected that the proposing party satisfy the Assembly as to consistency before it will be prepared to adopt the new Rule'. Obviously, it was not too difficult to convince the ASP when it adopted new Rules 132bis, 134 bis, ter, and quater in 2012 and 2013.

²⁸ Amendments to the Rules of Procedure and Evidence, ICC-ASP/12/Res 7, 27 November 2013 (Adopted at the Twelfth Plenary Meeting of the ASP); see new Rule 134bis entitled 'Presence through the Use of Video Technology'; new Rule 134ter entitled 'Excusal from Presence at Trial' and new Rule 134quater entitled 'Excusal from Presence at Trial due to Extraordinary Public Duties'. In the same resolution, the ASP has decided to replace Rules 100 and 68 by newly drafted rules.

²⁹ It is to be noted that these new rules, contrary to Rule 132bis adopted in 2012, were *not* proposed by the judges acting by absolute majority in accordance with Art 51(2) ICC Statute. Judges only proposed amended Rules 100 and 68: see Report of the Bureau on Study Group on Governance, ICC-ASP/12/37, 15 October 2013 (Twelfth Session of the ASP).

³⁰ Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber V(a) of 18 June 2013 Entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1066, AC, ICC, 25 October 2013.

³¹ B Broomhall, 'Article 51' in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Article by Article* 2nd edn (Oxford: Hart 2008) 1044.

Rules 134bis, 134ter, and 134quater were adopted during ongoing proceedings³² at the ICC against a sitting Head of State and a sitting Deputy Head of State and were immediately used by the Defence of Mr Ruto, Deputy President of the Republic of Kenya, to request to be excused from attendance at trial.³³

The Prosecutor requested the Chamber to adopt a reading of Rule 134quater, which was consistent with the Statute, as mandated by Article 51(4) of the Statute. Indeed, it is for the judges to ‘ultimately decide whether the requirement of consistency between the Rules and the Statute has been respected by the Assembly of States Parties’.³⁴

The Chamber first underlined that ‘it is the States Parties who adopt amendments to the Rules’³⁵ and concluded that by ‘the incorporation of these Rules, the ASP clarified the position of States Parties in relation to the scope and application of Article 63(1) of the Statute’.³⁶

This reading of the Rules, as an instrument which ‘clarifies’ the Statute, seems to be in contradiction with the explanatory note attached to the Rules at the moment of their adoption in 2002, which clearly underlines that the Rules are simply an instrument for the application of the Statute to which they are subordinated in all cases. By adopting rules ‘clarifying’ the Statute, the States Parties are simply avoiding the cumbersome process established by those states in Article 121 of the Statute for amendments to the Statute. Such a process requires ratification of those amendments by seven-eighths of the States Parties, whereas the adoption of Rules only requires the a two-thirds majority of States Parties to the Statute and therefore allows governments to avoid the process of ratification, which most often means national parliament control and significant delays.

It seems that, less than 12 years after the adoption of the Rules and the commitment expressed by states at that time to defend the integrity and supremacy of the Statute, neither the States Parties nor the ICC judges have respected or enforced the Statute supremacy over the Rules.

Originally, however, as a consequence of the hierarchy between the Statute and the Rules strongly underlined by the ASP at the moment of the adoption of the Rules in 2002, Pre-Trial Chamber I, in its decision issued on 17 January 2006,³⁷ stated that:

³² This could already raise serious concerns. In this regard, the ECHR has repeatedly stated that: ‘The principle of the rule of law and the notion of fair trial enshrined in Article 6 (art 6) preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute.’ See *Stran Greek Refineries and Stratis Andreadis v Greece* App no 13427/87 (ECtHR, 9 December 1994) para. 49; see also *Zielinski et al. v France* App no 24846/94 and 34165/96 to 34173/96 (ECtHR, 28 October 1999) para. 57. This issue was apparently not discussed before Trial Chamber V(A): see Reasons for the Decision on Excusal from Presence at Trial under Rule 134quater, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1186, TC V(A), ICC, 18 February 2014.

³³ Defence Request pursuant to Art 63(1) of the Rome Statute and Rule 134quater of the Rules of Procedure and Evidence to Excuse Mr William Samoei Ruto from Attendance at Trial, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1124, ICC, 16 December 2013.

³⁴ See B Broomhall (n 31).

³⁵ Reasons for the Decision on Excusal from Presence at Trial under Rule 134quater, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1186, TC V(A), ICC, 18 February 2014, para. 53.

³⁶ Ibid., para. 56.

³⁷ Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *Situation in the Democratic Republic of the Congo*, ICC-01/04-101-tEN-Corr, PTC I, ICC, 17 January 2006, para. 47.

With regard to the Prosecutor's argument pertaining to rule 92 of the Rules of Procedure and Evidence, the Chamber must point out that, pursuant to article 51, paragraph 5 of the Statute, the Rules of Procedure and Evidence is an instrument that is subordinate to the Statute. It follows that a provision of the Rules cannot be interpreted in such a way as to narrow the scope of an article of the Statute.

With regard to the binding character of the Rules for the judges, in accordance with Article 21(1)(a) of the Statute, the ICC jurisprudence seems to no longer follow the original strict respect for those Rules: at times, ICC Chambers have either disregarded the Rules or adopted procedures not foreseen in those Rules.

Indeed, Trial Chamber V has established in 2012³⁸ a system of victims' participation in the proceedings which does not follow what is established in Rules 89 to 93 of the Rules. In its decision, the Chamber referred to Article 68(3) of the Statute as the legal basis to develop a distinct model for victims' participation, disregarding what the States Parties agreed in the Rules. Although the Chamber refers also to Article 51(5) of the Statute, which indeed allows a Chamber to set aside a rule if it is in contradiction with the Statute, the Chamber does not come to the conclusion in its decision that Rules 89 to 93 are in contradiction with the Statute, but simply that the system of victims' participation in the proceedings established in the Rules is not the most appropriate in the case the Chamber is dealing with. The Chamber is here clearly disregarding Article 21(1)(a) of the Statute, which obliges the judges to apply the Rules, subject to the sole exception of finding those Rules either in contradiction with the Statute or with internationally recognized human rights, a conclusion which was not reached by Trial Chamber V.

In addition to setting aside rules without proper justification, recent jurisprudence shows that Trial Chambers have used the 'flexibility' which they have found in the Statute, especially in Article 64, by adopting the 'procedures' felt to be most appropriate by the bench in order to properly manage the trial, even if such procedures were not foreseen in the Statute or Rules:

Article 64 of the Statute grants the Chamber flexibility in managing the trial. Its formulation makes it clear that the Statute is neither an exhaustive nor a rigid instrument, especially on purely procedural matters such as witness preparation, and that silence on a particular procedural issue does not necessarily imply that it is forbidden. Article 64 is formulated so as to give judges a significant degree of discretion concerning the procedures they adopt in this respect, as long as the rights of the accused are respected and due regard is given to the protection of witnesses and victims.³⁹

Different examples may be given in this regard. Trial Chambers have generally requested the Prosecutor to present a post-confirmation document containing the charges which is referred to as an 'updated document containing the charges',⁴⁰

³⁸ Decision on Victims' Representation and Participation, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-460, TC V, ICC, 3 October 2012, para. 29.

³⁹ Decision on Witness Preparation, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-524, TC V, ICC, 2 January 2013, para. 27.

⁴⁰ Order for the Prosecution to File an Amended Document Containing the Charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1548, TC I, ICC, 9 December 2008;

whereas neither the Statute nor the Rules provide for such a document to be presented by the prosecutor after the confirmation of charges. To the contrary, Article 61(7) of the Statute is rather clear in stating that the accused person is to be committed to trial on the charges as confirmed, which indicates that the decision on the confirmation of charges issued by the Pre-Trial Chamber is the basis for the trial, with no further document containing the charges being foreseen in the Statute or the Rules. More recently, Trial Chamber V(A) has also accepted the possibility of a ‘no case to answer motion’ while recognizing that such a procedure was not contemplated by the Statute or the Rules.⁴¹

It seems, therefore, that the original principled approach for a strict respect of the Statute and the Rules is slowly fading away in favour of a more ‘flexible approach’. However, such an approach obviously provides less ‘procedural certainty’ to the parties, which have to adapt to the procedural framework established by each Trial Chamber. This was probably not the result intended by the drafters of the Statute and the Rules, especially through the adoption of Article 21 of the Statute.

The last of the three main legal texts, the Elements of Crimes,⁴² does certainly constitute a particular text in the trilogy contained in Article 21(1)(a). In order to understand their exact status before the Court, one has to refer to Article 9 of the Statute where it is explained that the Elements of Crimes (although they must be applied by the Court) are not binding upon it, but are meant to be of assistance to the Court in the interpretation and application of Articles 6, 7, and 8. Indeed, the way in which the Elements of Crimes have been drafted and adopted by the ASP evidently differs from the drafting of the Statute and the Rules, especially through the presence of extensive footnotes in the text. Pre-Trial Chambers have, however, made extensive reference to Elements of Crimes⁴³ and have, for example, requested the parties to strictly apply them when preparing their in-depth analysis charts of the evidence submitted to the Chamber.⁴⁴

The exact relationship between the Elements of Crimes and the Statute, which was a controversial issue during the negotiations of those texts, has also been controversial in the jurisprudence of the Court. In the decision issued together with the first

see also oral order issued by Trial Chamber III, Transcript, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-T-14-ENG ET WT, TC III, ICC, 7 October 2009, 13, lines 5–10; see also Order for the Prosecution to File an Updated Document Containing the Charges, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-439, TC V, ICC, 5 July 2012.

⁴¹ Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on ‘No case to Answer’ Motions), *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1134, TC V(A), ICC, 3 June 2014, paras 10–18.

⁴² Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002 (ICC-ASP/1/3), Part II-B.

⁴³ Decision on the Confirmation of the Charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-803-tEN, PTC I, ICC, 29 January 2007, paras 205 and 240; Decision on the Prosecution Application under Art 58(7) of the Statute, *Harun and Kushayb, Situation in Darfur, Sudan*, ICC-02/05-01/07-1, PTC I, ICC, 27 April 2007, paras 29 and 43.

⁴⁴ Decision on the Submission of an Updated, Consolidated Version of the In-Depth Analysis Chart of Incriminatory Evidence, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-232, PTC III, ICC, 10 November 2008, see the structure of the model chart annexed to that decision.

warrant of arrest against Omar Hassan Al-Bashir,⁴⁵ the majority of Pre-Trial Chamber I concluded that the Elements of Crimes must be applied ‘unless the competent Chamber finds an irreconcilable contradiction’ between the Elements on the one hand, and the Statute on the other.⁴⁶ In case such contradiction would be found, the Statute should prevail according to the majority, as indicated by Article 9(3) of the Statute. This position is justified, according to the majority, by:

the object and purpose of article 9(1) of the Statute, which consists of furthering the *nullum crimen sine lege* principle embraced in article 22 of the Statute, by providing a priori legal certainty on the content of the definition of the crimes provided for in the Statute. In the majority’s view, had the application of the Elements of crimes been fully discretionary for the competent Chamber, the safeguards provided for by the article 22 *nullum crimen sine lege* principle would be significantly eroded.⁴⁷

This last affirmation by the majority is rather strange, as it seems to suggest that the elaborate definitions of the crimes contained in Articles 6, 7, and 8 of the Statute actually do not comply with the principle *nullum crimen sine lege*. As stressed in the dissenting opinion, the ‘legal definitions of the crimes are espoused in the Statute alone’.⁴⁸ The position of the majority is indeed difficult to reconcile with the role entrusted to the Elements of Crimes in Article 9(1) of the Statute, which is to ‘assist’ the Court in its interpretation and application of the Statute. The *travaux préparatoires* indicate that this was meant to establish the non-binding nature of this particular instrument as indicated earlier, and as stressed also in the dissenting opinion of Judge Usacka.⁴⁹

18.2.1.2 The supplementary legal texts

In addition to the three texts explicitly mentioned in Article 21(1)(a), the Statute and the Rules, as first sources of law before the ICC, refer to other texts which play an important role in the jurisprudence of the Court, such as the Regulations of the Court,⁵⁰ the Regulations of the Registry,⁵¹ the Code of Professional Conduct for Counsel,⁵² the Regulations of the Trust Fund for Victims,⁵³ and the Regulations of the Office of the prosecutor.⁵⁴ Those texts indicate clearly that the Regulations of the Registry are subject

⁴⁵ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al-Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-3, PTC I, ICC, 4 March 2009, see in particular paras 126 to 133 for the Majority’s Decision and paras 16 to 18 for the Separate and Partly Dissenting Opinion of Judge Anita Ušacka.

⁴⁶ *Ibid.*, majority decision, para. 128. ⁴⁷ *Ibid.*, para. 131.

⁴⁸ See Separate and Partly Dissenting Opinion of Judge Anita Ušacka (n 45) para. 18.

⁴⁹ H Von Hebel, ‘The Making of the Elements of Crimes’ in R Lee (ed.), *The International Criminal Court Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers 2001) 8; see also Separate and Partly Dissenting Opinion of Judge Anita Ušacka (n 45) para. 17.

⁵⁰ ICC Regulations of the Court.

⁵¹ Regulations of the Registry, ICC-BD/03-03-13, 6 March 2006 (Approved by the Presidency), as amended on 25 September 2006 and 4 December 2013 (‘ICC Regulations of the Registry’).

⁵² Code of Professional Conduct for Counsel, ICC-ASP/4/Res 1, 2 December 2005 (Third Plenary Meeting of the ASP).

⁵³ Regulations of the Trust Fund for Victims, ICC-ASP/4/Res 3, 3 December 2005 (Fourth Plenary Meeting of the ASP).

⁵⁴ Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, 23 April 2008 (‘ICC Regulations of the OTP’).

to the Regulations of the Court,⁵⁵ which are in turn subject to the Rules,⁵⁶ which are subject to the Statute as explained previously. The Regulations of the OTP also indicate that they are subject to the Statute, the Rules, and the Regulations of the Court.⁵⁷ The legal system established by the Statute is therefore already a beautiful pyramid, composed of at least four different layers which represent a sum of almost 800 articles, rules, and regulations. This means of course (as noted by the ICC Appeals Chamber)⁵⁸ that the Regulations of the Court, for example, are subject to the Rome Statute. The same applies obviously to the Regulations of the Registry, which are at the bottom of the pyramid.

The Code of Professional Conduct for Counsel does not indicate its exact position within this complex hierarchy. The ICC Appeals Chamber has stated that this ‘Code is a part of the Court’s applicable law under Article 21(1)(a) of the Statute, which requires the Court to apply, in the first place, its Statute, Elements of Crimes and Rules of Procedure and Evidence’.⁵⁹ This is because Rule 8 of the Rules mandates the drawing-up of such a Code.

The Code of Professional Conduct for Counsel, however, affirms clearly its primacy towards national law in its Article 4:

Where there is any inconsistency between this Code and any other code of ethics or professional responsibility which counsel are bound to honour, the terms of this Code shall prevail in respect of the practice and professional ethics of counsel when practicing before the Court.

Unlike the Regulations of the Court or the Regulations of the Registry, the text of the Regulations of the Trust Fund for Victims does not contain any reference concerning its placement in the pyramid. The ICC Appeals Chamber has applied those Regulations ‘in conjunction’ with the Statute and Rules, without clarifying where they should fit in the beautiful pyramid.⁶⁰

18.2.2 The case law of the ICC

According to Article 21(2) of the Statute, the ICC may apply its own case law, but is not bound to do so. The paragraph does not make any difference between the jurisprudence of the Pre-Trial, Trial, or Appeals Chambers of the Court.

⁵⁵ Regulation 1 ICC Regulations of the Registry.

⁵⁶ Regulation 1 ICC Regulations of the Court; for an example in the jurisprudence of the Court, see Decision on Defence request on the suspension of time limits during judicial recess, *L Gbagbo, Situation in the Republic of Côte d’Ivoire*, ICC-02/11-01/11-585, PTC I, ICC, 27 December 2013, para. 7.

⁵⁷ See Regulation 1 ICC Regulations of the OTP.

⁵⁸ Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled ‘Décision sur la Demande de Mise en Liberté Provisoire de Thomas Lubanga Dyilo’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-824, AC, ICC, 13 February 2007, para. 43.

⁵⁹ Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber II Dated 20 July 2011 Entitled ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence’, *Muthaura et al., Situation in the Republic of Kenya*, ICC-01/09-02/11-365, AC, ICC, 10 November 2011, para. 48.

⁶⁰ Decision on the Admissibility of the Appeals Against Trial Chamber I’s ‘Decision Establishing the Principles and Procedures to be Applied to Reparations’ and Directions on the Further Conduct of Proceedings, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2593, AC, ICC, 14 December 2012, paras 52–7.

Existing case law was applied very soon in the jurisprudence of the ICC. On 28 October 2005⁶¹ Pre-Trial Chamber II, noting Article 21(2) of the Statute, made reference to a decision issued by Pre-Trial Chamber I on 9 March 2005 concerning the necessity for the participants to abide by procedural remedies provided for in the Statute.

On 31 March 2006 Pre-Trial Chamber I⁶² decided to follow the principles established by Pre-Trial Chamber II concerning the interpretation of Article 82(1)(d) of the Statute:

Article 21 (2) of the Statute allows the Court to apply principles and rules of law as interpreted in its previous decisions. Accordingly, in the opinion of the Chamber, the principles set out in the Decision of Pre-Trial Chamber II should be applied here.

Article 21(2) leaves a lot of discretion to the ICC concerning the use of its case law and it seems that ICC Chambers have used such discretion: indeed, some Chambers have heavily relied on their own case law⁶³; the case law of the Appeals Chamber⁶⁴ does not seem to be placed on a higher level than the case law of other Chambers of the Court, which is in line with the wording of Article 21(2) which refers to the Court and does not give a particular weight to the jurisprudence of the Appeals Chamber. This will certainly produce some instability in the ICC jurisprudence for the next few decades, as Chambers are not bound by their previous case law. Moreover, the frequent modification of their composition, taking into consideration that judges shall hold office for a term of nine years and are not eligible for re-election,⁶⁵ may provoke important changes in the jurisprudence in all ICC Chambers, including the Appeals Chamber. As a matter of fact, the present Appeals Chamber will dramatically change its composition in March 2015, as four out of five judges composing the Appeals Chamber are leaving the Court at that time.

However, it may be interesting for a Court whose Statute is so difficult to amend⁶⁶ and may remain substantially unchanged for a long time to have more flexibility as far as the evolution of its case law is concerned.

Recent jurisprudence tends to further demonstrate that Chambers do not feel bound by the jurisprudence of other Chambers. Even more interesting to note, Chambers have deviated from previous jurisprudence either explicitly or implicitly, simply ignoring the jurisprudence of other Chambers. As an example, Trial Chamber V has

⁶¹ Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes From the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, *Kony et al., Situation in Uganda*, ICC-02/04-01/05-60, PTC II, ICC, 28 October 2005.

⁶² Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *Situation in the Democratic Republic of the Congo*, ICC-01/04-135-tENG, PTC I, ICC, 31 March 2006, para. 18.

⁶³ Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 toa/0337/07 and a/0001/08, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-357, PTC I, ICC, 2 April 2008.

⁶⁴ Decision on Application for Leave to Appeal by the Defence of Mathieu Ngudjolo Chui against the Decision on Joinder, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-384, PTC I, ICC, 9 April 2008.

⁶⁵ See Art 36(9)(a) ICC Statute.

⁶⁶ See Art 121 ICC Statute.

allowed witness preparation at trial, deviating clearly and explicitly from the jurisprudence of Trial Chambers I, II, and III, even going so far as noting that Trial Chamber I had prohibited witness preparation by ‘relying heavily on Article 21’.⁶⁷

On other occasions, Chambers have deviated from previous jurisprudence without mentioning previous decisions by other Chambers; this was the case, for example, with regard to the legal basis used to reach the conclusion that States Parties had an obligation to arrest and surrender Omar Al Bashir notwithstanding his position as sitting head of a State not Party to the Statute.⁶⁸ This was criticized by the doctrine, as, according to one author, Article 21(2) ‘certainly does not mean that the Court can change its jurisprudence without even clarifying the reasons why’.⁶⁹ Actually, this is what Article 21(2) at least allows: a Chamber may totally disregard the jurisprudence of other Chambers, either explaining why it does so or without even uttering a word about previous jurisprudence.

One area where the jurisprudence of the Court has been particularly unstable and divergent is in relation to victims both with regard, to a certain extent, to the criteria under Rule 85 of the Rules to admit them to participate in the proceedings⁷⁰ and with regard to their procedural rights.⁷¹

Article 21(2) has been interpreted by ICC Chambers as a source of law which can be used without resorting to other sources of law. As an example, once the ICC Appeals Chamber established that the procedural remedy of a ‘stay of the proceedings’, although not foreseen in the Statute or Rules,⁷² could be used by ICC Chambers under some specific conditions,⁷³ other Chambers have applied such a procedural remedy by referring to ‘principles’ established in the ‘Court’s previous jurisprudence’.⁷⁴ This could of course be easily criticized, as it would suffice that one Chamber establishes

⁶⁷ Decision on Witness Preparation, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-588, TC V, ICC, 2 January 2013, see para. 30 and note 57.

⁶⁸ Compare, Decision Pursuant to Art 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, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-139, PTC I, ICC, 12 December 2011; with, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-195, PTC II, ICC, 9 April 2014.

⁶⁹ See P Gaeta, ‘Guest Post: The ICC Changes its Mind on the Immunity from Arrest of President Al Bashir, But It Is Wrong Again’ (*Opinio Juris*, 23 April 2014) <<http://opiniojuris.org/2014/04/23/guest-post-icc-changes-mind-immunity-arrest-president-al-bashir-wrong/>> accessed 25 August 2014.

⁷⁰ See T Bachvarova, ‘Victims’ Eligibility before the International Criminal Court in Historical and Comparative Context’ (2011) 11 *International Criminal Law Review* 665.

⁷¹ See G Bitti, ‘Les Droits Procéduraux des Victimes Devant la Cour Pénale Internationale’ (2011) 44 *Criminologie* 63.

⁷² This is not to criticize the decision taken by the Appeals Chamber, which correctly based its decision to create such a new procedural remedy on Art 21(3) ICC Statute.

⁷³ Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled ‘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’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1486, AC, ICC, 21 October 2008, para. 77.

⁷⁴ Decision on Defence Application for a Permanent Stay of the Proceedings Due to Abuse of Process, *Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-868-Red, TC V(B), ICC, 5 December 2013, para. 14.

a ‘principle’ on a dubious legal basis in order to allow other Chambers to apply such a principle on the basis of Article 21(2) of the Statute. In this sense, ICC Chambers should not simply apply previous jurisprudence without analysing what was the legal basis used to establish such a jurisprudence.

18.3 External Sources of Law

Article 21 of the Statute refers to two very different bodies of external sources of law. Article 21(1)(b) and (c) refer to different formal sources of law as subsidiary sources of law to be applied by the Court. Article 21(3) refers to a material source of law, namely ‘internationally recognized human rights’, which seem to enjoy a superior status before the Court.

18.3.1 Subsidiary sources of law

Article 21(1) refers to two different formal sources of law: the applicable treaties and principles and rules of international law, mentioned in paragraph 1(b) on the one hand, and the general principles of law, mentioned in paragraph 1(c) on the other.

Those two sources of law are, however, subsidiary to the internal sources mentioned in paragraph 1(a), namely the Statute, the Elements of Crimes, and the Rules. They are also precisely ranked: paragraph 1(b) is a second source of law whereas paragraph 1(c) is a third source of law.⁷⁵

Indeed, in accordance with Article 21(1)(b), the Court shall apply, in the second instance, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict. No hierarchy is indicated between the ‘applicable treaties’ and the ‘principles and rules of international law’.

Failing that, in accordance with Article 21(1)(c), the Court shall apply general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

The Appeals Chamber has, however, ruled that the application of these second or third sources of law is subject to the same condition: the existence of a gap in the Statute.⁷⁶

⁷⁵ Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Art 19 (2) (a) of the Statute of 3 October 2006, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-772, AC, ICC, 14 December 2006, para. 34.

⁷⁶ Id.

The first decision in this respect is in fact the first decision issued by the ICC Appeals Chamber, which shows that the issue of applicable law has been crucial for the development of the ICC jurisprudence from the very beginning. Much remains to be decided in this respect.

On 24 April 2006 the prosecutor presented to the Appeals Chamber an application entitled ‘Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal’. The application was indeed nothing less than ‘extraordinary’. Nothing in the Statute provides for the possibility to appeal a decision denying leave to appeal. According to the prosecutor, this was simply a lacuna in the law established by the Statute and the Rules, which could be remedied by resorting to the general principles of law referred to in Article 21(1)(c) of the Statute.

The existence of a gap in the Statute was analysed by the Appeals Chamber in its decision issued on 13 July 2006⁷⁷ concerning the Prosecutor’s application for extraordinary review. In order to do so, the Appeals Chamber had to interpret the Statute and in doing so stated the obvious, which is that the Statute is a treaty and that its interpretation is to be governed by the VCLT,⁷⁸ more specifically, Articles 31 and 32 of that convention.

The Appeals Chamber, analysing the text of Article 82(1)(d) of the Statute and more generally the entire Part VIII of the Statute dealing with appeal and revision, decided that the Statute defines exhaustively the right to appeal against decisions of Pre-Trial and Trial Chambers and that there is no gap in the regime of interlocutory appeals established by the Statute. This was, according to the Appeals Chamber, confirmed by the *travaux préparatoires* and by the fact that a proposal by a state to provide for an appeal against a refusal of leave to appeal was rejected. The Appeals Chamber then concluded:

The inexorable inference is that the Statute defines exhaustively the right to appeal against decisions of first instance courts, namely decisions of the Pre-Trial or Trial Chambers. No gap is noticeable in the Statute with regard to the power claimed in the sense of an objective not being given effect to by its provisions. The lacuna postulated by the Prosecutor is nonexistent.⁷⁹

Therefore, a gap in the Statute may be defined as an ‘objective’ which could be inferred from the context or the object and purpose of the Statute, an objective which would not be given effect by the express provisions of the Statute or the Rules, thus obliging the judge to resort to the second or third source of law—in that order—to give effect to that objective. In short, the subsidiary sources of law described in Article 21(1)(b) or (c) cannot be used just to add other procedural features to those already provided for in the Statute and the Rules. In this sense, we saw, already in the first

⁷⁷ Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, AC, ICC, 13 July 2006, paras 33–42.

⁷⁸ VCLT (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁷⁹ Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, AC, ICC, 13 July 2006, paras 33–42.

years of the Court, continuity in the jurisprudence of the ICC concerning the respect for the Statute and the Rules, as was already decided by both Pre-Trial Chamber I and Pre-Trial Chamber II in their decisions issued in March and October 2005 concerning the ‘Prosecutor’s positions’.

From that position of the jurisprudence, it was possible to infer that the interpretation of the different ICC Chambers of the Court was going in the direction of restricting the application of both Article 21(1)(b) and (c), in order to give full effect to the superiority of the Statute and the Rules regarding the procedural framework of the Court—a result certainly intended by the states when drafting the Statute and the Rules.

The decision by the Appeals Chamber has been a clear affirmation that the external sources of law described in Article 21(1)(b) and(c) were subsidiary sources of law and not additional sources of law. They would therefore only be applied when a gap arose in the application of the Statute or the Rules which had to be filled by subsidiary sources of law in order to give effect to the provisions of the Statute or the Rules.

Of course, this means that the application of sources of law before the ICC is to be much less flexible than it had been before the ICTY or the ICTR. But this is certainly the result that states intended when they drafted a very precise Statute of 128 articles and very precise Rules comprised initially of 225 rules.

However, even if there is a gap in the Statute or the Rules, it may not be easy to find a ‘principle or rule of international law’ or ‘general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with the Statute and with international law and internationally recognized norms and standards’. What is to be understood by ‘applicable treaties and principles and rules of international law’ under Article 21(1)(b), has not been addressed by the Appeals Chamber in its decision of 14 December 2006⁸⁰ because there was no noticeable gap in the Statute or the Rules.

The most exciting issue in relation to Article 21(1)(b) has been the relevance of the jurisprudence of the ad hoc Tribunals in the context of ICC proceedings. This topic is an ongoing and vivid matter of discussion before the ICC, since participants have tended to refer to the jurisprudence of both ad hoc Tribunals constantly in their submissions to the ICC. The jurisprudence of these Tribunals, however, is not as such part of the applicable law under Article 21 of the Statute, although the proceedings and jurisprudence of these Tribunals have had a considerable degree of attraction for participants in ICC proceedings.

The popularity of the jurisprudence of the ad hoc Tribunals may be explained by two reasons. First, it is easier to rely on a system which has been working for 20 years instead of contributing to the development of a new system, which appears both more complex and more controversial because it combines elements of the civil law and the common-law

⁸⁰ Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Art 19 (2) (a) of the Statute of 3 October 2006, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-772, AC, ICC, 14 December 2006, para. 34.

traditions (as opposed to the ad hoc Tribunals which were initially essentially relying on the common-law tradition). Second, many of the people who have been recruited by the ICC had previously worked at the ad hoc Tribunals for years and became acquainted with their practices. These persons are naturally inclined to import rules of the system of the ad hoc Tribunals to the ICC. The application of the jurisprudence and practices of the ad hoc Tribunals before the ICC is thus both a sociological and a legal problem.

Indeed, if the ICC was only meant to follow the Statute, Rules, and jurisprudence of the ad hoc Tribunals, it would be difficult to justify why states have negotiated the ICC Statute and Rules for so many years when they could have just referred to the Statute and Rules of the ad hoc Tribunals. Obviously, states wanted to establish a different system for the ICC. In addition, one may notice that, contrary to the Statute of the SCSL, the Statute makes no reference to the jurisprudence of the ad hoc Tribunals.⁸¹

This important issue was first dealt with by Pre-Trial Chamber II in its decision issued on 28 October 2005, which responded to the argument concerning the relevance of the jurisprudence of the ad hoc Tribunals for the ICC in the following way:

As to the relevance of the case law of the ad hoc tribunals, the matter must be assessed against the provisions governing the law applicable before the Court. Article 21, paragraph 1, of the Statute mandates the Court to apply its Statute, Elements of Crimes and Rules of Procedure and Evidence ‘in the first place’ and only ‘in the second place’ and ‘where appropriate’, ‘applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflicts’. Accordingly, the rules and practice of other jurisdictions, whether national or international, are not as such ‘applicable law’ before the Court beyond the scope of article 21 of the Statute. More specifically, the law and practice of the ad hoc tribunals, which the Prosecutor refers to, cannot *per se* form a sufficient basis for importing into the court’s procedural framework remedies other than those enshrined in the Statute.⁸²

This problem was once again addressed in a decision issued by Pre-Trial Chamber I on 8 November 2006 regarding the contested practice of ‘witness proofing’.⁸³ Indeed, the prosecutor asserted that the practice of witness proofing was a widely accepted practice in international criminal law, thus referring, albeit implicitly, to Article 21(1)(b).

To support his submission, the prosecutor mentioned two decisions of the ICTY and one decision of the SCSL. In fact, according to the Chamber, only one of the three decisions mentioned by the prosecutor expressly authorized the practice of witness proofing and therefore the Chamber concluded that the prosecution assertion that the practice of witness proofing was a widely accepted practice in international criminal law was unsupported.

⁸¹ By contrast, see Art 20(3) of the SCSL Statute which states: ‘The Judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda.’

⁸² Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes in the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, Kony et al., *Situation in Uganda*, ICC-02/04-01/05-60, PTC II, ICC, 28 October 2005, para. 19.

⁸³ Decision on the Practices of Witness Familiarization and Witness Proofing, Lubanga, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-679, PTC I, ICC, 8 November 2006, paras 28–34.

The question which should have been answered first is to what extent ‘practices in international criminal law’ may be seen as ‘principles and rules of international law’ under Article 21(1)(b) of the Statute. Thus far, only one Trial Chamber has made reference to the ‘general practice in the administration of international criminal justice’⁸⁴ or ‘customary international criminal procedural law’:

Rule 54 common to ICTR and ICTY Rules is a general template that is repeatedly seen in identical or varying formulations in the procedural laws of the Special Court for Sierra Leone, the Special Tribunal for Lebanon and Extraordinary Chambers in the Courts of Cambodia. The result of these repeated procedural laws is inescapably the crystallisation of customary international criminal procedural law, which recognises that a trial chamber of an international criminal court may subpoena a witness to appear for testimony.⁸⁵

However, it seems doubtful that the concept of ‘international criminal practice’ exists in reality. ‘International criminal proceedings’ are widely fragmented as a result of the unprecedented development of international or internationalized criminal Tribunals which follow very different approaches as far as criminal procedural law is concerned. For example, if one takes a closer look at the issue of the participation of victims in criminal proceedings, one may already observe at least three different types of approaches: (i) the practice of the ICTY, the ICTR, and the SCSL is closely based on the common law model which traditionally does not provide at all for the participation of victims in the proceedings; (ii) the Khmer Rouge Tribunal⁸⁶ follows the civil law model which allows victims to participate in the proceedings as full parties; and, finally, (iii), somewhere between those two approaches are the ICC⁸⁷ and the Lebanon Tribunal⁸⁸ which allow for the participation of victims in proceedings but with a somewhat undefined status. ‘International criminal practice’ has become as diverse as national criminal practice and is thus at the moment, and has certainly for a long time been, a ‘mirage’ in international law. It is obvious that with the adoption of a very precise (and different from those of the ad hoc Tribunals) Statute and very precise Rules, states wanted to move away from the Rules adopted by the ad hoc Tribunals. The reference to those Rules as constituting ‘customary international criminal procedural law’ is not only misplaced but also in complete contradiction with what Article 21 dictates to the ICC judges.

This is reflected in the position of Trial Chamber 1,⁸⁹ which was also confronted with the issue of witness proofing at the request of the ICC prosecutor. Trial Chamber I noted:

43. Turning to the practices of international criminal tribunals and courts, the prosecution submitted that the practice of witness proofing is here permissible,

⁸⁴ Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on ‘No Case to Answer’ motions), *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1334, TC V(A), ICC, 3 June 2014, para. 17.

⁸⁵ Decision on Prosecutor’s Application for Witness Summonses and Resulting Request for State Party Cooperation, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1274-Corr2, TC V(A), ICC, 17 April 2014, para. 91.

⁸⁶ See Internal Rules for the Extraordinary Chambers in the Courts of Cambodia, 12 June 2007, especially Rule 23 on ‘Civil Party Action by Victims’.

⁸⁷ See Arts 15(3), 19(3), and 68(3) ICC Statute and Rules 50, 59, and 89 to 93 ICC RPE.

⁸⁸ Art 17 of the Statute of the Special Tribunal for Lebanon is a copy of Art 68(3) of the ICC Statute.

⁸⁹ Decision Regarding the Practices Used to Prepare and Familiarize Witnesses for Giving Testimony at Trial, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-/04-01/06-1049, TC I, ICC, 30 November 2007.

endorsed and well established. The Trial Chamber notes, as has been established by recent jurisprudence from the International Criminal Tribunals of the former Yugoslavia and Rwanda, that witness proofing, in the sense advocated by the prosecution in the present case, is being commonly utilized at the ad hoc Tribunals.

44. However, this precedent is in no sense binding on the Trial Chamber at this Court. Article 21 of the Statute requires the Chamber to apply first the Statute, Elements of Crimes and Rules of the ICC. Thereafter, if ICC legislation is not definitive on the issue, the Trial Chamber should apply, where appropriate principles and rules of international law. In the instant case, the issue before the Chamber is procedural in nature. While this would not, *ipso facto*, prevent all procedural issues from scrutiny under Article 21(1)(b), the Chamber does not consider the procedural rules and jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis.
45. The ICC Statute has, through important advances, created a procedural framework which differs markedly from the ad hoc tribunals, such as, for example, in the requirement in the Statute that the prosecution should investigate exculpatory as well as incriminatory evidence, for which the Statute and the Rules of the ad hoc tribunals do not provide. Also, the Statute seemingly permits greater intervention by the Bench, as well as introducing the unique element of victim participation. Therefore, the Statute moves away from the procedural regime of the ad hoc tribunals, introducing additional and novel elements to aid the process of establishing the truth. Thus, the procedure of preparation of witnesses before trial is not easily transferable into the system of law created by the ICC Statute and Rules. Therefore, while acknowledging the importance of considering the practice and jurisprudence of the ad hoc tribunals, the Chamber is not persuaded that the application of the ad hoc procedures, in the context of preparation of witnesses for trial, is appropriate.

If ICC Chambers have been generally cautious with regard to the rules and jurisprudence of the ad hoc Tribunals as far as procedural law is concerned, a slightly different picture prevails in the area of substantive criminal law. For example, Pre-Trial Chamber I found that neither the Statute nor the Elements of Crimes provide for a definition of an international armed conflict.⁹⁰ In reaching a conclusion on this issue, the Chamber relied on the jurisprudence of the ICTY Appeals Chamber on the basis of Article 21(1)(b). The same was done in respect of the definition of an armed conflict not of an international character.⁹¹ The same methodology was also used to determine the necessary nexus between the armed conflict

⁹⁰ Decision on the Confirmation of the Charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-803-tEN, PTC I, ICC, 29 January 2007, paras 205–11.

⁹¹ Ibid., para. 233; see also Decision Pursuant to Art 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, ICC, 15 June 2009, para. 229.

and the alleged war crimes concerned.⁹² But Pre-Trial I refused to adopt the jurisprudence of the ICTY on modes of liability, especially the concept of ‘joint criminal enterprise’, taking into consideration the specific wording of Article 25(3) of the Statute.⁹³

Turning now to the source of law described in Article 21(1)(c), what is to be understood by ‘general principles of law’? In its decision dated 13 July 2006,⁹⁴ the Appeals Chamber did not try to provide an interpretation of all the conditions set up by this paragraph. In his elaborate application to the Appeals Chamber, the Prosecutor sought to demonstrate that there was a general principle of law to the effect that any decision of a first instance court could be appealed, especially a decision disallowing an appeal to a higher court. The Prosecutor referred to 14 countries from the civil law system, four countries from the common law system, and three countries from the Islamic law system.

The Appeals Chamber dismissed the prosecutor’s submission in its decision issued on 13 July 2006 on the basis that ‘nothing in the nature of a general principle of law exists or is universally adopted entailing the review of decisions of hierarchically subordinate courts disallowing or not permitting an appeal’.⁹⁵

In its decision, the Appeals Chamber did not define what is to be understood by ‘general principles of law derived by the Court from national laws of legal systems of the world’. It may be difficult to ever find such a principle in the field of criminal procedural law, as the laws vary considerably from one country to another even within the same legal system. The same is certainly true for substantive criminal law, including modes of liability, where there is also a ‘radical fragmentation’ of national legal systems.⁹⁶

But even if such a principle existed, it would be difficult to apply it before an international criminal court since the structure of courts in a state is fundamentally different from the structure of an international court. Indeed, in its 13 July 2006 Decision, the ICC Appeals Chamber noted that:

The Pre-Trial and Trial Chambers of the International Criminal Court are in no way inferior courts in the sense that inferior courts are perceived and classified in England and Wales. Hence, any comparison between them and inferior courts under English law is misleading.⁹⁷

⁹² Decision on the Confirmation of the Charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-803-tEN, PTC I, ICC, 29 January 2007, para. 287.

⁹³ Ibid., paras 322–41.

⁹⁴ Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, AC, ICC, 13 July 2006.

⁹⁵ Ibid., para. 32.

⁹⁶ Concurring Opinion of Judge Christine Van den Wyngaert, Judgment pursuant to Art 74 of the Statute, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-4, TC II, ICC, 19 December 2012, para. 17.

⁹⁷ Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, AC, ICC, 13 July 2006, para. 30.

Very recently however, a Trial Chamber⁹⁸ has referred to Article 21(1)(c) to conclude that ICC Chambers were in an ‘analogous position as a domestic criminal court’:

On the question of whether an ICC Trial Chamber may compel the appearance of a witness, not only do general principles of international law—including those derived from national laws, pursuant to article 21(1)(c) of the Rome Statute—offer a basis to place an ICC Trial Chamber in an analogous position as a domestic criminal court.

Such an affirmation is rather strange, as certainly the drafters of the Statute were not willing to place the ICC in an analogous position to national courts. Indeed, national courts often may order police forces to enforce their decisions, something which was clearly denied to the ICC by states negotiating and adopting the Statute. Therefore, the fact that generally national courts have such a power cannot be used *against* the clear wording of the Statute to establish such a power for the ICC in accordance with Article 21(1)(c). Such a source of law can only be used, as explained earlier, if there is a gap in the Statute and not, as stated by a Trial Chamber, to ‘augment’ the provisions of the Statute.⁹⁹ Indeed, as noted in the dissenting opinion¹⁰⁰ to this decision:

The concept of ‘implied powers’ cannot apply in this case. The Court shall exercise its functions and powers ‘as provided for in the Statute’ and this provision ‘is directed against an expansion of the Court’s powers beyond the Statute’. In the case at hand, there is no lacuna in the Statute, as States Parties have clearly agreed that in matters of cooperation, only voluntary appearances of witnesses shall be facilitated. It also strikes me as particularly difficult to rely on the implied powers doctrine in a context where the drafters of the Statute have demonstrated a deliberate intent to limit the Court’s authority.

The issue of the existence of a ‘general principle of law’ was raised again in the context of witness proofing. The Prosecutor invoked Article 21(1)(c) in order to establish the existence of a general principle of law concerning the practice of witness proofing. Trial Chamber I rejected this argument on the ground that the Prosecutor had only referred to countries from the common law tradition in his submission. The Chamber noted:

However, the Trial Chamber does not consider that a general principle of law allowing the substantive preparation of witnesses prior to testimony can be derived from national legal systems worldwide, pursuant to Article 21 (1) (c) of the Statute. Although this practice is accepted to an extent in two legal systems, both of which are founded upon common law traditions, this does not provide a sufficient basis for any conclusion that a general principle based on established practice of national legal systems exists. The Trial Chamber notes that the Prosecution’s submission with regard to national jurisprudence did not include any citations from the Romano-Germanic legal system.¹⁰¹

⁹⁸ Decision on Prosecutor’s Application for Witness Summonses and Resulting Request for State Party Cooperation, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1274-Corr2, TC V(A), ICC, 17 April 2014, para. 65.

⁹⁹ *Ibid.*, para. 91.

¹⁰⁰ Dissenting Opinion of Judge Herrera Carbuccia on the ‘Decision on Prosecutor’s Application for Witness Summonses and Resulting Request for State Party Cooperation’, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1274-Anx, TC V(A), ICC, 29 April 2014, para. 21.

¹⁰¹ Decision Regarding the Practices Used to Prepare and Familiarize Witnesses for Giving Testimony at Trial, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-/04-01/06-1049, TC I, ICC, 30 November 2007.

The fact that the parties could not rely on solely a few national legal systems in order to establish a ‘general principle of law’ has been recently reaffirmed by the ICC Appeals Chamber, therefore avoiding at the ICC a jurisprudence analogous to the one developed at the ICTY and ICTR where national jurisprudence from Australia and/or the United States of America was sufficient to establish the existence of ‘customary international law’ and therefore ‘applicable law’ before those tribunals. This was just a technique to ensure complete common law domination in the law applied by those tribunals. However, this was certainly not acceptable for a permanent international criminal court for most of the delegations at the Rome Conference, which explains, at least partially, both the precision in the drafting of the Statute and the existence of its Article 21.

Fortunately, at the ICC, the Appeals Chamber has very recently again reminded the Prosecutor that case law from the United States of America was not applicable in light of the clear wording of Article 21(1).¹⁰² It seems, however, difficult for the ICC Prosecutor to understand properly Article 21 of the Statute and therefore to avoid excessive reliance on the case law from common law jurisdictions. Previously, in 2011, the ICC Appeals Chamber reminded the Prosecutor that the Court had its own legal framework:

This Court has its own legal framework governing the issues that arise in this appeal, as set out above. This cannot be replaced by the practice of other courts and tribunals in the present circumstances. In this context, the Appeals Chamber notes that the Prosecutor does not explain his reliance upon case law from just one domestic jurisdiction (the United States). It is not argued that article 21 (1) (c) of the Statute is applicable in the current circumstances, nor that the case law presented should be interpreted as founding a general principle of law ‘derived by the Court from national laws of legal systems of the world’ within the meaning of that article. The Appeals Chamber therefore does not find that case law to be of assistance in resolving the issues before it in the present appeal.¹⁰³

This finding shows once again that the external sources of law mentioned in Article 21(1)(b) and (c) of the Statute should be of limited use before the ICC and indeed have been of limited use apart from some very isolated jurisprudence. The most important source of law (in addition to the Statute and the Rules) should be Article 21(3) of the Statute, i.e. ‘internationally recognized human rights’.

18.3.2 ‘Internationally recognized human rights’ as source of law before the ICC

Long before the first jurisprudence of the ICC, some authors pointed out the consequences which Article 21(3) may have on the application of the Statute:

While the original intention behind this paragraph may have been to limit the court’s powers in the application and interpretation of the relevant law, it could have the

¹⁰² Decision on the Prosecutor’s Appeal against the ‘Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1123, AC, ICC, 13 December 2013, see paras 28 and 32.

¹⁰³ Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber II Dated 20 July 2011 Entitled ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence’, *Muthaura et al., Situation in the Republic of Kenya*, ICC-01/09-01/11-365, AC, ICC, 10 November 2011, para. 62.

opposite effect and broaden the competence of the court on these matters. It provides a standard against which all the law applied by the court should be tested. This is a sweeping language, which, as drafted, could apply to all three categories in Article 21.¹⁰⁴

Article 21(3) raises two interesting issues. The first question is what is to be understood by ‘internationally recognized human rights’? The second one concerns the role of ‘internationally recognized human rights’, i.e. the meaning of ‘application and interpretation’. If the ICC jurisprudence has been quite audacious with regard to the first question, it has been much more hesitant with regard to the second one.

18.3.2.1 What are ‘internationally recognized human rights’?

The Statute does not provide any definition concerning the scope of this material source of law. This provision may encompass a quite broad category of rights, especially if compared with the language used in Article 7(1)(h) of the Statute which uses the expression ‘grounds that are universally recognized as impermissible under international law’. Thus, ‘internationally recognized human rights’ represent arguably a broader category of human rights which do not have to reach the level of ‘universal recognition’.¹⁰⁵ Of course, the interesting question then arises: is regional recognition sufficient?

It seems that the jurisprudence of the Court has given a broad meaning to ‘internationally recognized human rights’. It has relied heavily, for example, on the jurisprudence of regional courts such as the European Court of Human Rights and the IACtHR, and also on resolutions adopted by the UN General Assembly (‘GA’).

In this respect, it may even be said that the jurisprudence of the Court has been audacious. In a decision issued on 10 March 2009,¹⁰⁶ the ICC Presidency, with regard to the right of detainees to receive visits at the expense of the Court, referred to ‘international human rights jurisprudence and instruments’ such as resolutions of the UNGA and the Economic and Social Council, but also recommendations from the Council of Europe, concluding observations from the UN Committee Against Torture, the Standards of the European Committee for the Prevention of Torture, a report of the European Commissioner for Human Rights, and concluding observations of the UN Human Rights Committee. The Presidency in its decision also accepted what could be seen as an ‘emerging internationally recognized human right’ when recalling the ‘growing international support for positive action on the part of detaining authorities in order to enable detained persons to exercise their rights’. There is therefore a huge

¹⁰⁴ M Arsanjani, ‘The Rome Statute of the International Criminal Court’ (1999) 93 *American Journal of International Law* 22.

¹⁰⁵ G Edwards, ‘International Human Rights Challenges to the New International Criminal Court: the Search and Seizure Right to Privacy’ (2001) 26 *Yale Journal of International Law* 323.

¹⁰⁶ Decision on ‘Mr Mathieu Ngudjolo’s Complaint under Regulation 221(1) of the *Regulations of the Registry* against the Registrar’s Decision of 18 November 2008’, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-RoR-217-02/08-8, Presidency, ICC, 10 March 2009, paras 27–9 and 40.

probability that Article 21(3) will become the way for the ICC to make the Statute, which is almost impossible to amend or adapt to the evolution of international law as far as international human rights are concerned. It is to be hoped that what has been qualified as a ‘chink in the armour of the Rome Statute’¹⁰⁷ will be used effectively by the ICC judges.

As an example of the use of ‘internationally recognized human rights’ in the ICC jurisprudence, when defining ‘harm suffered’ in Rule 85 of the Rules in the context of the participation of victims, Pre-Trial Chamber I¹⁰⁸ referred to the ‘Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’ adopted by the UNGA on 29 November 1985¹⁰⁹ and to the ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law’ (‘Basic Principles’) adopted by the UNGA on 16 December 2005.¹¹⁰ Likewise, Trial Chamber I¹¹¹ referred to the Basic Principles as an authoritative source for the definition of victims. The same resolutions were referred to by Pre-Trial Chamber II with regard to the rights of victims in the context of the situation in the Republic of Kenya.¹¹²

But it is certainly the jurisprudence of the European Court of Human Rights which has been referred to most, as has, to a lesser extent, the jurisprudence of the IACtHR. Pre-Trial Chamber I made reference to the case law of both courts in relation to the right to liberty:

11. In the Chamber’s view, the review which article 58 (1) of the Statute requires that the Chamber undertake consistent with the fact that, apart from other collateral consequences of being the subject of a case before the Court, the fundamental right of the relevant person to his liberty is at stake. Accordingly, the Chamber emphasizes that it will not take any decision limiting such a right on the basis of applications where key factual allegations are fully unsupported.
12. As required by Article 21 (3) of the Statute, the Chamber considers this to be the only interpretation consistent with the ‘reasonable suspicion’ standard provided for in article 5 (1) (c) of the European Convention of Human Rights and the interpretation of the Inter-American Court of Human Rights in respect of the fundamental right of any person to liberty under article 7 of the American Convention on Human Rights.¹¹³

¹⁰⁷ See also Powderly, Chapter 19, this volume.

¹⁰⁸ Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *Situation in the Democratic Republic of the Congo*, ICC-01/04-101-tEN-Corr, PTC I, ICC, 17 January 2006, para. 115.

¹⁰⁹ Annex to UNGA Res 40/34 (29 November 1985) UN Doc A/RES/40/34.

¹¹⁰ Annex to UNGA Res A/RES/60/147 (16 December 2005) UN Doc A/RES/60/147.

¹¹¹ Decision on Victims’ Participation, *Lubanga, Situation in the Democratic Republic of the Congo*, 18 January 2008, ICC-01/04-01/06-1119, TC I, ICC, 18 January 2008, para. 35.

¹¹² Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-24, PTC II, ICC, 3 November 2010, para. 5.

¹¹³ Decision on the Prosecutor’s Application for a Warrant of Arrest, Art 58, *Lubanga, Situation in the Democratic Republic of the Congo*, PTC I, ICC, 10 February 2006; this decision is to be found as Annex I to the Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation

To give another example, the ICC Appeals Chamber referred to the case law of the European Court of Human Rights to underline the importance of sufficient reasoning in judicial decisions and to allow the use of anonymous witnesses in the context of the confirmation of the charges.¹¹⁴

Pre-Trial Chamber I¹¹⁵ has more recently referred to both the jurisprudence of the European Court of Human Rights, the ICTY, the ICTR, and the ECCC in order to define ‘fitness to stand trial’. It is interesting to see that the ICC Chambers have not only referred to the jurisprudence of human rights courts but also to the jurisprudence of international or internationalized criminal tribunals. What matters is not the nature of the Tribunal or Court issuing the decision, but how the substance of the international human right at stake has been defined by those international Courts. It is certainly acceptable to also refer to the jurisprudence of other international criminal Tribunals to see how international human rights have been defined by those tribunals. However, the use of their jurisprudence or rules to import into the ICC procedural framework aspects of their procedural system which has nothing to do with the ICC procedural framework is certainly not acceptable in view of Article 21 of the Statute.

18.3.2.2 The meaning of ‘interpretation and application’

The Court must ensure that the interpretation and application of the law described in Article 21 of the Statute is consistent with internationally recognized human rights, thus subordinating all formal sources of law described in Article 21, including the Statute and the Rules to internationally recognized human rights. ICC Chambers have shared different interpretations of the notions of ‘interpretation and application’.

Pre-Trial Chamber I has read ‘interpretation and application’ to mean only ‘interpretation’, thus adopting a restrictive reading of Article 21(3):

Considering that, as this Chamber has repeatedly stated, the Chamber, in determining the contours of the statutory framework provided for in the Statute, the Rules and Regulations, must, in addition to applying the general principle of interpretation set out in article 21 (3) of the Statute, look at the general principles of interpretation as set out in article 31 (1) of the Vienna Convention on the Law of Treaties, according to which ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’.¹¹⁶

of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-8-Corr, PTC I, ICC, 24 February 2006.

¹¹⁴ Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre- Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’, *Lubanga, Situation in the Democratic Republic of the Congo*, 14 December 2006, ICC-01/04-01/06-773, AC, ICC, 14 December 2006, paras 20 and 50.

¹¹⁵ Decision on the Fitness of Laurent Gbagbo to Take Part in the Proceedings before this Court, *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-286-Red, PTC I, ICC, 2 November 2012, paras 43–9.

¹¹⁶ Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, *Katanga, Situation in the Democratic Republic of the Congo*, 10 March 2008, ICC-01/04-01/07-257, PTC I, ICC, 10 March 2008.

However, in international law, a distinction must be made between the rules of interpretation of treaties as set forth in the VCLT and a material source of law, such as the one stipulated in Article 21(3), which refers to ‘internationally recognized human rights’.

The ICC Appeals Chamber has underlined the importance of the fact that, pursuant to Article 21(3) of the Statute, the applicable law must not only be interpreted, but also be applied in accordance with internationally recognized human rights. It held:

37. Breach of the right to freedom by illegal arrest or detention confers a right to compensation to the victim (see article 85 (1) of the Statute). Does the victim have any other remedy for or protection against breaches of his/her basic rights? The answer depends on the interpretation of article 21 (3) of the Statute, its compass and ambit. Article 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it including the exercise of jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights.

It appears, therefore, that ‘application’ is something different from ‘interpretation’. It implies that a certain result must be reached, whether or not it is explicitly or implicitly provided for in the law applicable in accordance with Article 21, and that such a result must be in conformity with internationally recognized human rights.

This means for the application of subsidiary sources of law such as those described in Article 21(1)(b) or (c) that a certain objective must be found in the Statute or the Rules, as primary sources of law, which is not given effect by those sources. In the context of Article 21(3), however, the objective is to be found in internationally recognized human rights. Hence, the application of the Statute, Rules, and other subsidiary sources of law set out in Article 21(1) will always have to produce a result compatible with internationally recognized human rights, even if such an objective does not appear from the application of the Statute, Rules, or subsidiary sources of law provided in Article 21(1), as interpreted in accordance with the rules of interpretation set out in Articles 31 and 32 of the VCLT adopted on 23 May 1969.

This interpretation supports the conclusion that internationally recognized human rights may constitute an additional source of law. They might, for instance, provide additional procedural remedies to participants in the proceedings which were not foreseen in the Statute or the Rules. The ICC jurisprudence goes in that direction with the creation by the ICC Appeals Chamber of a new procedural remedy, not foreseen in the Statute and Rules, i.e. the possibility for ICC Chambers to ‘stay proceedings’.¹¹⁷ Such a remedy was directly based on Article 21(3) which requires the Court to exercise

¹¹⁷ Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Art 19(2)(a) of the Statute of 3 October 2006, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-772, AC, ICC, 14 December 2006, para. 37; Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled ‘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’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1486, AC, ICC, 21 October 2008, paras 77–83; Judgment on the

its jurisdiction in accordance with internationally recognized human rights. Such a procedural remedy may oblige the ICC to renounce to exercise its jurisdiction in case of a fundamental violation of the human rights of the person prosecuted. Such a remedy is not provided for in the Statute or the Rules, which appear to limit the right of the victim of such a violation to receiving compensation in accordance with Article 85 of the Statute.

This creation of new procedural remedies by the ICC jurisprudence on the basis of Article 21(3) will certainly be very useful for persons prosecuted before the ICC and victims participating in the proceedings before the ICC. Whereas the example of the stay of the proceedings is certainly an interesting, albeit limited, new procedural remedy for persons prosecuted, internationally recognized human rights could be very useful to create new procedural remedies for victims, such as, for example, the right to challenge a decision by the prosecutor not to investigate or not to prosecute, or the absence of such a decision taken by the prosecutor within a reasonable time. In this regard, it is interesting to note that Recommendation Rec(2000)19 adopted by the Council of Europe¹¹⁸ provides for the following:

34. Interested parties of recognised or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute; such a challenge may be made, where appropriate after an hierarchical review, either by way of judicial review, or by authorising parties to engage private prosecution.

This could, therefore, become an additional procedural mechanism for judicial review, on the initiative of victims, of prosecutorial decisions not to investigate or not to prosecute, or of the excessive time taken by the Prosecutor to decide whether to initiate an investigation or a prosecution, in addition to what the Statute provides in Article 53.

According to a more controversial interpretation of Article 21(3), this provision might serve as a basis to set aside an article of the Statute which is, or which application would be, in contradiction with internationally recognized human rights.

In 2011 Trial Chamber II decided, on the basis of Article 21(3) of the Statute, that detained witnesses who were transferred to the Court by the DRC to testify in the *Katanga* and *Ngudjolo* trial could not be returned to that country, contrary to the dispositions of Article 93(7)(b) of the Statute:

As matters stand, the Chamber is unable to apply article 93(7) of the Statute in conditions which are consistent with internationally recognized human rights, as required by article 21(3) of the Statute. If the witnesses were to be returned to the DRC

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 the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2582, AC, ICC, 8 October 2010, paras 55–61.

¹¹⁸ Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System adopted by the Committee of Ministers on 6 October 2000. On the procedural rights of victims in criminal proceedings, see R Aldana-Pindell, ‘An Emerging Universality of Justiciable Victims’ Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes’ (2004) 26 *Human Rights Quarterly* 605; see also *Perez v France* App no. 47287/99 (ECtHR Grand Chamber, 12 February 2004) para. 68; see also *Blake v Guatemala* (IACtHR, 24 January 1998) para. 97.

immediately, it would become impossible for them to exercise their right to apply for asylum and they would be deprived of the fundamental right to effective remedy.¹¹⁹

This seems to be the first time where an article of the Statute was clearly set aside by a Chamber, as the application of that article would have been contrary to Article 21(3) of the Statute.

On 4 February 2013 those witnesses still detained in the Court detention centre in The Hague filed a request to be released. Trial Chamber I rejected that request, albeit only by a majority, giving an *a posteriori* explanation to its decision issued on 9 June 2011 where it decided not to apply Article 93(7)(b) in light of internationally recognized human rights:

Ultimately, in the 9 June 2011 Decision, two decisive factors were at play: the risk of the immediate violation of a fundamental norm of international customary law whose peremptoriness finds increasing recognition among States and from which no derogation is permitted (*jus cogens*) and the impossibility of applying the Statute in compliance with this norm. Otherwise stated the only means to adhere to the peremptory norm of non-refoulement was to suspend article 93(7) of the Statute temporarily and not apply it should the asylum claims succeed.¹²⁰

The reasoning adopted by Trial Chamber II raises the question of whether there are different categories of ‘internationally recognized human rights’. In such a case, according to that Chamber, only one particular category of those internationally recognized human rights, i.e. those raising to the level of ‘*jus cogens*’, would permit a Chamber to set aside an article of the Statute. Such a reasoning does not seem to be in conformity with Article 21(3) of the Statute, which only refers to one category of rights, i.e. ‘internationally recognized human rights’, with no further specification. It is also in contradiction with the jurisprudence of the Court so far, which has applied Article 21(3) of the Statute without any requirement that the rights to be applied under that category be part of ‘*jus cogens*’. This would unduly restrict the category of internationally recognized human rights to be applied by the Court. The dissenting opinion to this decision correctly raises this issue:

Furthermore, the Majority does not convincingly explain why the Court’s obligation under article 21(3) to apply article 93(7) in accordance with internationally recognized human rights sufficed to set aside the Court’s obligation to return the Detained Witnesses immediately after finishing their testimony in order to protect their fundamental right to seek asylum, but why this obligation is inapplicable in relation to the equally fundamental right not to be detained arbitrarily. This unequal treatment is especially difficult to understand in light of the fact that it would be the

¹¹⁹ Decision on an *Amicus Curiae* Application and on the ‘*Requête Tendant à Obtenir Présentations des Témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux Autorités Néerlandaises aux Fins d’Asile*’ (Arts 68 and 93(7) of the Statute), *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3003-tENG, TC II, ICC, 9 June 2011, para. 73.

¹²⁰ Decision on the Application for the Interim Release of Detained Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3405-tENG, TC II, ICC, 1 October 2013, para. 30.

exact same legal provision—i.e. article 93(7) of the Statute—that would have to be suspended in order to give effect to the Chamber’s obligations to respect fundamental human rights. In this regard, I strongly distance myself from the Majority’s suggestion that the reason why article 21(3) prevailed in the first case but not in the second is because the former human right—i.e. the right to apply for asylum and the prohibition against *non-refoulement*—is a norm of *jus cogens* from which no derogation is permitted. A lot could be said about such an argument, but I will simply note here that article 21(3) speaks of ‘internationally recognized human rights’ and is thus not limited in its application to *jus cogens* or ‘non-derogable norms’.¹²¹

As Trial Chamber II declared that it lacked competence to entertain the request for release presented by the three detained witnesses and therefore declared such request inadmissible, the three detained witnesses tried to appeal the decision under Article 82(1)(b) of the Statute, which provides for the possibility to appeal directly (without leave) a decision granting or denying release of the person being investigated or prosecuted.

The Appeals Chamber declared, by majority, the appeal inadmissible:

The Appeals Chamber considers that the Detained Witnesses’ arguments regarding article 21(3) of the Statute are misplaced. The Detained Witnesses do not identify, nor does the Appeals Chamber find, an internationally recognized human right to appeal that requires the Appeals Chamber to expand its limited subject-matter appellate jurisdiction under the Statute, beyond the scope of the powers vested in it by the States Parties.¹²²

The argument used by the Appeals Chamber to declare the appeal inadmissible is not really pertinent. What was at stake in this case was not ‘an internationally recognized human right to appeal’ but actually the right to liberty, which was clearly identified by the detained witnesses and is without doubt a very important, internationally recognized human right. This point is rightly raised in the dissenting opinion:

In my view, a narrow understanding of article 82 (1) (a) of the Statute, would, in the circumstances of this case, be irreconcilable with article 21 (3) of the Statute, according to which the Court has to apply and interpret the Statute consistently with internationally recognized human rights. This is because if the appeal were found to be inadmissible, it would become impossible for the Detained Witnesses to exercise their right to judicial review of the legality of their detention. It would be an especially peculiar result for a court such as the ICC, which is meant to provide a forum to address the most serious human rights’ violations, not to be able to address and remedy human rights violations for which it itself is responsible.¹²³

¹²¹ Dissenting Opinion of Judge Christine Van den Wyngaert, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3405-Anx, TC II, ICC, 1 October 2013, para. 6.

¹²² Decision on the Admissibility of the Appeal against the ‘Decision on the Application for the Interim Release of Detained Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350’, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3424, AC, ICC, 20 January 2014, para. 30.

¹²³ Dissenting Opinion of Judge Sang-Hyun Song, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3424-Anx, AC, ICC, 20 January 2014, para. 17.

What is even more interesting in relation to those three detained witnesses is that the Appeals Chamber issued another decision the same day,¹²⁴ also by majority, acting *proprio motu* within the context of the *Ngudjolo* case which it was seized of since the prosecutor's appeal against the decision of acquittal issued by Trial Chamber II on 18 December 2012. Basically reversing the decision issued by Trial Chamber II on 9 June 2011, the Appeals Chamber came to the conclusion that Article 93(7)(b) of the Statute could be applied in the case of the three detained witnesses in conformity with Article 21(3) of the Statute. It seems that the Appeals Chamber was concerned about the adverse consequences that Trial Chamber II's interpretation of Article 21(3) could have on the cooperation of states with the Court:

article 21(3) of the Statute requires that article 93 (7) of the Statute be applied and interpreted in conformity with internationally recognized human rights; it does not require the Court to *violate* its obligations pursuant to article 93 (7) (b) of the Statute. Furthermore, such an interpretation would seriously damage the Court's ability to enter into future cooperation agreements with States, which would undermine the Court's ability to obtain needed testimony and evidence and render it more difficult to establish the truth in the cases before it.¹²⁵

The analysis of this recent ICC jurisprudence gives a mixed picture of the way ICC Chambers are using Article 21(3) as a source of law. If they have been generous in the way to define 'internationally recognized human rights', the use of such a source, especially to set aside an article of the Statute, seems to be much more controversial.

This mixed picture about the real impact of Article 21(3) with regard to the sources of law to be applied by the ICC appears also from a rather selective use of Article 21(3) by ICC Chambers. Indeed, a closer look at ICC jurisprudence leaves the impression that although Article 21(3) mandates the Court to apply all sources of law described in Article 21 in conformity with internationally recognized human rights, sometimes references to those rights are conspicuously absent from ICC decisions.

For example, in two decisions¹²⁶ issued in the context of the situation in Kenya, Pre-Trial Chamber II denied the possibility for those who were *publicly* named in the Prosecutor's applications under Article 58 of the Statute for the issuance of summonses to appear to present observations. The reasons given by Pre-Trial Chamber II were that 'the proceedings triggered by the Prosecutor's application for a warrant of arrest or a summons to appear are to be conducted on an *ex parte* basis' and that 'under the statutory framework of the Court, there is no legal basis for a person under the Prosecutor's investigation to submit observations at the current stage of the proceedings'. While correct with regard to the wording of Article 58 of the Statute, those decisions fail to

¹²⁴ Order on the Implementation of the Cooperation Agreement between the Court and the Democratic Republic of the Congo Concluded Pursuant Art 93(7) of the Statute, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-158, AC, ICC, 20 January 2014.

¹²⁵ Ibid., para. 26.

¹²⁶ Decision on Application for Leave to Submit *Amicus Curiae* Observations, *Situation in the Republic of Kenya*, ICC-01/09-35, PTC II, ICC, 18 January 2011, para. 10; Decision on the 'Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber Relating to the Prosecutor's Application under Article 58(7)', *Situation in the Republic of Kenya*, ICC-01/09-42, PTC II, ICC, 11 February 2011, para. 6.

consider the impact of internationally recognized human rights in accordance with Article 21(3) of the Statute. Actually, those rights are not even considered and Article 21(3) is not even mentioned. However, the jurisprudence of the European Court of Human Rights with regard to when a person can be considered as ‘charged’¹²⁷ and therefore when the rights under Article 6 of the European Convention of Human Rights start to apply, could have led the Chamber to a different result, applying Article 58 of the Statute in conformity with internationally recognized human rights as mandated by Article 21(3) of the Statute.

The same is true of a decision taken by Pre-Trial Chamber I¹²⁸ with regard to a request by victims in the situation in the DRC to receive information from the Prosecutor about the investigation in that situation into the crimes they had allegedly suffered. Pre-Trial Chamber I denied the request without even mentioning Article 21(3) or internationally recognized human rights. However, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1985, which was used by the very same Pre-Trial Chamber for the definition of harm suffered by victims in a decision issued the previous year,¹²⁹ provides in its paragraph 6(a) that victims should be informed of ‘the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information’.¹³⁰

In order to really apply in a consistent way Article 21(3), ICC Chambers should systematically in their decisions consider the compatibility of their conclusions with internationally recognized human rights. This is not done and the result is a selective application of internationally recognized human rights, a result which is not in conformity with Article 21(3) of the Statute.

It remains to be seen whether the Court will in fact use all the potential of Article 21(3), as it is doubtful that it has done so for the moment. It is, however, clear that the compatibility of certain articles of the Statute with internationally recognized human rights remains uncertain. One of these controversial articles is Article 16, which allows a political body, the UNSC, to interfere with prosecutions conducted by a judicial body, the ICC. Such interference would certainly be in breach of Article 6 of the European Convention of Human Rights, which establishes the requirement of

¹²⁷ See *Eckle v Germany* App no. 8130/79 (ECtHR, 15 July 1982) para. 73; *Foti and others v Italy* App no. 7604/76, 7719/76, 7781/77, and 7913/77 (ECtHR, 10 December 1982) para. 52; *Kravtas v Lithuania* App no. 12717/06 (ECtHR, 18 January 2011), Second Section, para. 36. The European Court of Human Rights has repeatedly stated that a person is to be considered as ‘charged’ when he or she has been officially notified that he or she would be prosecuted.

¹²⁸ Decision on the Requests of the Legal Representative for Victims VPRS 1 to VPRS 6 Regarding ‘Prosecutor’s Information on Further Investigation’, *Situation in the Republic of the Congo*, ICC-01/04-399, PTC I, ICC, 26 September 2007.

¹²⁹ Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *Situation in the Democratic Republic of the Congo*, ICC-01/04-101-tEN-Corr, PTC I, ICC, 17 January 2006, para. 115; the Chamber used paragraph 1 of that Declaration.

¹³⁰ Adopted by the UNGA on 29 November 1985, see Annex to UNGA Res 40/34 (29 November 1985) UN Doc A/RES/40/34; on the rights of victims to receive information with regard to criminal investigations concerning the crimes they have allegedly suffered, see also *MC Kerr v United Kingdom* App no. 28883/95 (ECtHR, 4 May 2001), Third Section, para. 157; *Ogur v Turkey* App no. 21594/93, (ECtHR Grand Chamber, 20 May 1999) para. 92.

an independent tribunal. It remains to be seen whether the ICC will in fact set aside a Chapter VII Resolution adopted by the SC requesting the Court not to proceed with a prosecution under Article 16. However, it is difficult to argue that such an intervention by a political body in an ongoing case before the ICC would be compatible with internationally recognized human rights.

18.4 Conclusion

While the picture which appeared from the review conducted in 2008¹³¹ of the application of Article 21 of the Statute by ICC Chambers was rather clear and seemed to be respectful of the applicable law before the ICC, the picture appears more blurred in 2014.

If the original jurisprudence of the Appeals Chamber from 2006¹³² asserting the supremacy of the Statute and Rules still stands in theory, in practice, however, several attempts, especially at the trial stage, were made in order to try to move away from the procedural framework established by the Statute and the Rules.

Such attempts should not be encouraged, as they contradict the clear willingness of the drafters of the Statute to provide procedural certainty for the participants in the proceedings before the ICC.

To leave more space for ‘judicial creativity’ outside of the procedural framework established by the Statute and the Rules would allow the judges, at their will, to reject a motion by arguing that the applicable law before the ICC does not provide for such a procedural remedy or to accept such motion by creating the remedy themselves if they find it is appropriate to do so.

It is submitted that there is no need to allow for more judicial creativity than that already foreseen in Article 21(3). One ‘chink in the armour of the Rome Statute’ is enough. This would allow the ICC Chambers to adapt the Statute and the Rules to the growing and evolving body of ‘internationally recognized human rights’ and should be encouraged. Rather than trying to import procedures from the ad hoc Tribunals or from some domestic jurisdictions in contradiction with what is mandated by Article 21, ICC Chambers should use to their full extent the possibility given to them by Article 21(3), something they are hesitant to do.

¹³¹ See G Bitti, ‘Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC’ in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden/Boston: Martinus Nijhoff 2009) 293.

¹³² See *supra* Subsidiary sources of law, the jurisprudence of the Appeals Chamber in relation to the use of subsidiary sources of law.

The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function

Reflections on Sources of Law and Interpretative Technique

*Joseph Powderly**

19.1 Introduction

The successful conclusion of the Rome Conference in July 1998 heralded a new era in which the utopia of a genuinely realizable notion of global justice was one small but significant step closer to realization. While in the context of the ad hoc Tribunals for the former Yugoslavia and Rwanda primary responsibility for the drafting of the constituent statutes was entrusted to the United Nations Office of Legal Affairs,¹ at Rome, state delegations assumed the reins for what was to prove to be a highly complex and often fraught drafting process.² With direct state involvement came the influence of competing state interests and the challenge of delicate consensus-building. Amongst the primary objectives of states at Rome was the desire to ensure, as much as possible, that the constituent statute of any future permanent ICC should be comprehensive in terms of the clear provision of positive rules in a manner akin to that of a domestic criminal code.

While states may have sought such a comprehensive code out of a genuine desire to ensure the certainty and predictability of applicable rules in full conformity with the principle of legality, this brought with it the potential added benefit (at least in the view of sceptical or cautious states) of curtailing the interpretative freedom of the bench and, by extension, their role in the progressive development of the law. It is evident from a cursory observation of the near-exhaustive nature of the definitional

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¹ See V Morris and M Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary History and Analysis* (New York: Transnational Publishers 1995); R Zacklin, 'Some Major Problems in the Drafting of the ICTY Statute' (2004) 2 *Journal of International Criminal Justice* 361; V Morris and M Scharf, *An Insider's Guide to the International Criminal Tribunal for Rwanda* (New York: Transnational Publishers 1998).

² See M C Bassiouni (ed.), *The Statute of the International Criminal Court: A Documentary History* (New York: Transnational Publishers 1998); M C Bassiouni (ed.), *The Legislative History of the International Criminal Court* (New York: Transnational Publishers 2005); M C Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of the International Criminal Court' (1999) 32 *Cornell International Law Journal* 443; R Lee (ed.), *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International 1999); J Washburn, 'Negotiation of the Rome Statute of the International Criminal Court and International Lawmaking in the 21st Century' (1999) 11 *Pace International Law Review* 361; F Benedetti and J Washburn, 'Drafting the International Criminal

parameters of the subject-matter jurisdiction of the Court (Articles 6, 7, and 8)³ that states wished to limit the space within which the bench would be required to look beyond the text of a provision in the exercise of their interpretative mandate. The logical inference to be drawn from the punctilious nature of the Rome Statute is that it represents an implied stifling of the judicial role in the continued progressive development of international criminal law, a role that has been central to the realization of the international criminal legal order.⁴ In drawing this inference, it is assumed that states wished to move international criminal adjudication away from its common law heritage, placing ever-greater emphasis on the sanctity of positive rules and a pseudo separation of powers which clearly distinguished the bench from the legislative mandate assumed by the states themselves. However, in so doing, states effectively sought to reengineer the very nature of the international criminal judicial function.

While the drafters of the Rome Statute may have intended to curtail the creative interpretative capacity of the bench, of course it does not automatically follow that such intentions would be obediently and unwaveringly honoured by the bench. Irrespective of the purported textual clarity of the instrument, the primary task of the judge with respect to the interpretation and application of the law remains undiluted. Textual clarity does not transform adjudication into a simple and entirely predictable mechanical process, however much states may wish this to be the case. The application of law is dependent on a preceding act of interpretation, since it is necessary 'to form an understanding of what the authoritative text requires in order to apply it'.⁵ Interpretation, which we might define as the process by which the meaning of a text is understood and expressed, cannot be realistically constructed as an impersonal objective process. The subjective predilections and cultural assumptions of the bench lie to a greater or lesser extent in the background of the interpretative process. On a hermeneutical level, '[t]he text is not an object entirely independent of its reader, nor its interpretation an entirely individual and subjective activity'.⁶

Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference' (1999) 5 *Global Governance* 1; P Kirsch and J Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 *The American Journal of International Law* 2; R Clark, 'Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Court's First Substantive Law Discussion in the Lubanga Dyilo Confirmation Proceedings' (2008) 19 *Criminal Law Forum* 519; P Kirsch and V Oosterveld, 'Negotiating an Institution for the Twenty-First Century: Multilateral Diplomacy and the International Criminal Court' (2000-2001) 46 *McGill Law Journal* 1141.

³ Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 ('Rome Statute').

⁴ See generally, A Zahar and G Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press 2008); S Darcy and J Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press 2010); M Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection* (Oxford: Oxford University Press 2012); L van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Leiden: Martinus Nijhoff 2005); S Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (Cambridge: Cambridge University Press 2014).

⁵ N MacCormick, 'Argumentation and Interpretation in Law' (1995) 9 *Argumentation* 467, 470.

⁶ I Johnstone, 'Treaty Interpretation: The Authority of Interpretative Communities' (1990-1) 12 *Michigan Journal of International Law* 371, 378.

Rather than engaging in a futile attempt to entirely extinguish subjectivity from the interpretative process, legal orders typically seek to balance subjectivity and objectivity through the institution of what Owen Fiss has labelled as a set of ‘disciplining rules’.⁷ These disciplining rules take on a variety of forms dependent on the legal order in question, but are generally recognizable in the traditional canons or aids to statutory construction and constitutional principles invoked by the bench in the interpretative process. While the argument can and has been made that such disciplining rules themselves require interpretation, this does not, however, render them incapable of constraining the interpretative process.⁸

Looking specifically to the international legal order, the relevant set of disciplining rules are to be found in the specific interpretative provisions included within treaty texts themselves and, more generally, in Articles 31–3 of the VCLT.⁹ Article 31(1)’s iconic wording provides that, ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’. As remarked by Jean-Marc Sorel and Valerie Boré Eveno, the text of Article 31(1) offers a compromise between ‘defenders of textual interpretation, of subjective interpretation based on the parties’ intention, and of ends-focused or teleological interpretation which attempts to extract those meanings from the text which might be intended beyond the formulation used’.¹⁰ The primary objective of Articles 31–3 is to allow the bench to adopt an interpretative approach ‘that is simultaneously obvious (the ordinary meaning of terms), logical (an *acte clair*), and effective (a useful effect).¹¹ The direct applicability of the Vienna rules in the interpretation of the statutes of the Yugoslavia and Rwanda Tribunals was accepted in the absence of a dedicated interpretative provision despite the fact that these instruments were not treaty texts *per se*.¹² However, since the ad hoc Tribunals were ostensibly tasked with the interpretation and application of a penal statute for the purposes of determining individual criminal responsibility, additional disciplining rules beyond Articles 31–3 came into play, namely, the principle of legality and norms of international human rights law.

Given the treaty status of the Rome Statute, similar concerns with respect to the direct applicability of the Vienna rules do not arise; however, questions remain as to the safety of invoking the teleological or purposive ambit of the Vienna rules in the interpretation of substantive international criminal law and related provisions of the

⁷ O Fiss, ‘Objectivity and Interpretation’ (1981–2) 34 *Stanford Law Review* 739, 744.

⁸ O Fiss, *The Law as it Could Be* (New York: New York University Press 2003) 179. See also S Fish, ‘Fish v Fiss’ (1984) 36 *Stanford Law Review* 1325.

⁹ Arts 31–3 VCLT (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (‘Vienna Convention’).

¹⁰ J-M Sorel and V Boré Eveno, ‘Article 31: General Rule of Interpretation’ in O Corten and P Klein, *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford: Oxford University Press 2011) 808.

¹¹ Ibid.

¹² See ‘Trial Chamber Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, *Tadić*, IT-94-1-T, TC, ICTY, 10 August 1995, para. 10: ‘Although the Statute of the Tribunal is a *sui generis* legal instrument and not a treaty, in interpreting its provisions and the drafter’s conception of the applicability of the jurisprudence of other courts, the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties appear relevant.’

Statute directly relevant to individual criminal responsibility.¹³ However, it seems that states were not blind to this question during the drafting process and sought to directly address it through the express inclusion of additional disciplining rules within the text of the Rome Statute itself. It is argued that these additional interpretative disciplining rules are enshrined most concretely in the provisions of Articles 21 and 22 on the applicable law and *nullum crimen sine lege* respectively. Both of these provisions insist on the prioritization of a literal or ordinary textual approach to the interpretation and application of norms of substantive international criminal law provided for in the Statute, such as the definition of crimes, modes of liability, and defences. Taken together, they can be viewed as implicitly seeking to constrain and control the freedom of the bench to engage in creative or expansive interpretation undertaken in the interests of the progressive development of the law.

The objective of this chapter is to examine the law and practice of the ICC with respect to these two provisions, with a view to determining whether or not they are effectively corseting the interpretative freedom of the bench as intended by the drafters of the Rome Statute. In considering Article 21, it is argued that it constitutes much more than a mere provision delineating the sources of applicable law, and should be viewed as implicitly endorsing a set of interpretative guidelines, dictating not only the applicable rules but also the manner, circumstances, and order in which the bench must interpret and apply them. It is suggested that Article 21 conceives of the judicial function as a mechanical and (crucially) manageable process in which the text of the statute is omniscient. However, while the textualism mandated by Article 21 is certainly to the fore in the Court's interpretative practice to date, it is nonetheless evident that it is not dogmatically adhered to, with the bench willing to exploit the chinks in Article 21's armour in order to pursue a creative interpretational approach (most typically in line with a teleological approach) when deemed necessary from a normative and policy perspective. In delineating the contours of the Court's practice with respect to Article 22, and in relation to the provision of strict construction under Article 22(2) in particular, it is suggested that while such a provision is entirely appropriate in the context of a penal statute, its application does not necessarily prohibit progressive interpretation in all circumstances.

In order to frame the parameters of the discussion of Articles 21 and 22's disciplining potential, the chapter begins in section 19.2 with a consideration of the potential negative impact of the Rome Conference's codification effort on the diverse applicable law available to the ICC bench, before looking at the import of Article 10 of the Rome Statute on the development of customary norms of international criminal law. In section 19.3 we embark on a detailed analysis of the manner in which applicable law has been identified by the ad hoc Tribunals for the former Yugoslavia and Rwanda and

¹³ L Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 *European Journal of International Law* 543; D Jacobs, 'Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories' in J d'Aspremont and J Kammerhofer (eds), *International Legal Positivism* (Cambridge: Cambridge University Press, 2014) 451–74 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046311> last accessed 18 August 2014.

the influence of Article 38 of the Statute of the ICJ on this process. In section 19.4 we turn from framing the discussion to a detailed exploration of the contours of Articles 21 and 22(2) and their potential corseting of the interpretative freedom of the bench. In so doing, the section considers issues surrounding the limits of textualism (with a specific focus in this respect on the bench's interpretation of Article 25(3)(a)), the institution of a hierarchy of sources, the role of internal and external precedent, and the overarching significance of international human rights law in providing space for progressive interpretation of the Rome Statute. Finally, in section 19.5 some conclusions are offered.

19.2 The Rome Statute as a Means of Codifying Judicial Interpretative Restraint

The codification of law is a necessary and important step in the maturation of any legal order. Legislative efforts in this area, to any observer with an interest in legal certainty and the general flourishing of the rule of law, are to be encouraged and widely supported. This rings especially true with respect to the codification of penal laws. On the eve of embarking on the epic task of drafting the Model Penal Code, its principal architect, Herbert Wechsler, reflected on the societal significance of such an undertaking:

If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.¹⁴

For Weschler, the absence of a codification effort was an indicator of 'neglect and inattention' of the legal order.¹⁵ We might say that from an international legal perspective, the importance of the development of codified rules has not gone entirely unnoticed or unaddressed.¹⁶ For instance, it is important not to forget the import of Article 13(1)(a) of the Charter of the United Nations bestowing on the General Assembly the responsibility of 'promoting international cooperation in the political field and *encouraging the progressive development of international law and its codification*'.¹⁷ Neither should we forget the fact that in giving substance to Article 13(1)(a),

¹⁴ H Wechsler, 'The Challenge of a Model Penal Code' (1952) 65 *Harvard Law Review* 1097, 1098. See also F Remington, 'The Future of the Substantive Criminal Law Codification Movement—Theoretical and Practical Concerns' (1987–8) 19 *Rutgers Law Journal* 867.

¹⁵ Wechsler (n 14) 1100.

¹⁶ See H Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Leiden: Brill 1972); R Jennings, 'The Progressive Development of International Law and its Codification' (1947) 24 *British Yearbook of International Law* 301; R Jennings, 'Judicial Legislation in International Law' (1937–8) 26 *Kentucky Law Journal* 112.

¹⁷ Art 13(1)(a) Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (emphasis added).

the General Assembly saw fit to establish the ILC (the Commission), which since 1947 has been actively engaged in ‘the promotion of the progressive development of international law and its codification’.¹⁸ The codification of customary norms offers the prospect of ‘legal clarity and certainty, systematization of the law, coherence, consistency and perhaps the reform of pre-existing deficient law’. But in general terms at least, what does codification necessarily mean? For instance, does it simply involve ‘the writing down of already existing rules of law’,¹⁹ with little or no deviation from established practice?

Conveniently, Article 15 of the Statute of the Commission provides us with some guidance: ‘“codification of international law” is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine’.²⁰ For Hersch Lauterpacht, the codification of international rules was much more than the mere addition of form to substance, but rather was critical to the preservation of the international legal order itself. Writing in 1955, he remarked that:

It is probably a fact that the absence of agreed rules partaking of a reasonable degree of certainty is a serious challenge to the legal nature of what goes by the name of international law. That circumstance alone supplies cogent proof of the justification, nay, of the urgency of the task of codification of international law. The matter is not merely one of *elegantia juris* and of a ‘better expression of international law’ in the sense that it evokes ‘a somewhat vague and distant interest of States’. Clarity and certainty are not mere embellishments of the law. They are, particularly in the international sphere, of its essence. Within the state obscurity and uncertainty of the law are a drawback (...) [T]he uncertainties, gaps, and obscurities of the law are not merely perpetuated. They feed and grow on their own evil inasmuch as they are kept alive and magnified by the conflicting and extreme assertions of the parties to disputes. The call for codification is therefore not the product of legal perfectionism. It is an imperative need of international society, and it is only on account of more pressing problems assailing its very existence that the consciousness of the urgency of codification has been relegated into the background.²¹

In the international legal context, codification necessarily implies the enumeration of accepted customary norms via the conclusion of a treaty text. Consequently, the fruits of any codification effort will be subject to the will and consensual agreement of states; ‘[t]hus, every codification of international law involves an element of innovation, meaning the difference between codification of custom and progressive

¹⁸ UNGA Res 174(II) (21 November 1947) UN Doc A/RES/174(II).

¹⁹ Jennings, ‘The Progressive Development of International Law and its Codification’ (n 16). See also K Wolfke, ‘Can Codification of International Law be Harmful?’ in J Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague: Martinus Nijhoff 1984).

²⁰ Art 15 Statute of the ILC (adopted by the General Assembly in Resolution 174(II) of 21 November 1947, as amended by Resolutions 485(V) of 12 December 1950, 984(X) of 3 December 1955, and 36/39 of 18 November 1981); see also Arts 18–24.

²¹ H Lauterpacht, ‘Codification and Development of International Law’ (1955) 49 *American Journal of International Law* 16, 20 (internal citations omitted). See also W Friedmann, ‘The United Nations and the Development of International Law’ (1969–70) 25 *International Journal* 272.

development of the law is a matter of degree'.²² In essence, should the reformatory effects of the presumed codifying effort overwhelm the acknowledged elements of the customary rule 'it becomes misleading to describe the process as one of codification at all'.²³ However, it is rare that a treaty will be entirely declaratory of custom, and it is more likely that it will include both codified and reformatory or developmental provisions.²⁴

While Lauterpacht's comment attaches in a general sense to the international legal order, it applies with particular resonance to the codification of rules of international criminal law. A narrow, rather simplistic analysis might suggest that the verve with which the international community undertook the task of codifying aspects of substantive international criminal law only really gathered momentum during the complex and often fraught negotiations at Rome. There is undoubtedly some truth to this contention; however, it ignores the codification efforts undertaken in the immediate aftermath of the Nuremberg process and the sporadic and often incomplete activities of the Commission during the period spanning 1947–98.²⁵

Amongst the principal objectives of the United Nations in the aftermath of the Nuremberg judgment was the prioritization of building on the rather creative argument that the London Charter, far from being contrary to the principle of legality, was expressive of international law existing at the time of its creation.²⁶ In this respect, we should bear in mind a number of seminal resolutions of the General Assembly, most obviously, Resolution 95(I) of 11 December 1946, which, in affirming 'the principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal', instructed the antecedent of the Commission, the Committee on the Progressive Development of International Law and its Codification, to 'treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal code, of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal'.²⁷ With the adoption of General Assembly Resolution 177(II) in 1947, responsibility for this undertaking was entrusted to the newly established Commission. Indeed, General Assembly

²² Grover (n 13) 565.

²³ J Brierly, 'The Future of Codification' (1931) 12 *British Yearbook of International Law* 1, 3—quoted in M Villiger, *Customary International Law and Treaties* (The Hague: Brill 1985) 126.

²⁴ Grover (n 13) 566.

²⁵ See generally, M C Bassiouni, 'Historical Survey: 1919–1998' in M C Bassiouni (ed.), *The Statute of the International Criminal Court: A Documentary History* (New York: Transnational Publishers 1999); M C Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1997) 10 *Harvard Human Rights Journal* 11; M C Bassiouni, 'The International Criminal Court in Historical Context' (1999) *Saint Louis-Warsaw Transatlantic Law Journal* 55; M C Bassiouni, 'The Need for an International Criminal Court in the New International World Order' (1992) 25 *Vanderbilt Journal of Transnational Law* 151; J Armstead, 'The International Criminal Court: History, Development and Status' (1998) 38 *Santa Clara Law Review* 745; H Jescheck, 'The Development of International Criminal Law after Nuremberg' in G Mettraux (ed.), *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press 2009).

²⁶ Trials of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946, vol. 1, Judgment (International Military Tribunal, Nuremberg 1947–9), reprinted in (1947) 41 *American Journal of International Law* 172, 216 ('IMT Judgment').

²⁷ UNGA Res 94(I) (11 December 1946) UN Doc A/RES/94(I).

Resolution 260(B)(III) of 1948 instructed the Commission to go a step further and ‘study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions’.²⁸ Simply stated, the necessity of codifying the jurisprudential legacy of the Nuremberg process was not ignored in the immediate aftermath of its conclusion; in fact, it was seen as essential in reifying the concept of international criminal justice against accusations of illegality and Victor’s justice, giving substance to the mantra that ‘law which is not backed by sanctions quickly loses its credibility’.²⁹

With the affirmation by the General Assembly of the principles contained in and derived from the Nuremberg process, it was felt that the substantive law of the Tribunal—most particularly that relative to individual criminal responsibility—was now beyond reproach in terms of its customary status. However, the fact that the principles were merely affirmed and not formally adopted by the General Assembly³⁰ is perhaps indicative of the unwillingness of states to move from *ex post facto* acknowledgement of the principles of law unpinning the London Charter, to prospective acceptance of rules of general, binding applicability. This conclusion is supported by the ultimate fate of the Commission’s efforts to draw up a Code of Crimes against the Peace and Security of Mankind, a process set in motion in 1947,³¹ stalled in 1954,³² resumed in 1981,³³ and ultimately concluded in 1996 with the submission of an unadopted draft Code.³⁴ It is perhaps a little unfair to criticize the Commission for its efforts, especially when we recall its conception of codification as being based on ‘extensive State practice, precedent and doctrine’.³⁵ These basic ingredients simply were not in existence at the time of the Commission’s original undertaking and the geopolitical climate was, to put it kindly, not exactly accommodating of or receptive to its efforts. Such a conclusion necessarily sets to one side the related, regular multilateral instruments concluded in the decade following the conclusion of the Nuremberg process, the most obvious being the Genocide Convention of 1948,³⁶ the Geneva Conventions of 1949,³⁷ and the Convention relating to the Status of Refugees

²⁸ UNGA Res 260(B)(III) (9 December 1948) UN Doc A/RES/260(B)(III).

²⁹ J Kellenberger, ‘Foreword’ in K Dörmann et al., *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press 2003) ix.

³⁰ UNGA Res 455(V) (12 December 1950) UN Doc A/RES/455(V) merely invited ‘the governments of Member States to furnish their observations’ on the principles codified by the Commission.

³¹ UNGA Res 177(II) (21 November 1947) UN Doc A/RES/177(II).

³² UNGA Res 897 (IX) (4 December 1954) UN Doc A/RES/897(IX).

³³ UNGA Res 36/106 (10 December 1981) UN Doc A/RES/36/106.

³⁴ See 1996 Yearbook of the International Law Commission, vol. II.

³⁵ Art 15 Statute of the ILC (n 20).

³⁶ Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

³⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

of 1951.³⁸ These instruments, while of great value and import, did not provide any meaningful movement in the direction of formalizing a permanent institutional forum for the adjudication of individual criminal responsibility. In terms of tangible outcomes, it is difficult to avoid the conclusion that the immediate effort to codify the substantive legal legacy of Nuremberg can only be viewed as being partially successful.

The limited success of the post-Nuremberg codification project can be contrasted with that of the Rome Conference. While the impetus behind the effort to establish a permanent international criminal court had been reignited in 1989, it was only really with the establishment of the ad hoc Tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 respectively that significant inroads were made towards meaningful, binding codification of international criminal rules. On one level, the 1998 Rome Conference can be viewed as a concerted effort to reaffirm, but also crucially to codify, the Nuremberg principles in the light of the now existent state practice, precedent, and doctrine brought about by the activities of the ad hoc Tribunals.³⁹ On another level, it is perhaps more persuasive to argue that far from being the primary objective of the drafters, the codification of elements of substantive international criminal law, afforded customary status by the ad hoc Tribunals, was merely a positive by-product of the Rome project. As argued by Leena Grover, it is possible to infer from the drafting history that States Parties intended 'to draft definitions of crimes in the Rome Statute which would mirror existing custom and crystallize emerging custom to the greatest extent possible, while recognizing the need to build consensus with a view to promoting universal ratification'.⁴⁰

While it is hardly surprising that by enumerating positive rules pertaining to individual criminal responsibility the Rome Statute should be viewed as a radical embodiment of the post-Westphalian legal order, it should be noted that at no point does the Statute claim the status of an international criminal code. It is fair to say that while a large percentage of the definitions of the subject-matter jurisdiction (Articles 6, 7, and 8) are generally consistent with customary standards, there are some notable deviations from custom, thereby supporting Philippe Kirsch's contention that 'the definitions of crimes in the ICC Statute were to reflect existing customary international law, and not create new law', but the end result 'contain[s] uneasy technical solutions, awkward formulations, [and] difficult compromises that fully satisfied no one'.⁴¹ As the inclusion of Article 10 makes clear, it was the understanding of States Parties that the inclusion of certain norms in the Rome Statute does not prejudice the continued

³⁸ Convention relating to the Status of Refugees (signed 18 July 1951, entered into force 22 April 1954) 189 UNTS 137.

³⁹ See Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years' (n 25).

⁴⁰ Grover (n 13) 567.

⁴¹ P Kirsch, 'Customary International Humanitarian Law, its Enforcement, and the Role of the International Criminal Court' in L Maybee and B Chakka (eds), *Custom as a Source of International Humanitarian Law: Proceedings of the Conference to Mark the Publication of the ICRC Study 'Customary International Humanitarian Law'* (Geneva: International Committee of the Red Cross 2006) 79–80. See also R Cryer, 'Of Custom, Treaties, Scholars and the Gavel: The Influence of International Tribunals on the ICRC Customary Law Study' (2006) 11 *Journal of Conflict and Security Law* 239.

development of international criminal norms in the practice of other domestic and international fora.⁴² This appears to acknowledge or indeed mandate that customary norms of international criminal law may very well continue to develop outside of the context of the Rome Statute, but such developments may not necessarily be directly applicable before the Court. In this respect, Kriangsak Kittichaisaree has remarked that Article 10 ‘was intended to emphasize that the inclusion or non-inclusion in the ICC Statute of certain norms would not prejudice the positions of states on the customary law status of such norms, would not prejudice existing norms or further developments of international law, and would not authorize the ICC to apply existing or new norms omitted deliberately in the ICC Statute’.⁴³

Therefore, unlike the ad hoc Tribunals, customary international law is *not* considered a direct, primary source of law at the ICC. In this regard, Grover comments that, ‘there was perhaps a fear that if custom were recognized as the direct source of law for the Court’s jurisdiction, the perceived creativity of ICTY and ICTR judges might repeat itself with judges of the Court’.⁴⁴ The likely impact of Article 10 on the continued progressive development of international criminal law can be viewed in both positive and negative terms.⁴⁵ On the one hand, it acknowledges that the Rome Statute is not determinative of the entire international criminal legal order and that rules will continue to develop in accordance with the needs and wishes of the international community; however, in so doing, it implies that such developments will not be automatically applicable before the Court unless a pre-existing basis is found in the primary internal law of the Statute to which customary international law can act merely as an interpretational aid. In short, the bench is to interpret and directly apply the text of the Rome Statute, not emerging or crystallizing norms of customary international law. It is clear, therefore, that, like codification, the prospect of the significant fragmentation of the international criminal order was not something of genuine concern to the drafters. Their aim, it would appear, was to create a self-contained regime.⁴⁶

The import of the foregoing analysis is that while it is tempting to declare the codifying effect of the Rome Statute, this has only a partial basis in reality. The lengths to which the drafters went in defining the constituent law was not indicative of a precise codification effort but rather an attempt to lend certainty, predictability, and formality to the substantive law of the Court via consensual rule drafting. The object of this chapter is to consider whether or not, in their efforts to lend certainty and predictability to the law, the drafters of the Rome Statute in fact went too far. To put it more provocatively, the chapter will assess whether rigid positivism and quasi-formalist

⁴² Art 10 Rome Statute: ‘Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.’

⁴³ K Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press 2001) 52.

⁴⁴ Grover (n 13) 571. See also W Schabas, ‘Customary Law or “Judge-Made” Law: Judicial Creativity at the UN Criminal Tribunals’ in J Doria et al., *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blyshchenko* (Leiden: Martinus Nijhoff 2009).

⁴⁵ See L Wexler Sadat, ‘Custom, Codification and Some Thoughts About the Relationship between the Two: Article 10 of the ICC Statute’ (1999) 49 *De Paul Law Review* 909.

⁴⁶ R Cryer, ‘Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources’ (2009) 12 *New Criminal Law Review* 390, 394.

conceptions of law are prioritized over any real appreciation or desire for the continued progressive development of the law via creative judicial interpretation.

The basis for such an accusation lies most obviously in the punctilious drafting of the entire document; so punctilious in fact, that it has invited accusations to the effect that it represents a fundamental mistrust in the competence and independence of the judiciary tasked with its interpretation and application.⁴⁷ When looking at the provisions addressing the Court's subject-matter jurisdiction, it is clear even to the lay reader why such inferences can be (and very often are) drawn. Take Article 8's treatment of war crimes as a natural, if slightly jaded, example, although it could attach with equal validity to the Statute's treatment of genocide under Article 6 and crimes against humanity under Article 7. Here the Rome Statute defines in 1,594 words what the constitutive statutes of the ad hoc Tribunals took 239 words to define and what the London Charter dispensed with in only 73 words.⁴⁸ This tally refers only to the wording of Article 8 in the Statute itself and does not take into account the Elements of Crimes document, prepared by the Preparatory Commission, with the express aim of providing the 'judges with an additional instrument which might help them with their interpretation of the definitions of crimes contained in the Statute'.⁴⁹ Whereas in the context of the ad hoc Tribunals for the former Yugoslavia and Rwanda there is a logical tendency to reflect on the 'undernourished'⁵⁰ state of their constituent statutes and the creative onus this placed on the judiciary, in the context of the Rome Statute we are very much dealing with an acute case of legislative obesity. Where the ad hoc Tribunal statutes allowed for and placed faith in the exercise of the creative interpretative judicial function, the Rome Statute appears, at least on the face of it, to encourage judicial sedentariness in the mechanical interpretation and application of rules.⁵¹

19.3 Identifying the Applicable Law—From Nuremberg to the Ad Hoc Tribunals

That a treaty establishing an international court should include a provision on the applicable law is hardly unusual; indeed, as Alain Pellet has said, such efforts are 'as old (or as recent!) as that of creating such courts themselves'.⁵² However, in an international criminal context, Article 21 is truly enigmatic, with only the vaguest genealogical connections

⁴⁷ D Hunt, 'The International Criminal Court: High Hopes, "Creative Ambiguity" and an Unfortunate Mistrust in International Judges' (2004) 2 *Journal of International Criminal Justice* 56. See also A Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *European Journal of International Law* 144, 163.

⁴⁸ A point well made by W Schabas, in W Schabas, 'Follow-Up to Rome: Preparing for Entry into Force of the International Criminal Court Statute' (1999) 20 *Human Rights Law Journal* 157, 163.

⁴⁹ Kellenberger, 'Foreword' in Dörmann et al. (n 29) x.

⁵⁰ See J Powderly, 'Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?' in Darcy and Powderly (n 4) 17.

⁵¹ See P Kirsch and V Oosterveld, 'The Post-Rome Conference Preparatory Commission in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press 2002) 97: '[A] majority of delegations expressed concern about imposing upon the judges a "checklist" approach to deciding cases.'

⁵² A Pellet, 'Applicable Law' in Cassese et al. (n 51) 1051.

with the antecedent statutes of the ad hoc Tribunals or the London Charter, which contain no equivalent provision. As noted by Robert Jackson, in drafting the London Charter, ‘substantive law could be gleaned from scattered sources’, but ‘there was no codification of applicable law’.⁵³ Looking at Article 6’s enunciation of the IMT’s subject-matter jurisdiction, we encounter some oblique references in paragraph (a) to ‘war in violation of international treaties, agreements or assurances’,⁵⁴ and in paragraph (b) to ‘violations of the laws or customs of war’, but nothing further.⁵⁵ In the judgment itself, the closest we come to a statement on the applicable law involves a restatement of the subject-matter jurisdiction followed by the bald determination that ‘[t]hese provisions are binding upon the Tribunal as the law to be applied to the case’.⁵⁶

In the context of the Yugoslav and Rwanda Tribunals, the most fruitful expression of the applicable law is perhaps unsurprisingly to be found not in the Statute, but rather in the interpretative commentaries/reports of the Secretary-General. The Secretary-General merely provided with respect to the Yugoslav Tribunal that it ‘should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise’.⁵⁷ The Report provides further that domestic criminal law is relevant only in consideration of sentence.⁵⁸ In terms of the Rwanda Tribunal, the Secretary-General’s remarks are similar but allow for greater flexibility, especially with respect to the applicability of Additional Protocol II to the Geneva Conventions, stating that in drafting the Statute, the Security Council

...elected to take a more expansive approach to the choice of applicable law than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime.⁵⁹

This constituted the barest semblance of interpretative guidance and was of questionable binding authority.⁶⁰

In essence, the Secretary-General merely provided that the Statutes were to be interpreted in the light of norms of customary international law and a non-exhaustive list

⁵³ R Jackson, ‘Nuremberg in Retrospect: Legal Answers to International Lawlessness’ (1949) 25 *American Bar Association Journal* 813.

⁵⁴ Art 6(a) Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945 in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 15 November 1945–1 October 1946* Vol. 1 (International Military Tribunal, Nuremberg 1947–9) (‘Statute of the IMT’).

⁵⁵ *Ibid.*, Art 6(b). ⁵⁶ IMT Judgment (n 26) 175.

⁵⁷ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704 (3 May 1993) para. 34.

⁵⁸ *Ibid.*, para. 35.

⁵⁹ Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc S/1995/134 (13 February 1995) para. 12.

⁶⁰ The Report of the Secretary-General has been identified as providing for a general interpretative methodology. See Judgment, *Kupreškić et al.*, IT-95-16-T, TC, ICTY, 14 January 2000, fn. 797 (‘Kupreškić Trial Judgment’).

of conventional instruments.⁶¹ A significant responsibility was therefore vested in the bench to determine the applicable law. Judge Mohamed Shahabuddeen would seem to reject any accusation of ambiguity, implying instead that the Secretary-General's statements provided sufficient legal certainty and guidance to the bench, stating that '[s]ince the criminal law was involved, it was important that there should not be the least doubt about what laws were applicable'.⁶² There was certainly little doubt, at least in his mind, as to the proper invocation of second-order applicable rules:

In effect, giving to the texts a fair meaning, the Tribunal has to apply customary international law. The Tribunal must be able to trace the origins of any law which it applies to customary international law; otherwise, it is applying an unauthorized source of law. The Tribunal is not therefore to apply a treaty which has not matured into customary law.⁶³

We know that the laconic nature of the ad hoc Statutes coupled with the free rein of the bench in the identification of the applicable law, particularly customary international law, accounts in no small way for the flourishing of the judicial role in the progressive development of international criminal law.⁶⁴ In the absence of an express provision detailing the applicable law, the judicial function at the ad hoc Tribunals undoubtedly involved not only the interpretation and application of the constituent statutes, but also the discovery, or rather excavation, of additional applicable rules to be invoked when confronting *lacunae* or textual ambiguities.⁶⁵ However, the extent of such freedom carries an additional burden, in terms of the establishment of decisional legitimacy and the pre-empting of accusations of judicial arbitrariness.⁶⁶ Commenting on this point, William Schabas has remarked that '[i]t does not appear obvious that the judges of the ad hoc Tribunals are even entitled to go beyond their statutes for sources of applicable law, given the silence of the statutes in this respect'.⁶⁷ The absence of an express provision detailing the applicable law will naturally encourage certain quarters of the interpretative community to proclaim that the spectre of judicial activism is in our midst.

It is fair to say that Shahabuddeen's apparent confidence in the clarity and completeness of the Secretary-General's guidance was not shared by all of his colleagues on the bench, resulting in the invocation of some creative, but also some analogous, reasoning. A kindred spirit, however, was to be found in the form of the late Antonio Cassese, who in his sibylline dissenting opinion in the *Erdemović* Sentencing Appeals

⁶¹ Report of the Secretary-General, 3 May 1993 (n 57) para. 34.

⁶² Shahabuddeen (n 4) 52. ⁶³ Ibid.

⁶⁴ See Powderly, 'Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?' (n 50).

⁶⁵ See B Schlüter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Leiden: Martinus Nijhoff 2010).

⁶⁶ See J Powderly, 'Distinguishing Creativity from Activism: International Criminal Law and the "Legitimacy" of Judicial Development of the Law' in W Schabas et al., *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Farnham, Surrey: Ashgate 2013).

⁶⁷ W Schabas, *The United Nations International Criminal Tribunals for the Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press 2007) 93.

Judgment invoked a teleological approach in reasoning that the identification of applicable rules must be determined, ‘by virtue of a contemplation of the unique object and purpose of an international criminal court, and the constraints to which such a court is subject’.⁶⁸ For Cassese, the parameters of the applicable law were clearly set out:

This International Tribunal is called upon to apply international law, in particular our Statute and principles and rules of international humanitarian law and international criminal law. Our International Tribunal is a court of law; it is bound only by international law. It should therefore refrain from engaging in meta-legal analysis. In addition, it should refrain from relying exclusively on notions, policy considerations or the philosophical underpinnings of common-law countries, while disregarding those of civil-law countries or other systems of law. What is even more important, a policy-oriented approach in the area of criminal law runs contrary to the fundamental customary principle *nullum crimen sine lege*. On the strength of international principles and rules my conclusions... differ widely from those of the majority of the Appeals Chamber.⁶⁹

Such reasoning provides little in the way of a judicial roadmap for the identification of positive applicable rules beyond the confines of individual reasoning. The relatively meagre guidance provided by both the Secretary-General and the Statute was highlighted in the early stages of the *Tadić* case (with particular relevance to the question of the persuasive value of extant jurisprudence from related international courts and tribunals):

The Report of the Secretary-General gives little guidance regarding the applicable sources of law in construing and applying the Statute and Rules of the International Tribunal. Although the Report of the Secretary-General states that many of the provisions in the Statute are formulations based upon provisions found in existing international instruments, it does not indicate the relevance of the interpretation given to these provisions by other international judicial bodies. This lack of guidance is particularly troubling because of the unique character of the International Tribunal.⁷⁰

This comment from the Trial Chamber reveals an appreciable sense of judicial frustration that a clear provision on the applicable law was not included in the Statute given the infancy of the international criminal legal order and the questionable value, or indeed persuasive legitimacy, of existing relevant jurisprudence. The Trial Chamber made its concerns plain:

It is the first international criminal tribunal ever to be established by the United Nations. Its only recent predecessors, the International Military Tribunals at

⁶⁸ Sentencing Appeals Judgment—Separate and Dissenting Opinion of Judge Cassese, *Erdemović*, IT-96-22-A, AC, ICTY, 7 October 1997, para. 10.

⁶⁹ *Ibid.*, para. 11(ii).

⁷⁰ Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, *Tadić* (n 12) para. 19. Para. 17: ‘A fundamental issue raised by this motion is whether, in interpreting and applying the Statute and Rules of the International Tribunal, the Trial Chamber is bound by interpretations of other international judicial bodies or whether it is at liberty to adapt those rulings to its own context.’

Nuremberg and Tokyo, were created in very different circumstances and were based on moral and judicial principles of a fundamentally different nature. In addition, the Nuremberg and Tokyo Tribunals were multinational but not international in the strict sense as only the victors were represented. By contrast, the International Tribunal is not the organ of a group of States; it is an organ of the whole international community.⁷¹

It is perhaps unsurprising, therefore, that refuge was sought by more positively inclined members of the bench in the seminal provisions of Article 38(1) of the Statute of the ICJ. By way of reminder, Article 38(1) provides as follows:

Article 38(1). The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

International custom, as evidence of a general principle accepted as law;

The general principles of law recognized by civilized nations;

Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁷²

Following on from Cassese's comments, in their joint separate opinion in *Erdemović*, Judges Gabriel Kirk McDonald and Lal Chand Vohrah relied on Article 38 as enumerating an exhaustive list of the sources of international law.⁷³ Adopting it as their reasoning template, they then proceeded to apply it systematically in their efforts to determine whether or not there existed a rule or general principle of law allowing for duress to be invoked as a defence to charges of crimes against humanity or war crimes.⁷⁴ While proclaiming the exhaustiveness of Article 38⁷⁵ is something of an overstatement, it is clear that, before the ad hoc Tribunals, Article 38 was considered an unwritten provision of the constituent statutes.⁷⁶ Indeed, on occasion it has been determined that it 'must be regarded as declaratory of customary international law'.⁷⁷ This seems a rather peculiar determination; quite how Article 38 could be considered a norm of customary international law, given its exclusive presence in the Statute of the ICJ and the potential consequences of applying such a label, is lost somewhat on the present author.

⁷¹ Ibid., para. 19

⁷² Art 38(1) Statute of the ICJ (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 933 ('ICJ Statute').

⁷³ Sentencing Appeals Judgment—Joint Separate Opinion of Judge McDonald and Judge Vohrah, *Erdemović*, IT-96-22-A, AC, ICTY, 7 October 1997, para. 40: 'The sources of international law are generally considered to be exhaustively listed in Article 38 of the Statute of the International Court of Justice.'

⁷⁴ Ibid., para. 39.

⁷⁵ A sentiment shared by Judge David Hunt, see Appeal Judgment—Declaration of Judge David Hunt, *Alexsovski*, IT-95-14/1-A, AC, ICTY, 24 March 2000, fn 364: 'Article 38 is generally regarded as a complete statement of the sources of international law.'

⁷⁶ See Schabas (n 67) 93.

⁷⁷ *Kupreškić* Trial Judgment (n 60) para. 540.

It is certainly reasonable to argue that the sources of law provided for under paragraphs (a) to (d) are the accepted sources of international law, but this does not necessarily lead to the conclusion that that which constitutes the applicable law before the ICJ is of general applicability to all international courts and tribunals. This could potentially lead to the absurd situation where a constituent statute of an international court or tribunal that expressly excludes a source of law provided for under Article 38 could be declared contrary to customary international law. The situation is not helped by rather simplistic doctrinal statements such as ‘the source of law in international criminal proceedings is not the national criminal law of any State, but the law emanating from the sources of law listed in Article 38(1)’.⁷⁸ Of course, the rationale for declaring the customary nature of Article 38 most likely lies in a desire to justify analogous reasoning. After all, Article 38 is one of the most recognizable provisions of the Statute of the ICJ, even if, as Pellet posits, ‘[i]t can be seen as a superfluous and useless clause, at best a clumsy and outmoded attempt to define international law, at worst a corset paralyzing the world’s highest judicial body’.⁷⁹

Its invocation can often adopt a syllogistic tone, as illustrated in the *Mucić* Trial Judgment:

It is obvious that the subject matter jurisdiction of the Tribunal is constituted by provisions of international law. It follows, therefore, that recourse would be had to the various sources of international law as listed in Article 38 of the Statute of the ICJ, namely international conventions, custom, and general principles of law, as well as other subsidiary sources such as decisions and the writings of jurists.⁸⁰

The constituent statutes of the ad hoc Tribunals are founded on principles of international law, the sources of international law are provided for in Article 38 of the Statute of the ICJ, hence Article 38 is applicable before the ad hoc Tribunals. There is a tendency here to treat Article 38 as a ‘kind of revealed truth rigidly defining the frontiers of international law and even the Court’s function’.⁸¹ Indeed, there is even an argument to be made that such a provision is entirely unnecessary, since as Pellet remarks, ‘it does no more than state the obvious and, most probably, had Article 38 not existed, the Court itself would have in any event complied with its requirements’.⁸²

It seems obvious that the true value of Article 38 is to be found not in the content or revelatory character of its provisions, but simply on account of its existence as a positive rule of international law. It ascribes no particular hierarchy of sources (paragraph (d) excepted), nor does it provide for any particular interpretative methodology. Its primary virtue is that, ‘it probably points to a rather fortunate midpoint between a mechanical application of the rules of law...and the dangers of the “gouvernement de juges”’.⁸³ It provides a formalist element in confronting statutory *lacunae* which is

⁷⁸ V Degan, ‘On the Sources of International Criminal Law’ (2005) 4 *Chinese Journal of International Law* 45, 50.

⁷⁹ A Pellet, ‘Article 38’ in A Zimmermann et al. (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press 2006) 680.

⁸⁰ Judgment, *Mucić* et al., IT-96-21-T, TC, ICTY, 16 November 1998, para. 414.

⁸¹ Pellet, ‘Article 38’ (n 79) 680. ⁸² Ibid. ⁸³ Ibid.

of persuasive value to the interpretative community, but its impact beyond this point is minimal. Much like the invocation of the general rule of interpretation found in Article 31 of the VCLT, it acts as a positivistic limb upon which individual reasoning can rest, insulating the bench from accusations of arbitrariness, judge-made law, and violations of the principle of legality. As Pellet remarked, the fluidity of Article 38 (in the sense that it omits reference to a specific hierarchy or interpretational method) is such that, were it to cease to exist, this would not greatly curtail the capacity of the bench to exercise their judicial function.⁸⁴ It goes without saying that inherent in the judicial function is responsibility for the identification of applicable rules necessary for the administration of justice.

This discussion of the manner in which the ad hoc Tribunals have dealt with the absence of a statutory provision dedicated to the exposition of the applicable law only serves to further illuminate the enigmatic and prescriptive character of Articles 21 and 22 of the Rome Statute, which, it is argued, do not seek to facilitate the exercise of the judicial function in the tradition of Article 38, but rather, to closely manage it.

19.4 Articles 21 and 22(2) of the Rome Statute: A Deliberate Effort to Restrict the Creative Capacity of the Bench?

19.4.1 Article 21(1) and (2)—the chaperoning of the judicial function and the prioritization of textual interpretation

Article 21 is truly unique and certainly one of the most idiosyncratic provisions of the Rome Statute. It is intriguing for a number of distinguishable reasons: its very existence, the specificity of its content, the series of hierarchies it imposes, and the constraints it appears to at least attempt to place on the creative interpretational capacity of the bench.⁸⁵ Before proceeding further, let us remind ourselves of what precisely Article 21 provides for:

Article 21

(1) The Court shall apply:

In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

⁸⁴ Ibid.

⁸⁵ See G Bitti, ‘Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC’ in G Sluiter and C Stahn (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Brill 2009) 286. Bitti claims Article 21 is interesting for three reasons; in omitting its impact on the judicial function he has in this author’s opinion failed to highlight perhaps its most important feature. See also Bitti, Chapter 18, this volume.

(2) The Court may apply principles and rules of law as interpreted in its previous decisions.

(3) The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion, or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.⁸⁶

A plain reading of the provision indicates a series of hierarchies distinguishing, with some precision, between the various ‘internal’ and ‘external’ sources of applicable law. As Pellet has remarked, ‘[i]t gives the judges apparently clear instructions concerning the application of the different sources of applicable law it enumerates: the Statute occupies the summit of the hierarchy it creates and the other sources are placed in hierarchical relationships that appear both relatively simple and logical’.⁸⁷ The clear distinction between the ‘internal’ or ‘proper’ law of the Court (Article 21(1)(a)) and the ‘external’ sources of law (Article 21(1)(b)–(c) and 21(3)) is to be expected and is certainly a welcome addition.

Looking first at the internal or proper sources of law, namely the Statute, Rules of Procedure and Evidence, and the Elements of Crimes, it is worth noting the absence of any mention of the Regulations of the Court, the Regulations of the Registry, the Code of Professional Conduct for counsel, or the Regulation of the Trust Fund for Victims, all of which play essential roles in the jurisprudence of the Court, some of which are expressly referred to in both the Statute and the Rules of Procedure and Evidence.⁸⁸ These internal instruments take their place at the foot of the hierarchical order and are to be ‘read subject to the Statute and the Rules’.⁸⁹ When these are taken into consideration, the internal law of the Court can be described as ‘a beautiful pyramid, composed of at least four different layers which represent a sum of 702 articles, rules and regulations’.⁹⁰ Naturally, the Statute sits atop this pyramid absorbing the subordinate sources of law below; the inclusion of the phrase ‘[i]n the first place’ in Article 21(1)(a) puts this well and truly beyond question. If any clarification were needed with respect to the hierarchy of internal law, Article 51(5) provides that ‘the Rules of Procedure and Evidence are an instrument for the application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases’,⁹¹ whereas the Elements of

⁸⁶ Art 21 Rome Statute.

⁸⁷ Pellet, ‘Applicable Law’ (n 52) 1077.

⁸⁸ See e.g. Art 52 Rome Statute.

⁸⁹ Regulation 1 Regulations of the Court, adopted by the Judges of the ICC on 26 May 2004 in accordance with Art 52 of the Rome Statute, and as amended on 14 June and 14 November 2007, ICC-BD/01-02-07. A similar provision is to be found in Regulation 1 of the Regulations of the Registry, stating that they are essentially at the base of the hierarchy: ‘These Regulations... shall be read subject to the Statute, the Rules and the Regulations of the Court.’ See also Decision on the Prosecutor’s ‘Application for Leave to Reply to “Conclusions de la défense en réponse au mémoire d’appel du Procureur”, Lubanga, Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-424, AC, ICC, 12 September 2006, para. 4.

⁹⁰ Bitti (n 85) 291.

⁹¹ Art 51(5) Rome Statute. See also Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *Situation in the Democratic Republic of the Congo*, ICC-01/04-101-tEN-Corr, PTC I, ICC, 17 January 2006, para. 47—‘[T]he Chamber must point out that, pursuant to article 51, paragraph 5 of the Statute, the Rules of Procedure and Evidence is an

Crimes document is intended merely to ‘assist the Court in the interpretation and application of articles 6, 7 and 8, consistent with the Statute’.⁹²

So far, so uncontroversial you might say. The jurisprudence to date clearly illustrates that the bench has had few difficulties applying this logical hierarchy, with one of the first decisions of the Appeals Chamber in the *Lubanga* case affirming the obvious textual structure of the provision:

Article 21(1) of the Statute provides that the Court must apply firstly the Statute, Rules of Procedure and Evidence and Elements of Crimes, secondly applicable treaties and principles and rules of international law and thirdly ‘[f]ailing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international and internationally recognized norms and standards’.⁹³

In invoking Article 21, the bench has frequently emphasized that while the general rules of treaty interpretation enshrined in Articles 31 and 32 of the VCLT apply, they ordinarily will only be directly invoked following an inconclusive textual or plain meaning analysis.⁹⁴ For example, in the *Lubanga* Trial Judgment, the Chamber was tasked with determining the elements of the war crime of the conscription, enlistment, and use of children under the age of 15 pursuant to Article 8(2)(e)(vii). In interpreting the contextual element of the offence as provided for in the Statute and the Elements of Crimes, the Chamber was of the opinion that adopting the plain meaning of the provision clearly determined that ‘it was sufficient to show that there was a

instrument that is subordinate to the Statute. It follows that a provision of the Rules cannot be interpreted in such a way as to narrow the scope of an article of the Statute.’

⁹² Elements of Crimes, ICC-ASP/1/3(part II-B), 9 September 2002 (First Session of the ASP) ‘General introduction’, para. 1. See also Art 9(1) Rome Statute.

⁹³ See Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, AC, ICC, 13 July 2006, para. 23; see also Decision on the Confirmation of Charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-803-tEN, PTC I, ICC, 29 January 2007, para. 69; Decision on the Prosecution Motion for Reconsideration, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-123, PTC I, ICC, 23 May 2006, 3; Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-166, PTC I, ICC, 23 June 2006, para. 9; Decision on the Practice of Witness Familiarization and Witness Proofing, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-679, PTC I, ICC, 8 November 2006, paras 7–10; Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1049, PTC I, ICC, 11 June 2007, paras 5 and 44; Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration and Motions for Clarification, *Situation in Uganda*, ICC-02/04-01/05-60, PTC II, ICC, 28 October 2005, para. 19; Decision on Confirmation of Charges, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-717, PTC I, ICC, 30 September 2008, para. 508: ‘[U]nder article 21(1)(a) of the Statute, the first source of applicable law is the Statute. Principles and rules of international law constitute a secondary source applicable only when the statutory material fails to prescribe a legal solution.’

⁹⁴ See e.g. Decision Adjourning the Hearing Pursuant to Art 61(7)(c)(ii) of the Rome Statute, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-388, PTC II, ICC, 3 March 2009, paras 21, 30, and 31; Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*,

connection between the conscription, enlistment or use of children under 15 and an armed conflict that was not international in character'.⁹⁵

Satisfied that such a textual analysis was sufficiently determinate, the Chamber concluded that it was unnecessary to discuss the interpretation of this element in any greater detail.⁹⁶ Turning to the interpretation of the constituent acts, namely, conscripting or enlisting of children under the age of 15 or using them to actively participate in hostilities, the Chamber acknowledged that 'in each instance the conduct is not defined in the Statute, the Rules or the Elements of Crimes',⁹⁷ and therefore attempted a more holistic interpretative approach purportedly in line with the Vienna Convention rules. Quoting the Appeals Chamber on this point, the Trial Judgment elaborated that:

The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.⁹⁸

In the reasoning that followed, the Trial Chamber noted the relevance of the jurisprudence of the SCSL with respect to the offence; however, it cautioned that:

Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the wording of the provision

ICC-01/05-01/08-424, PTC II, ICC, 15 June 2009, para. 361; Decision on the Final System of Disclosure and the Establishment of a Timetable, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-102, PTC I, ICC, 15 May 2006, para. 1; Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-824, AC, ICC, 13 February 2007, para. 15; Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1432, AC, ICC, 11 July 2008, para. 54; Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-257, PTC I, ICC, 10 March 2008, at 7; Decision on Application for Leave to Appeal by the Defence of Mathieu Ngudjolo Chui against the Decision on Joinder, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-384, PTC I, ICC, 9 April 2008, at 6; Judgment on the Appeal of Mr Mathieu Ngudjolo Chui against the Decision of Pre-Trial Chamber I entitled 'Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9', *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-521, AC, ICC, 27 May 2008, para. 16; Decision on the Prosecutor's Application for Warrants of Arrest, Art 58, *Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-20-Anx2, PTC I, ICC, 10 February 2006, para. 43; Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19, PTC II, ICC, 31 March 2010, para. 19.

⁹⁵ Judgment pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012, para. 571 ('Lubanga Trial Judgment').

⁹⁶ Ibid.

⁹⁷ Ibid., para. 600.

⁹⁸ Ibid., para. 601, quoting, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, *Lubanga* (n 93) para. 33. For similar statements of the Appeals Chamber see also Judgment on the Appeal of Mr Germain Katanga against the Decision of Pre-Trial Chamber I entitled 'Decision on the Defence Request Concerning Languages', *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-522, AC, ICC, 28 May 2008, paras 38 and 39; Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled 'Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered

criminalizing the conscription, enlistment and use of children under the age of 15 within the Statute of the SCSL is identical to Article 8(2)(e)(vii) of the Rome Statute, and they were self-evidently directed at the same objective. The SCSL's case law therefore potentially assists in the interpretation of the relevant provisions of the Rome Statute.⁹⁹

This cautionary note highlights the ambiguous status of external jurisprudence under Article 21(1)(b) and the extent to which the bench can formally and expressly rely on it in its interpretative enterprises. We will return to this issue in several instances later in the chapter, but at this juncture it is worth noting that, in the end result, the jurisprudence of the SCSL was given only sparing express consideration.¹⁰⁰ The Chamber evidently found itself on firmer ground, at least with respect to Article 21(1)(b), when referring to external instruments such as the Additional Protocols to the Geneva Conventions, the Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child.¹⁰¹ However, despite referring to these external sources of law as relevant aids to construction, it is evident that they were only utilized with a view to confirming the ordinary textual interpretation that was ultimately relied upon by the Chamber.¹⁰²

In declining the opportunity to further elaborate on the precise contours of Article 8(2)(e)(vii) beyond its ordinary meaning, the Trial Chamber courted controversy given prosecution submissions that the term 'use' should be interpreted to encompass circumstances of ill treatment, sexual violence, and forced marriage.¹⁰³ In the view of the majority (Judge Odio Benito dissenting on this point), since evidence relating to sexual and gender-based violence was not expressly included by the prosecution at the confirmation of charges stage of the proceedings, 'as a matter of law...it would be impermissible for the Chamber to base its Decision pursuant to Article 74(2) on the evidence introduced during the trial that is relevant to this issue'.¹⁰⁴ In her dissenting opinion, which dealt in large part with this interpretative choice, Judge Odio Benito emphasized that such a restrained textual approach was 'contrary to the "object and purpose" of the Rome Statute, contrary to internationally recognized human rights and discriminatory under Article 21(3)'.¹⁰⁵ She argued that '[s]ince neither the Statute nor the Elements of Crimes define further these three

by Art 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', *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1486, AC, ICC, 21 October 2008, para. 40; Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 28 July 2010 entitled 'Decision on the Review of the Detention of Mr Jean-Pierre Bemba Gombo Pursuant to Rule 118(2) of the Rules of Procedure and Evidence', *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1019, AC, ICC, 19 November 2010, para. 49.

⁹⁹ Lubanga Trial Judgment (n 95) para. 603.

¹⁰⁰ Ibid., paras 607, 616, 618, 624, and 626.

¹⁰¹ Ibid., para. 604.

¹⁰² Ibid., para. 608, where the Chamber relies on *Oxford English Dictionary* definitions of the constituent acts under Art 8(2)(e)(vii).

¹⁰³ See Prosecution's Closing Brief, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2748-Red, TC I, ICC, 1 June 2011, paras 227–34.

¹⁰⁴ Lubanga Trial Judgment (n 95) para. 630.

¹⁰⁵ Separate and Dissenting Opinion of Judge Odio Benito, Lubanga Trial Judgment (n 95) para. 6.

criminal conducts, the Chamber is required to define them taking into consideration other applicable law. Furthermore, pursuant to Article 21(3) of the Rome Statute, the Chamber is compelled to interpret and apply the law consistent with internationally recognized human rights.¹⁰⁶

While the majority's decision not to address evidence of sexual and gender-based crimes may have been compatible with Article 22(2)'s mandating of strict construction,¹⁰⁷ such judicial restraint undermined the gap-filling role inherent in the judicial function. As Judge Odio Benito remarked:

Although the Rome Statute's provisions are applied and interpreted in relation to specific charges brought against individuals, the Chamber must not disregard the interests that these provisions are meant to protect. In the present case, the statutory provisions are meant to protect the life and personal integrity of children under the age of 15. It would thus be impermissible for a Chamber to decline to enter a comprehensive legal definition of a crime and leave it open to a case-by-case analysis or to the limited scope of the charges brought against the accused. *This would be a step backwards in the progressive development of the law.*¹⁰⁸

While Judge Odio Benito may be accused of victim-centred teleological interpretation,¹⁰⁹ 'liberal overreach',¹¹⁰ or even of promoting a normative agenda, her concerns with respect to the adoption of an exclusively textual methodology reflect the inevitable unease that accompanies an interpretative regime that prioritizes plain meaning and strict construction over related considerations such as context and object and purpose.¹¹¹

Another example of relatively inflexible adherence to the ordinary meaning of the statutory text to the exclusion of other aids to construction is found once again in the *Lubanga* case, when the Appeals Chamber was required to expound on the parameters of the right to appeal as provided for under Article 82(1)(d) of the Statute. The prosecution argued that there was a glaring gap in Article 82(1)(d) given the omission of an automatic right to appeal all decisions of first instance chambers. Purportedly applying Article 31 of the Vienna Convention in union with Article 21(3), the Chamber concluded that, 'the Statute defines exhaustively the right to appeal against decisions of first instance courts, namely decisions of the Pre-Trial or Trial Chambers. No gap is noticeable in the Statute with regard to the power claimed in the sense of an objective not being given effect to by its provisions. The lacuna postulated by the Prosecutor

¹⁰⁶ Ibid.

¹⁰⁷ The majority were clearly of this opinion, see *Lubanga* Trial Judgment (n 95) para. 620. For in-depth consideration of Art 22(2), see section 19.4.4.

¹⁰⁸ Separate and Dissenting Opinion of Judge Odio Benito, *Lubanga* Trial Judgment (n 95) para. 7 (emphasis added).

¹⁰⁹ For more on victim-centred teleological interpretation, see D Robinson, 'The Identity Crisis of International Criminal Law' (2010) 21 *Leiden Journal of International Law* 925.

¹¹⁰ See L Sadat and J Jolly, 'Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorshach Blot' (2014) 26 *Leiden Journal of International Law* 755.

¹¹¹ For an exploration of theoretical aspects of textualism, from a domestic viewpoint, see for example C Nelson, 'What is Textualism' (2005) 91 *Virginia Law Review* 347; J Molot, 'The Rise and Fall of Textualism' (2006) 106 *Columbia Law Review* 1; J Manning, 'Textualism and Legislative Intent' (2005) 91 *Virginia Law Review* 419; A Gluck, 'The States as Laboratories of Statutory Methodological Consensus and the New Modified Textualism' (2010) 119 *Yale Law Journal* 1750.

is nonexistent.¹¹² The Chamber argued that this construction of Article 82(1)(d) was confirmed by the relevant *travaux* which were invoked in line with Article 32 of the Vienna Convention.¹¹³

Such interpretative restraint is consistent with the intent underpinning the drafting of Article 21.¹¹⁴ However, it is worth heeding the remark of Judge Mohammad Shahabuddeen in his partially dissenting opinion in the *Stakić* case, that '[e]ven more than domestic law, international law is concerned with substance; it is not willing to be mesmerized by sacramental words'.¹¹⁵ While Article 21(1)(a) certainly elevates the internal law to the status of a sacrament, as the following section will illustrate, this does not necessarily imply that the bench will in all instances observe it with dogmatic reverence, especially when normative and policy considerations come to pass.

19.4.1.1 The interpretation of Article 25(3)(a): the betrayal of textualism

While the prioritization of textual interpretative approaches coupled with fidelity to drafters' intent are typically associated with positivist or restrained judicial interpretative practices, it is nonetheless equally true that the express invocation of such interpretative techniques may mask or conceal the creative normative agenda of the bench. As Lauterpacht remarked, 'there is nothing easier than to purport to give the appearance of legal respectability and plausibility—by the simple operation of selecting one or more rules of interpretation—to a judicial decision which is lacking in soundness, in impartiality, or in intellectual vigour'.¹¹⁶ Similarly, the interpretative techniques formally identified are 'not the determining cause of judicial decisions, but the *form* in which the judge cloaks a result arrived at by other means',¹¹⁷ or as Gleider Hernandez

¹¹² Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, *Lubanga* (n 93) para. 39.

¹¹³ Ibid., para. 40: 'The interpretation accorded hereinabove to subparagraph (d) of paragraph 1 of article 82 of the Statute and article 82 generally is confirmed by the *travaux préparatoires* that establish as laid down in article 32 of the Vienna Convention on the Law of Treaties supplementary means of interpretation designed to provide (a) confirmation of the meaning of a statutory provision resulting from the application of article 31 of the Vienna Convention on the Law of Treaties and (b) the clarification of ambiguous or obscure provisions and (c) the avoidance of manifestly absurd or unreasonable results. The *travaux préparatoires* reveal that a specific suggestion made by the Kenyan delegation to the Committee of the Whole at the 1998 United Nations Diplomatic Conference of Plenipotentiaries designed in essence to give effect to the right claimed by the Prosecutor was turned down.'

¹¹⁴ See P Saland, 'International Criminal Law Principles' in R Lee (ed.), *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International 1999) 213–16.

¹¹⁵ Judgment—Partly Dissenting Opinion of Judge Shahabuddeen, *Stakić*, IT-97-24-A, AC, ICTY, 22 March 2006, para. 69. The sentiment of this remark was echoed by Judge David Hunt in his partially dissenting opinion in the *Hadžihasanović* case. Drawing on the *Nuclear Weapons* case at the ICJ, he remarked that 'there is no reason why the interpretation of rules of international law should be limited to literal interpretation, any more than the interpretation of municipal law'—Trial Chamber Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Separate and Partially Dissenting Opinion of Judge David Hunt, *Hadžihasanović* et al., IT-01-47-AR72, TC, ICTY, 16 July 2003, para. 4.

¹¹⁶ E Lauterpacht (ed.), *International Law: Being the Collected Papers of Sir Hersch Lauterpacht*, vols VII–VIII (Cambridge: Cambridge University Press 2009) 411.

¹¹⁷ H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) XXVI *British Yearbook of International Law* 48.

has argued, ‘judges shield their decisions through an outward show of judicial technique, behind which judges shield themselves from the accusation that they are engaging in law-creation rather than merely the interpretation of the law’.¹¹⁸

The foregoing examples have given a sense of the extent to which the bench of the ICC have relied on an isolated textual approach to avoid the appearance of express law-making. However, it is also possible to observe how a purportedly textual *and* teleological approach has been utilized in pursuit of an overtly developmental cause. The most striking example in this regard is the highly controversial interpretation of the contours of individual criminal responsibility provided for in Article 25 of the Rome Statute, and, in particular, the institution of the ‘control of the crime’ theory in the context of co-perpetration and indirect co-perpetration under Article 25(3)(a).¹¹⁹ Indeed, the Court’s jurisprudence with respect to Article 25 is such that some have argued that it has the capacity to act as a Rorschach blot test of interpretative techniques employed by the bench of the ICC.¹²⁰

The avenues through which the various Pre-Trial Chambers arrived at their interpretation and development of the control of the crime theory of co-perpetration, the related principal/accessory distinction, and, perhaps more controversially, the concept of indirect co-perpetration, are dealt with at length in the contributions of Jens David Ohlin, Thomas Weigend, and Elies van Sliedregt in this volume and will not be revisited in detail.¹²¹ However, it is worth highlighting the relative incoherence of the purportedly textual interpretative basis upon which these respective theories of individual criminal responsibility are based, and their apparent incompatibility with the interpretative regime dictated by Articles 21 and 22 of the Rome Statute. Indeed, this tension between Articles 21 and 22 and the prevailing interpretation of Article 25 (in particular Article 25(3)(a)) was eloquently emphasized by Judge Adrian Fulford in his Separate Opinion in the *Lubanga* Trial Judgment¹²² and by Judge Christine Van den Wyngaert in her Concurring Opinion in the *Ngudjolo* Trial Judgment.¹²³

Looking to the origins of the control of the crime theory for the purposes of Article 25(3)(a) in the *Lubanga* Confirmation of Charges Decision, it is remarkable to note the ease with which the bench was prepared to forgo the interpretative guidance instituted by Articles 21 and 22. In its opening gambit with respect to modes of liability, Pre-Trial Chamber I curiously remarked that ‘[t]he concept of co-perpetration embodied in article 25(3)(a) of the Statute requires *analysis*’.¹²⁴ While it may well be blatant

¹¹⁸ G Hernandez, *The International Court of Justice and the Judicial Function* (Oxford: Oxford University Press 2014) 13.

¹¹⁹ See e.g. J Ohlin et al., ‘Assessing the Control-Theory’ (2013) 26 *Leiden Journal of International Law* 725; E van Sliedregt, ‘The Curious Case of International Criminal Liability’ (2012) 10 *Journal of International Criminal Justice* 1171; G Werle, ‘Individual Criminal Responsibility in Article 25 ICC Statute’ (2007) 5 *Journal of International Criminal Justice* 953;

¹²⁰ See Sadat and Jolly (n 110).

¹²¹ Ohlin, Chapter 21, this volume; Weigend, Chapter 22, this volume; Van Sliedregt, Chapter 20, this volume; Olásolo, Chapter 23, this volume; and Ambos, Chapter 24, this volume.

¹²² See Separate Opinion of Judge Adrian Fulford, *Lubanga* Trial Judgment (n 95).

¹²³ See Judgment pursuant to Art 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, *Ngudjolo*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-4, TC, ICC, 18 December 2012.

¹²⁴ Decision on the Confirmation of Charges, *Lubanga* (n 93) para. 322 (emphasis added).

pedantry to point out the use of the doctrinally or scholarly associated noun ‘analysis’ as opposed to the more judicial and hermeneutically sound noun of ‘interpretation’, it is nonetheless arguable that its use is an indication of the Chamber’s belief that co-perpetration required the application of foundational conceptual reasoning as opposed to mere interpretative or textual clarity. In short, the Chamber was implying from the outset that given its evident indeterminacy, a certain degree of creative reasoning was required with respect to Article 25(3)(a). When confronted with conceptual and textual indeterminacy it would perhaps be expected that the Chamber would invoke the reasoning of the Appeals Chamber already mentioned, to the effect that such impasses must be negotiated via recourse to the sources of law incorporated in Article 21(1)(b) and (c) applied in conjunction with Article 31 of the Vienna Convention.¹²⁵ However, the Pre-Trial Chamber made little attempt to follow this methodological blueprint, choosing instead to base their analysis predominately on doctrinal sources (in particular, the scholarship of Claus Roxin), the reasoning of the Trial Chamber of the Yugoslav Tribunal in the (by now infamous) *Stakić* case, and the minority opinion of Judge Wolfgang Schomburg appended to the Appeals Judgment in the *Gacumbitsi* case at the Rwanda Tribunal.¹²⁶ Indeed, it is striking to observe the absence from the Chamber’s ‘analysis’ of any grounding in the sources of law provided for in Article 21(1)(b) and (c) and the extent to which a plain textual interpretation, which has been so prevalent in the bench’s approach to date, is forgone.

The Chamber unconvincingly suggests that despite rooting their ‘analysis’ almost exclusively in German criminal legal theory, the conceptualization of co-perpetration is ‘applied in numerous legal systems’.¹²⁷ Were the Chamber capable of providing a detailed insight into the current status of state practice on the issue, a persuasive argument could perhaps be made that the co-perpetration ought to be considered a general principle of law in accordance with Article 21(1)(c). However, the Chamber makes no effort to provide such an insight.¹²⁸ The reliance on doctrinal sources is particularly problematic given the fact the Article 21 does not include a provision equivalent to Article 38(1)(d) of the Statute of the ICJ allowing for recourse to ‘the teachings of the most highly qualified publicists’ as a subsidiary source of law.¹²⁹

It is difficult to tally the Pre-Trial Chamber’s expansive and relatively incomplete reasoning with respect to co-perpetration/indirect co-perpetration with the prevailing textual approach to interpretation mandated by Articles 21(1)(a) and 22(2) and as expressed in the burgeoning jurisprudence of the Court. It is perhaps the case, as suggested by Leila Sadat and Jarrod Jolly, that the Chamber was persuaded by Judge Schomburg’s contention that the German conceptualization of co-perpetration ‘suits the needs...of international criminal law particularly well...[as] a means to bridge

¹²⁵ See Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, *Lubanga* (n 93) para. 23.

¹²⁶ Decision on the Confirmation of Charges, *Lubanga* (n 93) paras 322–67 and accompanying footnotes.

¹²⁷ Ibid., para. 330.

¹²⁸ Ibid., para. 330, fn. 418.

¹²⁹ Art 38(1)(d) ICJ Statute (n 72). See also M Peil, ‘Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice’ (2012) 1 *Cambridge Journal of International and Comparative Law* 136.

any potential physical distance from the crime scene of persons who must be regarded as main perpetrators'.¹³⁰ At no point did the Pre-Trial Chamber intimate that the adoption of the German model was made necessary by virtue of a glaring statutory *lacuna*. Rather it seems that its adoption was a bald normative choice based on a perception that the choice of language adopted by the drafters implied a desire to deviate from the purely subjective standard of complicity developed and enforced by the ad hoc Tribunals as well as the perceived necessity to distinguish between principals and accessories. In essence, the adoption of the control over the crime theory was an issue of policy, rather than purely one of statutory interpretation. The subsequent Trial Judgment in the case effectively stated as much when it determined that Articles 25 and 28, 'should be interpreted in a way that allows properly expressing and addressing the responsibility for these crimes [sic]'.¹³¹

In the *Katanga and Ngudjolo* Confirmation of Charges Decision, Pre-Trial Chamber I, in elaborating on the notion of indirect co-perpetration, confirmed the control theory and expanded its reasoning to elucidate the presence of the theory in a number of domestic jurisdictions (i.e. five countries—Germany, Spain, Peru, Chile, and Argentina) while also providing a wealth of additional doctrinal authorities.¹³² Commenting on the *Lubanga* Pre-Trial Chamber's 'analysis' of the respective objective, subjective, and control over the crime approaches to co-perpetration, the *Katanga and Ngudjolo* Pre-Trial bench determined that:

The methodology for deciding between these three approaches was to analyze their consistency with the Statute, which is the first source of applicable law for this Court under Article 21(1)(a) of the Statute. Application of the Statute requires not only resorting to a group of norms by applying any of the possible meanings of the words in the Statute but also requires excluding at least those interpretations of the Statute in which application would engender an asystematic *corpus juris* of unrelated norms... [Referring here to the incompatibility of the objective standard with the notion of perpetration through another.]¹³³

The Chamber considers that in order for the Statute to be understood as a consistent body of predictable law, the criminal responsibility of a person—whether as an individual, jointly with another or through another person—must be determined under the control over the crime approach to distinguishing between principals and accessories.¹³⁴

The adoption of the control over the crime theory was, therefore, in the view of the *Katanga and Ngudjolo* Pre-Trial Chamber necessary in order to afford coherence, consistency, and predictability to the interpretation and application of Article 25(3)(a), with such considerations outweighing a purely textual approach.

¹³⁰ Sadat and Jolly (n 110) 776, citing Judgment—Separate Opinion of Judge Schomburg, *Gacumbitsi*, ICTR-01-64-A, AC, ICTR, 7 July 2006, para. 21.

¹³¹ *Lubanga* Trial Judgment (n 95) para. 976.

¹³² Decision on Confirmation of Charges, *Katanga and Ngudjolo* (n 93) paras 486 and 510 and accompanying footnotes.

¹³³ *Ibid.*, para. 481.

¹³⁴ *Ibid.*, para. 486.

Turning its attention to the notion of indirect co-perpetration the Chamber argued that it had clear textual support given Article 25(3)(a)'s inclusion of the phrase 'jointly with another or through another person'. Embarking on what was purportedly a classical textual interpretation, the Chamber determined that:

Two meanings can be attributed to the word 'or'—one known as weak or *inclusive* and the other strong or *exclusive*. An inclusive disjunction has the sense of 'either one or the other, and possibly both' whereas an exclusive disjunction has the sense of 'either one or the other, but not both'. Therefore to interpret the disjunction in article 25(3)(a) of the Statute as either 'inclusive' or 'exclusive' is possible from a strict textualist interpretation. In the view of the Chamber, basing a person's criminal responsibility upon the joint commission of a crime through one or more persons is therefore a mode of liability 'in accordance with the Statute'.¹³⁵

This invocation of so-called strict textualism is a perfect illustration of how a purported reliance on the ordinary, dictionary, meaning of a statutory text can nonetheless merely veil an overtly expansive interpretation. In rejecting the Chamber's 'inclusive/exclusive disjunctive' understanding of 'or' in the context of Article 25(3)(a) as 'with the greatest respect, unconvincing',¹³⁶ Judge Christine van den Wyngaert remarked that the '[i]nclusive disjunctive may be a concept known in formal logic, but it is totally foreign to ordinary language.... The Vienna Convention on the Law of Treaties requires that the terms be interpreted in accordance with their "ordinary meaning", rather than through the prism of formal logic.'¹³⁷

The Pre-Trial Chamber was unconcerned that the Appeals Chamber of the Yugoslav Tribunal had determined that indirect co-perpetration had no basis in customary international law. Noting this fact, the Chamber reasoned that:

Under article 21(1)(a) of the Statute, the first source of applicable law is the Statute. Principles and rules of international law constitute a secondary source applicable only when the statutory material fails to prescribe a legal solution. Therefore, and since the Rome Statute expressly provides for this specific mode of liability, the question as to whether customary law admits or discards the 'joint commission through another person' is not relevant for this Court. This is a good example of the need not to transfer the ad hoc tribunals' case law mechanically to the system of the Court.

This statement is a useful example of a reasoning double standard. While the Chamber is happy to invoke the reasoning of the Yugoslav Trial Chamber in the *Stakić* case when it comports with its normative and policy agenda, the strict hierarchy of sources mandated by Article 21(1) can be utilized and directly invoked in order to avoid inconvenient alternative sources of potentially persuasive authority. It also adds to the ambiguity surrounding the status of external jurisprudence as a source of law in the context of Article 21, an issue we will return to later in this chapter.

¹³⁵ Ibid., para. 491.

¹³⁶ Concurring Opinion of Judge Christine Van den Wyngaert, *Ngudjolo* (n 123) para. 60.

¹³⁷ Ibid., para. 60 and fn. 76.

Despite the deficiencies evident in the *Lubanga* and *Katanga and Ngudjolo* Pre-Trial Chamber interpretation of Article 25(3)(a), their reasoning has nonetheless been consistently endorsed, almost without question, in subsequent arrest warrant and confirmation of charges decisions, a fact which in itself provides an interesting insight into the operation of Article 21(2).¹³⁸ However, this is not to say that there has been a complete absence of judicial dissent on the matter. As alluded to earlier, Judge Adrian Fulford and Judge Christine Van den Wyngaert have been outspoken in their criticism of the Pre-Trial Chamber's reasoning in both the *Lubanga* and *Katanga and Ngudjolo* cases. Of particular interest is the fact that both have sought to highlight the incompatibility of the Pre-Trial Chamber's reasoning with an ordinary textual interpretation of Article 25(3)(a) and its inconsistency with Articles 21(1) and 22(2).

In his separate opinion appended to the *Lubanga* Trial Judgment, Judge Fulford remarked that in his view the control of the crime theory 'is unsupported by the text of the Statute and it imposes an unnecessary and unfair burden on the prosecution'.¹³⁹ Furthermore, he fundamentally rejected the determination that Article 25(3) instituted a hierarchy of modes of liability:

In my judgment, the plain text of Article 25(3) defeats the argument that subsections (a)–(d) of Article 25(3) must be interpreted so as to avoid creating an overlap between them.... [I]n my judgment the plain language of Article 25(3) demonstrates that the possible modes of commission under Article 25(3)(a)–(d) of the Statute were not intended to be mutually exclusive.¹⁴⁰

Invoking Article 31 of the Vienna Convention, in Fulford's view, 'a plain reading of Article 25(3)(a) establishes the criminal liability of co-perpetrators who contribute to the commission of the crime notwithstanding their absence from the scene, and it is unnecessary to invoke the control of the crime theory in order to secure this result'.¹⁴¹

¹³⁸ See e.g. Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Muthaura, Kenyatta and Ali, Situation in the Republic of Kenya*, ICC-01/09-02/11-382-Red, PTC II, ICC, 23 January 2012, paras 296–7; Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-373, PTC II, ICC, 23 January 2012, paras 289–92; Corrigendum of the Decision on the Confirmation of Charges, *Banda and Jerbo, Situation in Darfur, Sudan*, ICC-02/05-03/09-121-Corr-Red, PTC I, ICC, 7 March 2011, para. 126; Decision on the Confirmation of Charges, *Abu Garda, Situation in Darfur, Sudan*, ICC-02/05-02/09-243-Red, PTC I, ICC, 8 February 2010, paras 152–7; Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba* (n 94) paras 346–8; Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-3, PTC I, ICC, 4 March 2009, paras 210–13.

¹³⁹ Separate Opinion of Judge Adrian Fulford, *Lubanga* Trial Judgment (n 95) para. 3.

¹⁴⁰ Ibid., para. 7. See also para. 8: 'Some have suggested that Article 25(3) establishes a hierarchy of seriousness as regards the various forms of participation in a crime, with Article 25(3)(a) constituting the gravest example and Article 25(3)(d) the least serious. I am unable to adopt this approach. In my judgment, there is no proper basis for concluding that ordering, soliciting or inducing crime (Article 25(3)(d)) is a less serious form of commission than committing it "through another person" (Article 25(3)(a)), and these two concepts self-evidently overlap. Similarly, I am unable to accept that the criminality of accessories (Article 25(3)(c)) is greater than those who participate within a group (Article 25(3)(d)), particularly since many of history's most serious crimes occurred as a result of the coordinated action of groups of individuals, who jointly pursued a common goal.'

¹⁴¹ Ibid., paras 12 and 13.

Elaborating further on his rejection of the control of the crime theory, Judge Fulford acknowledged the relevance of the concept in certain domestic jurisdictions, but in light of Article 21(1)(c) cautioned against its direct transposition into the statutory framework of the ICC:

While Article 21(1)(c) of the Statute permits the Court to draw upon ‘general principles of law’ derived from national legal systems, in my view before taking this step, a Chamber should undertake a careful assessment as to whether the policy considerations underlying the domestic legal doctrine are applicable at this Court, and it should investigate the doctrine’s compatibility with the Rome Statute framework. This applies regardless of whether the domestic and the ICC provisions mirror each other in their formulation. It would be dangerous to apply a national statutory interpretation simply because of similarities of language, given the overall context is likely to be significantly different.¹⁴²

Judge Van den Wyngaert shared this view, remarking that ‘[c]onsidering its universalist mission, the Court should refrain from relying on particular national models, however sophisticated they may be’.¹⁴³ In this respect, Van den Wyngaert pointed out, entirely appropriately in this author’s view, the inconsistency of both the control theory and the notion of indirect co-perpetration with the requirement of strict construction provided for under Article 22(2).¹⁴⁴ Indeed, for Van den Wyngaert, Article 22(2)’s institution of strict construction was to be given interpretative primacy with respect to substantive law and modes of liability.¹⁴⁵ Such an interpretative rule was necessary in the interests of certainty and predictability of the law, both of which are amongst the central tenets of the rule of law and the right to a fair trial.¹⁴⁶ The Majority Opinion in the *Katanga* Trial Judgment appeared, at least momentarily, to agree with this reasoning in pointing out the potential incompatibility of a teleological approach to the interpretation of the definition of crimes and modes of liability with the principles of strict construction and the circumscribed applicability of the Vienna rules to the entirety of the Rome Statute text.¹⁴⁷ However, in their subsequent interpretation of modes of liability, crimes against humanity, and the application of Regulation 55, it can hardly be claimed that the Majority heeded their own cautionary statement.¹⁴⁸

The fact that the bench of the ICC has interpreted Article 25(3)(a) to include the Roxinian notions of co-perpetration and indirect co-perpetration is not in itself problematic or objectionable. In truth, the difficulty arises from the failure of the bench to coherently locate its reasoning within the sources of law regime mandated by Article 21 of the Rome Statute. As Jens David Ohlin remarks in his contribution in this volume, in adopting the prevailing interpretation of co-perpetration and indirect

¹⁴² Ibid., para. 10.

¹⁴³ Concurring Opinion of Judge Christine Van den Wyngaert, *Ngudjolo* (n 123) paras 5 and 17.

¹⁴⁴ Ibid., paras 6 and 7. ¹⁴⁵ Ibid., para. 18. ¹⁴⁶ Ibid., paras 19 and 20.

¹⁴⁷ See *Jugement redu en application de l’article 74 du Statut, Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3426, TC II, ICC, 7 March 2014, paras 54–5, see generally paras 38–57.

¹⁴⁸ For a detailed analysis, see C Stahn, ‘Justice Delivered or Justice Denied? The Legacy of the *Katanga* Judgment’ (2014) 12 *Journal of International Criminal Justice* 804.

co-perpetration, it is unclear whether the bench is predominately relying on principles of conventional treaty/statutory interpretation, is applying customary international law or general principles of law, or indeed, is engaging in a form of international *Dogmatik* in the sense that the bench is attempting ‘to reason from first principles the nature of co-perpetration and collective action in the context of atrocity’.¹⁴⁹ What is certain, however, is the unpersuasiveness of the argument that a purely textual understanding of Article 25(3)(a) supports the adoption of a particularly Germanic conception of co-perpetration and indirect co-perpetration. Such an argument is in danger, as Lauterpacht might put it, of being viewed as ‘lacking in soundness, in impartiality [and] in intellectual vigour’.¹⁵⁰ Moreover, the prevailing interpretation of Article 25(3)(a) profoundly compromises the contention that the inclusion of Articles 21 and 22(2) in the Rome Statute framework has fundamentally curtailed the creative interpretative capacity of the bench, and instead reinforces a more realist analysis that where policy issues and normative agendas are at play, the bench, if it so wishes, is more than capable of veiling its true interpretative intentions behind positive rules and the appearance of textual conformity.

19.4.1.2 Charting the origins of Article 21’s hierarchy of sources and the potential impact on the interpretative judicial function

Despite the consistent reasoning with respect to Article 25(3), and in particular Article 25(3)(a), there are certainly grounds to believe that the strict hierarchy of sources mandated by Article 21(1) is, for the most part, consistently observed, to the extent that in its interpretation and application the bench might be considered ‘more royalist than the king’.¹⁵¹ For instance, in the *Al Bashir* case the Pre-Trial Chamber determined that:

[a]ccording to article 21(1)(a) of the Statute, the Court must apply ‘in the first place’ the Statute, the Elements of Crimes and the Rules.... [T]hose other sources of law provided for in paragraphs 1(b) and 1(c) of article 21 of the Statute, *can only be applied* when the following two conditions are met: (i) there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such *lacuna* cannot be filled by the application of the criteria provided for in articles 31 and 32 of the Vienna Convention on the Law of Treaties and article 21(3) of the Statute.¹⁵²

This comment of the Appeals Chamber necessarily begs the question of how a *lacuna* in the Statute can be identified without giving some consideration to other relevant sources of law influential in the construction of a contextual understanding of any

¹⁴⁹ Ohlin, Chapter 21, section 21.2, this volume.

¹⁵⁰ Lauterpacht, *International Law: Being the Collected Papers of Sir Hersch Lauterpacht* (n 116) 411.

¹⁵¹ Cryer, ‘Royalism and the King’ (n 46) 392.

¹⁵² Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir* (n 138) para. 126 (emphasis added); see also Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, *Lubanga* (n 93) paras 22–4.

particular provision. It is a simple fact that the interpretation of a provision, and in particular the identification of *lacunae*, cannot be achieved in a reasoning vacuum.¹⁵³

Variations on the *Al Bashir* approach have been expressed, such as in the *Ruto et al* Confirmation of Charges Decision, where the Pre-Trial Chamber determined that it ‘should not resort to applying article 21(1)(b), unless it has found no answer in paragraph (a)’.¹⁵⁴ The bench is, therefore, as we have seen, required to exhaust all avenues of interpretative resolution via a textual interpretation of the internal law pursuant to the general rule of treaty interpretation enshrined in Article 31 of the VCLT.¹⁵⁵ Should the *lacuna* or ambiguity persist, Article 21(1)(b) provides ‘[i]n the second place, and where appropriate’ relevant external treaties and ‘the principles and rules of international law’ may be invoked. Should this fail to resolve the interpretative impasse general principles of criminal law, derived from the ‘legal systems of the world’ may be drawn upon as a last resort. Irrespective of the source eventually utilized, pursuant to Article 21(3), the interpretation adopted and applied must be ‘consistent with internationally recognized human rights’. By establishing this sequenced methodology, Article 21(1) appears to institute a predetermined, mechanical approach to the resolution of statutory gaps and may be contrasted with the spirit of Article 38 of the Statute of the ICJ, which merely establishes the sources of law and not their means of interpretation or application. As Gilbert Bitti has remarked, ‘this means that the application of sources of law before the International Criminal Court is... much less flexible than it has been before the ICTY or ICTR. But this is certainly the result that States intended when they drafted a very precise Statute of 128 articles and very precise Rules of Procedure and Evidence comprised of 225 rules.’¹⁵⁶

Regrettably, little if anything can be gleaned from the *travaux préparatoires* to the Rome Statute, such as they exist, which might throw some light on the true rationale behind the drafting of Article 21, most crucially with respect to whether or not the drafters wished to provide for a particular conception of the judicial function through Article 21.¹⁵⁷ Looking to the pre-history of the Rome Conference, namely the ILC’s efforts, it is evident that such a fastidious provision was a relatively late edition to the debate on the applicable law. For instance, the 1993 ILC Draft provided for the following wording:

¹⁵³ Cryer, ‘Royalism and the King’ (n 46) 398.

¹⁵⁴ Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Ruto, Kosgey and Sang* (n 138) para. 289. See also Decision on Confirmation of Charges, *Katanga and Ngudjolo* (n 93) para. 508.

¹⁵⁵ See Decision on Application for Leave to Appeal by the Defence of Mathieu Ngudjolo Chui against the Decision on Joinder, *Katanga and Ngudjolo* (n 94) 7: ‘[U]nder these specific circumstances—the existence of a *legislative lacuna* in the regulation of a procedural matter—the strict literal interpretation of the relevant provisions required by the principle of legality is not possible and the Chamber, acting under paragraph 1(a) of article 21 must apply the interpretative criteria provided for in the Vienna Convention on the Law of Treaties’.

¹⁵⁶ Bitti (n 85) 295–6. See also Bitti, Chapter 18, this volume.

¹⁵⁷ See Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’ (n 47) 144–5: ‘[U]nlike most multilateral treaties concluded under the auspices of the United Nations, in the case of the Rome Statute there hardly existed preparatory works reflecting the debates and negotiations that took place at the Rome Diplomatic Conference. The need for informal, off-the-record discussions clearly arose out of the necessity to overcome major rifts in a smooth manner and in such a way as to avoid states losing face by changing their position... Considered as a contribution to international

The Court shall apply:

- (a) this Statute;
- (b) applicable treaties and the rules and principles of general international law; and
- (c) as a subsidiary source, any applicable rule of national law.¹⁵⁸

Commenting on the draft, its chief architect, James Crawford, made clear that the provision was expressly modelled on Article 38 in accordance with the ‘if it’s not broken, don’t fix it’ mentality:

By contrast with the inevitably rather complex jurisdictional provisions, the treatment of applicable law is simplicity itself. The court is to apply its statute, applicable treaties, and rules and principles of general international law, and as a subsidiary source, applicable rules of national law....No doubt to say that applicable rules, whether derived from treaties, general international law or national law, are to be applied is not to say very much. *But the way in which treaties and rules and principles of international law are applied under Article 38 of the Statute of the International Court is now fairly well understood, and there was little point in seeking to elaborate them in one particular context.*¹⁵⁹

The 1996 Report of the Preparatory Committee, however, does provide some interesting guidance as to the thinking of states at that particular juncture in the drafting process. It shows a split amongst states with respect to the flexibility of any eventual statute. On the one hand, there were those delegations who ‘cautioned against the risk of compounding the Statute with extensive and detailed rules’, since ‘the Statute could not specify all rules, nor could it predict all types of issues which might come before the Court’.¹⁶⁰ On the other hand, there were delegations who were fearful that allowing for a judicial role in the progressive development of the law ‘would not be consistent with the principle of legality’.¹⁶¹ It is here that we first encounter the move towards a more prescriptive conception of the applicable law

treaty law, the Statute strikes the commentator as a text that is markedly different from other multilateral treaties. It bears the mark of strong political and diplomatic difference over certain major issues, and shows the difficulty to ironing them out’. In this regard M Cherif Bassiouni has commented that, ‘some problems were inevitable since the drafting process itself suffered from the flaws of multilateral negotiating practices. The drafting process was too vulnerable to the obstinacy of single delegations or even single delegates who refused to allow approval by consensus. There has to be a better way to draft such complex multilateral treaties.’ Bassiouni, ‘Negotiating the Treaty of Rome on the Establishment of an International Criminal Court’ (n 2) 467. See also Sadat, ‘Custom, Codification and Some Thoughts about the Relationship between the Two’ (n 45) 910: ‘As the drafting of the ICC treaty proceeded, however, the disadvantages of codification also became clear. Indeed, it began to seem that there might be a fundamental incompatibility between the political agendas of States and the process of codifying, in a progressive manner, the customary international law of war and crimes against humanity. Thus, the codification process was fated to produce a text that represented a set of political compromises, rather than a new set of progressive norms criminalizing behavior on a broad scale. To put it another way, if the criminal law in the ICC Statute was seen as a net in which to catch the war criminals of the world, it contained some very large holes through which some major criminals might escape the Court’s reach.’

¹⁵⁸ Report of the ILC on the work of its forty-fifth session (3 May–23 July 1993) UN Doc A/48/10, at 111.

¹⁵⁹ J Crawford, ‘The ILC’s Draft Statute for an International Criminal Tribunal’ (1994) 88 *American Journal of International Law* 140, 147–8 (emphasis added).

¹⁶⁰ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, UN Doc A/51/22[VOL-I](SUPP) (1996) para. 182.

¹⁶¹ Ibid., para. 184.

provision. Most particularly, discussions within the Committee highlighted concerns that draft Article 33 (later Article 21)

...was vague and should be revised by: (a) substantiating in more detail the sources of the substantive law which the Court would apply; and (b) elaborating the essential elements of the general principles of criminal law.... It was also suggested that the primacy of the Statute and the order of relevance and applicability of other sources of applicable law should be made explicit in the revision of the article.¹⁶²

This belief, that the detailed elaboration of positive rules was the only way of ensuring interpretative compliance with the principle of legality, has been the subject of vociferous criticism. For instance, in his commentary to Article 21, Alain Pellet remarks that ‘it was undoubtedly necessary to define the jurisdiction of the Court and to respect the requirements of the *nullum crimen sine lege* principle as in all criminal proceedings... [h]owever, there was no need to go into such great detail, or even to set out the substantial rules applicable’.¹⁶³ He continues further that, ‘under the pretext that this exercise was rendered necessary by the criminal law principle of “legality” of crimes and misdemeanours, the negotiators have mechanically transposed an internal legal principle to the international sphere’.¹⁶⁴ What is perhaps more curious is the fact that states’ concerns as to the sanctity of the principle of legality within the text of the Statute would be directly addressed by the more general interpretative provisions of Articles 21(3) and 22, which, as Kenneth Gallant points out, ‘immediately incorporate[s] the principles of legality that have become customary international law’.¹⁶⁵ It seems somewhat trite to remark that the enumeration of the applicable law can help guard against violations of the principle of legality; however, it is unpersuasive to argue that the principle could only be properly protected if such a provision included the delineation of a series of complex hierarchies such as to carefully regiment the interpretative freedom of the bench.

The issue of the imposition of a hierarchical structure arose during the drafting of Article 38 of the Statute of the Permanent Court of International Justice, the text of which was replicated without amendment as Article 38 of the Statute of the ICJ. The *travaux préparatoires* are revealing and have a definite resonance in trying to disentangle the rationale behind Article 21(1)’s attempted corseting of the applicable law

¹⁶² Ibid., para. 188.

¹⁶³ Pellet, ‘Applicable Law’ (n 52) 1055. Cf. I Caracciolo, ‘Applicable Law’ in F Lattanzi and W Schabas (eds), *Essays on the Rome Statute of the International Criminal Court—Volume I* (Rome: il Sirente 1999) 212: ‘The complexity of the normative system that the activity an international criminal tribunal must keep as a reference is manifested by the content of Article 21 on applicable law. This article can be viewed as the closing provision of the Statute, embodying the legal principle *nullum crimen sine proeria lega*.’

¹⁶⁴ Ibid., 1056. See also M McAuliffe-DeGuzman, ‘Article 21—Applicable Law’ in O Triffterer (ed.), *Commentary to the Rome Statute* 2nd edn (München: C H Beck, Hart, Nomos 2008) 703–4: ‘The primary challenge faced in drafting article 21 was the need to adhere to the principle of *nullum crimen sine lege* in the context of the loosely structured international legal order, with no sovereign legislature. Modern criminal law, even in common law countries, lies almost exclusively within the domain of legislators. International law, on the other hand, develops through the gradual emergence of custom and the recognition of general principles of law.’

¹⁶⁵ K Gallant, *The Principle of Legality in International and Comparative Law* (Cambridge: Cambridge University Press 2009) 332.

and by extension the interpretative freedom of the bench. In considering the question of the applicable law, the President of the Advisory Committee of Jurists to the Council of the League of Nations, Baron Deschamps, passionately advocated for the inclusion of a strict '*ordre successif*' in the draft article. He argued that 'it would be dangerous to allow the judges to apply the law of right and wrong exclusively according to their own personal understanding of it'; he felt it imperative 'to indicate the line which the judges must follow; and compel them to conform to the dictates of the legal conscience of civilized nations'.¹⁶⁶ If such a controlling provision could be concluded, it 'would merit the gratitude of humanity'.¹⁶⁷ The proposed inclusion of a specified order of applicable law was quite clearly, therefore, for the purposes of ensuring that the bench did not in any way encroach on the sanctity of sovereign consent in the resolution of disputes. It was certainly not expressly proposed as being in the interests of justice or the proper administration of the judicial function.

Despite Deschamps' plea and promise of the gratitude of humanity, the proposal was ultimately rejected.¹⁶⁸ In this regard, delegate De Lapradelle argued that '[a] judge must, of course, judge according to law; the law must be defined, 'but this duty must be left to the judges'.¹⁶⁹ The inclusion of a strict definition of the sources of law would be unreasonable 'and even unjust'.¹⁷⁰ In his view, '[t]here would be no danger in allowing the Court to consider whether any particular legal solution were just and equitable, and if necessary to modify, if the situation arose, the legal solution according to the exigencies of justice and equity'.¹⁷¹ 'Confidence', he argued, 'must be put in the judges, and they must be allowed to consider these different elements for themselves'.¹⁷² Delegate Root shared these sentiments, warning that '[i]f the Committee undertook to establish the actual rules to be followed by the judges, they would exceed their mandate which was to organize the Court and not to make laws for it'.¹⁷³ Indeed, it was also proposed that 'the law of objective justice' be included within the applicable law provision not only because it would have a significant impact on 'progress in international life', but also because it would complement the application of law, and 'as such [would be] essential to the judge in the performance of the great task entrusted to him'.¹⁷⁴

The end result therefore rejected a provision on the applicable law which mandated the formalized and controlled judicial application of law (in a manner protective of essential state interests) in favour of a provision which protected judicial independence and the full and proper exercise of the judicial function. What's more, it acknowledged that sources other than law could be utilized if necessary in the interests of justice. Taking this into consideration, it is difficult not to share Pellet's scepticism

¹⁶⁶ Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920) Annexe No. 3, 318.

¹⁶⁷ Ibid.

¹⁶⁸ See League of Nations, Documents Concerning the Action Taken by the Council of the League of Nations under Art 14 of the Covenant and the Adoption of the Assembly of the Statute of the Permanent Court (1920) 145. Commenting on its proposed removal from the draft, the French Delegate, Fromageot, 'explained that its effect would be to enable the Court to state as the sole reason for its judgments that the award seemed to it to be just. This did not imply that the Court might disregard existing rules'.

¹⁶⁹ Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (n 166) 296.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid., 293.

¹⁷⁴ Ibid., 324–5.

with respect to the legality argument raised by certain delegations when considering Article 21, since such protections are expressly provided for in the Statute. The more likely scenario is that states simply utilized the principle of legality as a convenient shield to mask a desire to be more protective of state interests. In this sense, it is not necessary to be versed in the ‘tenets of critical legal scholarship’ to accept that the sources of international [criminal] law are not untouched by politics.¹⁷⁵

19.4.1.3 Article 21(1)(b)–(c) and Article 21(2): the position of customary international law, general principles of law, and internal and external precedent in the Rome Statute’s interpretative regime

In instituting a precise hierarchy of sources, the drafters have displayed a wilful ignorance of the contours of the interpretative process and, crucially, of the complex nature of the interplay of sources in international adjudication.¹⁷⁶ The absence of a hierarchy in Article 38(1) implicitly acknowledges the complex overlap of sources of law that cannot be addressed via recourse to a simple formula.¹⁷⁷ The actual sources of law provided for in Article 21(1)(b) and (c) are relatively uncontroversial; however, the wording of Article 21(1)(b) is unlikely to be revered for its clarity or eloquence. It provides for the application, ‘where appropriate’—that is, once a textual interpretation of the internal law has been exhausted—of applicable treaties ‘and principles and rules of international law, including the established principles of the international law of armed conflict’. This rather opaque reference has given rise to some speculation as to the applicability of customary international law. Pellet put his criticism thus:

The sibylline drafting of this provision nonetheless gives cause for perplexity. Why use such an indirect expression when a simple reference to international custom would have sufficed? Why refer to ‘principles and rules’, when both are placed on the same footing? Why, above all, make special reference to the ‘established principles [and not rules?] of the international law of armed conflict’, when they undoubtedly form part of the ‘principles of international law’?¹⁷⁸

It would no doubt be amusing to develop a conspiracy theory to the effect that the wording of Article 21(1)(b) establishes the drafter’s intent to exclude customary international law as a subsidiary source of law, but in reality there is no doubt that ‘principles and rules of international law’ is intended to refer to both general principles and customary norms of international law. It is arguable that, even in the absence of any reference to custom, it could nonetheless be permissibly invoked by the bench. Why customary international law was not referred to in less remote terms is not obvious from the drafting history. For Pellet, this anomaly was ‘most likely due to the fact that the criminal lawyers, whose influence increased during the drafting of the Statute, opposed it in the name of an erroneous conception of the principle of legality of offences and punishment’.¹⁷⁹

¹⁷⁵ Cryer, ‘Royalism and the King’ (n 46) 390. See also D Kennedy, ‘The Sources of International Law’ (1987) 2 *American University Journal of International Law and Policy* 1.

¹⁷⁶ Ibid., 394.

¹⁷⁷ Ibid.

¹⁷⁸ Pellet, ‘Applicable Law’ (n 52) 1070.

¹⁷⁹ Ibid., 1071.

The wording of Article 21(1)(b) leaves uncertain the extent to which the bench is permitted to rely on the jurisprudence of other international criminal tribunals in identifying ‘principles and rules of international law’. However, before returning to this issue, it is clear from Article 21(2) that ‘the Court *may* apply principles and rules of law as interpreted in its previous decisions’. However, this fails to establish a clear hierarchy delineating the decisions of the various Chambers of the Court—perhaps the only hierarchy one would expect to find in a provision of this nature.¹⁸⁰ In this regard, it fails to fully or coherently adopt the oft-repeated finding of the Yugoslav Appeals Chamber in the *Aleksovski* case that, in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions and should only depart from them ‘for cogent reasons in the interests of justice’, and further that the *ratio decidendi* of its decisions are binding on subordinate chambers of the Tribunal in line with the common law tradition and the equivalent, if unacknowledged, practice of the civil law tradition.¹⁸¹

In one of its very first decisions in the *Lubanga* case, the Appeals Chamber not only ignored the *Aleksovski* principle, but rejected the notion of inferior or subordinate Chambers: ‘[t]he Pre-Trial and Trial chambers of the International Criminal Court are in no way inferior courts in the sense that inferior courts are perceived and classified in England and Wales. Hence, any comparison between them and inferior courts under English law is misleading.’¹⁸² While relying on a purely textual interpretation of the provision, subsequent practice of ‘lower’ chambers reveals a readiness to follow previous decisions. For example, in the *Katanga and Ngudjolo* Confirmation of Charges Decision, the Pre-Trial Chamber in its interpretation of the evidentiary standard of substantial grounds to believe saw ‘no compelling reason to depart from its application of the standard as established in the *Lubanga* case’.¹⁸³ In addressing the understanding to be given to direct or indirect co-perpetration under Article 25(3)(a), the same Chamber remarked in following the precedent set in the *Lubanga* case, that such guidance was ‘particularly significant in the instant proceedings, as no other Chamber of the Court has thus far provided a divergent interpretation of these matters’.¹⁸⁴ In the *Bemba* case, the Pre-Trial Chamber, in its interpretation of ‘jointly with another’ under Article 25(3)(a), determined that there was ‘no reason to deviate from the approach and line of reasoning embraced by Pre-Chamber I, as it is consistent with the letter and spirit of article 25(3) of the Statute’.¹⁸⁵ Indeed, given the relative paucity of Appeals Chamber jurisprudence and the contrasting flourishing of Pre-Trial Chamber jurisprudence, there is an argument to be made that the Pre-Trial

¹⁸⁰ See Bitti (n 85) 293.

¹⁸¹ Judgment, *Aleksovski*, IT-95-14/1-A, AC, ICTY, 24 March 2000, paras 107 and 113, see generally paras 92–113.

¹⁸² Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, *Lubanga* (n 93) para. 30.

¹⁸³ Decision on Confirmation of Charges, *Katanga and Ngudjolo* (n 93) para. 65.

¹⁸⁴ Ibid., fn. 618.

¹⁸⁵ Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba* (n 94) para. 348.

Chamber enjoys *de facto* binding authority, especially given the potential impact any deviation from Pre-Trial authorities may have on the rights of the accused.¹⁸⁶

In *Lubanga*, we get some acknowledgement of the binding nature of Appeals Chamber jurisprudence, with the Pre-Trial Chamber deciding to follow the ‘guiding principles prescribed in the judgments rendered by the Appeals Chamber’.¹⁸⁷ There are, however, several instances in which Chambers have invoked Article 21(2) in order to reject pre-existing jurisprudence, although there is yet to be an instance in which the jurisprudence of the Appeals Chamber has been expressly rejected.¹⁸⁸ While the Court’s jurisprudence on Article 21(2) continues to develop, it is nevertheless evident that, in wishing to make clear the rejection of a dedicated *stare decisis* rule, the drafters entirely failed to delineate a clear and (what might be considered) obvious hierarchy between Chambers. It is ironic, in a provision so replete with complex hierarchies, that the relatively straightforward question of the necessary internal hierarchy between Chambers was not addressed. If, as is inferable from the *travaux*, concern for the sanctity of the principle of legality—the need for certainty and predictability of rules—lies behind the rigid drafting of Article 21(1), no such equivalent concern appears to attach to the question of establishing a consistent and coherent body of internal jurisprudence. It seems likely that the true explanation lies simply with poor or sloppy drafting or with states wishing to protect possible future interests by replicating the basic import of Article 59 of the Statute of the ICJ, which expressly excludes *stare decisis*.¹⁸⁹ It may be the case that states wished the Court to decide cases based on law, not precedent—*non exemplis, sed legibus iudicandum est*.

Returning to the question of whether or not the Court may rely on the jurisprudence of other international courts and tribunals in the identification of rules and principles of law for the purposes of Article 21(1)(b),¹⁹⁰ it is clear, at least on the back of current jurisprudence, that this is going to be a regrettably difficult struggle, with somewhat divergent (but equally cautious) approaches emerging depending on whether the issue

¹⁸⁶ See e.g. Separate Opinion of Judge Adrian Fulford, *Lubanga* Trial Judgment (n 95) para. 21, where Judge Fulford rejected the control of the crime theory for the purpose of Art 25(3)(a) but nonetheless acknowledged that to deviate from the Pre-Trial Chamber determination of the matter at the Art 74 stage would be detrimental to the rights of the accused.

¹⁸⁷ Decision on the Confirmation of Charges, *Lubanga* (n 93) para. 154.

¹⁸⁸ See Decision on Art 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-621, PTC I, ICC, 20 June 2008, para. 59; Decision on the Requests of the Legal Representative of Applicants on Application Process for Victim’s Participation and Legal Representation, *Situation in the Democratic Republic of the Congo*, ICC-01/04-374, PTC I, ICC, 17 August 2007, paras 37–8.

¹⁸⁹ Art 59 ICJ Statute (n 72): ‘The decision of the Court has no binding effect except between the parties and in respect of that particular case.’

¹⁹⁰ See *Kupreskic* Trial Judgment (n 60) para. 540: ‘More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law.’ Cf Art 20(3) Statute of the SCSL (2002) 2178 UNTS 138, annex: ‘The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda.’

under examination relates to procedural or substantive law.¹⁹¹ Under Article 38(1)(d), judicial decisions are of course identified as a subsidiary means for the determination of international rules, which, as Volker Nerlich points out, 'is reflective of a general methodological approach for the ascertainment of rules of international law'.¹⁹² For William Schabas, the interpretation of Article 21(1)(b) 'surely cannot be taken as depriving the Court of the authority to consider principles and rules of law derived from the case law of other judicial bodies'.¹⁹³ It would therefore be exceptional if the Court were to rule entirely against their applicability to considerations under Article 21(1)(b).

There is, nonetheless, an appreciable reluctance in the jurisprudence to benefit directly from this rich resource. Looking first at the interpretation of procedural rules the Court appears willing to give the external jurisprudence at least some consideration. For example, in the now infamous witness proofing debate in the *Lubanga* case,¹⁹⁴ Trial Chamber I made the following determination:

The Trial Chamber notes, as has been established by recent jurisprudence from the International Criminal Tribunals of the former Yugoslavia and Rwanda, that witness proofing, in the sense advocated by the prosecution in the present case, is being commonly utilized at the ad hoc Tribunals.... However, this precedent is in no sense binding on the Trial Chamber at this Court. Article 21 of the Statute requires the Chamber to apply first the Statute, Elements of Crimes and Rules of the ICC. Thereafter, if ICC legislation is not definitive on the issue, the Trial Chamber should apply, where appropriate, principles and rules of international law. In the instant case, the issue before the Chamber is procedural in nature. While this would not, ipso facto, prevent all procedural issues from scrutiny under Article 21(1)(b), the Chamber does not consider the procedural rules and jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis.... *[W]hile acknowledging the importance of considering the practice and jurisprudence of the ad hoc tribunals, the Chamber is not persuaded that the application of the ad hoc procedures, in the context of preparation of witnesses for trial, is appropriate.*¹⁹⁵

¹⁹¹ If Art 38 was under discussion, this point would be clearly addressed by paragraph (d). On this issue see generally, V Nerlich, 'The Status of ICTY and ICTR Precedent on Proceedings before the ICC' in Sluiter and Stahn (n 85).

¹⁹² Ibid., 313.

¹⁹³ W Schabas, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press 2010) 396, backing up this point by reference to extant ICC jurisprudence—see fn. 116.

¹⁹⁴ See generally, K Ambos, 'Witness Proofing before the ICC: Neither Legally Admissible nor Necessary' in Sluiter and Stahn (n 85); R Karemeyer et al., 'Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence' (2008) 21 *Leiden Journal of International Law* 683; W Jordash, 'The Practice of "Witness Proofing" in International Criminal Tribunals: Why the International Criminal Court Should Prohibit the Practice' (2009) 22 *Leiden Journal of International Law* 501; S Vasiliev, 'Proofing the Ban on "Witness Proofing": Did the ICC Get it Right?' (2009) 20 *Criminal Law Forum* 193.

¹⁹⁵ Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *Lubanga* (n 93) paras 43–5 (emphasis added). Cf. Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes in the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, *Kony* et al., *Situation in Uganda*, ICC-02/04-01/05-60, PTC II, ICC, 28 October 2005, para. 19: 'As to the relevance of the case law of the ad hoc tribunals, the matter must be assessed against the provisions governing the law applicable before the Court... [T]he

Given the noted differences in procedural regimes governing the ad hoc Tribunals on the one hand and the ICC on the other, there is definite merit to the Trial Chamber's determination of the limited value that can be attached to the procedural jurisprudence of the ad hoc Tribunals. As Nerlich puts it:

Particular care should be exercised in identifying *faux amies*: many of the procedural provisions of the ICC Rules of Procedure and Evidence are similar, or even identical, to provisions of the Rules of Procedure and Evidence of the ad hoc tribunals; yet given the systemic difference between the procedural systems outlined above, it may well be that an interpretation of the corresponding provisions by the ICTY or the ICTR may be inappropriate for the ICC. In other words, when relying on the external context of a provision it must always be ensured that the *internal* context...is respected.¹⁹⁶

While similar divergences are appreciable in aspects of substantive law—bearing in mind the detailed definitional constructs of Articles 6, 7, 8 and 25—there is nevertheless evidence of considerable openness to ad hoc jurisprudential guidance, particularly with respect to the determination of contextual elements. For example, in the *Lubanga* Confirmation of Charges Decision, Pre-Trial Chamber I determined that coherent definitions of international and non-international armed conflict could not be distilled from either the Statute or the Elements of Crimes. Faced with such a predicament, Article 21(1)(b) was called upon to assist in addressing what must be regarded as a glaring statutory *lacuna*, whereupon the Chamber allowed itself to be guided by the established jurisprudence of both the Yugoslav Tribunal and the ICJ on the matter.¹⁹⁷ Addressing the question of the necessity of establishing a nexus between an armed conflict and the commission of alleged war crimes, the Pre-Trial Chamber held that '[i]n this respect... [it] follows the approach of the jurisprudence of the ICTY, which requires the conduct to have been closely related to the hostilities occurring in any part of the territories controlled by the parties to the conflict'.¹⁹⁸ However, it is also clear that such jurisprudence will only be considered once the textual interpretation of the provision has been exhausted in accordance with Article 21(1)(a). There are of course notable exceptions, such as the aforementioned use of the *Stakić* Trial Judgment in the interpretation of Article 25(3)(a). It seems that while ad hoc Tribunal jurisprudence on substantive international criminal law is unlikely to be directly applied, it is frequently an important aspect of the interpretative process.

The applicability of ad hoc Tribunal jurisprudence with respect to Article 21(1)(b) applies with equal validity to the identification of 'general principles of law derived by the Court from national laws of legal systems of the world' pursuant to Article 21(1)(c).¹⁹⁹ The intelligibility of this provision stands in contrast to the vast majority of Article 21(1), and would in fact appear to be consistent with the approach adopted by

law and practice of the ad hoc tribunals, which the Prosecutor refers to, cannot per se form a sufficient basis for importing in the Court's procedural framework remedies other than those enshrined in the Statute.'

¹⁹⁶ Nerlich (n 191) 322.

¹⁹⁷ Decision on the Confirmation of Charges, *Lubanga* (n 93) paras 205–37.

¹⁹⁸ Ibid., para. 287. ¹⁹⁹ Art 21(1)(c) Rome Statute.

the ad hoc Tribunals in the identification of general principles of law.²⁰⁰ In this respect the general principles of law falling under paragraph (c) are entirely distinct from the principles of international law provided for under paragraph (b). It is clear that the general principles of law envisaged as populating paragraph (c) are not related to 'general principles of law' as provided for under Article 38(1)(c) of the Statute of the ICJ, but rather to those principles of law commonly underpinning domestic legal orders, particularly in the criminal sphere.²⁰¹ As Schabas maintains, it acts as 'an invitation to consult comparative criminal law as a subsidiary source of norms'.²⁰²

It is worth noting that Article 21(1)(c) is entirely consistent with the general tenor of the remarks made by Judge Antonio Cassese in his dissenting opinion in the *Erdemović* Sentencing Appeals Judgment. Commenting on the extent to which 'an international criminal court may or should draw upon national concepts and transpose these concepts into criminal proceedings', he cautioned that 'legal constructs and terms of art upheld in national law should not be automatically applied at the international level. They cannot be mechanically imported into international criminal proceedings'.²⁰³ Article 21(1)(c) heeds this advice in instituting the caveat that such principles identified following an examination of a cross-section of diverse domestic practices can only be utilized provided that 'those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards'. In making particular reference to 'the national laws of States that would normally exercise jurisdiction', it would appear that once again the drafters wished to reinforce Article 21's absolute consistency with the principle of legality, even if it is difficult to conceive of a scenario where it would be 'appropriate' to rely on the national law of a specific state to the exclusion of all others.²⁰⁴ The absolute requirement of consistency with the internal law of the Court serves not only to reinforce the textual primacy of the Statute, Rules of Procedure and Evidence, and the Elements of Crimes, but also protects against a liberal invocation of paragraph (c) for creative purposes. However, given its consistency with what is now established as international criminal practice, there are few grounds for criticism.

It is neither expected nor entirely desirable that the bench of the ICC would seek to casually adopt the jurisprudence of the ad hoc Tribunals as an additional primary source of internal law. However, as demonstrated by the ad hocs themselves, the jurisprudence of related international courts and tribunals nonetheless constitutes a series of extremely rich resources which can be creatively utilized in the ascertainment of customary norms under Article 21(1)(b) and general principles of law under Article 21(1)(c). There is some cause for concern, however, in observing the reluctance with which the Court has, at least thus far, consciously relied on this vast resource. The

²⁰⁰ See F Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Leiden: Martinus Nijhoff 2008).

²⁰¹ Art 38(1)(c) ICJ Statute (n 72); '(c) the general principles of law recognized by civilized nations'.

²⁰² Schabas, *The Rome Statute of the International Criminal Court: A Commentary* (n 193) 393.

²⁰³ Sentencing Appeals Judgment—Separate and Dissenting Opinion of Judge Cassese, *Erdemović* (n 68) paras 2–3.

²⁰⁴ For a more detailed examination of the drafting history of Art 21(1)(c), see Schabas, *The Rome Statute of the International Criminal Court: A Commentary* (n 193) 393–4.

drafting of Article 21 is such that Chambers have felt compelled to clearly justify their utilization and have frequently favoured restraint. Instead of freely drawing on the complex interplay of sources identifiable in the international legal order in the interpretation of its constituent instruments, the bench of the ICC has instead effectively had to reinvent the wheel. The strict hierarchy instituted by Article 21(1) makes this a regrettable inevitability. The drafters of Article 21 clearly wished to mandate a restrained, formalized approach to the interpretation of the applicable law, making recourse to additional sources and a creative methodology a rare and last resort which must be tallied with the hierarchical structure of Article 21. However, observing Article 21(3), it would appear that not all avenues are closed to permissible interpretative creativity at the ICC.

19.4.2 Article 21(3)—consistency with international human rights law as a general interpretative provision

The foregoing analysis of Article 21(1) and (2) reveals a concerted effort on the part of the drafters to consciously limit the capacity of the bench to move beyond the interpretation and application of the internal law of the Court in accordance with its ordinary textual meaning. We have discussed at length the potential stifling of the judicial function brought about by the inclusion of a series of strict, mechanical hierarchies and modes of application of applicable law, which conceive of the judicial function as a statutorily manageable process. There is no doubt that the practice of the Court to date illustrates that the interpretational regime imposed by Article 21(1) and Article 22(2) is utilized in numerous instances in order to justify a restrained interpretative approach, with various Chambers expending some effort in justifying interpretational recourse to supplementary rules and principles in a manner inconsistent with the reality of the complex interplay of sources in the international legal order. However, a potential chink in the armour of this burgeoning culture of restraint is appreciable in the wording of Article 21(3), which provides that:

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.

Appended curiously to the tail end of Article 21, paragraph (3) constitutes a general principle of interpretation to be applied to both the internal and external law of the Court.²⁰⁵ Alain Pellet refers to it as ‘perplexing’, instituting what he describes as ‘a sort of international “super-legality”’ whereby norms of international human rights law are afforded normative superiority over all other sources of both internal and external

²⁰⁵ See e.g. Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Art 19(2)(a) of the Statute of 3 October 2006, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-772, AC, ICC, 14 December 2006, para. 36; *Lubanga Trial Judgment* (n. 95) para. 602: ‘The Appeals Chamber has also

law.²⁰⁶ While arguments can be made to the contrary, there is nothing in either the drafting history or the ordinary meaning of the terms, beyond negative inferences, that might prohibit such an interpretation.²⁰⁷ William Schabas, in acknowledging Article 21(3)'s rich potential, comments that:

No other provision of the Rome Statute governs the application and interpretation of all of its provisions, as well as all of the other sources of applicable law. It is analogous to constitutional provisions in national law that authorize courts to interpret and even disallow legislated texts to the extent they are incompatible with fundamental human rights standards or they are discriminatory.²⁰⁸

The nature of Article 21(3)'s true potential lies in the construction that any and all interpretations and applications of the panoply of applicable law provided for in Article 21(1) must be consistent with 'internationally recognized human rights'. Therefore, Article 21(3) effectively proclaims that it is within the power of the bench to refuse to apply any provision of the internal law (i.e. the Statute, Rules of Procedure and Evidence, and Elements of Crimes) if such application would be contrary to norms of internationally recognized human rights.²⁰⁹ The absence of a definition of internationally recognized human rights leaves it open to the bench to determine the rules populating this obtuse category, thereby allowing for judicial autonomy in the application of the Statute's overarching interpretative provision.²¹⁰ In this respect it acts as the *lex specialis* for the interpretation and application of the applicable law, irrespective of possible conflicts with interpretative results arrived at via recourse to the Vienna rules. That we can speak of Article 21(3) in such terms is ironic given that the supposed rationale for its inclusion lay once again with 'the principle of legality and the desire to limit judicial discretion'.²¹¹ However, far from limiting judicial discretion, it mandates the bench to draw on a wide variety of external rules and jurisprudence in its interpretation and application of the law which not only reinforces and complements the

decided that Article 21(3) of the Statute "makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognized human rights. It requires the exercise of the jurisdiction of the Court in accordance with internationally recognized human rights norms"; Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-108-Corr, PTC I, ICC, 19 May 2006, para. 7; Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, *Katanga and Ngudjolo* (n 94); Decision on the Set of Procedural Rights Attached to the Procedural Status of Victims at the Pre-Trial Stage of the Case, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-475, AC, ICC, 13 May 2008, paras 57 and 78.

²⁰⁶ Pellet, 'Applicable Law' (n 52) 1079–81, 1079: '[I]t seems to introduce (or recognize?) a hierarchy between the norms to be applied by the Court: certain rules are given (or recognized as having?) an intrinsic superiority stemming not from their source, but their subject matter.'

²⁰⁷ Cf. G Hafner and C Binder, 'The Interpretation of Article 21(3) ICC Statute, Opinion Reviewed' (2004) 9 *Austrian Review of International and European Law* 163. The main crux of their argument being, if super-legality had been intended, it would have been expressly mandated.

²⁰⁸ Schabas, *The Rome Statute of the International Criminal Court: A Commentary* (n 193) 398.

²⁰⁹ See Hafner and Binder (n 207). ²¹⁰ Ibid.

²¹¹ Grover (n 13) 559. See also M Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *American Journal of International Law* 22: 'While the original intention behind this paragraph

principle of legality under Article 22, but also allows scope for the progressive development of the law via creative judicial interpretation.²¹²

While Kenneth Gallant argues that Article 21(3) potentially allows the bench ‘to some extent to modify the definitions of crimes over which the Statute gives the ICC jurisdiction’,²¹³ it is more likely that in such instances Article 22(2) will intervene to prevent any prejudice to the rights of the accused. It is clear that Article 21(3) does not override the Statute as such, but rather comes into effect when more than one interpretation of a provision is possible, dictating that the interpretation that best conforms with human rights must be adopted.²¹⁴ So while Article 21(3) has significant potential, its necessary utilization in conjunction with Article 22 ensures that the principle of legality and the rights of the accused retain their potent force. Indeed, the principle of legality is without question subsumed within the category of internationally recognized human rights; to suggest its exclusion would be an absurdity. An example of the interpretation and application of Article 21(3) in conjunction with Article 22 in the interests of the rights of the accused is observable in Judge Van den Wyngaert’s Concurring Opinion in the *Ngudjolo* case. In rejecting the Pre-Trial Chamber’s application of the notion of indirect co-perpetration, she remarked that:

Individuals must have been in a position to know at the time of engaging in certain conduct that the law criminalized it. The Grand Chamber of the European Court of Human Rights has given considerable weight to the elements of ‘accessibility’ and ‘foreseeability’ in its assessment of the legality principle. I doubt whether anyone (inside or outside the DRC) could have known, prior to the Pre-Trial Chamber’s first interpretations of Article 25(3)(a), that this article contained such an elaborate and peculiar form of criminal responsibility as the theory of ‘indirect co-perpetration’, much less that it rests upon the ‘control over the crime’ doctrine.²¹⁵

Looking to the current practice of the Court with respect to Article 21(3), it is evident that its employment often acts as an effective means of circumventing the strict hierarchy of sources instituted by Article 21(1). As such, it is clear that external sources of law can be readily relied upon in the interpretation and application of the internal law of the Court without necessarily invoking textual ambiguity or a statutory *lacuna*, which, as we have seen, would be required in order for sources of law falling under Article 21(1)(b) and (c) to be formally utilized. In this sense, international human

may have been to limit the court’s powers in the application and interpretation of the relevant law, it could have the opposite effect and broaden the competence of the court on these matters. It provides a standard against which all the law applied by the court should be tested. This is sweeping language, which, as drafted, could apply to all three categories of Article 21; J Verhoeven, ‘Article 21 of the Rome Statute and the Ambiguities of Applicable Law’ (2002) 33 *Netherlands Yearbook of International Law* 2.

²¹² See K Gallant, ‘Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court’ in M C Bassiouni (ed.), *International Criminal Law—Volume III* (Leiden: Brill 2008) 693; G Edwards, ‘International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy’ (2001) 26 *Yale Journal of International Law* 323.

²¹³ See Gallant, ‘Individual Human Rights in a New International Organization’ (n 212) 693.

²¹⁴ Hafner and Binder (n 207) 178.

²¹⁵ Concurring Opinion of Judge Christine Van den Wyngaert, *Ngudjolo* (n 123) para. 20.

rights law constitutes a potentially ever-present guiding aid in the construction of all aspects of the Rome Statute and acts as a bulwark against judicial arbitrariness.

A useful example is observable in the *Lubanga* case with respect to the applicability of the doctrine of abuse of process in the context of proceedings before the Court despite its absence from the Statute and the Rules of Procedure and Evidence. Addressing the issue, the Appeals Chamber focused on the centrality of Article 21(3) to any determination arrived at:

Article 21(3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety.... Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.²¹⁶

Following an examination of a selection of ECtHR case law and domestic practice, the Appeals Chamber held that the application of Article 21(3) dictated that the right to a stay of proceedings based on abuse of process must be recognized as falling within the ambit of Article 67 of the Statute:

Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.²¹⁷

The Appeals Chamber therefore recognized the applicability of abuse of process, not on the basis of its inherent jurisdiction as one might have predicted given the practice of the ad hoc Tribunals, but rather via direct invocation of Article 21(3).²¹⁸ In this respect, the interpretative developmental potential of Article 21(3) seems clear for all to see.

The recognition of abuse of process by the Appeals Chamber in light of Article 21(3), and in particular the rights of the accused under Article 67, can be compared

²¹⁶ Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Art 19(2) of the Statute of 3 October 2006, *Lubanga* (n 205) para. 37.

²¹⁷ Ibid., para. 39.

²¹⁸ See J Liang, 'The Inherent Jurisdiction and Inherent Powers of International Courts and Tribunals: An Appraisal of their Application' (2012) 15 *New Criminal Law Review* 375. See also Decision on the Admissibility and Abuse of Process Challenges, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-802, TC III, ICC, 24 June 2010, paras 252 and 253.

with their interpretation of the permissible timeframe and circumstances in which the recharacterization of facts under Regulation 55 may be implemented by Pre-Trial and Trial Chambers.²¹⁹ In its consideration of the issue in the *Lubanga* case, the Appeals Chamber determined, following an examination of numerous international human rights instruments and relevant jurisprudence of the ECtHR in line with Article 21(3), that ‘human rights law demands that the modification of the legal characterization of facts in the course of the trial must not render the trial unfair’.²²⁰ It held further that the modalities of the Regulation’s application in accordance with the rights of the accused would, of necessity, have to be considered on a case-by-case basis.²²¹ From a reasoning perspective, it would appear that Article 21(3) was appropriately utilized in this instance; however, the same can hardly be said about the interpretation and application of Regulation 55 by the Trial Chamber in the *Katanga* case.²²²

Numerous examples of the developmental potential of Article 21(3) are observable throughout the practice of the Court; however, it would be remiss not to mention in passing the extent to which the Court has relied on international human rights law in giving substance to the right of victim participation.²²³ Without delving into the issue in any detail, it is nonetheless worth noting that the Court has consistently interpreted the right of victim participation pursuant to Article 68 and Rules 85 and 89 of the Rules of Procedure and Evidence through the lens of international human rights law via direct invocation of Article 21(3).²²⁴ In this respect the Court has sought guidance in (amongst other instruments) the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, and the Convention on the Rights of the Child. On the related issue of victim reparations, the Trial Chamber in *Lubanga*, acting pursuant to Article 21(3), issued its decision establishing guidelines for the operationalization of the Court’s reparations regime

²¹⁹ For an in-depth discussion of this issue see Heller, Chapter 39, this volume. See also D Jacobs, ‘A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court and the Uses of Regulation 55?’ in Schabas et al. (n 66).

²²⁰ 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’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2205, AC, ICC, 8 December 2009, paras 84–5.

²²¹ *Ibid.*, para. 85.

²²² See Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against Accused Persons, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3319-tENG/FRA, TC II, ICC, 21 November 2012; Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against Accused Persons—Minority Opinion of Judge Christine Van den Wyngeart, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3319-tENG/FRA, TC II, ICC, 21 November 2012; Judgment on the Appeal of 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’, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3363, AC, ICC, 27 March 2013.

²²³ For a detailed examination of this issue, see Vasiliev, Chapter 45, this volume.

²²⁴ See for example (amongst many): Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *Situation in the Democratic Republic of the*

in light of a wealth of international human rights law and practice.²²⁵ The Court has also invoked Article 21(3) with respect to a plethora of procedural and evidential questions. For instance, in the context of the *Lubanga* Confirmation of Charges Decision, the Pre-Trial Chamber grounded their interpretation of the evidential standard of ‘substantial grounds to believe’ firmly on the jurisprudence of the ECtHR.²²⁶

The foregoing constitutes nothing more than a mere snapshot of the Court’s practice with respect to Article 21(3).²²⁷ However, it is sufficient to establish the point that, while Article 21(3) does not endow the bench with exceptional creative powers, it does represent a chink in the armour of Article 21(1) such that the judicial role in the progressive development of the law via creative judicial interpretation, far from being extinguished, may continue to flourish and evolve in accordance with the requirements of the international criminal legal order.

19.4.3 Article 22(2)—interpretative freedom and the requirements of strict construction

‘It is a basic principle of justice that a person may not be punished if the incriminating acts, when they were committed, were not prohibited by law.’²²⁸ The principle of legality, thus put, has been ever present in the international criminal justice discourse going right back to the post-First World War Leipzig trials.²²⁹ As a basic principle of justice,

Congo (n 91); Decision on Victims’ Participation in Proceedings, *Situation in the Republic of Kenya*, ICC-01/09-24, PTC II, ICC, 3 November 2010; Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, *Muthaura, Kenyatta and Ali*, *Situation in the Republic of Kenya*, ICC-01/09-02/11-267, PTC II, ICC, 26 August 2011; Fourth Decision on Victims’ Participation, *Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-320, PTC II, ICC, 12 December 2008; Decision on the Treatment of Application for Participation, *Katanga and Ngudjolo*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-933, PTC I, ICC, 26 February 2009; Decision on the Applications by Victims to Participate in the Proceedings, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1556, PTC I, ICC, 15 December 2008.

²²⁵ Decision Establishing the Principles and Procedures to be Applied to Reparations, *Lubanga, Democratic Republic of the Congo*, ICC-01/04-01/06-2904, TC I, ICC, 7 August 2012, paras 185 and 186: ‘[T]he right to reparations is a well-established and basic human right, that is enshrined in universal and regional human rights treaties, and in other international instruments, including the UN Basic Principles; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime; the Nairobi Declaration; the Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa; and the Paris Principles.... [G]iven the substantial contribution by regional human rights bodies in furthering the right of individuals to an effective remedy and to reparations; the Chamber has taken into account the jurisprudence of the regional human rights courts and the national and international mechanisms and practices that have been developed in this field.’

²²⁶ Decision on the Confirmation of Charges, *Lubanga* (n 93) para. 38. See also Decision on the Prosecutor’s Application for Warrants of Arrest, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-20-Anx1, PTC I, ICC, 10 February 2006; Decision on the Confirmation of Charges, *Abu Garda* (n 138) para. 36.

²²⁷ For further insight into the practice of the Court with respect to Article 21(3), see Bitti, Chapter 18, this volume.

²²⁸ W Schabas, ‘General Principles of Criminal Law in the International Criminal Court Statute (Part III)’ (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 402, 406. See also K Ambos, ‘General Principles of Criminal Law in the Rome Statute’ (1999) 10 *Criminal Law Forum* 1.

²²⁹ See A Kramer, ‘The First Wave of International War Crimes Trials: Istanbul and Leipzig’ (2006) 14 *European Review* 441; G Gordon Battle, ‘The Trials before the Leipsic Supreme Court of Germans Accused

it enjoys the rare distinction of constituting a non-derogable norm of international human rights law with a positive basis in all of the major international and regional human rights instruments.²³⁰ Along with fidelity to customary international law, it typically constitutes the ‘Golden Rule’ of interpretation applicable to international criminal instruments and should be viewed as an element of a sequenced interpretative approach that aims at ensuring certainty, predictability (or fair warning), and textual consistency.²³¹ Enshrined most concretely in Article 22 of the Rome Statute, there is no ambiguity as to its centrality in the interpretative schematics of the instrument.²³² While issues surrounding recourse to the principle in an interpretative sense would certainly justify lengthy treatment in its own right, it is nonetheless worth highlighting a number of factors which establish that the formal operation of the principle is a central component of the interpretative regime of the Rome Statute.

The principle of the non-retroactive application of law, as a core element of the principle of legality, is well known and uncontested.²³³ Of more discursive value at this juncture are a number of its constituent presumptions, particularly the presumption in favour of the strict construction of penal statutes and the inextricably linked principle of *in dubio pro reo*, which appears to specifically institute a quasi-judicial obligation to cautiously interpret penal statutes or at least to emphasize the non-creative interpretation of criminal statutes. Article 22(2) of the Rome Statute supplies a succinct definition: ‘[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted’.²³⁴ As a general principle of law it has enjoyed a long history; for instance, in 1887 Lord Escher proclaimed in *Tuck & Sons v Priester* that:

of War Crimes’ (1921) 8 *Virginia Law Review* 1; W Schabas, ‘*Nullum Crimen Sine Lege*’ in W Schabas, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press 2012) 47–72.

²³⁰ See e.g. Art 15 International Covenant on Civil and Political Rights (adopted by UNGA Res 2200A (XXI) (16 December 1966), entered into force 23 March 1976) 999 UNTS 171; Art 7 Convention for the Protection of Human Rights and Fundamental Freedoms (concluded 11 April 1950, entered into force 3 September 1953) 213 UNTS 221; Art 9 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123; Art 7(2) African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 Rev. 5.

²³¹ See Report of the Secretary-General, 3 May 1993 (n 57) para. 34: ‘In the view of the Secretary-General, the application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law’. See also Powderly, ‘Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?’ (n 50) 17.

²³² Additional limbs of the principle of legality (particularly with respect to retroactivity) are also observable in: Art 11(1)—‘The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute’; and Art 24(1) and (2)—1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute. 2. In the event of a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply.’

²³³ In this respect Art 22(1) of the Rome Statute provides, ‘[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court’. See generally, Gallant, *The Principle of Legality in International and Comparative Criminal Law* (n 165); L Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Oxford: Oxford University Press 2014) 102–219.

²³⁴ Art 22(2) Rome Statute.

[i]f there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for construction in penal sections.²³⁵

The nature of its application, at least domestically, is, however, rather removed from the literal import of its definition. It is quite obvious, most particularly in a common-law context, that in fact the principle is infrequently invoked and rarely acts as a disincentive for the adoption of broad or developmental interpretations.²³⁶ The great Granville Williams, commenting some years ago, remarked that:

[n]owadays the criminal courts rarely apply the rule of strict construction. They will still apply it if they are in genuine doubt as to the intention of the legislature and if there are no considerations indicating the desirability of a wide interpretation of the statute. But if the statute admits of alternative interpretations and public policy suggests that the wider interpretation should be preferred, the courts will usually apply the wider one.²³⁷

In this sense the presumption appears to act as a last resort once the various canons and aids to construction have failed to provide legitimate interpretative clarity. In support of this conclusion, the renowned authority on issues of statutory interpretation, Peter Maxwell, commented that:

[t]he effect of the rule of strict construction might almost be summed up in the remark, that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject, and against the Legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to its expression of manifest intention; and that all cases within the mischiefs aimed at are, if the language permits, to be held to fall within its remedial influence.²³⁸

Thus, if after attempting to rationalize the text in accordance with the intentions of the drafters and the general object and purpose of a provision the ambiguity persists, then the benefit of such ambiguity is to accrue to the accused.²³⁹ In many ways, the

²³⁵ (1887) 19 QBD 629, 638. Quoted in J Bell and G Engle, *Cross: Statutory Interpretation* 3rd edn (London: LexisNexis Butterworths 1995) 172.

²³⁶ See UK Law Commission Report 177, 'Criminal Law: A Criminal Code of England and Wales' (1989) 3.17: 'We are skeptical...whether such a principle really exists. It is of course often referred to by the courts, but it is rarely applied in practice. This is because the "principle" cannot sensibly be used as a rule for the resolution of all ambiguities.' See also A Ashworth, 'Interpreting Criminal Statutes: A Crisis of Legality?' (1991) 107 *Law Quarterly Review* 419; A Ashworth and J Horder, *Principles of Criminal Law* 7th edn (Oxford: Oxford University Press 2013) 68; L Hall, 'Strict or Liberal Construction of Penal Statutes' (1934–5) 48 *Harvard Law Review* 748; J Walker, 'Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge' (2003) 58 *New York University Annual Survey of American Law* 203; J Jeffries, 'Legality, Vagueness and the Construction of Penal Statutes' (1985) 71 *Virginia Law Review* 189. Cf. *Oxford v Moss* (1979) 68 Cr App R 183.

²³⁷ Quoted in Bell and Engle (n 235) 174–5.

²³⁸ P Maxwell, *On the Interpretation of Statutes* 6th edn (London: Sweet and Maxwell 1920) 500–1.

²³⁹ See also *DPP v Ottewell* (1970) AC 642: 'where after full inquiry and consideration one is left in doubt. It is not enough that the provision is ambiguous in the sense that it is capable of having two meanings.'

invocation of *in dubio pro reo* is a confession of no clear resolution of interpretative ambiguity, akin perhaps to the notion of *non liquet*, such that the only equitable determination must be the one that best protects the rights of the accused (linked most frequently to the presumption of innocence).

In the context of international criminal proceedings, the principle of strict construction has been infrequently referenced and only occasionally invoked.²⁴⁰ One such instance was in the *Akayesu* case before the Rwanda Tribunal where there was a disparity of meaning between the English and French versions of the Statute, specifically relating to reconciling the understanding to be given to ‘killing’ and ‘*meurtre*’ under Article 2(2) of the Statute in the context of the crime of genocide. Utilizing the principle, the Trial Chamber determined that:

[g]iven the presumption of innocence of the accused, and pursuant to the general principles of criminal law, the Chamber holds that the version more favourable to the accused should be upheld and finds that Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder given in the Penal Code of Rwanda, according to which ‘*meurtre*’ (killing) is homicide committed with intent to cause death.²⁴¹

However, the best exploration of the principle and the potential impact its invocation may have on the interpretative enterprise of the bench is to be found in the comments of the Trial Chamber in the *Čelebići* case. The discussion is well worth reproducing in full:

It is for the legislature and not the court or judge to define a crime and prescribe its punishment. It is the well-recognized paramount duty of the judicial interpreter, or judge, to read into the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object. The rule of strict construction requires that the language of a particular provision shall be construed such that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. The accepted view is that if the legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which should naturally fall within the mischief intended to be prevented, the interpreter is not competent to extend them. A strict construction requires that no case shall fall within a penal statute which does not comprise all the elements which, whether morally material or not, are in fact made to constitute the offence as defined by the statute. It has always been the practice of courts not to fill omissions in legislation when this can be said to have been deliberate. It would seem, however, that where the omission was accidental, it is usual to supply the missing words to give the legislation the meaning intended. The paramount object in the

²⁴⁰ See e.g. Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence, *Tadić*, IT-94-1-A, AC, ICTY, 15 October 1998, para. 73; Sentencing Appeal Judgment—Separate and Dissenting Opinion of Judge Cassese, *Erdemović* (n 68) para. 49; Judgment, *Kayishema and Ruzindana*, ICTR-95-1-T, TC, ICTR, 21 May 1999, para. 103; Judgment, *Rutaganda*, ICTR-96-3-T, TC, ICTR, 6 December 1999, para. 51; Judgment, *Musema*, ICTR-96-13-T, TC, ICTR, 27 January 2000, para. 155.

²⁴¹ Judgment, *Akayesu*, ICTR-96-4-T, TC, ICTR, 2 September 1998, para. 501.

construction of a criminal provision, or any other statute, is to ascertain the legislative intent. The rule of strict construction is not violated by giving the expression its full meaning or the alternative meaning which is more consonant with the legislative intent and best effectuates such intent. The effect of strict construction of the provisions of a criminal statute is that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of construction fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. This is why ambiguous criminal statutes are to be construed *contra proferentem*.²⁴²

It follows from this, therefore, that there is (at least theoretically) nothing in the principle of strict construction which prohibits the bench from addressing *lacunae* in the Statute via recourse to creative interpretation of positive rules. This conclusion, which applies with equal validity to the entirety of the principle of legality, is entirely consistent with the jurisprudence of the ECtHR. Like all rules, the effectiveness of criminal rules is dependent on their judicial interpretation and application to changing circumstances. Commenting on this point in *C R v the United Kingdom*, the ECtHR found that the principle of legality ‘cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen’.²⁴³

Provided that the interpretation of the offence proceeds on the basis of an extant positive rule, its clarification and modification to related foreseeable circumstances is entirely consistent with the principle of legality. As Mohamed Shahabuddeen has declared, ‘the principle of *nullum crimen sine lege* does not bar the progressive development of the law, provided that the developed law retains the essence of the original crime’.²⁴⁴ This accords with the general tenor of Andrew Ashworth’s contention that those ‘who knowingly “sail too close to the wind” should not be surprised if the law is interpreted so as to include their conduct’.²⁴⁵ The general import of this conclusion finds support in the jurisprudence of the Appeals Chamber of the Yugoslav Tribunal, who held in the *Odjanić* case that, while the principle of legality does not outlaw the progressive development of the law via creative judicial interpretation, it

²⁴² Judgment, *Delalić et al.*, IT-96-21-T, TC, ICTY, 16 November 1998, paras 408–13.

²⁴³ *C R v United Kingdom* (Judgment) 22 November 1995, para. 34 (emphasis added); *Kokkinakis v Greece* (Judgment) 17 EHRR 397, para. 397.

²⁴⁴ M Shahabuddeen, ‘Does the Principle of Legality Stand in the Way of the Progressive Development of the Law?’ (2004) 2 *Journal of International Criminal Justice* 1013. He continues at 1017: ‘For the moment, it seems that, in applying the principle of *nullum crimen sine lege*, the proper approach is for the court to consider the scientific implication of the basic principles of a crime and to see whether the impugned behaviour falls within the framework of conduct proscribed by those principles. Thus, when the substance of the matter is regarded as against the theory of the thing, it is difficult not to support rulings in the larger sense mentioned, always provided that the alleged acts are within the “very essence” of the original crime even though not corresponding to every detail of it.’ See also Shahabuddeen (n 4) 70–4.

²⁴⁵ Ashworth, ‘Interpreting Criminal Statutes’ (n 236) 430. See also *Knoller v DPP* [1973] AC 435, 463, where Lord Morris remarked that ‘those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where he will fall in’.

does, however, ‘prevent a court from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification’.²⁴⁶

Turning to the manner in which the principle of strict construction has been interpreted and applied thus far by the bench of the ICC, the Appeals Chamber has underlined that ‘it is guided by the principle [of] *in dubio pro reo* as a component of the presumption of innocence, which is a general principle in criminal procedure that applies, *mutatis mutandis*, to all stages of the proceedings’.²⁴⁷ While the principle is central to the interpretative regime of the Rome Statute, it must be emphasized that Article 22(2) is unambiguous in limiting its application to the interpretation of the substantive penal provisions of the Statute (i.e. the definition of crimes pursuant to Articles 6–8bis and modes of liability as provided for in Articles 25 and 28), with the possible caveat that it may be applied with respect to the interpretation of additional articles of the Statute and general principles having a direct impact on the application of these substantive provisions.²⁴⁸

However, in certain respects the jurisprudence to date would benefit from clarity on this point. For instance, in challenging the application of the power to join cases at the pre-trial stage, *Ngudjolo* argued that the principle of strict construction trumped any interpretation arrived at via recourse to the Vienna rules. Rejecting this argument, the Pre-Trial Chamber determined that since Article 64(5) and Rule 136 were silent on the matter, a procedural *lacuna* existed such that ‘the strict literal interpretation of the relevant provisions required by the principle of legality [was] not possible’, before proceeding to resolve the question pursuant to the Vienna rules.²⁴⁹ Reviewing the question, the Appeals Chamber failed to point out the questionable relevance of strict construction to the interpretation of the impugned provisions, stating instead that the Pre-Trial Chamber’s determination was in accordance with the rights of the accused and far from violating the principle of legality in fact gave ‘expression to it’.²⁵⁰ A statement to the effect that the resolution of such procedural questions must be achieved pursuant to Article 21(3) and the Vienna Convention rules would certainly have been useful in this instance.

Express acknowledgement of the specific applicability of Article 22(2) to the interpretation of the penal provisions of the Statute is, however, found in the Concurring Opinion of Judge Van den Wyngaert in the *Ngudjolo* case. As alluded to previously, in rejecting the inclusion of the notion of indirect co-perpetration in the interpretation of Article 25(3)(a), she remarked that:

²⁴⁶ Decision on Dragoljub Ojdanic’s motion challenging jurisdiction—joint criminal enterprise, *Ojdanić*, IT-99-37-AR72, AC, ICTY, 21 May 2003, paras 37–8.

²⁴⁷ Defence Response to the Prosecution’s Document in Support of the Appeal, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-508-tENG, AC, ICC, 2 April 2012, para. 35; Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba* (n 94) para. 31.

²⁴⁸ See Schabas, *The Rome Statute of the International Criminal Court: A Commentary* (n 193) 410.

²⁴⁹ Decision on Application for Leave to Appeal by the Defence of Mathieu Ngudjolo Chui against the Decision on Joinder, *Katanga and Ngudjolo* (n 94) 7.

²⁵⁰ Judgment on the Appeal against the Decision on Joinder Rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-573, AC, ICC, 9 June 2008, para. 9.

I attach the greatest importance to Article 22(2) of the Statute, which obliges the Court to interpret the definition of crimes strictly and prohibits any extension by analogy. There can be little doubt that this fundamental principle applies with equal force in relation to the definition of criminal responsibility. Indeed, I believe that this article overrides the conventional methods of treaty interpretation, as defined in the Vienna Convention on the Law of Treaties, particularly the teleological method. Whereas these methods of interpretation may be entirely adequate for interpreting other parts of the Statute, I consider that for interpreting articles dealing with the criminal responsibility of individuals, the principles of strict construction and *in dubio pro reo* are paramount.²⁵¹

As for the rationale underpinning the express inclusion of the principle within the Statute framework, Van den Wyngaert was outspoken in her remarks that, while the principle was necessary in the interests of certainty and predictability, it was nonetheless the case that ‘the drafters wanted to make sure that the Court could not engage in the kind of “judicial creativity” of which other jurisdictions may at times have been suspected’.²⁵²

There are a number of examples of Article 22(2) intervening in order to stymie the potentially creative or developmental urges of the bench. For example, in the *Bemba* case, the Pre-Trial Chamber was required to determine whether the concept of *dolus eventualis* or foreseeability was cognizable in Article 30 of the Statute.²⁵³ Following a textual interpretation, confirmed via recourse to the relevant *travaux préparatoires*, and considered in light of Article 22(2), the Chamber rejected its inclusion, stating that such a finding:

[a]ims to ensure that any interpretation given to the definition of crimes is in harmony with the rule of strict construction set out in article 22(2) of the Statute. It ensures that the Chamber is not substituting the concept of *de lege lata* with the

²⁵¹ Separate Opinion of Judge Adrian Fulford, *Lubanga* Trial Judgment (n 95) para. 18.

²⁵² Ibid., para. 19. See also Decision on the OPCD’s Request for Leave to Appeal the 3 July 2008 Decision on Applications for Participation, *Situation in the Democratic Republic of the Congo*, ICC-01/04-535, PTC I, ICC, 4 September 2008. Here the Office of Public Counsel for the Defence ('OPCD') challenged the manner in which the Pre-Trial Chamber decided on victim status applications submitted at the investigation stage as being in violation of the principle of *in dubio pro reo*. Rejecting the argument, the Single Judge, Judge Anita Ušacka, held that, 'the OPCD's argument that the Decision of 3 July 2008 modified the application of the principle of *in dubio pro reo* in respect of the decisions applications is misguided' (para. 23). She then proceeded to draw on the jurisprudence of the Pre-Trial Chamber to the effect that the principle was inapplicable to this aspect of the proceedings, since 'the application process is not related to questions pertaining to the guilt or innocence of the suspect or accused person or to the credibility of Prosecution witnesses as it only aims at determining whether the procedural status of victims should be granted to applicants. Hence, it can be distinguished from criminal proceedings before the Court, which include the investigation of a situation, the initiation of a case and the pre-trial, trial and appeal stages of a case, which are governed by specific articles, rules and regulations' (para. 23, citing Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, *Situation in the Democratic Republic of the Congo*, ICC-01/04-417, PTC I, ICC, 7 December 2007, para. 6).

²⁵³ Since Art 30 provides for the inclusion of a general mental element in the definition of crimes—unless otherwise provided for—it clearly falls within the scope of Art 22(2)'s interpretative ambit.

concept of *de lege ferenda* only for the sake of widening the scope of article 30 of the Statute and capturing a broader range of perpetrators.²⁵⁴

Interestingly, this interpretation constituted a tacit rejection of the Pre-Trial Chamber's prior recognition of the concept in the *Lubanga* Confirmation of Charges Decision. In that instance, the Chamber made no effort to tally their interpretation with Article 22(2), relying instead on interpretative guidance derived from doctrine and ad hoc Tribunal jurisprudence.²⁵⁵ Later in the *Bemba* Confirmation of Charges Decision, the Chamber invoked a similarly literal textual interpretation in recognizing the presence of a causality requirement in the *chapeau* of Article 28. Once again, the Chamber emphasized that their interpretation was 'consistent with the principle of strict construction mirrored in article 22(2) of the Statute which, as a part of the principle *nullum crimen sine lege*, compels the Chamber to interpret this provision strictly'.²⁵⁶

With respect to the interpretation of crimes specifically, the Court has been alert to the need to adopt interpretations in accordance with the Elements of Crimes document (as mandated by Article 9) read in light of Article 22 and in particular Article 22(2). For example, in their interpretation of the elements of the offence of conscripting, enlisting, and using children in armed conflict, the Trial Chamber in the *Lubanga* case was careful to point out the consistency of their textual interpretation with both the Elements of Crimes and Article 22(2).²⁵⁷ A similar approach was adopted in the *Katanga and Ngudjolo* Confirmation Decision with respect to the interpretation of other inhumane acts under Article 7(1)(k) of the Statute, although significant guidance was also derived from ad hoc Tribunal jurisprudence.²⁵⁸ However, for the most comprehensive treatment of the close alliance between the Elements of Crimes and Article 22, we must look to the first arrest warrant decision in the *Al Bashir* case. In this instance, the Pre-Trial Chamber was addressing whether or not the crime of genocide, as provided for under Article 6 of the Statute, should be interpreted to include a contextual element to the effect that the conduct in question 'must have taken place in the context of a manifest pattern of similar conduct directed against the targeted group or must have had such a nature so as to itself effect, the total or partial destruction of the targeted group'.²⁵⁹ The Majority, Judge Ušacka dissenting, found that the Elements of Crimes and the Rules 'must be applied unless the competent Chamber finds an irreconcilable contradiction between these documents on

²⁵⁴ Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba* (n 94) para. 369.

²⁵⁵ Decision on the Confirmation of Charges, *Lubanga* (n 93) paras 349–60.

²⁵⁶ Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba* (n 94) para. 423. For a critique of interpretative issues arising in the *Bemba* Confirmation Decision see K Ambos, 'Critical Issues in the *Bemba* Confirmation Decision' (2009) 22 *Leiden Journal of International Law* 715.

²⁵⁷ *Lubanga* Trial Judgment (n 95) para. 620. See section 19.4.1 for a detailed discussion of the Trial Chamber's reasoning on this issue.

²⁵⁸ Decision on Confirmation of Charges, *Katanga and Ngudjolo* (n 93) paras 446–55.

²⁵⁹ Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir* (n 138) para. 123. For more on this issue, see Kreß, Chapter 27, this volume.

the one hand, and the Statute on the other hand'.²⁶⁰ The Majority considered that this interpretation was:

[a]lso supported by the object and purpose of article 9(1) of the Statute, which consists of furthering the *nullum crimen sine lege* principle embraced in article 22 of the Statute, by providing *a priori* legal certainty on the content of the definition of crimes provided for in the Statute. In the Majority's view, had the application of the Elements of Crimes been fully discretionary for the competent Chamber, the safeguards provided for by the article 22 *nullum crimen sine lege* principle would be significantly eroded.²⁶¹

This interpretation was also held to be fully consistent with a strict construction of Article 6.²⁶²

The inclusion of Article 22(2) is merely an additional reminder of the fact that states intended the Rome Statute to constitute a detailed *lex scripta* of substantive international criminal law. While the objective may have been to lend certainty and predictability to the law, it is undoubtedly the case, as suggested by Judge Van den Wyngaert, that states also wished to curtail the creative interpretative potential of the bench. The potential continuation of the liberally legislating bench, so characteristic of the judges at the ad hoc Tribunals, was anathema to the drafters of the Rome Statute. Article 22(2) allied with Article 21(1) simply act as restraining buckles in the attempted strait-jacketing of the interpretative judicial function visibly brought to bear in the Rome Statute framework. However, as the jurisprudential reality to date illustrates, the bench is more than capable of performing impressive feats of creative interpretative escapology.

19.5 Conclusions

This chapter has illustrated that the Rome Statute's attempted corseting of the creative interpretative freedom of the bench through the inclusion of a set of specific 'disciplining' rules, in the form of Article 21's institution of textualism and a hierarchy of sources and Article 22(2)'s mandating of strict construction in the interpretation of substantive international criminal law, has ultimately proved to be a failure. While adherence to the ordinary meaning of the text has been given priority and has in numerous instances resulted in a decidedly restrained interpretative approach, it is nonetheless evident, such as with respect to the prevailing interpretation of Article 25(3)(a), that the bench is prepared to forgo the ordinary meaning of the text when policy considerations enter the interpretative fray. Such instances have, thus far, been rare in comparison to the liberal teleology characteristic of the jurisprudence of the ad hoc Tribunals. However, the discussion of Article 21's strict hierarchy of sources suggests that accusations to the effect that the Rome Statute 'evinces a certain mistrust in the judges',²⁶³ and shows an intent on the part of the drafters to 'maintain control over

²⁶⁰ Ibid., para. 128.

²⁶¹ Ibid., para. 131.

²⁶² Ibid., para. 133.

²⁶³ Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (n 47) 163.

the making of international law and to keep a tight leash on the ability of international judges to go beyond what the States Parties have agreed to’,²⁶⁴ are neither hyperbolic nor defamatory.

It has been argued that the objective of the Rome Conference was not to expressly codify rules developed before the antecedent criminal tribunals—the extent to which this occurred was little more than a welcome by-product—but was rather focused on arriving at a consensually drafted penal Statute constructed such as to attract as many ratifications as possible. It is evident that in drafting the Statute, states went to considerable lengths to attempt to ensure that the circumstances in which it would be deemed necessary to have recourse to judicial discretion in the interpretation and application of the law would be kept to an absolute minimum. In this respect, the internal law of the Court, taken as a whole, can be viewed as an attempt to reconfigure the traditional and prevailing contours of the international criminal judicial function.

This endeavour is no better illustrated than in the form of Articles 21(1) and 22(2). As we have discussed, Article 21(1) not only sought to identify the applicable law—in itself a seminal development in an international criminal context—but also to carefully dictate the methodology to be applied by the bench in its invocation. In so doing, the drafters showed a regrettable ignorance of the complex nature of the interplay of sources of law within the international legal order and enumerated a provision with the potential to frustrate permissible and legitimate interpretational creativity aimed at progressively developing the law. However, Article 21(3)’s requirement that the interpretation and application of the Rome Statute be in conformity with international human rights law constitutes one obvious avenue via which the bench can free themselves from the constraints of the strict hierarchy of sources and the prioritization of text. While Article 21(3)’s rich potential is yet to be fully realized, it is expected that as the Court’s jurisprudence continues to mature, so will its invocation of this provision. Article 22(2)’s requirement that the subject-matter jurisdiction of the Court be strictly construed is entirely in keeping with general principles of criminal law and is entirely appropriate, but should not be viewed as prohibiting developmental interpretation in any and all circumstances. This chapter’s examination of the law and practice of the Court with respect to sources of law and interpretational techniques illustrates that, whereas the drafters may have wished to corset the judicial function in positive rules, the bench has identified sufficient wriggle-room in order to allow them to breathe life into the law.

²⁶⁴ Hunt (n 47) 61.

20

Perpetration and Participation in Article 25(3)

*Elies van Sliedregt**

20.1 Introduction

Article 25 of the ICC Statute¹ and its interpretation has generated much debate amongst practitioners and commentators, on blogs, in scholarly writing, and in dissenting opinions appended to ICC judgments. Case law on Article 25, in particular the Pre-Trial Chamber Decisions confirming charges in the cases against *Lubanga*² and *Katanga and Ngudjolo*,³ and the Trial Chamber judgment in *Lubanga*,⁴ are lengthy and replete with complex meanderings on criminal law theory. Particularly striking are the reliance on German criminal law and the attempt to develop a *Dogmatik* in Article 25(3).

Relying on Article 21 of its Statute (on the sources of law), the ICC has forged a distinct path away from the law of other international and internationalized courts and liability theories, such as the JCE. With respect to the latter, this may be welcomed from a liberal justice perspective. Despite its usefulness as a tool fighting systemic and masterminded criminality, JCE has been controversial for its broad scope. Also, the text of the ICC Statute indicates a different approach to criminal responsibility than jurisprudence of the ad hoc Tribunals. Article 25(3)(a) is unique in that it explicitly recognizes the remote principal or the non-physical perpetrator.⁵ It follows from Article 25(3)(a) that joint and indirect perpetrators who do not fulfil all the elements of the *actus reus* can be regarded as *perpetrators*. This means that indirect and joint perpetrators are liable in their own right; liability is not derived from the person who physically commits the crimes, as is the case with complicity liability. The ICC has embraced the concept of ‘control’ to interpret Article 25 and to identify who can be regarded as the criminal mastermind behind mass violence.

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¹ Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute').

² Decision on the Confirmation of Charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-803-tEN, PTC I, ICC, 29 January 2007 ('Lubanga Confirmation Decision').

³ Decision on the Confirmation of Charges, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-717, PTC I, ICC, 30 September 2008 ('Katanga and Ngudjolo Confirmation Decision').

⁴ Judgment Pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012 ('Lubanga Trial Judgment').

⁵ See also Weigend, Chapter 22, this volume. See also ICC, *Prosecutor v Thomas Lubanga Dyilo*, Judgment, Case No. ICC-01/04-01/06A A 5, 1 December 2014, paras 465–6 (hereinafter Lubanga Appeal Judgment).

The text of Article 25(3) was the result of difficult diplomatic negotiations. It brings together different modes of liability, which explains why it contains a number of partially overlapping liability theories.⁶ The question before the ICC is how to interpret such a provision. Should a (Pre-)Trial Chamber adopt a dogmatic approach structuring the whole of the provision, rationalizing overlapping modes of liability, or should it adopt a case-by-case approach, focusing on the wording of the Statute and limiting itself to interpreting the subparagraph in the case before it? The answer to this question has divided the Trial Chambers in the first two judgments of the ICC: the *Lubanga* conviction of 14 March 2012⁷ and the *Ngudjolo* acquittal of 18 December 2012.⁸ Roughly speaking, the majority opinion in *Lubanga*, endorsing the Pre-Trial Chamber Decision in *Lubanga* (and *Katanga* and *Ngudjolo*), represents a dogmatic approach where one single legal theory—based on the concept of ‘control’—is thought to provide the theoretical grounding of Article 25 and where the law is expected to reflect subtle differences in the degrees of blameworthiness.⁹ The separate and dissenting opinions in the *Lubanga* and the *Ngudjolo* cases, on the other hand, take a more pragmatic approach and look at the law from the perspective of the legality principle. What matters is that the definitions of modes of liability capture as comprehensively as possible potential forms of reprehensible conduct.¹⁰ Modes of liability can be interpreted one by one only insofar as the charges and the facts before it require a judge or court to do so. On 1 December 2014 the Appeals Chamber in *Lubanga* found in favour of the majority and adopted the control theory as structuring Article 25(3) into modes of liability that reflect different degrees of blameworthiness.¹¹

In this chapter I aim to bring together some of the earlier writings on Article 25(3).¹² Furthermore, I base my discussion on a body of scholarly work and commentaries that have been published since the Confirmation Decision in *Lubanga*, the first ICC ruling on Article 25(3). By now, opinions have developed and critique has crystallized. In an attempt to summarize and analyse this critique, I rely on some of the thoughtful and eloquent contributions published in this volume on Article 25(3). In that sense, this chapter provides a meta-analysis of the chapters that address modes of liability: co-perpetration by Jens Ohlin,¹³ indirect perpetration by Thomas Weigend,¹⁴ and common purpose liability by Kai Ambos.¹⁵ For a thorough analysis of the respective modes of liability, I refer to these contributions.

⁶ W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press 2010) 431; R Rastan, ‘Review of ICC Jurisprudence 2008’ (2009) 7 *Northwestern University Journal of International Human Rights* 261, para. 14.

⁷ *Lubanga* Trial Judgment (n 4).

⁸ Judgment Pursuant to Art 74 of the Statute, *Ngudjolo*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-3, TC II, ICC, 18 December 2012 (‘*Ngudjolo* Trial Judgment’).

⁹ J Ohlin et al., ‘Assessing the Control-Theory’ (2013) 26 *Leiden Journal of International Law* 725, 743.

¹⁰ Ibid. ¹¹ *Lubanga* Appeal Judgment (n 5) paras 467–8.

¹² E van Sliedregt, ‘The Curious Case of International Criminal Liability’ (2012) 10 *Journal of International Criminal Justice* 1171; E van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press 2012); Ohlin et al. (n 9).

¹³ See also Ohlin, Chapter 21, this volume.

¹⁴ See also Weigend (n 5).

¹⁵ See also Ambos, Chapter 24, this volume.

To give Article 25 more context and to place it in a history of liability theories attuned to system criminality, I discuss post-Second World War case law and Tribunal law on criminal responsibility.

20.2 JCE and its Predecessors: A Twist on Complicity Liability

It has been said many times that international crimes differ from domestic or ‘ordinary’ crimes in that they connote, by definition, a plurality of people engaged in the commission of crimes and a criminal mastermind planning and inducing such crimes.¹⁶ This type of criminality is also referred to as system criminality and challenges traditional theories of perpetration and criminal participation, such as complicity liability, and a ‘physical’ concept of perpetration. While certain domestic crimes—e.g. organized crime and hooliganism—also display features of system criminality, and thus deviate from the basic structure of most cases in municipal law, this type of criminality constitutes the exception while in ICL it is the rule.

The Nuremberg Tribunal proceeded on the basis of a liability theory that was especially designed to capture the magnitude and bureaucratic nature of Nazi criminality. This theory, referred to as the ‘collective criminality theory’, focused on (i) members of organizations through which the Nazi war machine carried out the ‘final solution’ and (ii) those in leadership positions orchestrating the Holocaust.¹⁷ Its architect, US Colonel Bernays, brought these two groups of defendants and levels of culpability together by proposing that organizations like the Gestapo and the Nazi cabinet would stand trial through their individual representatives. Organizations would be declared criminal and their representatives would be responsible for being part of a criminal conspiracy. Those occupying lower positions would be prosecuted for ‘membership of a criminal organization’ in subsequent proceedings.

While Bernays’ theory was never fully implemented, it became the framework within which national Allied war crimes courts and tribunals applied liability theories drawn from domestic law that deviated from traditional complicity law. It is this case law that constitutes the basis for JCE as developed at the ICTY. As the following examples illustrate, peculiar features of system criminality surface when studying post-Second World War cases.¹⁸ In particular, two points warrant attention: (i) nuancing the principal–accomplice distinction and (ii) the lack of theoretical grounding.

¹⁶ See for instance the contributions in A Nollkaemper and H van der Wilt (eds), *System Criminality in International Law* (Cambridge: Cambridge University Press 2009). See also Ohlin (n 13), who compares co-perpetration in the ‘garden-variant’ of criminality in the domestic context and co-perpetration in an international context.

¹⁷ For an elaborate account of this theory see N Jørgensen, *The Responsibility of States for International Crimes* (Oxford: Oxford University Press 2000).

¹⁸ Examples are drawn from earlier work: E van Sliedregt, ‘Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide’ (2007) 5 *Journal of International Criminal Justice* 184, 185; Van Sliedregt, *Individual Criminal Responsibility* (n 12) 30–6.

20.2.1 Non-categorization in normative terms

To make clear that there was no normative difference between direct (physical) involvement and indirect (functional) involvement in a crime, prosecutors and judges in post-Second World War proceedings refrained from using the principal-accomplice terminology. Instead, they relied on concepts such as 'participating in a criminal organization or pursuing a common criminal design'. In the trial of *Altstötter et al. (Justice Case)*,¹⁹ an American military court attributed liability on the basis of the division of tasks in an organization. Strictly speaking, defendants were accomplices to the crimes, yet the court held that:

the person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of the commission, and the person who pulls the trigger are all principals or accessories to the crime.²⁰

In establishing guilt for the extermination and deportation of Jews, in *Pohl et al.* the US military court drew the analogy of four men robbing a bank where 'the acts of any of the four, within the scope of the overall plan, become the acts of all the others'.²¹ In this way, 'the various participants in the programme tossing the shuttlecock of responsibility from one to the other'²² could be found individually responsible. All forms of participation were treated equally and each of the participants was liable as a direct perpetrator. Similar reasoning can be found in the *Max Wielen* case, where the commander who ordered the shooting and the men who shot the victims were all considered participants in a joint criminal effort.²³

In the trial of *Franz Holstein & Twenty-Three Others*, the military tribunal in Dijon divided the accused, who were all charged with crimes against the French resistance, into three categories: 'those found guilty as instigators, mainly by issuing orders; those found guilty as perpetrators; and those found guilty as their accomplices'.²⁴ The accused who had been in command of the men who committed the crimes were held responsible as instigators. Those who could not be labelled as instigators were found guilty as accomplices, for having facilitated and prepared the crimes before the fact, whereas others were found guilty as accomplices for supplying means during the crime.²⁵ The court made clear, however, that no fundamental distinction existed between these two types of accomplice:

It is a universally recognised principle of modern penal law that accomplices during or after the fact are responsible *in the same manner* as actual perpetrators or as instigators, who belong to the category of accomplices before the fact (emphasis added).²⁶

¹⁹ *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg*, Washington (1949–53) ('TWC') Vol. III, 954–1201.

²⁰ Ibid., 1063. ²¹ TWC, Vol. V, 1173. ²² Ibid.

²³ *Trial of Max Wielen and Seventeen Others*, United Nations War Crimes Commission, Law Reports of Trials of War Criminals ('UNWCC Law Reports') Vol. XI, 43–4, 46 (1949).

²⁴ *Trial of Franz Holstein and Twenty-Three Others*, UNWCC Law Reports, Vol. VII, 26.

²⁵ Their liability was regulated by Art 60(2) and (3) of the French Penal Code: 'Those who have furnished arms, instruments or any other means which have served in the action knowing that they would serve this purpose; those who knowingly have aided or assisted the perpetrator or perpetrators of the action in the facts which have prepared or facilitated or in those which have consummated the action,' UNWCC Law Reports Vol. VII, 33.

²⁶ Ibid., 32.

In Dutch post-Second World War law, the distinction between accomplices as mere facilitators and accomplices as full participants was abandoned when trying war criminals. This meant that a special statute was adopted to set aside, temporarily, ordinary rules of criminal participation that provided for an automatic mitigation of sentence for facilitators (*medeplichtigen*).²⁷

The Nuremberg cases are still relevant today. They constitute international precedents that have been relied upon in case law at the ICTY, mainly to carve out the contours of JCE liability.²⁸ Also, in ICTY and ICTR law categorization is irrelevant when charges are brought under JCE.²⁹ In principle, all members of a JCE are equally liable. JCE liability enables reference to political and military superiors as ‘participants’ in a JCE rather than accessories, which, strictly speaking, they are under a theory of complicity.

This brings me to the nature of ‘fair labelling’. Anglo-American complicity law is the classic example of a ‘naturalistic’ or ‘empirical’ approach to perpetration and participation.³⁰ It takes as a starting point the natural world and the reality of cause and effect. In the empirical approach the perpetrator-principal is the one who most immediately causes the *actus reus*/the offence. The accessory/accomplice is the one who contributes to causing the *actus reus*. The empirical system is a bottom-up system. If you apply it to a complex structure of criminal cooperation, for instance an army, you start with the soldier who killed a civilian upon the orders of his superior who implemented a policy issued by a government minister. Thus, in the Anglo-American scheme, the government minister is an accessory.

The complicity-model has been the dominant approach at the Tribunals, albeit in a somewhat adapted version. Some have argued it does not meet the demands of ‘fair labelling’, which requires that liability is expressed in such a way that it fairly represents the nature and magnitude of the law breaking.³¹ In the context of masterminded violence, using the term ‘accessory’ sounds inappropriate. Schabas observes that ‘the “accomplice” is often the real villain, and the “principal offender” a small cog in the machine. Hitler did not, apparently, physically murder or brutalize anybody; technically, he was “only” an accomplice to the crime of genocide.’³²

²⁷ Art 12 of the Decree of 22 December 1943 encapsulates the rule that facilitators are liable to the same penalties as those prescribed for the crime itself. It is left to the Court to decide whether the same penalty will actually be imposed. This rule deviates from Arts 45 and 49 of the Dutch Penal Code, where the maximum penalty for complicity is reduced by one-third of the punishment prescribed for the crime. A similar adaptation was made in the Netherlands East Indies legislation with Art 5 of the Statute Book Decree No. 45 of 1946. For cases by Dutch military courts, see UNWCC Law Reports, Vol. XI, 97–8. See for a similar change to domestic law Art 4 of the Norwegian War Crimes Law, UNWCC Law Reports, Vol. XV, 89.

²⁸ Van Sliedregt, ‘Joint Criminal Enterprise’ (n 18) 185–6.

²⁹ Ibid., 186.

³⁰ Van Sliedregt, *Individual Criminal Responsibility* (n 12) 71–7; Ohlin et al. (n 9) 740.

³¹ D Guilfoyle, ‘Responsibility for Collective Atrocities: Fair Labeling and Approaches to Commission in International Criminal Law’ (2011) 64 *Current Legal Problems* 1, 6.

³² W Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press 2000) 286. On the origin of the complicity terminology and the classification of the ‘secondary principal’ for those who were closely involved in committing the crime as non-principals, see also Van Sliedregt, *Individual Criminal Responsibility* (n 12) chapter 6, section 6.6.1, 112–16.

Judges at the ICTY have insisted on the non-normative meaning of terms such as ‘principal’, ‘perpetrator’, and ‘co-perpetrator’ when referring to a participant in a JCE.³³ They are merely terms of ‘convenience’.³⁴ This is to make clear that variance in role and blameworthiness has no place when attributing criminal responsibility. It is at the sentencing stage that each contribution to a crime is weighed. This position also implies that reference to accomplice or accessory liability does not imply ‘lesser’ liability. This non-normative complicity model has been somewhat difficult to sustain. It is undeniable that aiding and abetting-liability at the Tribunals has developed into a form of ‘lesser liability’ vis-à-vis JCE liability.³⁵

Non-differentiation in normative terms has evoked criticism. The extended form of JCE,³⁶ which requires a *dolus eventualis*/recklessness test, differs from the basic form of JCE liability (closely akin to co-perpetration), which requires participants to share the intent. It is felt that extended JCE with its lower *mens rea* degree and more attenuated link to the crime should translate to lesser rather than equal liability.³⁷

20.2.2 JCE: ever-expanding and a weak theoretical basis

Analysis of post-Second World War case law on common design-liability shows that cooperation in the war machine results in liability when the act had some ‘real bearing’ on the crime; a vague and potentially broad concept of causation.³⁸

³³ Consider Judge Hunt’s view: ‘No such distinction exists in relation to sentencing in this Tribunal, and I believe that it is unwise for this Tribunal to attempt to categorise different types of offenders in this way when it is unnecessary to do so for sentencing purposes. The Appeals Chamber has made it clear elsewhere that a convicted person must be punished for the seriousness of the acts which he has done, whatever their categorisation.’ Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction *Joint Criminal Enterprise*, Milutinović et al., IT-99-37-AR72, AC, ICTY, 21 May 2003, para. 31.

³⁴ Judgment, *Tadić*, IT-94-1-A, AC, ICTY, 15 July 1999 (‘*Tadić* Appeal Judgment’) para. 192; Judgment, *Krnojelac*, IT-97-25-T, TC II, ICTY, 15 March 2002, para. 77.

³⁵ Van Sliedregt, *Individual Criminal Responsibility* (n 12) 78–9.

³⁶ Also known as Third Category JCE. The Appeals Chamber in *Tadić* recognized three categories. The first category relates to cases where all co-defendants possessing the same intent pursue a common criminal design, for instance the killing of a certain person. The second category concerns the so-called concentration camp cases, where the requisite *actus reus* comprises the active 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 each accused. The *mens rea* element comprises: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates. Intent may also be inferred from the accused’s position within the camp. The third category concerns cases where ‘one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose’. *Tadić* Appeal Judgment (n 34) para. 204.

³⁷ See Ohlin, who argues that ‘[t]he most basic problem with the doctrine of joint criminal enterprise [is] its imposition of equal culpability for all members of a joint enterprise’. J Ohlin, ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’ (2007) 5 *Journal of International Criminal Justice* 69, 85. See also G Boas et al., *International Criminal Law Practitioner Library* (Cambridge: Cambridge University Press 2008) 65–6. One scholar proposed to abandon differentiation and modes of liability altogether. James Stewart argues in favour of a unitary approach to criminal participation that collapses all modes of liability into a single standard. See J Stewart, ‘The End of “Modes of Liability” for International Crimes’ (2012) 25 *Leiden Journal of International Law* 165.

³⁸ Culpability for common design-liability requires that the defendant knew of the crime and that his conduct amounted to a certain degree of participation in the crime. This is not necessarily tangible

Because of a remote or ‘overdetermined’³⁹ link to the underlying crime, and thus the difficulty of establishing *actus reus*, the rationale of culpability under common purpose/JCE liability lies in the ambit of *mens rea*. Agreeing to a common criminal purpose or plan is JCE’s distinctive feature and *raison d’être*. In *Tadić*, JCE was contrasted to aiding and abetting-liability, which requires an act to be assistance that is specifically directed to a specific crime.⁴⁰ The word ‘specific’ is used to mark the difference with common purpose/JCE liability, which makes culpable, acts that in *some* way are directed to the furtherance of the common criminal design.⁴¹

Over time, however, ICTY case law has reversed the objective–subjective balance of JCE. This is due to the expansion of JCE liability and the court’s response to this development. Initially applied to mob-violence type situations and small-scale enterprises, JCE’s scope of application broadened to large-scale enterprises, broad in time and geographical scope.⁴² Common plans of the JCE can be persecution, deportation, and forcible transfer. These objectives are achieved through the commission of specific crimes such as murder, torture, and rape.⁴³ The objective can be even more at the ‘meta-level’, e.g. the aim to modify the balance of Kosovo through the commission of deportation, murder, forcible transfer, and persecution⁴⁴ or ‘the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population’.⁴⁵ In these broad JCEs, leaders and foot soldiers, representing different levels of liability, are all charged as participants in one single JCE. In *Brđanin*, the Appeals Chamber distinguished the different levels of liability as constituting two separate but connected JCEs.⁴⁶ This introduced the concept

assistance. In the case *Bruno Tesch & Others* (the Zyklon B case), a case against the suppliers of poison gas to concentration camps, the Judge Advocate pointed out that the prosecutor had to prove that the accused knew that the gas was to be used for the purpose of killing human beings (TWC, Vol. I, 101). He did not pay attention to the causal link (part of *actus reus*); the proof that gas had been supplied was sufficient, coupled with the knowledge that such large deliveries could not possibly be going there to disinfect the buildings or delouse clothing. As to the *actus reus*, it was found in *Max Wielan & Seventeen Others* (the Stalag Luft III case) that ‘[t]he persons concerned must have been part of the machine doing some duty, carrying out some performance which went on directly to achieve the killing, that it had some real bearing on the killing, would not have been so effective or been done so expeditiously if that person had not contributed his willing aid’ (UNWCC Law Reports, Vol. XI, 46).

³⁹ See J Stewart, ‘Overdetermined Atrocities’ (2012) 10 *Journal of International Criminal Justice* 1189.

⁴⁰ *Tadić* Appeal Judgment (n 34) para. 229.

⁴¹ Ibid., subpara. (iii). See also Judgment, Šainović et al., IT-05-87-A, AC, ICTY, 23 January 2014, para. 1623.

⁴² The *Tadić* Appeal Judgment (n 34, para. 227) left the door open for such a broad interpretation by holding that ‘[t]here is no necessity for this plan, design or purpose to have been previously arranged or formulated, [it] may materialise extemporaneously and be inferred from the fact that a plurality of persons act in unison to put into effect a joint criminal enterprise’.

⁴³ Judgment, *Kvočka* et al., IT-98-30/1-T, TC, ICTY, 2 November 2001 (*Kvočka* et al. Trial Judgment) paras 319–20.

⁴⁴ Amended Joinder Indictment, *Milutinović* et al./*Sainović* et al., IT-05-87-PT, OTP, 16 August 2005, para. 19.

⁴⁵ For example, ‘the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population’. Judgment, *Martić*, IT-95-11-A, AC, ICTY, 8 October 2008, para. 445.

⁴⁶ To enable imputation of crimes of foot soldiers to leaders, it must be proved that there is a link between the two JCEs through at least one person at ‘leadership level’ who uses a person at ‘execution level’ to physically commit crimes. Judgment, *Brđanin*, IT-99-36-A, AC, 3 April 2007, paras 410–13.

of inter-linked or vertical JCEs⁴⁷ and fundamentally changed JCE or common purpose-liability as it was applied in *Tadić*.

In an attempt to limit over-expansion, the *Kvočka* Trial Chamber qualified participation in a JCE as ‘significant’ if the act or omission ‘makes an enterprise efficient or effective’.⁴⁸ The *Kvočka* Appeals Chamber endorsed this ruling, but used different wording: JCE liability requires a ‘substantial contribution’ to the joint criminal enterprise.⁴⁹ The *Brđanin* Appeals Chamber went back to the term ‘significant’ when it held that, ‘[a]lthough 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’.⁵⁰

Haan concludes from an analysis of case law that in the end not much is required to satisfy JCE’s subjective elements of a common plan while attempts to limit JCE’s expansive scope have resulted in emphasizing the objective element.⁵¹ She deplores the inconsistency between theory and practice of JCE. The latter concept, based on an actual agreement of the participants in the crime, is not apt to reflect the interplay between members of different levels of authority and the co-existence of vertical and hierarchical links between the participants.⁵² Senior leaders, for instance, are found guilty because they possessed a position of authority, which enabled them to provide ‘[f]or the legal, political, and social framework that allowed the direct perpetrators to act in a climate of total impunity’.⁵³ I agree with Haan. To my mind, JCE’s inconsistency in theory and practice is, partly, the result of its weak theoretical grounding. Its underlying principles are insufficiently clear; JCE in ICTY case law has traits of membership liability, of co-perpetration, but also of indirect perpetration.

20.3 Control Theory: A Novel Approach

The ICC Pre-Trial Decision confirming the charges in *Lubanga*⁵⁴ laid the foundation for the control theory. It was further endorsed and developed in the Confirmation Decision in *Katanga and Ngudjolo*⁵⁵ and the Trial Chamber judgment in *Lubanga*.⁵⁶ The theory has its source in the writings of criminal law scholar Claus Roxin, who attempted to devise a theory for holding Nazi leaders such as Adolf Eichmann responsible as *perpetrators* of the atrocities committed under their regime.⁵⁷

⁴⁷ See C Farhang, ‘Point of no Return: Joint Criminal Enterprise in *Brđanin*’ (2010) 23 *Leiden Journal of International Law* 137.

⁴⁸ *Kvočka* et al. Trial Judgment (n 43) para. 309.

⁴⁹ Judgment, *Kvočka* et al., IT-98-30/1-A, AC, ICTY, 28 February 2005, para. 97

⁵⁰ The exact difference between substantial contribution or significant contribution is not entirely clear. See also Boas et al. (n 37) 46–51.

⁵¹ V Haan, ‘The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia’ (2005) 5 *International Criminal Law Review* 167, 194–195.

⁵² Ibid., 196. ⁵³ Ibid. ⁵⁴ *Lubanga* Confirmation Decision (n 2).

⁵⁵ *Katanga and Ngudjolo* Confirmation Decision (n 3). ⁵⁶ *Lubanga* Trial Judgment (n 4).

⁵⁷ C Roxin, ‘Straftaten im Rahmen organisatorischer Machtapparate’, *Golddammer’s Archiv für Strafrecht* (GA) (1963) translated to English: C Roxin, ‘Crimes as Part of Organized Power Structures’ (2011) 9 *Journal of International Criminal Justice* 193. See also C Roxin, *Täterschaft und Tatherrschaft* 8th edn (Berlin: De Gruyter 2006) 242–52, 704–17; C Roxin, *Strafrecht Allgemeiner Teil Band II: Besondere Erscheinungsformen der Straftat* (Munich: C H Beck 2003) 46 *et seq.*

The ICC has relied on Roxin's theory to conceptualize a non-physical concept of perpetration (functional or intellectual perpetration). Principals are those who control the will and the act of physical perpetrators whose crimes are imputed to him or her. This approach to perpetration is referred to by Roxin as an 'objective approach' in the sense that the ability to dominate or control the acts of physical perpetrators or an organization is regarded as a form of perpetration triggering principal liability. Dominance/control is the defining line between principals and accessories⁵⁸ and requires the person to have the power to determine whether a certain act is done. There are three ways in which domination can occur: (i) when a person does the relevant act him/herself (here Roxin's theory coincides with classic theories of (physical) perpetration), (ii) when he does it jointly with others (joint or co-perpetration), or (iii) when he uses another person as a tool (indirect perpetration).

Roxin's theory has been adopted in other parts of the world, mainly Spanish-speaking countries, where German scholars have assisted in criminal law reform. Given that the Spanish approach is German-influenced, this essentially means that one legal system lies at the basis of the control theory at the ICC.⁵⁹ Judges Fulford and Van den Wyngaert in their minority opinions to the cases of *Lubanga* and *Ngudjolo*, respectively, disagree with the reliance on German law. First, because Article 21(1)(a) requires interpretation of the text of the Statute in its 'plain' or 'ordinary' meaning. In their view the text of the Statute does not provide for the control theory.⁶⁰ Second, because the control theory does not have the status of customary international law or a general principle and hence does not rank as a source of law under Article 21 of the Statute. Ohlin, in his chapter on co-perpetration, does not regard the import of German law as problematic. It can be viewed as an independent exercise in international *Dogmatik*; an attempt to develop an international criminal law theory.⁶¹ I take a middle position, as will be made clear later in the chapter. The control theory can be regarded as subsumed under the text of Article 25(3)(a), which provides for the perpetrator behind the perpetrator, but Roxin's theory should not be embraced in its entirety.

Before discussing the interpretation of Article 25(3), we need to have a closer look at two of the control theory's innovative features: (i) its normative nature, and (ii) its inaptitude to capturing complex collective violence.

⁵⁸ His seminal piece in this respect: Roxin, 'Straftaten im Rahmen organisatorischer Machtapparate' (n.57).

⁵⁹ S Manacorda and C Meloni, 'Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?' (2011) 9 *Journal of International Criminal Justice* 159, 170. See also T Weigend, 'Perpetration through an Organization. The Unexpected Career of a German Legal Concept' (2011) 9 *Journal of International Criminal Justice* 91, 105.

⁶⁰ Separate Opinion of Judge Adrian Fulford, *Lubanga* Trial Judgment (n 4) paras 6–12; Concurring Opinion of Judge Christine Van den Wyngaert, Judgment pursuant to Art 74 of the Statute, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-4, TC II, ICC, 19 December 2012, para. 17.

⁶¹ See also Ohlin (n 13).

20.3.1 The normative principal

The theory of ‘control of the crime’ can be regarded as subsumed under Article 25(3) (a) of the ICC Statute because of its recognition of the perpetrator behind the perpetrator, i.e. ‘functional perpetration’. This can be taken from the wording: A person is criminally responsible if that person, ‘commits such a crime, whether as an individual, jointly with another or *through another person, regardless of whether that other person is criminally responsible*’ (emphasis added).

Functional perpetration as subsumed in subparagraph (3)(a) is not readily apparent when one is not familiar with Roxin’s work or other theories of functional perpetration.⁶² Still, principal liability for crimes committed through culpable persons is fundamentally different from the complicity law theory of innocent agency where the indirect perpetrator only qualifies as principal when the agent he uses to commit crimes is innocent.⁶³ Indeed, Article 25(3)(a) deviates from the other subparagraphs in 25(3) that do contain classic forms of complicity liability. The ruling by the ICC Trial Chamber in *Katanga* recognized this:

La liste des modes de responsabilité énoncée à l'article 25-3 du Statut distingue les personnes dont le comportement est *constitutif* de la commission du crime elle-même de celles dont le comportement est seulement *en lien* avec la commission d'un crime par autrui.⁶⁴

As I will discuss, this essentially means that Article 25(3) incorporates two theories of liability.

Functional perpetration and the control theory are a response to the desire to capture the liability of those who mastermind violence whilst being remote from the crime scene. The control theory has a normative starting point. Perpetrators/principals are those who are considered ‘most responsible’ because they have a position of control. Unlike complicity law, which we termed ‘naturalistic’ or ‘empirical’ in its approach to criminal participation and that constitutes a bottom-up approach, the normative approach is a top-down system. Going back to our soldier who killed a civilian upon the orders of his superior who implemented a policy issued by a government minister, we start with the person who has the main responsibility, the minister, and work our

⁶² Dutch criminal law provides for a theory of functional perpetration developed in case law. See H van der Wilt, ‘Joint Criminal Enterprise. Possibilities and Limitations’ (2007) 5 *Journal of International Criminal Justice* 91.

⁶³ Roxin’s theory of perpetrator behind the perpetrator has been subject to critique, exactly because it deviates from the innocent agency-format and provides for this parallel structure. Those who criticize him argue that one cannot indirectly perpetrate a crime when the person who carries out the act is an autonomous, criminally responsible person. Weigend counters this critique by pointing out that the attribution of criminal responsibility is not a yes/no question of logic. In normative terms, it is possible to hold the person in the background as well as the person at the front criminally responsible as perpetrators because they both—and independently of each other—possess sufficient autonomous dominance over the criminal act. See J Ohlin (n 13).

⁶⁴ Jugement Rendu en Application de l’Article 74 du Statut, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436, TCII, ICC, 7 March 2014 (‘*Katanga Trial Judgment*’) para. 1384. See also *Lubanga* Appeal Judgment (n 5) para. 465.

way down to the smaller fry in the lower echelons of the military unit. The government minister is a principal *as well as* the others in the lower echelons of the military unit.

20.3.2 Organizational liability

The *Eichmann* case also inspired Roxin to develop an organizational variant of his theory: dominance over an organization (*Organisationsherrschaft*).⁶⁵ In this theory, dominance over physical perpetrators is channelled through an organization with a tight hierarchical structure, consisting of replaceable members (fungibility) and operating outside the legal order. ‘Fungibility’ of members and ‘illegality’ ensure that those in the organization had no incentive but to abide by the norms/orders set by the perpetrator at the highest echelon of the organization.⁶⁶ Remoteness from the crime is compensated by organizational control.⁶⁷

The PTC in the case of *Katanga and Ngudjolo* applied a liability theory developed along the lines of *Organisationsherrschaft* to impute crimes committed by militia in the Congolese village of Bogoro to the two defendants who commanded these militia. The judges affirmed that control over the direct perpetrator can be exerted by means of an organization: an Organized Structure of Power (OSP).⁶⁸ The PTC held that the accused had control over an apparatus based on hierarchical relations between the accused and their subordinates. This OSP consisted of ‘sufficient subordinates’. As commanders, the accused are ‘perpetrators behind the perpetrators’ who mobilize the authority and power within the organization to secure compliance with their orders.⁶⁹ Execution of the crime is secured by automatic compliance and the crimes can be mutually attributed to both accused.

A complication in this case was that the subordinates were of different ethnic origin and would only be commanded by the commander directly superior to them who was of the same ethnic origin. Mutual attribution of crimes was thus problematic. Another complication concerned the sexual offences (rape, sexual slavery) that were committed by soldiers in the aftermath of the attack on Bogoro, since they could not be traced back to the common plan.

The first complication was addressed by combining two modes of liability, indirect perpetration and co-perpetration: indirect co-perpetration. This would require proof of a common plan and coordinated cooperation. Van den Wyngaert, in her dissenting to the *Katanga* judgment and earlier in her concurring opinion to the *Ngudjolo* acquittal, opines that combining modes of liability resulted in creating a fourth mode of liability in Article 25(3)(a), which goes beyond the text of the Statute and violates the legality principle (*nullum crimen sine lege*), in particular Article 22(2).⁷⁰

⁶⁵ See (n 57) for references that discuss the liability theory.

⁶⁶ Weigend (n 59) 97, Roxin, ‘Crimes as Part of Organized Power Structures’ (n 57) 198–9, 202–4.

⁶⁷ ‘Loss of proximity to the act is compensated by an increasing degree of organizational control by the leadership positions in the apparatus.’ *Ibid.*, 200.

⁶⁸ *Katanga and Ngudjolo* Confirmation Decision (n 3) para. 498. ⁶⁹ *Ibid.*, para. 513.

⁷⁰ Minority Opinion of Judge Christine Van den Wyngaert, *Jugement Rendu en Application de l’Article 74 du Statut, Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436-AnXI, TC II, ICC, 7 March 2014, para. 278; Concurring Opinion of Judge Christine Van den Wyngaert (n 59) paras 63–4.

I would argue that the combination of indirect perpetration and co-perpetration is not necessarily prohibited in that it would *eo ipso* violate the principle of legality. It should, however, be approached with caution. With a cascading connection of modes of liability, the base crime may disappear into the background. Thus, proof is required of the elements of *each* mode of liability.⁷¹ The PTC in *Katanga and Ngudjolo* did not insist on accumulation of the elements of indirect perpetration and co-perpetration. While it did require proof of the elements of co-perpetration as discerned in *Lubanga*, it required ‘*distinct* elements’⁷² for indirect co-perpetration, i.e. not elements of indirect perpetration as a separate mode of liability.⁷³ By now, indirect co-perpetration features in a number of ICC cases; it seems to have become part of the fabric of ICC law.⁷⁴

The second complication, the ‘extended’ (sexual) crimes, was addressed by accepting a broad understanding of ‘control’. According to the PTC, violent and strict training regimes before the attack on Bogoro instilled in the subordinates a propensity to commit crimes.⁷⁵ Osiel uses the analogy of the ‘watchmaker’. A leader is like an evil watchmaker who attaches a clock to a bomb, winds it up, and walks away knowing with reasonable certainty that the device will detonate.⁷⁶ As I have argued elsewhere, this is an interesting but also troublesome comparison because it shows the potential of this theory to broaden the scope beyond that of personal culpability.⁷⁷ In a dissenting opinion, Judge Ušacka expressed her disagreement with the PTC’s majority on the charges of sexual crimes. In her view, there was insufficient evidence to establish that the accused had knowledge that rape and sexual slavery would be committed by the combatants in the ordinary course of events.⁷⁸ As will be further discussed, the PTC’s ruling on control through an OSP is problematic and warrants critique.

On 7 March 2014 the *Katanga* Trial Chamber⁷⁹ acquitted Katanga of the charges of sexual offences where Ngudjolo had been acquitted a year earlier on all charges.⁸⁰

20.4 How to Understand Article 25(3): Some Suggestions

20.4.1 Categorization and fair labelling

Why the insistence at the ICC on distinguishing between principal and accessory liability? This is a valid question. After all, the practical value of distinguishing between

⁷¹ Van Sliedregt, *Individual Criminal Responsibility* (n 12) 69–70.

⁷² *Katanga and Ngudjolo* Confirmation Decision (n 3) para. 494.

⁷³ Ibid., paras 494–518.

⁷⁴ Warrant of Arrest for Jean-Pierre Bemba Gombo replacing the Warrant of Arrest issued on 23 May 2008, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-15, PTC II, ICC, 10 June 2008; Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-1, PTC I, ICC, 4 March 2009; Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Muthaura et al., Situation in the Republic of Kenya*, ICC-01/09-02/11-382-Red, PTC II, ICC, 23 January 2012.

⁷⁵ *Katanga and Ngudjolo* Confirmation Decision (n 3) para. 518.

⁷⁶ M Osiel, *Making Sense of Mass Atrocities* (Cambridge: Cambridge University Press 2009) 105.

⁷⁷ Van Sliedregt, *Individual Criminal Responsibility* (n 12) 170.

⁷⁸ Partly Dissenting Opinion by Judge Anita Ušacka, *Katanga and Ngudjolo* Confirmation Decision (n 3) paras 19–22.

⁷⁹ *Katanga* Trial Judgment (n 64).

⁸⁰ Judgment pursuant to Art 74 of the Statute, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-3, TC II, ICC, 18 December 2012.

principals and accessories is limited: it does not come with a sentence reduction. This is also what Judge Fulford opines in his separate and partly dissenting opinion in *Lubanga*:

Article 78 of the Statute and Rule 145 of the Rules of Procedure and Evidence, which govern the sentences that are to be imposed, provide that an individual's sentence is to be decided on the basis of 'all the relevant factors', 'including the gravity of the crime and the individual circumstances of the convicted person'. Although the 'degree of participation' is one of the factors listed in Rule 145(1)(c) of the Rules, these provisions overall do not narrowly determine the sentencing range by reference to the mode of liability under which the accused is convicted, and instead this is simply one of a number of relevant factors.⁸¹

Moreover in ICL, accessories are punished as principals; someone who aided and abetted rape is convicted of rape.

The answer lies in the quest for expressive justice. Value is attached to fair labelling and the idea that international criminal justice is tasked with expressing a narrative. Fair labelling accounts for the advance of the normative approach to criminal participation and the desire to adhere to the distinction between those who are culpable as principals and those who are culpable as accessories. Stigmatization through principal status is important bearing in mind the denunciatory and educational function of punishment. Making clear who masterminded crimes by referring to him/her as a 'principal' who 'commits' crimes is important in communicating to victims and the international community as a whole who was the 'real' culprit.

This is why the 'empirical' approach to criminal participation, referring to masterminds as accessories, cannot perform this denunciatory function. It is interesting to note that at the ad hoc Tribunals the normative approach has also gained ground. Think of the creation of a hierarchy of liability: aiding/abetting—JCE and development of broad, non-physical concepts of 'commission' at the ICTR.⁸²

20.4.2 Two liability models in one provision

The PTC in *Lubanga* and *Katanga* embraced the control theory *by exclusion* of other theories of liability. The normative approach in Article 25(3)(a) has been taken to govern the whole of Article 25, including subparagraphs (b)–(d). A rigorous distinction is made between principal liability in subparagraph (3)(a) and accessory liability in subparagraphs (b)–(d). The latter forms are regarded as less blameworthy. Charging defendants as intellectual or remote principals under 25(3)(a) means they played a central role, that they had 'control of the crime'.⁸³ This is contrasted with liability

⁸¹ Separate Opinion of Judge Adrian Fulford, *Lubanga* Trial Judgment (n 4) para. 9.

⁸² Judgment, *Seromba*, ICTR-2001-66-A, AC, ICTR, 12 March 2008, para. 171. See for a comment, F Giustanini, 'Stretching the Boundaries of Commission Liability. The ICTR Appeals Judgment in *Seromba*' (2008) 6 *Journal of International Criminal Justice* 783.

⁸³ Consider, for instance, para. 518 of the *Katanga and Ngudjolo Confirmation Decision* (n 3): 'The leader's ability to secure this automatic compliance with his orders is the basis for his principal—rather than accessory—liability. The highest authority does not merely order the commission of a crime, but

under 25(3)(b)–(d) where control plays no role.⁸⁴ According to Werle and Burghardt, the control element implies a higher degree of blameworthiness for perpetrators in subparagraph (3)(a).⁸⁵ As a result, there is a preference at the ICC to charge and confirm charges under Article 25(3)(a). According to Schabas, this has diminished the significance of the other modalities of liability in Article 25(3).⁸⁶ The *Lubanga* Appeals Chamber recently endorsed this ‘all-inclusive’ normative reading of Article 25(3).⁸⁷

I disagree with this interpretation of Article 25. The fact that Article 25(3)(a) provides for intellectual perpetration and hence the normative approach does not make it the sole theoretical grounding for the whole of Article 25. Nor does it ‘reduce’ the modalities in subparagraphs (b)–(d) to a lesser liability. This does not comport with the text and the drafting history of Article 25. As the chairman of the Working Group on General Principles recalls, Article 25(3) posed great difficulties to negotiate; eventually a near-consensus was reached where there would be one provision covering the responsibility of principals and all other modes of participation.⁸⁸ It was to provide the court with a range of modalities from which to choose from.

The *Katanga* Trial Chamber also rejected the idea of a hierarchy of blameworthiness. Accepting that Article 25(3) contains a number of overlapping modes of liability, it held that:

En effet, l'article 25 du Statut ne fait qu'identifier différents comportements illégaux et, en ce sens, la distinction proposée entre la responsabilité de l'auteur du crime et celle du complice ne constitue en aucun cas une 'hiérarchie de culpabilité' (*hierarchy of blameworthiness*) pas plus qu'elle n'édicte, même implicitement, une échelle des peines. Aussi ne peut-on exclure que, après avoir statué sur la culpabilité, le juge décide de prononcer des peines atténuées contre les complices sans que, pour autant, cela constitue pour lui une règle impérative. Il demeure que ni le Statut ni le Règlement de procédure et de preuve ne prévoient un principe d'atténuation de la peine pour les formes de responsabilité autre qu'une commission et, pour la Chambre, il n'existe pas de corrélation automatique entre le mode de responsabilité et la peine. Ceci démontre bien que l'auteur d'un crime n'est pas *toujours* considéré comme étant moralement plus répréhensible que le complice.⁸⁹

through his control over the organization, essentially decides whether and how the crime would be committed.'

⁸⁴ The PTCs in *Lubanga* and *Katanga* reject the ICTY understanding of JCE liability as a form of co-perpetration/principal liability and instead regard common purpose-liability in 25(3)(d) as a ‘residual form of accessory liability’ since it is described in terms of *contributing* to the commission of crimes. *Katanga* and *Ngudjolo* Confirmation Decision (n 58) para. 483 and *Lubanga* Confirmation Decision (n 2) para. 337.

⁸⁵ G Werle and B Burghardt, ‘Indirect Perpetration: A Perfect Fit for International Prosecution of Armchair Killers?’ (2011) 9 *Journal of International Criminal Justice* 85, 88. See also G Werle and B Burghardt, ‘Establishing Degrees of Responsibility. Modes of Participation in Article 25 of the ICC Statute’ in E van Sliedregt and S Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press 2014) 301–19.

⁸⁶ See Schabas (n 7) 430–1.

⁸⁷ *Lubanga* Appeals Judgment (n 5) para. 471.

⁸⁸ P Saland, ‘International Criminal Law Principles’ in R Lee (ed.), *The International Criminal Court. The Making of the Rome Statute—Issues, Negotiations, Results* (The Hague: Kluwer Law International 1999) 198.

⁸⁹ *Katanga* Trial Judgment (n 64) para. 1386.

In my view, the modes of liability listed in subparagraphs (b)–(d) constitute the classic/empirical scheme of criminal participation that we find in most national criminal justice systems and at the ad hoc Tribunals. These modalities differ from the forms of perpetration in subparagraph (a) in that they are derivative or accessorial; liability depends on the principal crime.⁹⁰ For someone who orders a crime to be culpable, the crime must have been committed. This derivative nature does not entail ‘lesser liability’. There is no rule or theory that links accessorial liability to a mitigated form of criminal responsibility.⁹¹ More specifically, there is no reason why indirect perpetrators under Article 25(3)(a) deserve a more severe punishment than instigators under subparagraph (b).

Logic dictates that relying on Article 78 of the Statute and Rule 145 of the RPE, making clear that it is at the sentencing stage where all relevant factors are weighed to determine a sentence, no hierarchy exists amongst the modes of liability in subparagraphs (b)–(d). Contributions to crimes qualified as instigation, aiding and abetting, or common purpose-liability are to be weighed each on their own merits. Ambos, who earlier defended the idea of hierarchy between Article 25(3)(c) and common purpose liability in Article 25(3)(d), where the latter was viewed as a residual category of liability and thus less ‘blameworthy’ than aiding and abetting, is now of the view that these modes of liability are not structured in a hierarchical manner.⁹² This means that one should not attempt to distinguish between these two modes of liability when it comes to the nature of contribution (significant or substantial: what is the difference between the two?).⁹³

20.4.3 Mitigation for aiding and abetting?

A remaining question relates to the normative weight of aiding and abetting liability in Article 25(3)(c). Ohlin, generally in favour of using German law to develop an international *Dogmatik*, argues that this is where importing the German model would be a mistake.⁹⁴ The latter model provides for an *automatic* sentence reduction for accomplices. The heinous nature of international crimes is the objection to such a system. Even the defendant who aids and abets a massive genocide deserves a serious penalty.⁹⁵

It would not comport with post-Second World War case law to adopt an automatic sentence reduction. The changes to domestic law on aiding and abetting in the Netherlands, where the sentence reduction was abolished for Second World War crimes, accords with that point of view. Also, nuancing the principal–accomplice distinction in Nuremberg case law, to make clear that each of the parties to a crime, close and remote, could be punished with equal sentences, is still valid as a sentencing

⁹⁰ See also Ohlin et al. (n 9) 743–4.

⁹¹ Even in those systems that provide for a distinction between principals and accessories where categorization comes with a sentence reduction, ‘principal liability’ may still be derivative/accessorial. For instance, co-perpetrators in Dutch law have the status of accessories. Their liability rests on that of the physical perpetrator; they are only liable when the crime is committed or attempted. They are punished as if they were principals (Art 47(1) Dutch Penal Code: ‘Als daders van een strafbaar feit worden gestraft: 1. zij die het feit plegen, doen plegen of medeplegen’). See Ohlin et al. (n 9) 744 n 87.

⁹² See also Ambos (n 15).

⁹³ Ibid.

⁹⁴ See also Ohlin (n 13).

⁹⁵ Ibid.

principle. The *Katanga* Trial Chamber's finding cited earlier can be referred to as evidence of that.

Having said that, aiding and abetting in Tribunal case law has developed into a form of lesser liability.⁹⁶ This, however, is only the case in very specific circumstances, namely vis-à-vis JCE. Moreover, as the Charles Taylor case has shown, aiding and abetting may, in its own right, constitute the basis for a serious sentence.⁹⁷

20.4.4 Control through an OSP: *Dogmatik* gone wrong

The organizational variant of the control theory is fraught with difficulties, particularly when applied to the reality of African ethnic violence. While I accept that one can read Article 25(3)(a) in a 'multiple sense', accepting that the term 'through another person' can include multiple persons, thus enabling the importation of organizational liability, the PTC's ruling on control through an OSP is unpersuasive. Weigend points out that the concept of control is too broad and unspecific; it cannot support a conviction.⁹⁸ Moreover, he wonders whether international criminal law needs such a theory. Why not rely on instigation under Article 25(3)(b)?⁹⁹

The most problematic point of this theory is that it does not at all accord with the reality on the ground. Take, for instance, the charges of 'collateral' sexual crimes. Accepting that the physical perpetrator can go beyond what is ordered and act on his own initiative undermines the central tenet of Roxin's theory. *Organisationsherrschaft* requires the physical perpetrators to be mere cogs in the wheel, where the leaders, as intellectual perpetrators, dominate their will and acts to such an extent that their compliance with orders is automatic.

One cannot escape the impression that the PTC in *Katanga and Ngudjolo* was blinded by the beauty of *Dogmatik* and lost sight of the African reality. No wonder the OSP theory ended up as the basis for an acquittal¹⁰⁰ and a (controversial) recharacterization of charges (under Regulation 55).¹⁰¹

20.5 Concluding Observations

Mass criminality challenges traditional theories of criminal responsibility in at least three ways. First, because of the difficulty of establishing a causal link between conduct

⁹⁶ See Van Sliedregt, *Individual Criminal Responsibility* (n 12) 78–99.

⁹⁷ Taylor was convicted to 50 years. See Judgment, *Charles Taylor*, SCSL-03-1-T, TC, SCSL, 26 April 2012, para. 6959; affirmed on appeal in Judgment, *Charles Taylor*, SCSL-03-1-A, AC, SCSL, 26 September 2013.

⁹⁸ See also Weigend (n 5).

⁹⁹ This is indeed what the defence submitted in the *Katanga* trial as an alternative to indirect co-perpetration. See *Katanga* Trial Judgment (n 63) para. 1375 and Conclusions écrites de la Défense, ICC-01/04-01/07-3266-Corr2-Red, Defence, ICC, 29 June 2012, para. 1217.

¹⁰⁰ *Ngudjolo* Trial Judgment (n 8).

¹⁰¹ A majority in the *Katanga* Trial Chamber recharacterized the charges from indirect co-perpetration to common purpose under Art 25(3)(d). Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3319, TC II, ICC, 21 November 2012 (see also the Dissenting Opinion by Judge Christine Van den Wyngaert included in this TC Decision).

and crime.¹⁰² Second, because of the normative weight of functional, non-physical involvement in crimes (the ‘remote principal’). Third, because of the parallel nature of culpability which means that one crime triggers liability at different levels: at leadership/intellectual level and at foot soldier/execution level.

In international law, novel concepts of perpetration and participation have been developed to meet these challenges. JCE and the control theory are two such theorizations. Comparing Nuremberg case law, JCE liability at the ICTY, and the control theory at the ICC, two differences emerge that run along the Nuremberg/ICTY-ICC divide. First, the (non-)adherence to categorization of modes of liability. Second, (not) adopting a dogmatic approach to perpetration and participation.

While in Nuremberg and in ICTY case law the distinction between principals and accomplices is suppressed, making sure that it has no significance to the outcome of the case, the ICC adheres to categorizing principals and accomplices. To my mind, this difference between Tribunal law and ICC law is really only important in the ambit of fair labelling. Categorization should not affect sentencing. Yet, with the recent Appeals Chamber judgment in *Lubanga*, accepting a hierarchy of blameworthiness in Article 25(3), categorizing and sentencing are now directly linked. This deviates from previous practice. Ever since Nuremberg, ICL has adopted a unitary theory of participation when it comes to sentencing.¹⁰³ Role variance was only considered at the sentencing stage. In other words, categorizing contributions to a crime did not necessarily have a normative meaning. What really sets Tribunal law apart from ICC law in the realm of liability theories is the reliance on *Dogmatik*. The usage of criminal law doctrine when interpreting Article 25(3) is a break from the more pragmatic, Anglo-American approach to law-making that dominated at the ad hoc Tribunals. The dogmatic approach, however, is not uncontroversial. It is criticized for its import of German law and for losing sight of the facts on the ground. I largely agree with this critique, although I value *Dogmatik* and the control theory to the extent that it accepts the normative/remote principal in subparagraph (a). The latter approach, better than complicity law (representative of an ‘empirical’ approach), captures the nature of masterminded violence, which matters from the perspective of fair labelling. The all-inclusive approach, suggesting that the whole of Article 25 is premised on the control theory, should, however, be faulted. I endorse Van den Wyngaert and Fulford’s position to approach modes of liability on a case-by-case basis and to reject the idea of a hierarchy of blameworthiness in Article 25.

Having discussed the differences, one should not lose sight of the similarities in the law of perpetration and participation at the ICTY and the ICC. For instance, there are similarities between indirect co-perpetration at the ICC and interlinked JCE at the ICTY. As Ohlin submits, ‘the ICC’s problem of combining modes of liability is structurally identical to the ICTY’s problem of linking a leadership level JCE with the RPP

¹⁰² Either because of the remoteness to the crime, or the impossibility to establish which conduct caused the prohibited result or consequence considering multiple sufficient causes: ‘overdetermined atrocities’. See Stewart (n 39).

¹⁰³ This unitary theory is premised on classic complicity law and essentially means that ‘[s]omeone against whom it is proved that they aided, abetted, counselled or procured the commission of murder

(relevant physical perpetrators)?¹⁰⁴ The principles of attribution are not so different; they both need proof of a common plan and control over a person used as a tool. They thus share distinctive features, which is not so strange bearing in mind that they capture similar forms of criminality. Also, in-depth analysis, by looking into the interplay between law and fact, demonstrates that co-perpetration and JCE liability are much more alike than ICC PTCs are willing to admit.¹⁰⁵ Moreover, we must be mindful of the fact that the ICC has no monopoly on the normative approach to criminal participation. It has been part of ICL since Nuremberg, albeit in a different, even opposite way, from the approach at the ICC. As was made clear earlier, in Nuremberg and at the ICTY, recognizing the remote principal resulted in abandoning the accomplice–principal distinction, whereas the ICC, by insisting on categorization, endorses the normative approach.

For future perspectives it is opportune to adopt a harmonizing approach and look through labels and legal categories. This serves national adjudication of international crimes, since national adjudicators rely on the international framework when trying war criminals. Moreover, it halts legal pluralism where it is unnecessary.

20.6 Outlook on the Future

The ICC has been functioning for more than a decade now. It is well beyond its infancy and it is time to discuss its first achievements. In the area of substantive ICL, in particular theories of liability, its main achievement is recognizing the normative/remote principal through the control theory. The impact of the latter theory, however, is greater than it should be; it should not provide the theoretical grounding of the whole of Article 25(3) of the ICC Statute.

In the realm of substantive criminal law, in particular with regard to modes of liability, the ICC should resist two temptations. First, the temptation to create the perfect liability theory. The ICC Statute with its elaborate statutory definitions, general part, Elements of Crime, and Article 21 on sources of law, breathes a ‘black letter law’ approach. Practice at the ICC, however, does not comport with this approach. The first decisions by PTCs constitute substantive law-making that to my mind goes well beyond the task of confirming charges. I would expect the court to take a more textual approach, on a case-by-case basis, guided by Article 31 of the VCLT.

The second, related temptation that should be resisted is to mould the law to fit the facts. Here I think of the contrived findings of the PTC in *Katanga and Nganjolo* with regard to the rape and sexual slavery charges that were regarded as ‘collateral crimes’. Broadening the control theory this way betrays a result-oriented approach and makes it vulnerable to the exact same critique that has been voiced with regard to JCE liability.

by another—for example, by supplying the gun which fired the fatal shot—is herself convicted of murder. So far as her conviction goes, it is just as if she had pulled the trigger herself.’ J Gardner, ‘Aid, Abet, Counsel, Procure: an English View of Complicity’ in A Eser et al. (eds), *Einzelverantwortung und Mitverantwortung im Strafrecht. European Colloquium on Individual, Participatory and Collective Responsibility in Criminal Law* (Freiburg i. Br, Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht 1998) 227–8.

¹⁰⁴ J Ohlin, ‘Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability’ (2012) 25 *Leiden Journal of International Law* 771.

¹⁰⁵ M Cupido, ‘Pluralism in Theories of Liability: Joint Criminal Enterprise versus Joint Perpetration’ in Van Sliedregt and Vasiliev (n 85).

21

Co-Perpetration

German *Dogmatik* or German Invasion?

Jens David Ohlin*

21.1 Introduction

In order to understand the ICC's jurisprudence on co-perpetration, one needs to trace the recent history of modes of liability at the international legal tribunals and the clash of legal traditions embodied by competing doctrinal paradigms. The current doctrines of co-perpetration, most notably the control theory of perpetration, are heavily influenced by German criminal law theory. To some judges and observers, the ICC's importation of Claus Roxin's famous theory is evidence that the ICC is finally getting serious about criminal law theory. To critics, though, the application of a particularly Germanic interpretation of co-perpetration is evidence that one legal culture is having an outsized influence on the direction of the court's jurisprudence.

In order to understand and evaluate this complaint, it is necessary to situate the current doctrines within their historical context, since in many respects the ICC's doctrine of co-perpetration is a reaction against the modes of liability applied at the ICTY and the ICTR. After providing that historical context, this commentary will then proceed to lay out the foundations of the ICC doctrine of co-perpetration, present and evaluate the most notable objections to the doctrine, and consider some alternate versions of co-perpetration that could be applied by the ICC in place of Roxin's control theory of perpetration. The resulting picture suggests a growing influence of criminal law theory in The Hague as the judges struggle to interpret Article 25 of the Rome Statute, a provision not known for its doctrinal sophistication.¹ The result is a set of ICC decisions that might even lay the groundwork for an emerging international *Dogmatik*, a *sui generis* discipline that one might describe as international criminal law theory. Despite these positive efforts, however, the Court has done insufficient work to justify its methodology (in particular its substantial reliance on German sources) and to properly ground its importation of domestic criminal law theory within a general

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¹ In this regard, see K Ambos, 'Article 25 Individual Criminal Responsibility' in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* 2nd edn (Münich/Oxford: C H Beck/Hart Publishing 2008) 743, 759 (Art 25 'demonstrates that a provision drafted without regard to basic dogmatic categories will create difficult problems of interpretation for the future ICC'). But see G Werle and B Burghardt, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute' in E van Sliedregt and S Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press 2014) 301–19 (arguing that Art 25 embodies a coherent hierarchy of blameworthiness).

theory of sources of international law. The following analysis will detail this emerging trend and critically evaluate the positive and negative aspects of the ICC doctrine of co-perpetration.

21.2 The Emergence of Co-Perpetration

In 1999 Judge Cassese presided over the *Tadić* Decision at the ICTY.² The Appeals Chamber announced that *Tadić* should be prosecuted as a participant in a JCE. Although JCE was not explicitly listed as a mode of liability in the ICTY Statute, the Chamber found that the mode of liability was implicitly recognized in Article 7 of the Statute.³ As customary evidence, the ICTY Appeals Chamber examined post-Second World War prosecutions before British and American military tribunals, including *Essen Lynching*,⁴ *Borkum Island*,⁵ and *Jepsen and Others*.⁶ These cases were not well known among scholars and some of them had never been translated or published. Nonetheless, the ICTY Appeals Chamber used them as an interpretive gloss on Article 7 of the ICTY Statute. Essentially, the ICTY concluded that JCE as a mode of liability was supported by customary international law.⁷

By now, the specifics of JCE are well understood and need not be chronicled in detail. The doctrine requires a plurality of persons acting in conformance with a common plan or design.⁸ Actions pursued by the group are attributable to the defendant as long as they are performed pursuant to the purpose or design of the endeavour (JCE I), pursuant to a system of ill-treatment (JCE II), or a reasonably foreseeable consequence of the common design (JCE III).⁹ The third category substantially resembles the vicarious responsibility that common-law lawyers associate with the *Pinkerton* doctrine.¹⁰ More importantly, JCE represented a *de facto* unitary approach to perpetration that eschewed categorical distinctions between principals and accessories.¹¹ True, JCE did not fully replace the category of aiding and abetting, such that aiding and abetting remained a viable mode of liability under the ICTY and ICTR jurisprudence.¹² That

² See Judgment, *Tadić*, IT-94-1-A, AC, ICTY, 15 July 1999 ('*Tadić*').

³ Ibid., para. 189 (discussing object and purpose of Art 7).

⁴ *Trial of Erich Heyer and Six Others [Essen Lynching]*, British Military Court for the Trial of War Criminals, Essen, 18–19 and 21–22 December (1945) UNWCC, vol. I, 88, 91.

⁵ *United States of America v Goebell et al. [Borkum Island Case]*, Case No. 12–489 (1946), microformed on 1–6 Records of United States Army War Crimes Trials, M1103 Rolls 1–7 (National Archives Microfilm Publications 1980), cited in *Tadić* (n 2) para. 210.

⁶ *Gustav Alfred Jepsen and Others*, UK, Proceedings of a War Crimes Trial held at Lueneburg, Germany (13–24 August 1946), judgment of 24 August 1946.

⁷ See *Tadić* (n 2) para. 220. See also *D’Ottavio and Others*, Cass Pen (12 Mar 1947) n 270 (Ita), reprinted in *D’Ottavio and Others* (2007) 5 *Journal of International Criminal Justice* 232; *Aratano and Others*, No. 102, Judgment (Ct of Cassation, February 21, 1949) (Ita), reprinted in *Aratano and Others* (2007) 5 *Journal of International Criminal Justice* 241.

⁸ See A Cassese, *International Criminal Law* 2nd edn (Oxford: Oxford University Press 2008) 191.

⁹ Ibid., 199. ¹⁰ *Pinkerton v United States*, 328 US 640, 648 (1946).

¹¹ See J Ohlin, ‘LJIL Symposium: Names, Labels, and Roses’ (*Opinio Juris*, 23 March 2012) <<http://opiniojuris.org/2012/03/23/ljil-names-labels-and-roses/>> accessed 1 May 2014.

¹² See *Tadić* (n 2) para. 192 (distinguishing JCE liability from aiding and abetting-liability). See also the excellent discussion in E van Sliedregt, *Individual Criminal Responsibility in International Law* 2nd edn (New York: Oxford University Press 2012) 77–8.

being said, few defendants were charged with aiding and abetting and even fewer were convicted of it. The virtue (or vice, depending on one's doctrinal inclination) of the JCE doctrine was that it treated all members of the common design as legally equivalent. As long as the defendants were all deemed to be members of the JCE, their relative importance became a matter of little importance to the doctrine of the ICTY. It was for this reason that JCE was criticized for being a 'Just Convict Everyone' doctrine.¹³ In the more technical language of criminal law theory, the JCE doctrine was close in spirit to a unitary approach to perpetration whereby all members causally responsible for the crime were labelled as perpetrators, regardless of their level of participation.

In their earliest decisions at the ICC, the judges of the Pre-Trial Chamber were inclined to approach collective criminality with a different set of doctrinal tools. Consequently, the judges imported the latest devices of German criminal law theory, in particular Claus Roxin's well-known control theory of perpetration. Roxin had developed the theory in 1963 in his book *Täterschaft und Tatherrschaft*, which immediately gained wide influence in German criminal law theory circles.¹⁴ Specifically, Roxin sought to develop a third way to perpetration that mediated between the competing mistakes of the objective and subjective approaches to perpetration. In the objective approach, well known in common-law jurisdictions such as the United States and Britain, the perpetrator is defined as the individual who performs the *actus reus* of the crime. All others are defined as accomplices or instigators.¹⁵ This produces somewhat paradoxical results, because a mob boss who orders a subordinate to kill a rival criminal will only be convicted as an accomplice since he did not perform the physical act of shooting the victim. However, our intuitions suggest that the mob boss, by virtue of his advanced location in the hierarchy, is more culpable (rather than less culpable) than the foot soldier who carries out the attack. Over time, the common law developed numerous doctrinal techniques to mitigate this shortcoming in its jurisprudence, most notably de-emphasizing or even collapsing the distinction between principals and accessories. Accordingly, US criminal law states that accomplices and principals are equally guilty and are subject to the same criminal penalties.¹⁶ When the doctrine provides an incoherent or implausible definition of the distinction between principals and accessories, the best solution is to deny the distinction any real relevance in the outcome of the case, which is precisely the avenue selected by the common law.

The rival theory, which gained adherence in German criminal law circles, is the subjective approach to perpetration. This solution concentrates on the *mens rea* of the actors involved. So, with regard to our hypothetical mob boss, he could be convicted as a principal perpetrator because he displays the relevant *mens rea* necessary for a murder

¹³ See M Badar, "Just Convict Everyone!"—Joint Perpetration: From *Tadić* to *Stakić* and Back Again? (2006) 6 *International Criminal Law Review* 293.

¹⁴ See C Roxin, *Täterschaft und Tatherrschaft* 8th edn (Berlin: de Gruyter 2006).

¹⁵ See W Blackstone, *Commentaries on the Laws of England in Four Books*, vol. 2 (Philadelphia: J B Lippincott Co. 1893) section 34. See also T Hughes, *A Treatise on Criminal Law and Procedure* (Indianapolis: Bobbs-Merrill Co. 1919) 122, s. 167.

¹⁶ Crimes and Criminal Procedure (18 US Code) s. 2(a).

conviction.¹⁷ This too has its detractors, since the individual with the relevant *mens rea* may be causally, temporally, and geographically removed from the physical commission of the crime—a tenuous connection that some may feel is emblematic of the uncertain causal connection between the defendant and the resulting crime.¹⁸ Is it fair to label such an individual as a principal perpetrator given the conceptual distance between them and the criminal act?

Roxin's brilliance came in devising, from whole cloth, a third way between the objective and subjective approaches to perpetration. Under Roxin's control theory, the perpetrator is defined as the individual who has control or 'hegemony' over the act, who decides whether the criminal transaction will occur.¹⁹ If there are two individuals who are in a position to jointly control the execution of the act, then they are labelled as co-perpetrators. In garden-variety murder cases in the domestic context, the control theory will frequently generate the same outcome as the subjective and objective approaches.²⁰ Most regular murders involve the unification within a single individual of *mens rea*, *actus reus*, and control. So if the defendant pulls the trigger, desires the outcome, and controls whether the murder occurs, he is the principal perpetrator regardless of the theory of commission applied in the case.

However, international crimes are not like garden-variety crimes that occur in the domestic context, for two reasons. First, international crimes are almost always perpetrated by a plurality of persons, making co-perpetration (or some variant such as JCE) crucial to prosecutorial strategy.²¹ Second, the person in control of the crime usually does not perform the actual killings that constitute the war crime, crime against humanity, or genocide. Rather, the person in control is higher up the chain of authority, directing a hierarchy, usually though not always military troops, who carry out the *actus reus* of the crime in question.²² In this regard, Roxin was heavily influenced by the prosecution of Adolf Eichmann in Israel, which prompted him to extend his control theory of perpetration to cases of indirect perpetration and organizational

¹⁷ See e.g. Decision on Confirmation of Charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-803, PTC I, 29 January 2007, para. 329 ('Lubanga Confirmation of Charges Decision'). ('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.')

¹⁸ For a comprehensive discussion, see K Ambos, *Treatise on International Criminal Law*, vol. I (Oxford: Oxford University Press 2013) 2011–12.

¹⁹ See also G Fletcher, *Rethinking Criminal Law* (reprint, New York: Oxford University Press 2000), who prefers to translate Roxin's concept of *Tatherrschaft* as 'hegemony over-the-act'.

²⁰ But see Ambos, *Treatise on International Criminal Law* (n 18) 2011 (concluding that in prosecutorial practice it is the objective and subjective approaches that will provide similar results).

²¹ The point is explored in greater depth in J Ohlin, 'Joint Intentions to Commit International Crimes' (2011) 11 *Chicago Journal of International Law* 693.

²² See J Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability' (2012) 25 *Leiden Journal of International Law* 771; K Ambos, 'Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the "Most Responsible"' in A Nollkaemper and H van der Wilt (eds), *System Criminality in International Law* (Cambridge: Cambridge University Press 2009) 127, 152.

perpetration.²³ In the case of indirect perpetration, Roxin argued, the defendant should be convicted as a principal perpetrator even though he does not perform the *actus reus* of the crime; he is, rather, an indirect perpetrator who uses other individuals as instruments to perform the killings.²⁴ He is, as the Germans say, the *Täter hinter dem Täter*, the perpetrator who stands behind the perpetrators.²⁵ The *Eichmann* trial provided an occasion to extend the control theory even further to deal with indirect perpetrators who indirectly perpetrate the crime by using an *organization* as an instrument to perform the international crime.²⁶ Roxin referred to this as *Organisationsherrschaft* (literally perpetration through an organization), which requires the use of an organized apparatus of power (or bureaucracy) as an instrument of the crime.²⁷ The individual sitting atop the organized hierarchy is defined by Roxin as the *Hintermann*, the mastermind behind the scene who implements the plan to be executed through others.²⁸ The common thread running through all of these doctrines—co-perpetration, indirect perpetration, and *Organisationsherrschaft*—is the defining feature of control as the *sine qua non* of perpetration. He who controls the crime is the perpetrator; all others are mere accomplices.

Roxin's theories were highly influential in German academic circles through the subsequent decades, although they were only operationalized in German criminal law when German courts decided the Border Guard Cases.²⁹ After unification, the German government prosecuted former East German government officials for the murder of East German citizens who were shot and killed as they attempted to flee across the Berlin Wall to freedom in the West. Unification increased the calls for justice for these atrocities—killings that sparked an ongoing and pervasive fear among the East German population that prevented them from attempting future escapes knowing of the deadly consequences of failure. So it is perhaps unsurprising that the German courts were unwilling to label the East German officials who ordered the fatal policy of shoot to kill as mere accomplices of the killings. They found that the government officials, including Honecker himself, should be convicted as principal perpetrators. The case became an occasion for the German courts to endorse and apply Roxin's control theory of perpetration. Roxin's theory moved from academic theory to doctrinal reality.³⁰

²³ See C Roxin, 'Crimes as Part of Organized Power Structures' (B Cooper tr.) (2011) 9 *Journal of International Criminal Justice* 193, reprinted from *Goltammer's Archiv für Strafrecht* (1963) 193.

²⁴ See Fletcher, *Rethinking Criminal Law* (n 19) 639.

²⁵ Some of these principles were also developed in F-C Schroeder, *Der Täter hinter dem Täter: Ein Beitrag zur Lehre von der mittelbaren Täterschaft* (Berlin: Duncker and Humblot 1965).

²⁶ See Roxin, 'Crimes as Part of Organized Power Structures' (n 23) 193. ²⁷ Ibid.

²⁸ See Roxin, *Täterschaft und Tatherrschaft* (n 14) 244; C Roxin, 'The Dogmatic Structure of Criminal Liability in the General Part of the Draft Israeli Penal Code—A Comparison with German Law' (1996) 30 *Israel Law Review* 60, 71 (E Silverman tr.). See also Ambos, *Treatise on International Criminal Law* (n 18) 154–5.

²⁹ *Bundesgerichtshof* (Federal Court of Appeals), judgment of 26 July 1994, in 40 *Entscheidungen des Bundesgerichtshofes in Strafsachen* (1995) 218, 236. For analysis, see T Weigend, 'Indirect Perpetration through an Organization: the Unexpected Career of a German Legal Concept' (2011) 9 *Journal of International Criminal Justice* 91, 94.

³⁰ M Bohlander, *Principles of German Criminal Law* (Portland: Hart Publishing 2009) 158.

In *Lubanga*, the ICC Pre-Trial Chamber imported Roxin's approach as an interpretive gloss on Article 25(3)(a) of the Rome Statute.³¹ No one seriously expected the Court to adopt the ICTY jurisprudence on JCE, though it was somewhat surprising that the Pre-Trial Chamber was so specific in concluding that Article 25(3)(a) codified Roxin's approach to perpetration.³² After all, Article 25(3)(a) makes no reference to control at all, simply asserting that a person is criminally responsible for a crime if he '[c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible'.³³ The Rome Statute clearly codifies perpetration, co-perpetration ('jointly with another'), and indirect co-perpetration ('through another'), though without specifying any particular doctrinal framework to understand these concepts. To add further confusion to the situation, Article 25(3)(d) also includes liability for contributions to collective crimes. Though the dividing line between Article 25(3)(a) and 25(3)(d) is unclear and mysterious, several scholars have attempted to provide answers to this question.³⁴ As it happens, the ICC has all but ignored Article 25(3)(d), preferring instead to prosecute cases as co-perpetration or indirect perpetration under Article 25(3)(a).³⁵ For this reason the ICC has not yet offered concrete answers about the overall structure of Article 25 of the Rome Statute.³⁶

The *Lubanga* Decision on co-perpetration was notable in several respects. The Pre-Trial Chamber concluded that Lubanga's trial should proceed under Article 25(3)(a) with Lubanga accused as a co-perpetrator of the crime of using child soldiers. The Pre-Trial Chamber also listed the formal requirements of co-perpetration as the following: (i) an agreement or common plan among a plurality of persons,³⁷ (ii) coordinated essential contribution by each co-perpetrator resulting in the realization of the objective elements of the crime;³⁸ (iii) the defendant fulfils the subjective elements of the crime in question;³⁹ (iv) the co-perpetrators are (a) mutually aware that implementing their common plan may result in the realization of the objective elements of the crime and (b) mutually accept the result by reconciling themselves to it or consenting to it;⁴⁰ and (v) the suspect is aware of the factual circumstances enabling him or her to jointly control the crime.⁴¹ What emerges from these doctrinal

³¹ *Lubanga* Confirmation of Charges Decision (n 17) para. 324.

³² See *ibid.*, para. 348.

³³ Art 25(3)(a) Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 ('Rome Statute').

³⁴ My own attempt was built largely on the conclusion that no coherent explanation is possible. Compare J Ohlin, 'Joint Criminal Confusion' (2009) 12 *New Criminal Law Review* 406, with G Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 *Journal of International Criminal Justice* 953 (arguing that Art 25 embodies a hierarchy or differentiation of participation based on four different levels of participation). See also Jugement rendu en application de l'article 74 du Statut—Concurring Opinion of Judge Christine van den Wyngaert, *Ngudjolo*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-4, TC II, ICC, 18 December 2012, paras 22–30 ('Ngudjolo, Van den Wyngaert Opinion').

³⁵ One of the few exceptions is Decision on Confirmation of Charges, *Mbarushimana*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-465-Red, PTC I, ICC, 16 December 2011, para. 275.

³⁶ The issue is also discussed in J Ohlin et al., 'Assessing the Control-Theory' (2013) 26 *Leiden Journal of International Law* 725, 740–1. See also Judgment pursuant to Art 74 of the Statute, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012, paras 994–9 ('Lubanga Judgment').

³⁷ *Lubanga* Confirmation of Charges Decision (n 17) para. 343.

³⁸ *Ibid.*, paras 346–8.

³⁹ *Ibid.*, paras 349–60.

⁴⁰ *Ibid.*, paras 361–5.

⁴¹ *Ibid.*, paras 366–7.

requirements is a picture of the control theory as a hybrid functional approach to perpetration that attempts to combine the most relevant elements of the objective and subjective approaches.⁴² In particular, the control theory combines objective requirements regarding the circumstances of the defendant's control (either individually or jointly) with awareness of these circumstances.

The *Lubanga* Decision was noteworthy in another regard. The Pre-Trial Chamber took great pains to insist that the control theory was widely representative of the world's legal cultures, concluding that '[t]he concept of control over the crime constitutes a third approach for distinguishing between principals and accessories which, contrary to the Defence claim, is applied in numerous legal systems'.⁴³ While this is no doubt true—Roxin's control theory has been applied in Latin American legal systems heavily influenced by German criminal law theory⁴⁴—it is a vast exaggeration to imply that Roxin's theories regarding co-perpetration are widely representative of different legal cultures. For this proposition, the *Lubanga* Pre-Trial Chamber cited Professor Fletcher's *Rethinking Criminal Law*, a treatise that extensively discussed, with admiration, Roxin's approach to perpetration.⁴⁵ However, though Fletcher himself is American, his *Rethinking* is not so much an analysis of Anglo-American or criminal law but rather a comparative examination of criminal law theory at the normative level.⁴⁶ Indeed, Fletcher has repeated that he is more interested in normative arguments for how the criminal law *ought* to be structured, without too much concern for the actual doctrine that persists in any particular jurisprudence.⁴⁷ To be too beholden to the current doctrine in any jurisdiction is to fall victim to the naturalistic fallacy—moving from what is to what ought to be. In the case of his discussion of Roxin in *Rethinking*, Fletcher's support amounted to admiration of Roxin's approach,⁴⁸ but neither Roxin nor Fletcher's analysis of it had any impact on Anglo-American common law for decades.⁴⁹ Indeed, even after Fletcher's well-known discussion of Roxin in *Rethinking*, no scholar of criminal law in the United States discussed or even cited Roxin for decades until just before Roxin's reemergence in the jurisprudence of the ICC with the *Lubanga* Decision.⁵⁰ This is not surprising, since Fletcher is

⁴² Ibid., para. 330.

⁴³ Ibid.

⁴⁴ See K Ambos, 'The Fujimori Judgment: A President's Responsibility for Crimes against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus' (2011) 9 *Journal of International Criminal Justice* 137.

⁴⁵ See Fletcher, *Rethinking Criminal Law* (n 19) cited in *Lubanga* Confirmation of Charges Decision (n 17) para. 330, fn. 418.

⁴⁶ See Fletcher, *Rethinking Criminal Law* (n 19) xxiii.

⁴⁷ See G Fletcher, 'Remembrance of Articles Past' in R Christopher (ed.), *Fletcher's Essays on Criminal Law* (New York: Oxford University Press 2013) 269, 275 ('when someone argues the way the law ought to be, it is not much of a claim to say, yes, but the law is not that way').

⁴⁸ See Fletcher, *Rethinking Criminal Law* (n 19) 655–7.

⁴⁹ Roxin was cited a few isolated times in the 1980s in American law review articles, though these citations had nothing to do with the control theory. See e.g. T Weigend, 'Sentencing in West Germany' (1983) 42 *Maryland Law Review* 37, 58, fn. 114 *et seq.*

⁵⁰ Two years prior to the *Lubanga* Confirmation of Charges Decision, a few important articles appeared, including M Osiel, 'The Banality of Good: Aligning Incentive Against Mass Atrocity' (2005) 105 *Columbia Law Review* 1751, 1829–37.

often credited with helping to explain and popularize the civil law approach to criminal law scholars in the English-speaking world.⁵¹ He is, therefore, responsible for a major exportation of German patterns of thought to English-speaking cultures. But one cannot cite *Rethinking* for the proposition that the control theory enjoys broad support in both civil-law and common-law jurisdictions. If the Pre-trial Chamber meant to imply this, it were mistaken.

This raises a methodological quandary about how criminal law theory fits into a general theory of sources within international law. When the Pre-Trial Chamber read Roxin's control theory of perpetration into Article 25 of the Rome Statute, was it engaged in treaty interpretation, recognizing customary international law, or relying on general principles of international law? The answer remains elusive. If the *Lubanga* Decision was an example of the first—treaty interpretation—the result must confront the fact that there is little evidence that the negotiators of the Rome Statute had Roxin's control theory in mind when they drafted the precise language of Article 25(3)(a) that allowed liability for crimes committed individually or jointly with another individual. Indeed, the bare text of Article 25(3) suggests that cases of co-perpetration were limited to two individuals working concurrently, since it states *with another individual* as opposed to saying *with other individuals*. The provision most explicitly describing mass criminality appears in Article 25(3)(d) and its reference to 'a group of persons acting with a common purpose'.⁵²

If the *Lubanga* Decision was a reference to the second option—customary international law—then other problems emerge. The control theory, while spreading in influence and application in other domestic legal systems, is not yet applied in such a wide range of domestic legal systems that it demonstrates the type of 'widespread' or 'uniform' state practice that would be sufficient to generate a norm of customary international law. Furthermore, it is unclear if its incorporation into the domestic systems where it is used was accompanied by any *opinio juris* (i.e. by a sense of legal obligation). Can it seriously be suggested that states that have adopted Roxin's theory of perpetration did so because they felt an international legal *obligation* to do so? This seems unlikely. Rather, it seems that they did so because they believed that the control theory of perpetration yielded intuitively correct results from a normative perspective, thus making it a positive candidate for importation into domestic law. But that is a far cry from the *opinio juris* necessary to establish a norm of customary law.

Indeed, this represents a far greater problem in international criminal law: the occasional use of the phrase 'customary international law' by some lawyers to describe the widespread use of particular doctrines within domestic systems or even international tribunals.⁵³ Criminal law approaches within domestic systems are usually

⁵¹ See also G Fletcher, *The Grammar of Criminal Law: American, Comparative, and International* (New York: Oxford University Press 2007); G Fletcher, *Basic Concepts of Criminal Law* (New York: Oxford University Press 1998).

⁵² Art 25(3)(d) Rome Statute. For analysis, see Ambos, 'Article 25' (n 1) 757–60.

⁵³ The issue is discussed in M Fan, 'Visionary Legal Construction: Custom, General Principles and the Great Architect Cassese' (2012) 10 *Journal of International Criminal Justice* 1063.

unaccompanied by *opinio juris*, and properly speaking are not customary norms.⁵⁴ Furthermore, criminal law approaches from another international tribunal are not an example of state practice, since the decisions of particular judges in international tribunals cannot be attributed to specific states. Therefore, decisions of international tribunals are not a source of customary international law, though they may follow pre-existing customary law in some circumstances. But it appears that some lawyers often refer to 'customary international law' with regard to ICL when what they really mean is a kind of 'common law' of ICL, a body of precedent or prior decisions that support a particular result. The use of the phrase 'customary international law' in this context is inconsistent with the general theory of customary international law as found in public international law.

The final possibility is to view the *Lubanga* Pre-Trial Chamber as engaging in an exercise in general principles of law.⁵⁵ However, this route demonstrates some of the same difficulties as the customary analysis. Is the control theory sufficiently widespread that it constitutes a *general principle of law*? Most scholars believe that the general principles ought to be truly general and, in the words of the ICJ Statute, 'recognized by civilized nations'.⁵⁶ In that respect, the citation of Fletcher is helpful but, as discussed, hardly evidence of a transcultural adoption of the control theory.

Perhaps it is best to interpret the *Lubanga* Pre-Trial Chamber Decision as an independent exercise in international *Dogmatik*, a *sui generis* attempt to engage in international criminal law theory.⁵⁷ By engaging in an examination of the nature of mass atrocity, and seeing the great potential of the control theory as a means of understanding co-perpetration in the Rome Statute, the Pre-Trial Chamber was developing an ICC-specific *Dogmatik*, an attempt to reason from first principles the nature of co-perpetration and collective action in the context of atrocity. This is an admirable pursuit. The only question is how to square this pursuit with a general theory of sources of international law. Perhaps the only solution is to liberate international criminal law from its subsidiary status within public international law and recognize that international judges are, fundamentally, *criminal* law judges deciding on the wrongfulness of actions and the culpability of actors appearing before them in a criminal trial. This necessarily requires elucidation of the Rome Statute when its content reveals gaps that require doctrinal elaboration. This is not necessarily an invitation to judicial experimentation,⁵⁸ but rather a recognition that criminal law categories codified in a statute are not self-applying and that *sui generis* criminal law theory has a role to play in law

⁵⁴ For a discussion of the requirements for the establishment of a customary norm, see generally A D'Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press 1971).

⁵⁵ On the relationship between general principles and criminal law theory, see N Jain, 'General Principles of Law as Gap-Fillers' (forthcoming); F Mantovani, 'The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer' (2003) 1 *Journal of International Criminal Justice* 26.

⁵⁶ Art 38 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 933.

⁵⁷ See G Fletcher, 'New Court, Old Dogmatik' (2011) 9 *Journal of International Criminal Justice* 179.

⁵⁸ For a critical example, see B Saul, 'Legislating from the Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' (2011) *Leiden Journal of International Law* 677.

application to fact in specific cases. Roxin's control theory of perpetration is probably best viewed within this framework.

The *Katanga and Ngudjolo* Decision represented the second application of Roxin's control theory to Article 25 of the Rome Statute.⁵⁹ However, the factual scenario presented in the case was remarkably different from *Lubanga*. Whereas Lubanga was charged as a co-perpetrator for his joint commission of recruiting child soldiers, Katanga and Ngudjolo were charged with responsibility for crimes committed by their respective subordinates. The application of the control theory to their co-perpetrated crimes was complicated by the fact that the two defendants controlled separate rebel forces.⁶⁰ In its Confirmation of Charges Decision, the Pre-Trial Chamber concluded that there was sufficient evidence to warrant a trial to determine whether the two rebel organizations jointly perpetrated the atrocities in question. Consequently, Katanga and Ngudjolo were viewed as co-perpetrators who formed a collective unit with a division of labour regarding the accomplishment of the task. However, since neither directly performed the criminal conduct in question, but controlled the outcome of the crime through an organized apparatus of power, the defendants were *indirect perpetrators*.⁶¹ The combination of these two facts—their horizontal cooperation to control the crime and their vertical control over their respective organizations—gave birth to a new flavour of the control theory.⁶² The Pre-Trial Chamber referred to this as indirect co-perpetration.⁶³

Although indirect co-perpetration is not explicitly listed in the Rome Statute, the Pre-Trial Chamber reasoned that it was a natural combination of the raw materials of co-perpetration and indirect perpetration.⁶⁴ Add the two together and you get indirect co-perpetration. The combination has been asserted in other recent ICC cases and it is likely to feature prominently in future ICC jurisprudence as long as the control theory reigns as the guiding doctrine of co-perpetration at the court.⁶⁵ Given that the Rome Statute has delegated to the court the task of prosecuting cases and defendants of the highest concern to the world community, many of the defendants in question will be geographically and perhaps temporally removed from the physical commission of the crime. Indeed, past prosecutors have publicly indicated their desire to concentrate their limited institutional resources on individuals high in the bureaucratic

⁵⁹ See Decision on Confirmation of Charges, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-717, PTC I, ICC, 30 September 2008, para. 484 ('By adopting the final approach of control over the crime, the Chamber embraces a leading principle for distinguishing between principals and accessories to a crime, one that synthesises both objective and subjective components').

⁶⁰ Ibid., para. 544.

⁶¹ Ibid., para. 511.

⁶² Ibid., para. 491.

⁶³ Ibid., para. 490 (rejecting the defence assertion that indirect co-perpetration is unsupported by the text of the Rome Statute).

⁶⁴ Ibid., para. 491 (cataloguing the various ways of interpreting the disjunction 'or' in the text of Art 25(3)(a)).

⁶⁵ See also Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, ICC, 15 June 2009, para. 370. See also Judgment, *Stakić*, ICTY-97-24-T, TC II, ICTY, 31 July 2003, para. 469; Decision on Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-1, PTC I, ICC, 4 March 2009, paras 216–23; Decision on Confirmation of Charges, *Muthaura, Kenyatta and Ali, Situation in Kenya*, ICC-01/09-02/11-382-Red, PTC II, ICC, 23 January 2012, paras 361–8.

chain of command, rather than foot soldiers who personally commit the *actus reus*.⁶⁶ Given that such defendants often collaborate with other leadership-level defendants to direct these crimes, it seems certain that the concept of indirect co-perpetration will play an ever-increasing significant role in the ICC jurisprudence on modes of liability.

21.3 Criticisms of the Control Theory of Perpetration

The application of the control theory in *Lubanga*, *Katanga* and *Ngudjolo*, and other ICC cases has prompted no shortage of criticisms. First, critics complain that the approach represents a form of comparative cherry picking. Second, the approach requires a hypothetical and nearly impossible counterfactual inquiry into whether the defendant's behaviour constituted an essential contribution to the crime. Third, the control theory's goal of separating co-perpetrators from mere accomplices might be inapposite in ICL, which does not have mandatory sentencing ranges that attach to these *Dogmatik* categories. These criticisms will now be explained and critically evaluated.

First, consider the claim about cherry picking. It is true that the control theory does not represent a wide swathe of legal cultures, although this might be equally true of competing modes of liability that are equally unsupported by some rival legal cultures. In a world of radical legal pluralism, finding a baseline of a universal criminal law may be difficult, unless one moves to a normative level and looks for a universal grammar of criminal law.⁶⁷ But if one is confined to the level of positive legal doctrine, any approach will inevitably prejudice either a civil-law or common-law approach to perpetration. If a court adopts JCE, it looks suspiciously like conspiracy or other common law modes of liability. If a court adopts co-perpetration based on the control theory, it looks suspiciously like a civil-law approach to co-perpetration. Once the criminal law is reduced to a universal baseline, it becomes as thin as paper.

The more legitimate criticism is that the ICC's version of co-perpetration based on the control theory might be unsupported by the Rome Statute. Both Judge Fulford and Judge Van den Wyngaert expressed similar sentiments in their respective *Lubanga* and *Ngudjolo* separate opinions.⁶⁸ For example, Fulford connects the

⁶⁶ See Paper on some policy issues before the OTP, OTP, ICC, September 2003. See also J Locke, 'Indictments' in L Reydams et al. (eds), *International Prosecutors* (Oxford: Oxford University Press 2012) 604, 609.

⁶⁷ On the issue of fragmentation, see E van Sliekdregt, 'Pluralism in International Criminal Law' (2012) 25 *Leiden Journal of International Law* 847, 852: 'Accepting pluralism at the national level does not disqualify the need for a general part at the *international* level. Substantive international criminal law is undertheorized and lacks a common "grammar". Moreover, certain liability theories have developed as genuine, *sui generis* international liability theories (JCE, command responsibility) that could be implemented at the national level alongside local law that traditionally forms part of the domestic general part (complicity liability, defences, sentencing). Developing an international general part will contribute towards a more sophisticated substantive international criminal law, especially when drawn on (general) principles of time-honoured domestic criminal law. In doing so, one must adopt a harmonizing approach'; A Greenawalt, 'The Pluralism of International Criminal Law' (2011) 86 *Indiana Law Journal* 1063.

⁶⁸ Separate Opinion of Judge Adrian Fulford, *Lubanga* Judgment (n 36) ('*Lubanga*, Separate Opinion Judge Fulford'); *Ngudjolo*, Van den Wyngaert Opinion (n 34). The *Lubanga* judgment and sentence

control theory in Article 25(3) with the alleged hierarchy between the different forms of perpetration embodied in Article 25(3)(a)–(d).⁶⁹ Under the ‘hierarchy’ view, Article 25 lists forms of perpetration in descending order of severity, so that Article 25(3)(a) involves principal forms of perpetration, either individually, cooperatively, or indirectly (or indeed cooperatively indirectly)—all of which generate liability as a principal perpetrator. In contrast, the other provisions in the article generate derivative forms of liability, such as accessory or accomplice liability. For example, Article 25(3)(b) deals with ordering, soliciting, and inducing, while Article 25(3)(c) deals with facilitation and aiding and abetting. Viewed in this light, the control theory helps animate the conceptual distinction that runs right down the middle between Article 25(3)(a) and 25(3)(b), i.e. the distinction between principals and mere accessories. Without the control theory, there is no principled way of distinguishing these categories.

Fulford rejects this line of argument, concluding that the various modes of liability ‘were not intended to be mutually exclusive’.⁷⁰ As such, their ordering in Article 25 is not suggestive and the need for a categorical explanation between them is illusory. Moreover, Fulford is not convinced by the majority that the Statute implies that accessories in Article 25(3)(c) are more culpable than those who contribute to group crimes under Article 25(3)(d).⁷¹ Contributing to a common criminal endeavour under Article 25(3)(d) seems to fit the paradigm of the history of collective atrocities, so it seems odd to reduce it to the lowest stop on the ladder of culpability.⁷²

Similarly, Judge Van den Wyngaert in her *Ngudjolo* concurring opinion also questioned whether the ICC was straying too far from the plain text of Article 25 of the Rome Statute.⁷³ In particular, Van den Wyngaert noted that the text says nothing about organizations, but the ICC has repeatedly applied Roxin’s *Organisationsherrschaft* as a version of indirect perpetration in cases where the defendant’s control was mediated through an organized apparatus of power.⁷⁴ In Van den Wyngaert’s view, the ICC statute defines indirect perpetration as committing a crime through another individual, not committing a crime through an *organization*, a term that is conspicuously absent from Article 25.⁷⁵

Second, Judge Fulford complained in his *Lubanga* separate opinion (at the Judgment phase) that determining whether the defendant provided an essential contribution to the criminal effort requires that the fact-finder engage in a hypothetical evaluation.⁷⁶ This criticism demands further explanation. The complaint is that the evaluation is unduly counterfactual. By asking whether the contribution was *essential* rather than simply substantial, the doctrine requires that the court posit the existence of an alternate world, without the defendant’s contribution, and assess how the criminal plan

were confirmed by the Appeals Chamber in 2014 in a decision that did not substantially revisit issues relating to modes of liability. See Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the ‘Decision on Sentence pursuant to Article 76 of the Statute’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-3122, AC, ICC, 12 January 2014.

⁶⁹ *Lubanga*, Separate Opinion Judge Fulford (n 68) para. 7. ⁷⁰ Ibid. ⁷¹ Ibid., para. 8.

⁷² Ibid. ⁷³ *Ngudjolo*, Van den Wyngaert Opinion (n 34) paras 11–12.

⁷⁴ Ibid., 52. ⁷⁵ *Lubanga*, Separate Opinion Judge Fulford (n 68) para. 17.

would have progressed in his absence. If the crime would have occurred anyway, then the defendant's contribution is hardly essential. On the other hand, if the commission of the crime was stymied by the defendant's putative non-participation, then the defendant's contribution is essential, and the requirements of the co-perpetration doctrine are satisfied. Why are some jurists reluctant to engage in such modal analysis? Indeed, such possible-world semantics arguably underlie any commonplace statement of a subjunctive nature. To say: 'I would have brought my umbrella if I had known that it was going to rain' is to posit the existence of a possible world where one has the relevant information, and then makes a claim about this possible world, i.e. I would have picked up my umbrella. Of course, this world does not exist; I did not know the weather forecast. So of course this entire subjunctive statement is hypothetical and counterfactual. But the fact remains that we all understand the semantic content of such statements. They are meaningful.

Indeed, the law often engages in counterfactual reasoning whenever causation is at issue; this is not the unique domain of the international criminal lawyer.⁷⁷ When the judge argues that the defendant's negligence caused the car crash, he is examining a world that never happened, where the defendant acts reasonably and prudently, and concludes that the car crash would have been avoided in that instance.⁷⁸ This is deeply counterfactual. So the law is shot through with hypothetical and counterfactual reasoning that cannot easily be replaced with other modes of analysis.

That being said, not all counterfactual reasoning is made alike. Some standards are easier to apply than others. With the control theory and the notion of an 'essential contribution', some problems emerge. In particular, the essential contribution requirement demands a trans-modal definition of the crime that crosses possible worlds. Imagine that if the defendant had not acted, some criminal activity would have occurred anyway but it would not have been exactly the same as the criminal activity that occurred in the real world. Does that count as an *essential* contribution or not? It depends on our definition of '*the crime*' in question. Say the defendant is a police official who helps coordinate the transfer of civilians of an oppressed minority from one village to a death camp. In the absence of the defendant's contribution, the victims would not have been deported to the death camp on that day. But perhaps the victims would have been deported a month later instead, and many of the same victims would have died. Does this suggest that the defendant's conduct was not essential? It depends on whether you define the first and second scenarios as the *same* crime. The only way to answer this is to have some theoretical account of the characteristics of the crime that distinguish between the *essential* nature of the crime and the peripheral details of the criminal activity. Change the essential nature and it is no longer the same crime; change the peripheral characteristics and you still have the same crime but just different details. These questions are not easy to answer.

⁷⁷ The issue is discussed in H L A Hart and T Honoré, *Causation in the Law* 2nd edn (Oxford: Oxford University Press 1985) 411–21.

⁷⁸ Ibid., 414.

The third criticism attacks the underlying rationale for the entire doctrinal enterprise that co-perpetration is designed to address. Judge Fulford noted that domestic criminal law systems often attach rigid consequences for sentencing depending on whether a particular defendant is convicted as a principal perpetrator or an accessory.⁷⁹ This is certainly true in Germany, where the control theory originated, and where the Penal Code codifies a requirement that defendants convicted as accomplices receive sentences reduced by a percentage amount.⁸⁰ Consequently, the status of accomplice or accessory is equal parts mode of liability and equal parts *mitigation*. In contrast, international criminal law includes no mandatory sentencing ranges; indeed, ICL does not even include any statutorily defined sentencing guidelines. Each crime prosecuted under the Rome Statute is subject to life in prison, and the result falls within the discretion of the Trial Chamber judges (subject to review by the Appeals Chamber). So Judge Fulford asks, why bother focusing the criminal law doctrine so rigidly around the distinction between principals and accessories when the law attaches no significance to the distinction when it comes to sentencing?⁸¹

The criticism is both right and wrong at the same time. It is right insofar as it correctly identifies the control theory as a creature of the German system that cannot be divorced from its origins. The German Penal Code, and other codes heavily influenced by it, consider the distinction between principal perpetrators and mere accomplices to be one of the most important in the general part,⁸² and the control theory is best understood as a new and innovative sorting mechanism to decide which defendants fall under one category or another.⁸³ Its merit stems from its alleged capacity to deliver more convincing answers to this sorting dilemma than other competing legal doctrines.⁸⁴ But one should never forget that the control theory is parasitically related to the distinction between principals and accessories, which has greater purchase on some legal systems than on others.

That being said, it is an exaggeration to say that the distinction between principals and accessories is irrelevant in ICL just because no sentencing consequences directly attach to the determination. First, although judges retain discretion, they will be highly influenced by these categories and will be more inclined to hand out heavier sentences if the defendant meets the legal requirements as a co-perpetrator. Second, the labels are also significant even before the issue of sentencing is addressed.⁸⁵ The

⁷⁹ *Lubanga*, Separate Opinion Judge Fulford (n 68) para. 11.

⁸⁰ Criminal Code of Germany (*Strafgesetzbuch StGB*) s. 27(2).

⁸¹ *Lubanga*, Separate Opinion Judge Fulford (n 68) paras 10–11.

⁸² See Bohlander (n 30) 153: ‘Criminal law as a state, of state reaction to the degree of personal guilt in law-breaking must provide for differing answers and liabilities depending on the type of participation in criminal behaviour.’ See also Van Sliedregt, *Individual Criminal Responsibility in International Law* (n 12) 77 (discussing rise of normative model in international criminal law).

⁸³ Ibid., 162.

⁸⁴ See Ambos, *Treaties on International Criminal Law* (n 18) 159–60: ‘If the state orders a violation of these rights or fails to prevent such violations, it does not live up to this special duty and thus its highest representatives incur criminal responsibility for being part of the state organization.’

⁸⁵ See, in this regard, H Vest, ‘Business Leaders and the Modes of Individual Criminal Responsibility under International Law’ (2010) 8 *Journal of International Criminal Justice* 851, 856 fn. 19: ‘With regard to international criminal law it may be preferable to speak of a “differentiating model with uniform (unified) range of punishment”’.

labels are independently significant, signalling levels of culpability to the world at large (both perpetrators and victims), as well as third parties watching the legal proceedings unfold. To insist upon the distinction between principals and accessories is to do more than just limit or guide the discretion of judges regarding sentencing; it is also to insist that labels matter, that the legal categories that attach to conduct and agents have real meaning and significance.⁸⁶ Moreover, defendants have a right to insist that these labels are accurate and carefully capture their relative culpability and the nature of their conduct. To call someone a co-perpetrator is far worse than to convict them of aiding and abetting genocide, and the international system should work hard to generate normatively defensible descriptions of behaviour.

One solution to the problem would be to import the German approach into international criminal law. There is no reason why, in theory, the ICC or a future ad hoc tribunal statute could not be amended so that co-perpetrators receive the highest sentences and accomplices receive a sentence reduction. However, I think importing the German model into international criminal law would be a mistake. International crimes are far more serious (morally) than the average domestic crime, and it is fanciful to pretend otherwise. We are dealing with conduct that resides on the margins of human decency and that often shocks our imagination about human nature. In some situations, even the defendant who aids and abets a massive genocide is deserving of a serious penalty, and that penalty might be life in prison.⁸⁷ In order to implement a system whereby accomplices receive automatic sentencing mitigation, one would have to insist that defendants convicted of aiding and abetting international crimes *always* deserve something less than a life sentence. Is this conclusion warranted after *a priori* investigation, without regard to the facts and evidence of a particular conflict, particular defendants, and particular victims? To pre-judge the scenario and, at the level of institutional design, decide that aiders and abettors of international crimes should *never* receive a life sentence—because that sentence would need to be reserved for the co-perpetrator—strikes me as the type of abstract analysis that ICL ought to eschew. There are some crimes that are *so* severe that even the defendants who fail to meet the requirements of co-perpetratorship are still culpable enough to deserve a lengthy sentence.

21.4 Alternative Accounts of Co-Perpetration

What are the alternative solutions where co-perpetration is concerned? Judge Fulford posited the possibility of a streamlined theory of co-perpetration, more closely

⁸⁶ On the principle of fair labelling, see F Mégret, ‘Prospects for “Constitutional” Human Rights Scrutiny of Substantive International Criminal Law by the ICC, with Special Emphasis on the General Part’ (paper presented at Washington University School of Law, Whitney R Harris World Law Institute, International Legal Scholars Workshop, Roundtable in Public International Law and Theory, 4–6 February 2010); Ohlin, ‘Joint Intentions to Commit International Crimes’ (n 21) 751; A Ashworth, ‘The Elasticity of *Mens Rea*’ in C Tapper (ed.), *Crime, Proof, and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworths 1981) 45.

⁸⁷ An example of this reasoning appears in *Kaing Guek Eav (Duch)*, (Appeal Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) para. 377.

attuned to the bare language of Article 25, which requires only the existence of a common plan between multiple individuals with coordinated activity to accomplish the result.⁸⁸ Fulford justified his new version of co-perpetration by noting that:

This self-evidently necessitates a sufficient meeting of minds, by way of an agreement, common plan or joint understanding. In practice, this will not always be explicit or the result of long-term planning, and the existence of the joint venture may need to be inferred from the conduct of the co-perpetrators.⁸⁹

This version of co-perpetration would deemphasize the aspect of control that forms the *sine qua non* of Roxin's theory and the *Lubanga* jurisprudence. In a sense, it elevates the subjective element to a higher place in the theory, generating a potential return to a subjective approach to co-perpetration, a doctrinal move that I have supported in other writings.⁹⁰ Indeed, there is no reason why a theory of co-perpetration could not be based on the mutuality of intention among the co-perpetrators.⁹¹ It seems at least plausible to suggest that the joint intention to carry out the crime—what Fulford describes as the meeting of the minds—constitutes a normative accurate description of collective criminality generating liability as a principal perpetrator.⁹² If an individual agrees with others to commit the crimes, and desires the result accomplished by the group, then the action is properly attributable to the individual *qua* participant in the collective agent. The act of the individual becomes the act of the whole by virtue of the mental element.⁹³

Fulford would, at the same time, reduce the objective requirements for co-perpetration. Instead of the robust requirement of an essential contribution, lower forms of contribution would be sufficient to meet the objective elements of co-perpetration.⁹⁴ Specifically, Fulford notes that:

Nothing in the Statute requires that the contribution must involve direct, physical participation at the execution stage of the crime, and, instead, an absent perpetrator may be involved. Either way, the use of the word 'commits' simply requires an operative link between the individual's contribution and the commission of the crime.⁹⁵

This would alleviate any pressure on the court to engage in hypothetical or counterfactual reasoning. As Fulford concludes, 'the plain text of Article 25(3) does not require proof that the crime would not have been committed absent the accused's involvement (viz. that his role was essential)'.⁹⁶

This streamlined version of co-perpetration would effectively flip the relative importance of the subjective and objective requirements that exist in the current control theory version of co-perpetration. Right now, the *Lubanga* standard requires a very high objective element (essential contribution) and a lower mental element (up to and including *dolus eventualis* based on the defendant reconciling oneself with

⁸⁸ *Lubanga*, Separate Opinion Judge Fulford (n 68) para. 16. ⁸⁹ Ibid., para. 15.

⁹⁰ J Ohlin, 'Searching for the Hinterman: In Praise of Subjective Theories of Imputation' (2014) 12 *Journal of International Criminal Justice* 325–43.

⁹¹ See Ohlin, 'Joint Intentions to Commit International Crimes' (n 21) 742.

⁹² Ibid., 745.

⁹³ For a discussion of the subjective approach as applied by German courts, see Bohlander (n 30) 162–3.

⁹⁴ *Lubanga*, Separate Opinion Judge Fulford (n 68) para. 15.

⁹⁵ Ibid.

⁹⁶ Ibid.

the knowledge that the common plan will result in the commission of the offence). The Fulford version of co-perpetration involves the exact opposite: a more robust *mens rea* requirement and a lower objective element that ensures that the defendant is causally connected to the crime but not necessarily an essential element in the *actus reus*. The subjective element would gain increased prominence in this version of co-perpetration. I have supported this move in the form of a Joint Intentions Theory of Co-Perpetration, which provides a philosophical foundation for this doctrinal option.⁹⁷

This raises a related point: What is the required mental element for co-perpetration? In the *Lubanga Confirmation of Charges Decision*, the Pre-Trial Chamber declared that *dolus eventualis* met the required mental element for co-perpetration.⁹⁸ This conclusion was embodied by its expressing of the co-perpetration standard as including that co-perpetrators must 'mutually accept the result by reconciling themselves to it or consenting to it'.⁹⁹ This language explicitly captured some of the more common theories of *dolus eventualis*, a civil law mental state that has generated no shortage of scholarly and judicial controversy.¹⁰⁰ The basic principle behind *dolus eventualis* is that the defendant does not purposely or knowingly produce the result, though he is aware of the possibility that the result will occur. For this reason, comparative law scholars and judges have sometimes referred to *dolus eventualis* as a civil law cousin to the common law mental state known as recklessness.¹⁰¹ However, other scholars have suggested that *dolus eventualis* represents a higher mental state, residing somewhere *between* recklessness and knowledge, since the defendant must reconcile himself to the possibility that the fulfilment of the common plan will bring about the crimes in question.

Setting aside for a moment the question of whether *dolus eventualis* equates with recklessness, the Pre-Trial Chamber's inclusion of *dolus eventualis* within the standard for co-perpetration was controversial, in part because it stood in some tension with the default mental state expressed in Article 30 of the Rome Statute, which requires acting with 'intent or knowledge unless otherwise provided'.¹⁰² Some have argued that *dolus eventualis* is one aspect of *intent* (or *dolus*), an argument that might ring true to civil-law-trained criminal lawyers (who think of intent as the broader concept of *dolus*) but sounds opaque and confusing to common-law-trained criminal lawyers, who are inclined to limit the concept of intent to acting with purpose

⁹⁷ See Ohlin, 'Joint Intentions to Commit International Crimes' (n 21) 742–3; Ohlin, 'Searching for the Hinterman' (n 90).

⁹⁸ See *Lubanga Confirmation of Charges Decision* (n 17) para. 352. ⁹⁹ Ibid.

¹⁰⁰ For a general discussion of the different theories grounding *dolus eventualis*, see M Badar, 'Dolus Eventualis and the Rome Statute Without It?' (2009) 12 *New Criminal Law Review* 433. These issues are also explored in K Ambos, 'Critical Issues in the *Bemba Confirmation Decision*' (2009) 22 *Leiden Journal of International Law* 715; S Finnin, *Elements of Accessorial Modes of Liability: Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers 2012) 158–60 (correctly noting that 'the fact that the individual decides to proceed with the relevant conduct despite knowledge of the substantial risk is evidence of some level of volition').

¹⁰¹ See also Cassese (n 8) 66.

¹⁰² G Werle, *Principles of International Criminal Law* 2nd edn (The Hague: TMC Asser Press 2009) 153–4 and fn. 87 ('Remarkably, the few commentators who advocate the inclusion of recklessness and *dolus eventualis* in the standard set by Art 30 of the ICC Statute rarely give any reasons for their position').

and acting knowingly. The other possibility is to argue that the ‘unless otherwise provided’ prong provides an invitation to import lower *mens rea* standards from customary international law, which in this case would include a customary rendering of the law of co-perpetration.¹⁰³ However, it seems clear that the reference to ‘unless otherwise provided’ was designed to refer to the Elements of Crimes or perhaps other statutory codifications,¹⁰⁴ but not customary law. To read it in this way produces an exception so large that it swallows the rule and undermines the whole point of establishing a default *mens rea* standard in the statute.¹⁰⁵

The *Lubanga* Trial Chamber backed away from the Pre-Trial Chamber’s commitment to *dolus eventualis*, or it *appeared* to do so. The *Lubanga* Trial Chamber concluded that the Pre-Trial Chamber was wrong to think that *dolus eventualis* was consistent with Article 30 of the default *mens rea* standard, so the co-perpetration standard should be expressed without reference to *dolus eventualis* or liability based on a realization of events that might occur.¹⁰⁶ However, at the same time, the *Lubanga* Trial Chamber confused matters by importing the principles of *dolus eventualis* but simply dropping the controversial label. Specifically, the Trial Chamber noted that:

[i]n the view of the Majority of the Chamber, the ‘awareness that a consequence will occur in the ordinary course of events’ means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future. This prognosis involves consideration of the concepts of ‘possibility’ and ‘probability’, which are inherent to the notions of ‘risk’ and ‘danger’. Risk is defined as ‘danger, (exposure to) the possibility of loss, injury or other adverse circumstance’. The co-perpetrators only ‘know’ the consequences of their conduct once they have occurred. At the time the co-perpetrators agree on a common plan and throughout its implementation, they must know the existence of a risk that the consequence will occur. As to the degree of risk, and pursuant to the wording of Article 30, it must be no less than awareness on the part of the co-perpetrator that the consequence ‘will occur in the ordinary course of events’. A low risk will not be sufficient.¹⁰⁷

With all due respect to the majority of the *Lubanga* Trial Chamber, this argument is unconvincing and incoherent. It purports to reject *dolus eventualis* but then it reintroduces liability for future acts that may ‘possibly’ or will ‘probably’ occur. Indeed, the Trial Chamber explicitly concedes that it is talking about liability for risk-taking

¹⁰³ See Badar, ‘Dolus Eventualis and the Rome Statute Without It?’ (n 100) 446.

¹⁰⁴ See W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press 2010) 475–6.

¹⁰⁵ In *Bemba*, Pre-Trial Chamber II disagreed with the *Lubanga* Confirmation of Charges Decision by rejecting the application of *dolus eventualis* with regard to Art 30. See Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo (n 65) para. 362.

¹⁰⁶ *Lubanga* Judgment (n 36) para. 1011: ‘The drafting history of the Statute suggests that the notion of *dolus eventualis*, along with the concept of recklessness, was deliberately excluded from the framework of the Statute (e.g. see the use of the words “unless otherwise provided” in the first sentence of Article 30). The plain language of the Statute, and most particularly the use of the words “will occur” in Art 30(2)(b) as opposed to “may occur”, excludes the concept of *dolus eventualis*.’

¹⁰⁷ Ibid., para. 1012.

behaviour, precisely the type of behaviour that falls within *dolus eventualis* or recklessness: risky behaviour that a defendant is aware of but decides to engage in anyway.

The only normative argument in favour of this approach is the Trial Chamber's philosophical scepticism that true knowledge is impossible because human agents can never predict the future. While this may be true, it cannot form a basis to collapse the distinction between recklessness and knowledge. The classical distinction between the two concepts is that acting with knowledge requires practical certainty while recklessness requires awareness of a risk that a consequence will probably occur. The only concession that the Trial Chamber makes is that a low risk will not be significant—a point consistent with the mental states of *dolus eventualis* and recklessness—doctrines that exclude liability for far-flung possibilities or justified risks. It is therefore submitted that the Trial Chamber, while purporting to reject *dolus eventualis*, immediately reintroduced it through the back door by virtue of its confused discussion of knowledge and risk-taking behaviour.¹⁰⁸

The important point here is that we should conceptually separate the issue of *dolus eventualis* from the doctrine of co-perpetration. The Trial Chamber agreed with the Pre-Trial Chamber that Article 25 should be interpreted in light of Roxin's control theory. That conclusion, however, is separate from the second question of which mental state applies to co-perpetration, and whether *dolus eventualis* will be sufficient to generate liability. In theory, the control theory of co-perpetration can be applied with *dolus eventualis* or without, and nothing internal to the concept of 'control' dictates an answer in either direction. The decision on *dolus eventualis* under Article 30 is therefore conceptually distinct from the decision of which the theory of co-perpetration is governed by Article 25 of the Rome Statute. Adopting the control theory does not 'control' the outcome of the *dolus eventualis* analysis. (However, the reverse may be true: if *dolus eventualis* is inconsistent with Article 30, then no amount of criminal law theory will justify the importation of the lower mental element into one's doctrine of co-perpetration under Article 25.)

This relates to a second point regarding the nature of the underlying agreement (under the objective elements for co-perpetration). Does the underlying plan need to be criminal in nature in order to generate liability, or might the co-perpetrators formulate a non-criminal plan that simply produces criminal consequences? This issue is of extreme importance given that some co-perpetrators will argue in court that their underlying agreement involved a legitimate war effort and that any atrocities committed by soldiers were incidental to that plan.¹⁰⁹ This is especially important given that the ICC has limited jurisdiction (or almost no jurisdiction) over the crime of aggression and matters of *jus ad bellum* generally. Co-perpetrators can claim that

¹⁰⁸ In contrast, Pre-Trial Chamber II correctly analysed the issue in *Bemba* when it concluded that the drafters of the Rome Statute did not use the words 'may occur' or 'might occur', thus demonstrating that liability required 'near inevitability or virtual certainty'. See Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo (n 65) para. 363.

¹⁰⁹ This argument was successfully made, in a slightly different context, by Stanišić and Simatović. See Judgment, *Stanišić and Simatović*, IT-03-69-T, TC I, ICTY, 30 May 2013, para. 2361.

they agreed to fight a war—and nothing more—and that the Court is prevented in most cases from inquiring into the legality of that war effort as a matter of *jus ad bellum*.¹¹⁰

The Pre-Trial Chamber in its *Lubanga* Confirmation of Charges Decision claimed to reject the possibility that a purely non-criminal plan could generate liability. It must have an ‘element of criminality’, it claimed.¹¹¹ However, on closer inspection it becomes clear that the ‘element of criminality’ does not require an explicit criminal goal, but rather is based on *dolus eventualis* and the possibility that crimes might occur during the execution of the non-criminal plan. Specifically, the Pre-Trial Chamber concluded that liability attaches to co-perpetrators if:

- i. the co-perpetrators have agreed: (a) to start the implementation of the common plan to achieve a non-criminal goal, and (b) to only commit the crime if certain conditions are met; or
- ii. that the co-perpetrators (a) are aware of the risk that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of the crime, and (b) accept such outcome.¹¹²

The notion that co-perpetrators are liable if they ‘accept’ that crimes might occur during the course of a non-criminal plan can only be justified by the principle of *dolus eventualis*, so it is clear that the Pre-Trial Chamber’s rendering of the common plan prong of the standard, as an objective element, was conceptually linked to the awareness prong of the standard as a subjective element. If *dolus eventualis* is appropriate in one domain, it presumably is appropriate in another; but if *dolus eventualis* contravenes Article 30 on one side of the equation it is equally inappropriate on the other side.

In the subsequent *Lubanga* Judgment, the Trial Chamber predictably followed its flawed analysis from the mental element and concluded that a non-criminal plan could generate liability if the common plan ‘included a critical element of criminality, namely that, its implementation embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed’.¹¹³ This again replicates the principle of *dolus eventualis* in every way except the name. Under this jurisprudence, co-perpetrators must be careful not to agree to non-criminal plans, such as pursuing a legitimate war effort, that might result in the commission of international crimes by subordinates under their control. This seems to transform co-perpetration as a mode of liability much closer in content to the doctrine of command responsibility, where commanders are responsible for the actions of their subordinates when they recklessly fail to prevent or punish the offences.¹¹⁴ But co-perpetration is not command responsibility. Furthermore, whether the Trial Chamber is normatively correct about liability for co-perpetrators who agree

¹¹⁰ This issue was also present in the Perišić case. See Judgment, *Perišić*, ICTY-IT-04-81-A, AC, ICTY, 28 February 2013.

¹¹¹ *Lubanga* Confirmation of Charges Decision (n 17) para. 344.

¹¹² *Ibid.* ¹¹³ *Lubanga*, Judgment (n 36) para. 984.

¹¹⁴ For a discussion of the conceptual inconsistencies in the command responsibility doctrine, see D Robinson, ‘How Command Responsibility Got so Complicated: A Culpability Contradiction, its Obfuscation, and a Simple Solution’ (2012) 13 *Melbourne Journal of International Law* 1.

to cooperate in non-criminal plans, it is certainly the case that the argument used to reach this result was theoretically disingenuous. If the Trial Chamber had wanted to reach this result, it should have explicitly endorsed the Pre-Trial Chamber's use of the concept of *dolus eventualis*. To take away *dolus eventualis* with one hand and then bring it back with the other is conceptually confusing, to say the least.

21.5 Concluding Evaluations

Is the ICC doctrine of co-perpetration a worthwhile example of criminal law *Dogmatik* or is it representative of a new theoretical invasion of The Hague with German criminal law principles? Judge Fulford's separate opinion in *Lubanga* demonstrates marked scepticism about the need to import certain distinctions from German criminal law theory that might have little place in the ICC scheme. Others have worried about the ICC becoming too weighted towards the criminal law approach of one particular system, a danger for an international institution hoping to achieve transcultural and global legitimacy. This is related to the question of sources and methodology, and whether the content of international criminal law, especially when it strays from the bare text of a codified instrument, should be broadly representative of multiple legal cultures, as opposed to weighted towards one particular approach.

It seems to me that whispers of a German invasion are unfair. The judges are engaging in first-order questions of criminal law theory. Regardless of whether they are reaching the correct answers on any particular question (and on this reasonable minds can disagree), it is laudable that the judges are engaging directly with the deep structure of the criminal law and the key distinctions, such as co-perpetrators and accessories, embodied within it. One should not fault the Germans for being successful in exporting their approach to the criminal law. In fact, the reason that other nations have modelled their penal codes on the German approach must be because the German Penal Code is either theoretically convincing, pragmatically useful, or both.¹¹⁵ If this constitutes an invasion, it is a welcome one.

However, one should also admit that judges and scholars have more work to do with regard to a general theory of sources that offers a central role for criminal law theory. It is neither statutory interpretation nor customary international law. If it is general principles of law, then the results ought to be more general, rather than weighted towards particular legal traditions. But reducing criminal law theory to the lowest common denominator would rob international tribunals of the rich materials that sophisticated criminal law systems have to offer. Nowhere is this more in evidence than in the doctrine of co-perpetration. The ICC was unwilling to adopt the ICTY jurisprudence on JCE and therefore worked hard to mine national legal systems for an account of co-perpetration that would carve a unique path in the international jurisprudence. This task should be supported and encouraged regardless of the specific doctrinal results that may generate controversy.

¹¹⁵ See Bohlander (n 30) 9: 'The fact that German law is to a large extent based on the more or less strict application of logic and well-developed methods of interpretation is also a function of the German academics' attitude to the judicial process: they do not see academic as the mere handmaiden of the judges, but as the guiding light.'

22

Indirect Perpetration

*Thomas Weigend**

22.1 Background

The perpetration of a crime through another person is a concept that has long been recognized in many legal systems. A person who instructs an innocent agent, for example a child, to kill another person, achieves his criminal purpose without personally facing the victim. He may be called an ‘indirect’ perpetrator (or a ‘perpetrator-by-means’) because he does not himself set in motion the immediate cause of the victim’s death. He is nevertheless held responsible for the victim’s death as a perpetrator because he controls the chain of events that leads to the killing.

According to traditional doctrine, the reason for holding the indirect perpetrator responsible as a perpetrator lies in the fact that no other responsible actor intervenes between the offender’s act (instructing the child) and the forbidden consequence (the victim’s death). This fact distinguishes an indirect perpetrator from an instigator, who also triggers a chain of events that leads to the commission of a crime, but who achieves his purpose ‘through’ a responsible person (namely, the direct perpetrator who acts upon the instigation). In spite of this sound theoretical distinction between indirect perpetrators and instigators, it is a policy question whether instigators should be punished less severely than principals. One may argue that it makes no difference for a person’s blameworthiness whether he persuades a child or an adult to carry out the criminal act that he intends to be committed. Many legal systems therefore authorize the judge to impose the same sentence on instigators as on (direct or indirect) perpetrators.¹

Indirect perpetration typically occurs where the human agent is not himself criminally responsible, for example, because he lacks *mens rea* or acts under duress or is below the age of criminal responsibility. The same reason that excludes the physical actor’s criminal responsibility makes him susceptible to being controlled by another person: a child can easily be manipulated into doing what an adult wants him to do, and a person under duress will act upon the will of the individual threatening him with harm to his life or health. Consequently, indirect perpetration is typically characterized by a combination of (a) a dominant position of the indirect perpetrator over the agent and (b) a lack of control (and a concomitant lack of criminal responsibility) on the part of the agent. But in some instances, only condition (a) may be fulfilled. For

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¹ See, e.g., Arts 121–6, 121–7 French Penal Code; German Penal Code s. 26; Arts 18(2) and 19(1) Polish Penal Code; Art 28(2)(a) Spanish Penal Code.

example, the actor who physically carries out the offence may be a legally responsible adult who is personally strongly dependent on another person, for example a dominant spouse, and therefore unquestioningly fulfils any wish the other person may express.² In that case, the person in the background has a dominant position, and yet the immediate actor does not lack control over the act.

In international criminal law, it is by no means exceptional that a person is legally responsible and at the same time under someone else's strict control. International crimes, such as war crimes or crimes against humanity, are typically committed not by individuals acting alone (or using just one human agent) but by collectives that frequently are hierarchically organized.³ In that case, the thin line between instigation and indirect perpetration becomes blurred. A soldier who receives an order from his superior remains a responsible agent under the law and may, under modern international criminal law,⁴ be held liable for any offence he commits, except for special situations where he can claim the defence of duress.⁵ Yet the commander may be in full control over what the soldiers in his unit will or will not do, because they obediently carry out his orders.

It is an open question whether the law should hold the commander in this situation responsible as an (indirect) perpetrator or as an accessory (for example, for ordering or instigating the crime). As mentioned earlier, this distinction will often not have a great bearing on the offender's sentence,⁶ but it is nevertheless important, in the interest of fair labelling, to draw a clear line between principal and accessorial responsibility. In the situation described, the fact that the act can legally be attributed to the soldier physically carrying out the offence is an argument for holding the superior liable as a mere accessory; for the doctrine of indirect perpetration is not needed in order to avoid a gap of impunity, where no one could be held responsible as a principal.⁷ In addition, the superior may have 'control' over the soldier as an empirical fact, but the law presumes a responsible adult to be in control of himself and not to be the tool of someone else, hence the kind of control presupposed by the doctrine of indirect perpetration is not present. On the other hand, one may argue that the concept of committing an offence 'through another person' does not refer to the legal responsibility

² For a case of this kind, see German Federal Court of Justice (*Bundesgerichtshof*), Judgment of 15 September 1988, 35 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 347. A couple (Ms H and Mr P) had instructed R, a naive young man who was secretly in love with Ms H, to kill a young woman, making him believe that the killing was necessary in order to appease a mythical 'King of Cats', who might otherwise kill thousands of innocent persons. R was held to be legally responsible and was convicted as a direct perpetrator of the (attempted) killing of the victim, but H and P were convicted as indirect perpetrators of the offence.

³ See F Jeßberger and J Geneuss, 'On the Application of a Theory of Indirect Perpetration in Al Bashir' (2008) 6 *Journal of International Criminal Justice* 853, 855.

⁴ The doctrine of *respondeat superior*, which had previously generally exonerated soldiers ordered to commit war crimes, has been abandoned; see A Cassese and P Gaeta (eds), *International Criminal Law* 3rd edn (Oxford: Oxford University Press 2013) 228–30.

⁵ See Sentencing Judgment, *Erdemović*, IT-96-22-T, TC, ICTY, 29 November 1996.

⁶ See R Cryer et al., *An Introduction to International Criminal Law and Procedure* 2nd edn (Cambridge: Cambridge University Press 2010) 364. See also section 22.6.2.1.

⁷ In the situation where a child is used as an agent, the child may be legally disqualified as a principal, so that there may exist no basis even for accessorial liability on the part of the person instructing the child.

of the physical actor but to the position of the person in the background: if he controls the commission of the criminal act then he should be held responsible as a perpetrator, regardless of the legal responsibility of the physical actor.

Indirect perpetration is only one of several legal concepts designed to describe the criminal responsibility of leaders who make others commit crimes but who avoid having blood on their own hands. Competing concepts are, e.g., superior responsibility,⁸ joint criminal enterprise, accessory liability for ‘ordering’, and conspiracy.⁹ Given its traditional narrow focus on innocent agents, indirect perpetration was perhaps the least likely candidate for becoming the favourite concept of the ICC when dealing with leaders of organized groups whose members commit atrocities. The concept of indirect perpetration had not been part of the picture at the Nuremberg trial of the main war criminals: under Article 6 of the London Statute of the IMT, ‘leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the listed crimes’¹⁰ were defined as ‘responsible for all acts performed by any person in execution of such plan’; additionally, conspiracy to commit the Crime against Peace was mentioned in Article 6(a) of the Statute. The IMT did not in fact distinguish between principal and accessory responsibility.¹¹

From the outset, the ICTY embraced the concept of JCE, rarely considering indirect perpetration (or even co-perpetration) as an alternative concept for adjudicating military and civilian leaders. It was only in the case against Milomir Stakić that the notion of indirect perpetration timidly raised its head,¹² only to be immediately pushed back on appeal.¹³ Nevertheless, when the Statute of the ICC was written, there appeared in Article 25(3)(a) a very broad version of indirect perpetration as a mode of perpetration, and the ICC was quick to apply it, even expanding the concept based on certain theories developed in German literature and case law on the subject.¹⁴ Still, there is doubt whether the concept of indirect perpetration has become part of customary international law beyond the ICC Statute.¹⁵ This question is particularly acute with regard to the expansive notion of indirect perpetration as adopted in Article 25(3)(a) ICC Statute, which is not reflected in many national jurisdictions.¹⁶ Moreover, two prominent ICC judges voiced their opposition to the broad use of indirect perpetration,

⁸ See Art 28 ICC Statute.

⁹ For an overview see K Ambos, ‘Command Responsibility and Organisationsherrschaft: ways of attributing international crimes to the “most responsible”’ in H van der Wilt and A Nollkaemper (eds), *System Criminality in International Law* (Cambridge: Cambridge University Press 2009) 127.

¹⁰ This formulation is close to what was to become JCE at the ICTY.

¹¹ The US and British military occupation tribunals in subsequent trials of war criminals likewise failed to distinguish between liability as a principal and as an accessory; see K Ambos, *Treatise of International Criminal Law. Volume I: Foundations and General Part* (Oxford: Oxford University Press 2013) 113.

¹² Judgment, Stakić IT-97-24-T, TC II, ICTY, 31 July 2003 (‘Stakić Trial Judgment’) paras 439 *et seq.*

¹³ Judgment, Stakić, IT-97-24-A, AC, ICTY, 22 March 2006 (‘Stakić Appeal Judgment’) para. 62.

¹⁴ See section 22.3 for details.

¹⁵ Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (‘ICC Statute’).

¹⁶ Jeßberger and Geneuss (n 3) 867–8. As the authors point out, the question of whether indirect perpetration is part of customary international law becomes acute in cases referred to the ICC by the UN Security Council.

especially in connection with co-perpetration.¹⁷ Given the relatively small number of decisions on this point, it is still an open question whether the concept of indirect perpetration will have the bright future that the first decisions of ICC Pre-Trial Chambers seemed to suggest, or whether competing ways of dealing with leaders' criminal responsibility will eventually prevail at the ICC.

22.2 Ad Hoc Tribunals and Indirect Perpetration

Before entering into a more detailed discussion of the 'state of the art' at the ICC, let us take a brief look at how the major ad hoc tribunals have dealt with the issue of leadership crime. The Statutes of the ICTY and the ICTR do not mention indirect perpetration. Article 7(1) ICTY Statute and Article 6(1) ICTR Statute list only the following forms of individual criminal responsibility: planning, instigation, ordering, committing, and aiding and abetting in the planning, preparation, or execution of a crime. In its seminal judgment in *Tadić*, the ICTY Trial Chamber found that these modes of liability have a basis in customary international law.¹⁸ The *Tadić* Appeals Chamber also found that JCE is one recognized mode of 'committing' a crime under Article 7(1) of the Statute.¹⁹ The Appeals Chamber mentioned the fact that most international crimes 'constitute manifestations of collective criminality'²⁰ and found that many national jurisdictions recognize similar forms of criminal responsibility.²¹ According to ICTY case law, not all direct perpetrators need to be members of the JCE. There can hence exist a structure similar to indirect co-perpetration: several co-conspirators at the top level commit the crimes 'through' intermediaries who are not part of the common enterprise.²²

Although JCE had been firmly implanted in ICTY case law a trial chamber presided over by German judge Wolfgang Schomburg in a 2003 judgment attempted to reverse the tide by rejecting JCE and introducing co-perpetratorship as a form of 'committing' a crime.²³ But this attempt was promptly rejected by the Appeals Chamber, which determined that this mode of liability 'does not have support in customary

¹⁷ See Concurring Opinion of Judge Christine Van den Wyngaert, Judgment pursuant to Art 74 of the Statute, *Ngudjolo*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-4, TC II, ICC, 19 December 2012, paras 49–57; see also Separate Opinion of Judge Adrian Fulford, Judgment pursuant to Art 74 of the Statute, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012, paras 6–12.

¹⁸ Opinion and Judgment, *Tadić*, IT-94-1-T, TC, ICTY, 7 May 1997 ('*Tadić* Trial Judgment') paras 663–9. For criticism of this assertion, see A Zahar and G Sluiter, *International Criminal Law* (Oxford: Oxford University Press 2008) 223 *et seq.*

¹⁹ Judgment, *Tadić*, IT-94-1-A, AC, ICTY, 15 July 1999 ('*Tadić* Appeal Judgment') paras 188 and 190. For a thorough analysis and critique of the theory and practice of JCE, see E van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press 2012) 131–47.

²⁰ *Ibid.*, paras 191–3. For a list of recent cases applying the JCE concept, see Ambos (n 11) 122, note 123.

²¹ *Tadić* Appeal Judgment (n 19) paras 224–5. The Appeals Chamber includes in its listing several national systems which do not recognize JCE as such, but recognize some form of co-perpetration as a mode of criminal liability.

²² See Judgment, *Brđanin*, IT-99-36-A, AC, ICTY, 3 April 2007, paras 410 *et seq.* For a discussion of this judgment, see van Sliedregt (n 19) 158–65.

²³ *Stakić* Trial Judgment (n 12) paras 439 *et seq.*

international law or in the settled jurisprudence of this Tribunal'.²⁴ This decision confirmed the dominant position of JCE in the jurisprudence of the ad hoc tribunals.²⁵

When comparing JCE and indirect perpetration, one should not overlook the fact that these two concepts are not direct competitors but relate to differing structures: in JCE, the focus is on a *horizontally* conceived 'common plan or design', all participants of which are attributed equal responsibility for all acts carried out in furtherance of the design. Indirect perpetration, by contrast, relates to *vertical* structures and considers the responsibility (only) of those on the top of the criminal pyramid. Although JCE covers these persons as well, JCE liability is less able to convey the specific responsibility of those in high positions. It is hence quite conceivable that both concepts co-exist.

22.3 The Inception of Article 25(3)(a) of the ICC Statute

In line with the majority of national legal systems,²⁶ Article 25(3) of the ICC Statute distinguishes between perpetrators²⁷ and accessories.²⁸ According to ICC Trial Chamber I, Article 25(3) of the Statute reflects a hierarchical structure of modes of liability, with the notion of principal liability expressing 'the blameworthiness of those persons who are the most responsible for the most serious crimes of international concern',²⁹ and the ICC Appeals Chamber has approved of this view.³⁰ ICC Trial Chamber II, by contrast, has emphasized that the distinction between principals and accomplices, inherent in Article 25(3) of the ICC Statute, does not reflect a 'hierarchy of blameworthiness'; according to Trial Chamber II, sentencing of principals and accomplices depends on each individual's personal blameworthiness, not on his or her formal role.³¹

The concept of indirect perpetration has been included among the modes of perpetration in Article 25(3)(a) of the Statute. In the 1996 proposal submitted by the Preparatory Committee, indirect perpetration was still formulated in the traditional way of innocent agency:

A person shall be deemed a principal where that person commits the crime through an innocent agent who is not aware of the criminal nature of the act committed, such as a minor, a person of defective mental capacity or a person acting under mistake of fact or otherwise acting without *mens rea*.³²

²⁴ *Stakić* Appeal Judgment (n 13) para. 62.

²⁵ For an overview of ICTR case law with regard to 'committing' crimes through using an agent see van Sliedregt (n 19) 91–3.

²⁶ See Ambos (n 11) 146. ²⁷ Art 25(3)(a) ICC Statute.

²⁸ Art 25(b), (c), and (d) ICC Statute.

²⁹ Judgment pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012 ('Lubanga Trial Judgment') para. 999. But see Separate Opinion of Judge Adrian Fulford (n 17) paras 6–12; Concurring Opinion of Judge Christine Van den Wyngaert (n 17) paras 22–30.

³⁰ ICC, Judgment on the Appeal of Thomas Lubanga Diyilo against his conviction, ICC-01/04-01/06-2842, AC, ICC, 1 Dec. 2014 ('Lubanga Appeals Judgment') para. 462: 'generally speaking and all other things being equal, a person who is found to commit a crime him- or herself bears more blameworthiness than a person who contributes to the crime of another person or persons'.

³¹ *Jugement rendu en application de l'article 74 du Statut, Le Procureur c. Germain Katanga*, ICC-01/04-01/07, TC II, ICC, 7 March 2014 ('Katanga Trial Judgment') paras 1383–7.

³² Materials can be found in C Bassiouni, *The Legislative History of the International Criminal Court*, vol. 2 (Ardsley: Transnational Publishers 2005) 200.

But a year later, the Preparatory Committee had changed the formulation to read almost exactly as the present Article 25(3)(a) reads:

A person is criminally responsible and liable for punishment for a crime...if that person...(a) commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible.³³

It is not known what brought about this change towards a more expansive concept of indirect perpetration, which differs from indirect perpetration as understood by many national jurisdictions which still limit indirect perpetration to the employment of innocent agents. The new formula obviously was not given much attention at the Rome conference but was adopted *en bloc* along with the other rules on the 'General Part'.³⁴ It is, in any event, beyond doubt that Article 25(3)(a) of the ICC Statute recognizes indirect perpetration both by innocent and by culpable agents.³⁵

22.4 Application of Article 25(3)(a) of the Statute by the ICC

The ICC, starting from its very first decisions on substantive issues, has consistently maintained that the hallmark of a principal perpetrator is his 'control' over the commission of the crime.³⁶ 'Control', according to the ICC, can be exerted not only by personally performing the *actus reus* of an offence, but also by 'masterminding' the commission of the crime from afar.³⁷ In its 2007 Decision on the confirmation of charges against Thomas Lubanga Dyilo, Pre-Trial Chamber I declared that 'principals to a crime are not limited to those who physically carry out the objective elements of the offence but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed'.³⁸ One group of such principals, according to the Pre-Trial Chamber, are those who control the will of those who carry out the objective

³³ Ibid., 198.

³⁴ See Jeßberger and Geneuss (n 3) 857, note 19. The issue is not mentioned in the brief account of the main debates at the Rome conference by P Saland, 'International Criminal Law Principles' in R Lee (ed.), *The ICC, The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer Law International 1999) 189 and 198.

³⁵ Van Sliedregt (n 19) 94–5; Werle (n 29) 178–9.

³⁶ Decision on the confirmation of charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06, PTC I, ICC, 29 January 2007 ('Lubanga Confirmation Decision') paras 329–30; Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-3, PTC I, ICC, 4 March 2009, para. 210. Both Trial Chambers I and II as well as the Appeals Chamber of the ICC have explicitly subscribed to this theory; see TC I, *Lubanga* Trial Judgment (n 29) para. 1003; TC II, *Katanga* Trial Judgment (n 31) paras 1393–6; AC, *Lubanga* Appeals Judgment (n 30) paras 469 and 473. For a strong critique of 'control theory' see L Yanev and T Kooijmans, 'Divided Minds in the Lubanga Trial Judgment: A Case against the Joint control theory' (2013) 13 *International Criminal Law Review* 89. See further J Ohlin et al., 'Assessing the Control-Theory' (2013) 26 *Leiden Journal of International Law* 725, 743–4. In support of control theory, see Ambos (n 11), 146–7; G Werle, *Principles of International Criminal Law* 2nd edn (The Hague: T M C Asser Press 2009) 169.

³⁷ *Lubanga* Appeals Judgment (n 30) para. 465.

³⁸ *Lubanga* Confirmation Decision (n 36) para. 330.

elements of the offence.³⁹ Pre-Trial Chamber I considers indirect perpetration to be ‘the most typical manifestation of the concept of control over the crime’,⁴⁰ which it regards as the hallmark of principal responsibility under the ICC Statute.

ICC Pre-Trial Chamber I made its most extensive statement on indirect perpetration in the 2008 Decision on the confirmation of charges against Germain Katanga and Mathieu Ngudjolo Chui.⁴¹ Katanga and Ngudjolo Chui were leaders of military groups connected with different ethnic groups in the Eastern Congo region of Ituri. According to the prosecutor’s charges, Katanga and Ngudjolo Chui developed the common plan to ‘wipe out’ the village of Bogoro, and their respective troops carried out that plan in a joint action. In the course of this action, the troops killed many members of the civilian population of Bogoro and committed other atrocities amounting to war crimes. The prosecutor charged Katanga and Ngudjolo Chui as co-perpetrators pursuant to Article 25(3)(a) ICC Statute, based on the theory that they exercised ‘joint control’ over the crimes committed.⁴² Since the defendants did not personally take part in the raid, their control over the acts committed by their soldiers could not be based on their presence at the place where the offences were committed; instead, Pre-Trial Chamber I declared that they jointly committed the war crimes ‘through other persons’ under their command, thus combining the modalities of co-perpetration and perpetration through another person.⁴³

The application of the doctrine of indirect perpetration in *Katanga and Ngudjolo* involved two special features, which are perhaps typical of indirect perpetration in the context of international criminal law: (i) there was—allegedly⁴⁴—not just one indirect perpetrator, but two of them working together, and (ii) their ‘agents’ were not individuals under their personal control but were troops whom they ‘controlled’ by means of a military organization. Both issues were squarely addressed by the Pre-Trial Chamber, and neither was regarded as precluding a finding of liability as indirect (co-)perpetrators.

22.4.1 Indirect co-perpetration

In dealing with the issue of joint indirect perpetration, the Pre-Trial Chamber I applied a combination of co-perpetration and indirect perpetration, two separate modes of responsibility under Article 25(3)(a) of the ICC Statute.⁴⁵ The problem in attributing the crimes committed by the soldiers to Katanga and Ngudjolo Chui, respectively, consisted in the fact that each leader commanded troops from different ethnicities, who distrusted each other and would not take orders from a leader belonging to

³⁹ *Lubanga* Confirmation Decision (n 36) para. 332; see also *Al Bashir, Situation in Darfur, Sudan* (n 36) para. 221.

⁴⁰ *Ibid.*, para. 339.

⁴¹ Decision on the confirmation of charges, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-717, PTC I, ICC, 30 September 2008 (‘*Katanga and Ngudjolo Confirmation Decision*’).

⁴² *Ibid.*, para. 473.

⁴³ *Ibid.*, paras 491–4.

⁴⁴ The proceedings against Mathieu Ngudjolo Chui were subsequently separated, and Ngudjolo was eventually acquitted of all charges.

⁴⁵ *Katanga and Ngudjolo Confirmation Decision* (n 41) paras 520–6, 546–9.

another ethnic group; hence Katanga would not have been able personally to ‘control’ the troops that were led by Ngudjolo Chui, and vice versa.⁴⁶ The Pre-Trial Chamber sought to solve this problem by explaining that co-perpetrators may jointly—i.e. based on a common plan—commit the criminal acts not physically but through other persons.⁴⁷ The activities of the co-perpetrators (for example, planning the attack and coordinating the activities of their troops) can be carried out long before the physical commission of the criminal acts by their subordinates.⁴⁸ The (indispensable) contribution of a co-perpetrator may then consist in nothing more than ‘activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes’.⁴⁹ The Pre-Trial Chamber thus returned to an analysis that the ICTY Trial Chamber had employed in *Stakić*.⁵⁰

22.4.2 Perpetration through another person by means of an organization

Since the accused in *Katanga and Ngudjolo* were not alleged to have had immediate personal control over each soldier who committed the crimes in question, the main issue was how they ‘controlled’ the perpetration of the offences. The Pre-Trial Chamber found that the necessary ‘control over the will of those who carry out the objective elements of the offence’⁵¹ can also be exerted by means of an organization: ‘[t]he cases most relevant to international criminal law are those in which the perpetrator behind the perpetrator commits the crime through another by means of “control over an organization” (*Organisationsherrschaft*)’.⁵²

Since the crimes covered by the ICC Statute ‘will almost inevitably concern collective or mass criminality’, the Statute must be understood to encompass organizational control as a form of perpetratorship: ‘[b]y specifically regulating the commission of a crime through another responsible person, the Statute targets the category of cases which involves a perpetrator’s control over the organization’.⁵³

The Pre-Trial Chamber then defined the necessary elements of an ‘organization’ by which the perpetrator can control the will of his subordinates:

The Chamber finds that the organization must be based on hierarchical relations between superiors and subordinates. The organization must also be composed of sufficient subordinates to guarantee that superiors’ orders will be carried out, if not by one

⁴⁶ Ibid., para. 519. ⁴⁷ Ibid., para. 521. ⁴⁸ Ibid., para. 526. ⁴⁹ Ibid., para. 525.

⁵⁰ *Stakić* Trial Judgment (n 12) paras 439 and 741. Whereas the ICTY Appeals Chamber had rejected the Trial Chamber’s approach in favour of JCE (n 24, para. 62), the Pre-Trial Chamber of the ICC declared that ‘this is a good example of the need not to transfer the ad hoc tribunals’ case law mechanically to the system of the Court’ (*Katanga and Ngudjolo* Confirmation Decision (n 41) para. 508).

⁵¹ *Katanga and Ngudjolo* Confirmation Decision (n 41) para. 488. ⁵² Ibid., para. 498.

⁵³ Ibid., para. 501. The Pre-Trial Chamber cites as authorities, among others, German authors K Ambos, ‘Article 25 Marginal Note 10’ in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court—Observers’ Notes, Article by Article* 2nd edn (München: C H Beck 2008), and C Kreß, ‘Claus Roxins Lehre von der Organisationsherrschaft und das Völkerstrafrecht’ (2006) 153 *Goltdammer’s Archiv für Strafrecht* 304, 307–8.

subordinate, then by another. These criteria ensure that orders given by the recognised leadership will generally be complied with by their subordinates.⁵⁴

In such an organization, the Chamber claimed, the orders of the leader will be carried out ‘automatically’; if one member should refuse to obey, another member will take over.⁵⁵

In a 2012 Decision, Pre-Trial Chamber II applied a similar standard, requiring for indirect perpetration, *inter alia*, that the offender must have control over an organization which ‘must consist of an organized and hierachal apparatus of power’ and that ‘the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect’.⁵⁶

The Pre-Trial Chambers were in agreement that perpetration by means of an organization can also be committed jointly by several leaders acting in concert, provided that each leader supplies a contribution necessary for the fruition of the common plan.⁵⁷ Applying these standards to the case before it, Pre-Trial Chamber I in *Katanga and Ngudjolo* concluded that there was sufficient evidence to show that defendants Katanga and Ngudjolo Chui in fact co-perpetrated the crimes in question through their respective troops, because compliance with their orders was ‘ensured’ and both leaders were aware of the crimes to be committed in the course of ‘wiping out’ the village of Bogoro.⁵⁸

After the cases of Germain Katanga and Mathieu Ngudjolo Chui had been separated and the latter had been acquitted, Trial Chamber II was again faced with the question as to whether Mr Katanga had ‘controlled’ the commission of crimes against humanity by soldiers in troops under his command. A majority of Trial Chamber II relied on the concept of ‘control over an organization’ as developed by Pre-Trial Chamber I and defined as the key element of such an organization its ‘automatisme fonctionnel’, which makes sure that the commander’s orders are carried out even if there is no personal link between the commander and the individual members of the group:⁵⁹

Le supérieur n’a pas besoin de contrôler la volonté de chacun des exécutants en recourant, par exemple, à la coercition ou à un subterfuge puisqu’il sait que, si un membre de l’organisation refuse d’obtempérer, un autre membre sera normalement disponible pour le remplacer et assurer, d’une manière ou d’une autre, l’exécution des ordres émis.⁶⁰

The exchangeability of each individual member of the organization is necessary, in the view of Trial Chamber II, to ensure the commander’s absolute control, and thereby to limit liability as a principal to those ‘qui contrôlent, effectivement et sans interférence possible, une partie au moins d’un appareil de pouvoir’.⁶¹

⁵⁴ *Katanga and Ngudjolo* Confirmation Decision (n 41) para. 512. ⁵⁵ Ibid., paras 515–17.

⁵⁶ Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Ruto, Kosgey, and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-373, PTC II, ICC, 23 January 2012 (‘Ruto et al. Confirmation Decision’) para. 292.

⁵⁷ *Katanga and Ngudjolo* Confirmation Decision (n 41) paras 524–6; *Ruto et al. Confirmation Decision* (n 56) para. 291.

⁵⁸ *Katanga and Ngudjolo* Confirmation Decision (n 41) paras 540–72.

⁵⁹ *Katanga Trial Judgment* (n 31) paras 1408–9. ⁶⁰ Ibid., para. 1408.

⁶¹ Ibid., para. 1412. Based on this high standard, Trial Chamber II regarded Germain Katanga not as a principal of the crimes charged, but found him guilty only under Art 25 (3)(d) ICC Statute; ibid., paras 1420–1.

When Pre-Trial Chamber I developed its concept of ‘perpetration through an organization’, it relied on legal writings and court opinions from various legal systems.⁶² But its approach has been most heavily influenced by German legal theory. The Chamber’s ‘crown witness’ was the influential German criminal law scholar Claus Roxin, who first published a theory of perpetration by means of an organization in 1963.⁶³ According to Roxin’s theory, the hallmark of indirect perpetration (*mittelbare Täterschaft*) is the perpetrator’s domination (*Beherrschung*) of the human agent who physically carries out the criminal act. Domination can take various forms. The indirect perpetrator can, for example, create a misconception about relevant facts, he can exert strong psychological pressure upon the actor, or he can employ a person who because of mental illness or immaturity is unable to realize what he is doing. Up to that point, Roxin followed the traditional German doctrine according to which indirect perpetration required an ‘innocent agent’. But when Roxin considered the case of Adolf Eichmann, who at the time when Roxin wrote his seminal article had just been tried and convicted of genocide in Jerusalem, he came to the conclusion that there must exist a further category of domination, one that does not rely on the immediate actor’s lack of criminal responsibility. He suggested that a person who is in charge of a hierarchically structured criminal organization can be said to ‘dominate’ the criminal acts committed by his subordinates where these subordinates unquestioningly carry out any orders given to them; this holds true, according to Roxin, even though the subordinates are themselves responsible perpetrators of the crimes they commit.⁶⁴ Roxin maintained that ‘domination’ of the commission of a crime is as absolute when the perpetrator works through an organization as when he uses an irresponsible human agent. In order to limit his concept to situations where the indirect perpetrator is capable of imposing his will on his subordinates, Roxin posited three additional conditions: the organization must have a tight hierarchical structure, members of the organization must be easily replaceable,⁶⁵ and the organization must (at least partially) operate outside the legal order.

After Roxin’s theory had lain dormant for 30 years, the German Federal Court of Justice (*Bundesgerichtshof*, BGH) brought it to life in the 1990s when it adjudicated crimes committed in the context of the strict border regime installed by the leadership of the German Democratic Republic (GDR).⁶⁶ After the end of the GDR, German courts were faced with determining criminal responsibility for the death

⁶² Ibid., 485 note 647 (citing a large number of German and Spanish authors).

⁶³ C Roxin, ‘Straftaten im Rahmen organisatorischer Machtapparate’, *Goltdammer’s Archiv für Strafrecht* (GA) (1963) 193. A similar concept was proposed almost contemporaneously by F-C Schroeder, *Der Täter hinter dem Täter* (Berlin: Duncker & Humblot 1965).

⁶⁴ Claus Roxin’s 1963 article has been translated into English: C Roxin, ‘Crimes as Part of Organized Power Structures’ (2011) 9 *Journal of International Criminal Justice* 193. For a more recent statement of his views, see C Roxin, ‘Organisationsherrschaft und Tatentschlossenheit’ (2006) *Zeitschrift für internationale Strafrechtsdogmatik* 293 (an online law journal, accessible at <<http://www.zis-online.com>>).

⁶⁵ Ibid., 297. Roxin emphasizes that members of the organization must be ‘fungible’, that is, any member unwilling or unable to carry out the leader’s orders must be replaceable by another subordinate. If the crime requires a specialist who is difficult to replace, the head of the organization can consequently not be responsible as a principal but only as an instigator.

⁶⁶ 40 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 218, 236 (1994).

of hundreds of GDR citizens who were killed when they attempted to cross the border to the West. Some of the border guards who had fired deadly shots were convicted of intentional homicide, and their claims of duress and mistake of law were rejected.⁶⁷ Subsequently, some of the highest political and military leaders of the GDR were accused of murder for instituting and maintaining the border regime, which included strict orders to border guards to prevent, by all means, any illegal defection from the GDR. These cases confronted the BGH with the question as to whether the leaders of the relevant GDR institutions could be punished as principal perpetrators even though the border guards had themselves been convicted as direct perpetrators of the border killings. Relying on Roxin's theory of 'perpetration through an organization', the BGH in 1994 held that the leaders of the GDR regime were not mere instigators but indirect perpetrators of homicide.⁶⁸ The Court conceded that normally a responsible actor who fires the fatal shot 'dominates' the unlawful killing, which would preclude any domination by other persons. But the Court recognized an exception for situations where the activity of a person in the background 'almost automatically' brings about the desired result, because that person makes use of certain organizational structures and rules and thus sets into motion 'rule-determined processes' (*regelhafte Abläufe*).⁶⁹

22.5 Criticism of the Pre-Trial Chamber's Approach

At the basis of the Pre-Trial Chambers' approach to principal and accessory liability under Article 25(3) of the ICC Statute lies the so-called control theory. Under that theory, a perpetrator is a person who 'controls' (that is, determines) whether the acts constituting an offence are carried out.⁷⁰ This concept has both a restrictive and an expansive effect:⁷¹ it excludes from the scope of perpetration under Article 25(3)(a) of the ICC Statute anyone whose contribution is not a necessary condition for the commission of the offence; but this concept also turns into perpetrators those whose (necessary) contributions have been made at a time and place far removed from the physical perpetration of the crime.⁷² The concept of indirect perpetration is closely linked to the expansive branch of control theory: 'control' can be said to extend to anyone whose interaction with another person is necessary for making that other

⁶⁷ 39 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 1 (1992); 39 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 168 (1993).

⁶⁸ 40 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 218 (1994).

⁶⁹ Ibid., 236. In a seemingly irrelevant but intentionally placed *dictum*, the Court indicated that 'the problem of responsibility for leading business enterprises could also be solved that way'; ibid., 237. In a series of later decisions, it became apparent that the BGH had inconspicuously but intentionally laid the groundwork for a broad extension of Roxin's original doctrine to business enterprises; see e.g. 40 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 257, 268 (1995); [2008] *Neue Zeitschrift für Strafrecht* 89. For a more detailed analysis of German case law see T Weigend, 'Perpetration through an Organization. The Unexpected Career of a German Legal Concept' (2011) 9 *Journal of International Criminal Justice* 91.

⁷⁰ The primary statement of this theory can be found in Lubanga Confirmation Decision (n 36) paras 330, 338–42.

⁷¹ For a more detailed analysis of 'control theory' see Ohlin et al. (n 29) 730–4.

⁷² See Lubanga Trial Judgment (n 29) paras 1003–4.

person commit the crime. There are no theoretical limits as to how the indirect perpetrator exerts his influence, whether by personal persuasion or by other means.

Although the ICC Pre-Trial Chambers have consistently applied this concept of perpetratorship, it has not unanimously been accepted in the Court. In separate opinions, Judges Fulford and Van den Wyngaert—both members of ICC Trial Chambers—raised a number of objections to the Pre-Trial Chambers' approach.⁷³ Their criticism concerns primarily the requirements for co-perpetration, but it also applies to the issue of indirect perpetration.

The judges' first objection concerns methodology: neither the text of the ICC Statute nor customary international law, they assert, indicates that the concepts of 'domination of another' or 'control by means of an organization' should be used to interpret the words of Article 25(3)(a) of the ICC Statute. As Judge Van den Wyngaert eloquently put it:

I believe that it is not appropriate to draw upon subsidiary sources of law, as defined in Articles 21(1)(b) and (c) of the Statute, to justify incorporating forms of criminal responsibility that go beyond the text of the Statute. Reliance on the control over the crime theory, whatever its merits are in Germany and other legal systems that have followed the German model, would only be possible to the extent that it qualifies as a general principle of criminal law in the sense of Article 21(1)(c). However, in view of the radical fragmentation of national legal systems when it comes to defining modes of liability, it is almost impossible to identify general principles in this regard. It is therefore very unlikely that the control theory could aspire to such a status. Moreover, even if general principles could be identified, reliance on such principles, even under the guise of treaty interpretation, in order to broaden the scope of certain forms of criminal responsibility would amount to an inappropriate expansion of the Court's jurisdiction.⁷⁴

Judge Van den Wyngaert further notes that the Court, under Article 22(2) of the ICC Statute, is obliged to interpret the provisions of the Statute strictly and is prohibited from expanding their plain meaning by analogy. Reading new modes of perpetratorship into the words of Article 25(3)(a) of the Statute, she claims, might violate the principles of strict construction and *in dubio pro reo*.⁷⁵

The second, substantive argument concerns two special forms of indirect perpetration adopted by the Pre-Trial Chambers, namely perpetration through an organization and indirect joint perpetration. Judge Van den Wyngaert thinks that neither of these modes has a basis in the text of Article 25(3)(a) of the ICC Statute or in customary international law.⁷⁶ She therefore deems the relevant case law of the ICC Pre-Trial Chambers to be an unwarranted expansion of the concept of indirect perpetration. With regard to exerting control over an agent through an organization, Judge Van den Wyngaert criticizes the Pre-Trial Chambers for 'dehumanising the relationship

⁷³ See (n 17).

⁷⁴ Concurring Opinion of Judge Christine Van den Wyngaert (n 17) para. 17. See also Separate Opinion of Judge Adrian Fulford (n 17) para. 10.

⁷⁵ Concurring Opinion of Judge Christine Van den Wyngaert (n 17) paras 18–20.

⁷⁶ Ibid., paras 52, 60–4.

between the indirect perpetrator and the physical perpetrator' and for thereby diluting the level of personal influence that the indirect perpetrator must exercise over the physical perpetrator.⁷⁷ In Judge Van den Wyngaert's view, joint indirect perpetration as accepted by the Pre-Trial Chambers likewise goes beyond the Statute, because under that doctrine a person can be held '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'.⁷⁸

In what follows, I will briefly address the validity of the criticism voiced by Judge Van den Wyngaert and then speculate about the possible direction the Court might take in the future.

22.6 A Narrow Version of Indirect Perpetration?

22.6.1 Indirect perpetration and the principle of legality

The authors of Article 25(3)(a) of the ICC Statute have left no doubt that 'commission' of a crime through another person is possible 'regardless of whether that other person is criminally responsible', and they have clearly separated this mode of criminal liability from ordering, soliciting, or inducing a crime as listed in Article 25(3)(b) of the Statute. The Statute thus neither ties liability for perpetration to the physical carrying out of the criminal act⁷⁹ nor negates indirect perpetration when the 'front man' is fully responsible for his act. In that regard, the expansive version of indirect perpetration adopted by the Pre-Trial Chambers cannot be faulted with going beyond the words of the Statute.

But that statement does not dispose of the question whether control *through an organization* is covered by the wording of Article 25(3)(a) of the ICC Statute.⁸⁰ In its decision in *Katanga and Ngudjolo*, Pre-Trial Chamber I claims that this particular mode of exerting control over another person 'has been incorporated into the framework of the Statute;... has been increasingly used in national jurisdictions; and... has been addressed in the jurisprudence of the international tribunals'.⁸¹ The evidence that the Chamber presents for this proposition, however, is not overly strong. The list of 'numerous' national jurisdictions claimed to be in favour of the concept of perpetration through an organization is limited to five (Argentina, Chile, Germany, Peru, and Spain), in one of which (Argentina) the Supreme Court had overturned a lower court judgment proposing this theory.⁸² International tribunals have indeed 'addressed' the issue, but so far have preferred to employ the JCE doctrine to convict organizers and other figures further removed from the scene of the crime.⁸³ The Pre-Trial Chamber's

⁷⁷ Ibid., para. 53. ⁷⁸ Ibid., para. 61. For similar criticism see van Sliedregt (n 19) 168–9.

⁷⁹ See *Lubanga* Confirmation Decision (n 34) paras 332–3, 339.

⁸⁰ There is nothing to suggest that *customary* international law recognizes the concept of 'perpetration through an organization' as a mode of criminal liability; cf. G Werle and B Burghardt, 'Die mittelbare Täterschaft—Fortentwicklung deutscher Strafrechtsdogmatik im Völkerstrafrecht?' in R Bloy et al. (eds), *Gerechte Strafe und legitimes Strafrecht* (Berlin: Duncker & Humblot 2010) 849, 854–5.

⁸¹ *Katanga and Ngudjolo* Confirmation Decision (n 41) para. 500. ⁸² Ibid., paras 502 and 504.

⁸³ See e.g. *Stakić* Appeal Judgment (n 13) para. 62 (discussing status of indirect perpetration in international criminal law and rejecting a combination of indirect perpetration and co-perpetration as suggested by the Trial Chamber in the same case). JCE has also been accepted by most 'hybrid' criminal tribunals; see Ambos (n 11) 136 *et seq.*

single substantive argument in favour of including control through an organization is that the ICC Statute ‘will almost inevitably concern collective or mass criminality’, and that it must therefore be understood to ‘target the category of cases which involves a perpetrator’s control over the organization’.⁸⁴ But this policy argument is hardly sufficient to address Judge Van den Wyngaert’s concern based on the legality principle. The best one can say in defence of the Pre-Trial Chambers’ opinion is that Article 25(3)(a) of the Statute makes no definitive statement either way. The Statute only speaks of committing a crime ‘through another person’ and says nothing about how the indirect perpetrator makes that other person do what he wants him to do. The word ‘through’ does not necessarily imply that a direct interaction between the indirect perpetrator and the ‘front man’ is a necessary element of indirect perpetration. The Pre-Trial Chambers’ interpretation thus cannot be said to violate the legality principle.

22.6.2 Substantive arguments

22.6.2.1 Perpetration through an organization

If the wording of the ICC Statute permits treating the use of an organization as indirect perpetration, that does not necessarily mean that it is good policy to recognize this particular mode of perpetration. Perpetration by means of an organization may well be too far removed from the prototype of indirect perpetration, where the perpetrator uses an individual ‘innocent agent’ to bring about the commission of the crime.

Historically, the introduction of ‘control through an organization’ into German legal doctrine can best be understood as a reaction to the phenomenon of ‘systemic’ crime, which defies the categories of traditional criminal law doctrine.⁸⁵ Events such as mass atrocities in the Second World War or the planned large-scale pollution of the environment by business enterprises may make it necessary to devise new modes of criminal responsibility, and the notion of indirect perpetration by using an organization is a response to that need. But the questions remain whether this special variant is indeed necessary for filling a gap and whether it can be defined with a precision sufficient for basing criminal punishment on it.

At the outset, it is useful to remember that leaders who order their subordinates to commit crimes will not escape punishment. Their conduct can easily be brought under the labels of instigation or ordering, and even in the absence of proof that orders were given, the concept of superior responsibility will permit the imposition of criminal punishment on leaders who condone criminal conduct. In many legal systems, these modes of responsibility are regarded as ‘accessorial’, which means that a person can be punished as an instigator only if the person instigated has at least attempted to commit an offence. But sentences for instigation or ordering can be as severe as those for perpetrators. According to Articles 77 and 78 of the ICC Statute, the Court can

⁸⁴ *Katanga and Ngudjolo* Confirmation Decision (n 41) para. 501.

⁸⁵ For a useful analysis, see G Heine, ‘Täterschaft und Teilnahme in staatlichen Machtapparaten’ (2000) 55 *Juristenzeitung* 920.

impose any sentence up to lifelong imprisonment, taking into account the gravity of the crime and the individual circumstances of the convicted person, and there is no distinction made among the various forms of responsibility listed in Article 25(3) of the Statute. There is thus no practical need for devising an additional mode of perpetration for leaders of organizations in international law.⁸⁶

It has been argued, on the other hand, that the inherently collective nature of international crime makes it particularly important that the verdict and sentence reflect precisely the specific role of each participant in the collective enterprise.⁸⁷ According to the case law of the ICTY, the ‘form and degree of the participation of the accused in the crime’ is a determinant factor of the gravity of the crime and hence of the sentence,⁸⁸ and Rule 145(1)(c) of the ICC Rules of Procedure and Evidence mirrors that view by listing the ‘degree of participation of the convicted person’ among several factors to be taken into account in sentencing. There may thus be more than an intuitive appeal to the idea that the individuals at the very top of a criminal system or state should not be labelled ‘mere’ instigators but should be named as who they are: those chiefly responsible for the atrocities committed in their name. ‘Perpetration through an organization’ may thus be a useful tool for achieving the largely symbolic but important goal of fair labelling.

But the usefulness of this tool depends on whether it is (i) theoretically consistent and (ii) generally applicable, and can (iii) be defined with sufficient precision.

- i. With regard to the first issue, some authors have spotted a self-contradiction in the concept of indirect perpetration through a culpable agent: how can the ‘front man’ who physically commits the criminal act be criminally responsible as a perpetrator and at the same time be a mere instrument in the hands of the leader of the organization?⁸⁹ One answer to this objection may be that the attribution of criminal responsibility is not a yes/no question of logic but a normative issue.⁹⁰ Under normative aspects, it is possible to hold the person in the background as well as the person at the front criminally responsible as perpetrators because they both—and independently of each other—possess sufficient autonomous dominance over the criminal act.
- ii. General applicability of the concept is another troublesome issue. Claus Roxin’s original version of this concept was devised ad hoc under the impression of large-scale state-organized atrocities and therefore contains elements that seem

⁸⁶ See Separate Opinion of Judge Adrian Fulford (n 17) paras 9–11.

⁸⁷ See F Giustiniani, ‘The Responsibility of Accomplices in the Case-Law of the Ad Hoc Tribunals’ (2009) 20 *Criminal Law Forum* 417, 419; Kreß (n 53) 308; Werle and Burghardt (n 80) 852.

⁸⁸ See e.g. Judgment, *Kupreškić et al.*, IT 95-16-T, TC, ICTY, 14 January 2000, para. 852.

⁸⁹ The Pre-Trial Chamber in *Katanga and Ngudjolo* Confirmation Decision (n 41) para. 499 note 660 put the problem as such: ‘Essentially, the possibility that a person may so control the will of another that he can be said to perpetrate a crime through that other, seems incompatible with a meaningful notion of that other as a fully responsible actor.’ See further L Kutzner, *Die Rechtsfigur des Täters hinter dem Täter und der Typus der mittelbaren Täterschaft* (Peter Lang 2004) 250; H Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Oxford University Press 2009) 119–22.

⁹⁰ Cf. J Vogel, ‘Individuelle Verantwortlichkeit im Völkerstrafrecht’ (2002) 114 *Zeitschrift für die gesamte Strafrechtswissenschaft* 403, 405–9.

accidental rather than essential. Even if applicability of the concept were reduced to inherently violent organizations,⁹¹ it lacks both an empirical and a theoretical basis other than the fact that the leaders of some organizations can, under certain conditions, be fairly certain that their orders will be carried out even if these orders involve the commission of a criminal offence. Moreover, Roxin's concept may fit 'orderly', bureaucratic dictatorships such as that of the National-Socialists in Germany or the Socialist Unity Party in the GDR; it hardly lends itself to being applied to largely disorganized militias or rebel armies, where the authority of a leader may be accepted only as long as he is successful in providing material goods and military success.⁹²

- iii. This leads to the issue of the concept's vagueness. There may exist an ideal type of an oppressive, authoritarian organization exerting irresistible pressure on its members to conform, but it is difficult, even within a single legal culture, to achieve agreement on the necessary components of such an organization.⁹³ Nor is there agreement on what position within the organization a person must have in order to qualify as an indirect perpetrator.⁹⁴ Moreover, even within a highly repressive organization not every aspect of a group member's activity is under full control; it is therefore necessary to decide, in each particular instance, whether a particular act was controlled by the organization to such an extent that principal responsibility can be allocated to the leaders of the organization.

Given these difficulties, recognizing a general concept of indirect perpetration by use of an organization may raise more problems than it solves.

22.6.2.2 Indirect co-perpetration

In her critical assessment of the Pre-Trial Chambers' approach to indirect perpetration, Judge Van den Wyngaert finds particularly objectionable the imposition of liability for indirect perpetration on leaders of two separate groups who have joined these

⁹¹ As suggested by B Schünemann, 'Die Rechtsfigur des "Täters hinter dem Täter" und das Prinzip der Tatherrschaftsstufen' in A Hoyer et al. (eds), *Festschrift für Friedrich-Christian Schroeder zum 70. Geburtstag* (Heidelberg: C F Müller 2006) 401 and 412.

⁹² It may be a sign of this weakness that the Pre-Trial Chamber in *Katanga and Ngudjolo Confirmation Decision* (n 41) para. 518, felt compelled to define 'rigorous training methods' as a tool of controlling organization members. The Chamber may have sensed that Roxin's original model was not conceived for an African environment and attempted to make up for the lack of a tight institutional organization of the militia by adding ad hoc new elements that it found to be present. Trial Chamber II, on the other hand, insisted on a 'strict control' model of an organization where leaders can be certain that their orders will be carried out 'automatically' (*Katanga Trial Judgment* [n 31], para. 1408). It is no surprise that the Trial Chamber found this feature absent in a relatively disorganized military group participating in ethnic conflict in the Democratic Republic of the Congo (*ibid.*, para. 1420).

⁹³ Even in Germany, there has been great disagreement as to whether the 'lawlessness' of the organization and the 'fungibility' of its members are necessary components of an organization that can transmit control of its leaders to its subordinate members; see the overview by B Schünemann, '§ 25 marginal notes 122–127' in H Laufhütte et al. (eds), *Strafgesetzbuch Leipziger Kommentar* vol. I, 12th edn (Berlin: De Gruyter 2007).

⁹⁴ On the question whether 'control' of an organization can be attributed only to its supreme leaders or to intermediate leaders as well, see Ambos (n 11) 115–16, 160 (citing cases from Latin America with differing results).

groups together for a criminal action. This, Judge Van den Wyngaert thinks, ‘leads to a radical expansion of Article 25(3)(a) of the Statute, and indeed is a totally new mode of liability’.⁹⁵ Judge Van den Wyngaert would accept the ‘junta’ scenario, where one single group of subordinates is subject to control by a group of leaders working together.⁹⁶ But in the (hypothetical) scenario presented by the *Katanga and Ngudjolo* case, there are two separate (feuding) groups cooperating in just one single (criminal) operation based on an agreement between their respective leaders. In this situation, two recognized forms of perpetration (co-perpetration and indirect perpetration) factually coincide. Leaving immaterial linguistic issues⁹⁷ aside, it is not necessary to invent a ‘fourth alternative’⁹⁸ in order to establish the responsibility of both leaders for the crimes committed by members of both groups. The leaders’ common plan is the key to their co-liability.⁹⁹ Co-perpetrators linked by a common plan can contribute in various ways to the commission of the crime, and one contribution can be to provide a human agent under the control of the co-perpetrator. If, for example, A and B carry out their common design to commit arson in the house of V by taking their young children (A’s son X and B’s daughter Y) together to V’s house, giving them matches, and instructing them to make a ‘nice fire’, A and B clearly are co-perpetrators of arson: they jointly use X and Y as their human agents to commit the offence. The situation in *Katanga and Ngudjolo* is structurally similar, if one assumes that Germain Katanga and Mathieu Ngudjolo Chui exerted control over their respective troops and intended them to commit the crimes they actually perpetrated.¹⁰⁰ There exists no doctrinal obstacle to applying Article 25(3)(a) of the ICC Statute to this situation. The critical issue lies not in joining human agents but in what it means to ‘control’ their operation.

22.7 Outlook

Given the vocal dissent of two ICC judges from the concepts developed by the Pre-Trial Chambers, it is difficult to predict the eventual fate of the broad ‘Germanized’ interpretation of indirect perpetration which has dominated ICC case law in the past few years. But which direction *should* the judges of the ICC take with respect to indirect perpetration?

The Statute of the ICC rules out a return to the traditional concept of commission through an innocent agent, because its Article 25(3)(a) expressly mentions non-innocent agents as a possible ‘means’ of indirect perpetration. Beyond this general guideline, we have seen that there are two basic approaches, one ‘literal’ and narrow, the

⁹⁵ Concurring Opinion of Judge Christine Van den Wyngaert (n 17) para. 61.

⁹⁶ *Ibid.*, para. 62.

⁹⁷ There has been a controversy between Pre-Trial Chamber I and Judge Van den Wyngaert as to whether ‘or’ in Art 25(3)(a) of the Statute is an ‘inclusive’ or an ‘exclusive’ conjunction; *ibid.*, para. 60.

⁹⁸ *Ibid.*, para. 59.

⁹⁹ Cf. J Ohlin, ‘Joint Intentions to Commit International Crimes’ (2011) 11 *Chicago Journal of International Law* 693; Ohlin et al. (n 29) 732–3.

¹⁰⁰ Similar analysis in Ambos (n 11) 157–8; Olásolo (n 89) 269; H van der Wilt, ‘The Continuous Quest for Proper Modes of Criminal Responsibility’ (2009) 7 *Journal of International Criminal Justice* 307, 314.

other ‘dogmatic’ (with a German accent) and relatively broad. Since there is not much by way of customary international law on the subject, and since the Statute merely mentions indirect perpetration without defining it, the legality principle does not prescribe either of the two solutions, and the judges are relatively free to decide which course they wish to take. Their decision in that regard does not depend on the issue as to whether there exists a ‘hierarchy’ among the modes of perpetration and participation in Article 25(3) of the ICC Statute. Even if that proposition were true, it would not give more than a small indication of a broader concept of indirect perpetration (because in a hierarchical system the competing modes of ordering and instigation would have a subsidiary function).

Since the judges need not choose among several ‘models’ of indirect perpetration, they can address and resolve the various substantive questions one by one. As regards the issue of joint indirect perpetration, the arguments that Judge Van den Wyngaert has raised against recognizing this mode of perpetration have not proved convincing. Co-perpetration based on a common plan can take many forms, and one of them is bringing together the human agents each co-perpetrator has under his control. There is hence no good reason for abandoning the course that the Pre-Trial Chambers have taken on this issue.

Indirect perpetration by means of an organization is a more difficult issue. We have seen¹⁰¹ that this concept has serious weaknesses and that it especially lacks precision. It may therefore be preferable to fall back on a broader, open-ended definition of ‘commission through another person’. Pre-Trial Chamber I in *Katanga and Ngudjolo* defined a principal as one who ‘has control over the will of those who carry out the objective elements of the offence’.¹⁰² The wisest course may be to leave that definition as it is. There exist are various ways of controlling another person’s will, such as exercising strong physical or psychological pressure, or creating a misconception concerning the relevant facts. The existence of an oppressive organization in which the actor is a subordinate member may, in a given case, likewise be instrumental in bringing strong pressure to bear on the subordinate’s will; but the fact that the defendant is the leader of an organization cannot by itself be conclusive evidence of his having control over the will of all members of the organization.¹⁰³

What amount of control is necessary to make a top member of an organization (or any other person) an indirect perpetrator is a normative question. There is no better general criterion for answering this question than the ‘control over the will’ test. Courts should be able to apply this test to the facts of each particular case; their determination should not be tied to legally binding sub-rules, for example, about the necessary qualities of an organization which would then automatically turn the leaders of this organization into perpetrators of whatever crimes other group members commit. Under the approach suggested here, it is not sufficient for the prosecution to merely establish the existence of an organization (with whatever qualities), but they need to

¹⁰¹ See section 22.6.2.1.

¹⁰² *Katanga and Ngudjolo* Confirmation Decision (n 41) para. 488.

¹⁰³ A similar solution has been suggested by Judge Christine Van den Wyngaert in her Concurring Opinion (n 17) paras 55–6; see also van Sliedregt (n 19) 169.

prove, on the particular facts of the case, that the defendant actually ‘controlled the will’ of the physical perpetrator.

It is not clear whether all judges of the ICC are ready to abandon their infatuation with the concept of ‘domination by organization’. But they might make life easier for themselves if they did, and they might be able to concentrate on the key requirement of indirect perpetration: control over another person.

Forms of Accessorial Liability under Article 25(3)(b) and (c)

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23.1 Introduction

The ICC understands the modes of liability listed in Article 25(3) of the ICC Statute pursuant to the theory of ‘control over the crime’.¹ According to this theory, as one moves down through the different sub-paragraphs in Article 25(3), the level of control over the crime decreases. As a result, principal liability is provided for in paragraph (a) (direct perpetration, indirect perpetration, co-perpetration with joint control, and indirect co-perpetration), whereas paragraphs (b) to (d) provide for accessory liability (ordering, instigation, planning, aiding and abetting, and assisting groups of persons acting with a common purpose). In other words, Article 25(3)(a) of the ICC Statute assigns principal liability to persons perpetrating a crime, whereas Article

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¹ Decision on the Confirmation of Charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-803-tEN, PTC I, ICC, 29 January 2007, para. 338 (‘Lubanga Confirmation Decision’); Decision on the Confirmation of Charges, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-717, PTC I, ICC, 30 September 2008 (‘Katanga and Ngudjolo Confirmation Decision’) paras 484–6; Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-3, PTC I, ICC, 4 March 2009 (‘Al Bashir arrest warrant decision’) para. 210; Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, ICC, 15 June 2009, para. 348; Decision on the Confirmation of Charges, *Abu Garda, Situation in Darfur, Sudan*, ICC-02/05-02/09-243-Red, PTC I, ICC, 8 February 2010, para. 152; Corrigendum of the ‘Decision on the Confirmation of Charges’, *Banda and Jerbo, Situation in Darfur, Sudan*, ICC-02/05-03/09-121-Corr-Red, PTC I, ICC, 7 March 2011, para. 126; Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1, PTC II, ICC, 8 March 2011, para. 39; Decision on the Prosecutor’s Application for

25(3)(b)–(d) ascribes accessory liability to those participating in the commission of a crime by third persons.²

Accessories to crimes perpetrated by third persons can promote the commission of the crimes with their orders, inducement, or plans, as envisaged in Article 25(3)(b) of the ICC Statute. Accessories can also facilitate the commission of crimes by third persons by their contribution or assistance thereto as provided for in Article 25(3)(c) of the ICC Statute. The present chapter analyses how these forms of accessory liability operate.³

Elements of the modes of liability envisaged in paragraphs (b) and (c) of Article 25(3) were proposed but eventually not included in the Elements of Crimes adopted in 2002 by the Preparatory Commission for the ICC.⁴ Consequently, the Court itself must refine these forms of liability through its case law.

Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Husse in Ali, *Muthaura, Kenyatta and Ali, Situation in the Republic of Kenya*, ICC-01/09-02/11-1, PTC II, ICC, 8 March 2011, para. 35; Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi', *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-1, PTC I, ICC, 27 June 2011, para. 68; Decision on the Confirmation of Charges, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-465-Red, PTC I, ICC, 16 December 2011, para. 279; Judgment Pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012 ('Lubanga Trial Judgment') paras 994, 998–9; Jugement Rendu en Application de l'Article 74 du Statut, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436, TC II, ICC, 7 March 2014 ('Katanga Trial Judgment') paras 1382, 1393–4; Public redacted version of 'Decision on the Prosecutor's Application Pursuant to Article 58 for a Warrant of Arrest against Laurent Koudou Gbagbo', *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-9-Red, PTC III, ICC, 30 November 2011, para. 74; Decision on the Prosecutor's Application Pursuant to Art 58 for a Warrant of Arrest against Charles Blé Goudé, *Blé Goudé, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-02/11-3, PTC III, ICC, 6 January 2012, para. 27; Decision on the Confirmation of Charges Pursuant to Art 61(7) (a) and (b) of the Rome Statute, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-02/11-373, PTC II, ICC, 23 January 2012 ('Ruto et al. Confirmation Decision') para. 291; Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Muthaura, Kenyatta and Ali, Situation in the Republic of Kenya*, ICC-01/09-02/11-382-Red, PTC II, ICC, 23 January 2012, para. 296; Public redacted version of 'Decision on the Prosecutor's Application Pursuant to Art 58 for a Warrant of Arrest against Simone Gbagbo', *S Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/12-2-Red, PTC III, ICC, 2 March 2012, para. 27; Separate Opinion of Judge Adrian Fulford, *Lubanga Trial Judgment* (n 1) paras 6–12; Concurring Opinion of Judge Christine Van den Wyngaert, Judgment pursuant to Art 74 of the Statute, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-4, TC II, ICC, 19 December 2012, paras 22–4, 28–30, 67; Dissenting Opinion of Judge Cuno Tarfusser, 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', *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3363, AC, ICC, 27 March 2013, paras 15–18.

² *Lubanga Confirmation Decision* (n 1) paras 320–1; *Katanga and Ngudjolo Confirmation Decision* (n 1) paras 471 and 517; *Al Bashir* arrest warrant decision (n 1) para. 27; *Ruto et al. Confirmation Decision* (n 1) para. 354; *Lubanga Trial Judgment* (n 1) paras 998–9; Decision on the Prosecutor's Application under Art 58, *Mudacumura, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/12-1-Red, PTC II, ICC, 13 July 2012 ('Mudacumura arrest warrant decision') para. 63; *Katanga Trial Judgment* (n 1) paras 1383 and 1387. See also F Diarra and P D'Huart, 'Art 25: Responsabilité Pénale Individuelle' in J Fernandez and X Pacreau (eds), *Statut de Rome de la Cour Pénale Internationale: Commentaire Article par Article* vol I (Paris: Pedone 2012) 810–11, 825, 827–8. See also E van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press 2012) 79, 83–8; J Ohlin et al., 'Assessing the Control-Theory' (2013) 26 *Leiden Journal of International Law* 725, 742–5.

³ For an analysis of the participation in a crime under Art 25(3)(d) of the ICC Statute, see Ambos, Chapter 24, this volume.

⁴ Preparatory Commission for the ICC, 'Proposal Submitted by the United States of America: Draft Elements of Crimes. Addendum', PCNICC/1999/DP.4/Add.3, 4 February 1999.

During its first decade of activities, the Court has charged individuals with alleged responsibility for ordering, soliciting, or inducing the commission of crimes under Article 25(3)(b) of the ICC Statute in seven cases.⁵ Furthermore, in two cases the Court has dealt with the alleged responsibility of individuals for aiding and abetting or otherwise assisting in the commission of a crime under Article 25(3)(c) of the ICC Statute.⁶ Nevertheless, since judgments have not been rendered in any of these cases yet, the case law of the Court on these forms of liability is rather limited.⁷ Indeed, the first judgments of the Court only clarified that paragraphs (b) and (c) of Article 25(3) provide for ‘secondary’ or ‘accessory’ liability,⁸ and that such liability depends on the existence of a ‘principal’ to the crime under Article 25(3)(a).⁹

Against this background and in conformity with Article 31(1) of the VCLT,¹⁰ the interpretative analysis of paragraphs (b) and (c) of Article 25 of the ICC Statute provided in this chapter benefits from relevant jurisprudence of the ad hoc tribunals applicable pursuant to Article 21(1)(b) of the ICC Statute,¹¹ and from other pertinent sources on a case-by-case basis.¹²

⁵ *Kony et al.* (ICC-02/04-01/05); *Ntaganda* (ICC-01/04-02/06); *Harun and Kushayb* (ICC-02/05-01/07); *Ruto and Sang* (ICC-01/09-01/11); *L Gbagbo* (ICC-02/11-01/11); *Mudacumura* (ICC-01/04-01/12); *Bemba et al.* (ICC-01/05-01/13).

⁶ *Ruto and Sang* (ICC-01/09-01/11); *Bemba et al.* (ICC-01/05-01/13).

⁷ In none of these seven cases has a decision on the confirmation of charges been issued, except for the case against *Ruto and Sang*, where judicial notice of a possible change in the legal characterization of the facts under Art 25(3)(b) and (c) was issued after the charges had been confirmed.

⁸ *Lubanga* Trial Judgment (n 1) paras 997–8. See also *Lubanga* Confirmation Decision (n 1) para. 320.

⁹ *Katanga* Trial Judgment (n 1) paras 1384–5.

¹⁰ Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, AC, ICC, 13 July 2006, para. 33; Judgment on the Appeal of Mr Germain Katanga against the Decision of Pre-Trial Chamber I entitled ‘Decision on the Defence Request Concerning Languages’, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-522, AC, ICC, 27 May 2008, paras 38–9; Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled ‘Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Art 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’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1486, AC, ICC, 21 October 2008, para. 40; Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 28 July 2010 entitled ‘Decision on the Review of the Detention of Mr Jean-Pierre Bemba Gombo Pursuant to Rule 118(2) of the Rules of Procedure and Evidence’, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1019, AC, ICC, 19 November 2010, note 74.

¹¹ *Mudacumura* arrest warrant decision (n 2) para. 63. See *Katanga* Trial Judgment (n 1) paras 40, 57, and 1395. See also V Nerlich, ‘The Status of ICTY and ICTR Precedent in Proceedings before the ICC’ in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff 2009) 317–20; B Goy, ‘Individual Criminal Responsibility before the International Criminal Court: A Comparison with the Ad Hoc Tribunals’ (2012) 12 *International Criminal Law Review* 1, 3–6.

¹² S Finnin, *Elements of Accessorial Modes of Liability: Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court* (Leiden: Martinus Nijhoff 2012) 33–6, and 179–80. The practice of the Special Panels for Serious Crimes in East Timor is not considered in this chapter because their judgments predominantly involve low-level perpetrators and it is often difficult to discern therein the elements of the form(s) of liability applied in the cases. See G Boas et al., *International Criminal Law Practitioner Library: Forms of Responsibility in International Criminal Law* vol. I (Cambridge: Cambridge University Press 2007) 377.

23.2 Ordering, Instigating, and Planning (Article 25(3)(b) of the ICC Statute)

23.2.1 Ordering

23.2.1.1 Introduction

Ordering has long been recognized as a mode of liability for international crimes.¹³ Accordingly, Article 25(3)(b) of the ICC Statute establishes that an individual will be criminally responsible if he ‘orders … the commission of such a crime which in fact occurs or is attempted’. However, the meaning of the term ‘orders’ used in this provision is not explained in the ICC Statute. Neither Article 25 nor Article 33 defines it.

To date, the ICC has made use of the mode of liability of ordering under Article 25(3)(b) in several cases.¹⁴ In the *Kony and Others* case, Pre-Trial Chamber II found reasonable grounds to believe that Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen ordered direct attacks against the civilian population, killing and enslaving civilians, and pillaging property in Uganda in 2003–4.¹⁵ In the *Mudacumura* case, Pre-Trial Chamber II found reasonable grounds to believe that Sylvestre Mudacumura ordered direct attacks against the civilian population, raping, torturing, mutilating, and killing civilians, imposing cruel treatment and violating the civilians’ dignity, and pillaging and destroying property in the DRC in 2009–10.¹⁶ In the *Bemba and Others* case, Pre-Trial Chamber II found reasonable grounds to believe that Jean-Pierre Bemba had ordered the commission of offences against the administration of justice since early 2012, namely the presentation of evidence that he knew was false or forged, the coaching of Defence witnesses called before the ICC, and the transfer of money to the latter during the trial held

¹³ Art II(2)(b) Control Council Law No. 10; Art 49 Geneva Convention I; Art 50 Geneva Convention II; Art 129 Geneva Convention III; Art 146 Geneva Convention IV; Art 7(1) Statute of the ICTY, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, Annex ('ICTY Statute'); Art 6(1) Statute of the ICTR, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Annex ('ICTR Statute'); Art 2(3)(b) 1996 ILC Draft Code of Crimes.

¹⁴ The Court has ruled on allegations of ordering the commission of crimes in other cases, but under Art 25(3)(a) of the Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute'). E.g. *Banda and Jerbo* Confirmation Decision (n 1) para. 155; *Blé Goudé* arrest warrant decision (n 1) para. 34.

¹⁵ Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, *Kony et al., Situation in Uganda*, ICC-02/04-01/05-53, PTC II, ICC, 27 September 2005, 12–19; Warrant of Arrest for Vincent Otti, *Kony et al., Situation in Uganda*, ICC-02/04-01/05-54, PTC II, ICC, 8 July 2005, 12–20; Warrant of Arrest for Okot Odhiambo, *Kony et al., Situation in Uganda*, ICC-02/04-01/05-56, PTC II, ICC, 8 July 2005, 10–12; Warrant of Arrest for Dominic Ongwen, *Kony et al., Situation in Uganda*, ICC-02/04-01/05-57, PTC II, ICC, 8 July 2005, 9–10. Additional allegations stand for ordering the enlistment of children, the imposition of cruel treatment and enslavement of civilians, and the infliction of serious bodily injury and suffering. See *Kony* arrest warrant (n 15) 13, 15, 17–19; *Otti* arrest warrant (n 15) 13, 15, 17–19; *Odhiambo* arrest warrant (n 15) paras 10–11; *Ongwen* arrest warrant (n 15) 9–10. So far, these warrants of arrest remain unexecuted. Another warrant alleging responsibility for ordering was withdrawn upon the death of the suspect (Decision to Terminate the Proceedings against Raska Lukwya, *Kony et al., Situation in Uganda*, ICC-02/04-01/05-248, PTC II, ICC, 11 July 2007).

¹⁶ *Mudacumura* arrest warrant decision (n 2) paras 64 and 69.

against him.¹⁷ In the *Ruto and Sang* case, Trial Chamber V(a) gave notice that the legal characterization of the facts and circumstances described in the charges may be subject to change in the eventual judgment to accord with liability for ordering, because, *inter alia*, William Ruto allegedly gave instructions for the perpetrators to carry out acts of killing and displacement of the civilian population in Kenya in 2007–8.¹⁸

In the *Ntaganda* case allegations are pending before Pre-Trial Chamber II that Bosco Ntaganda issued orders for his subordinates to commit crimes of murder, attacks against the civilian population and protected objects, forcible transfer, rape, pillaging, destruction of property, and training and using children under the age of 15 to participate actively in hostilities in the DRC in 2002–3.¹⁹ Similarly, in the *Laurent Gbagbo* case charges are pending before Pre-Trial Chamber I that Mr Gbagbo issued orders to his subordinates to carry out actions, such as the purchase of weapons or the containment of demonstrators, that led to the commission of murders, rapes, inhumane acts, and persecution in Côte d'Ivoire in 2010–11.²⁰

Finally, in the *Katanga and Ngudjolo* case the prosecutor submitted that the suspects ordered their subordinates to attack the civilian population of Bogoro on or around 24 February 2003, but Pre-Trial Chamber I did not entertain this allegation upon finding substantial grounds to believe that they were responsible under Article 25(3)(a) of the ICC Statute.²¹ Furthermore, in the *Mbarushimana* case the Court highlighted the distinction between ordering and the mode of liability envisaged in Article 25(3)(d).²²

23.2.1.2 Material elements

Pursuant to the case law of the ICTY, the ICTR, and hybrid tribunals such as the SCSL and the ECCC, ordering consists in making use of a ‘position of authority’ to command or instruct—and thereby to convince, persuade, compel, or impel—an individual to carry out the material elements of a crime.²³ An order may be limited to carry

¹⁷ Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido, *Bemba et al., Situation in the Central African Republic*, ICC-01/05-01/13-1-Red2-tENG, PTC II, ICC, 20 November 2013, 3, and paras 15 and 23.

¹⁸ Decision on Applications for Notice of Possibility of Variation of Legal Characterization, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1122, TC V(A), ICC, 12 December 2013, para. 44; Decision on Applications for Notice of Possibility of Variation of Legal Characterisation—Annex A: Reproduction of Annex A of the Prosecution Additional Submission (ICC-01/09-01/11-943-AnxA), *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1122-AnxA, 12 December 2013, paras 109 and 117.

¹⁹ Annex A: Prosecution’s Submission of Document Containing the Charges and the List of Evidence, *Ntaganda, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-203-AnxA, 10 January 2014, 56–7, 59–60, and paras 155–6; Annex A9: Prosecution’s Submission of its Presentation of Evidence at the Confirmation of Charges Hearing, *Ntaganda, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-258-AnxA9, 14 February 2014, 2.

²⁰ Prosecution’s Submission of Document Amendé de Notification des Charges, l’Inventaire Amendé des Éléments de Preuve à Charge, and le Tableau Amendé des Éléments Constitutifs des Crimes, and Response to Issues Raised by Pre-Trial Chamber I—Annexe 1: Document Amendé de Notification des Charges, *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-592-Anx1, 13 January 2014, paras 222 and 232–5.

²¹ *Katanga and Ngudjolo* Confirmation Decision (n 1) paras 470–1.

²² *Mbarushimana* Confirmation Decision (n 1) paras 274, 278–81, 286, 289.

²³ *Mudacumura* arrest warrant decision (n 2) para. 63, referring to Appeal Judgment, *Kordić and Čerkez*, IT-95-14/2-A, AC, ICTY, 17 December 2004, para. 28; Appeal Judgment, *Dragomir Milošević*,

out one isolated crime. It may also consist of general directions to act in a particular way whenever a given set of circumstances takes place.²⁴

It is not necessary to prove a formal superior-subordinate relationship in order to establish the existence of a position of authority to order the perpetrator the commission of the crime.²⁵ It is enough that the individual issuing the order exercises a significant influence over the perpetrator, pursuant to which the latter obeys the order of the former.²⁶ Therefore, criminal responsibility for ordering under the ICC Statute could be ascribed not only to hierarchical superiors in regular army units, but also to commanders of irregular forces (such as paramilitary groups) and political party leaders.²⁷

For responsibility to arise for ordering, the perpetrator must be sufficiently identified (i.e. by reference to the group or unit to which he belongs), but need not be individually identified.²⁸ Otherwise, it is not possible to evaluate whether the individual ordering the crime enjoyed a ‘position of authority’ over the perpetrator.

IT-98-29-1-A, AC, ICTY, 12 November 2009, para. 290. See also Appeal Judgment, *Semanza*, ICTR-97-20-A, AC, ICTR, 20 May 2005, para. 361; Appeal Judgment, *Gacumbitsi*, ICTR-97-20-A, AC, ICTR, 7 July 2006, para. 182; Appeal Judgment, *Ntagerura et al.*, ICTR-99-46-A, AC, ICTR, 7 July 2006, para. 365; Appeal Judgment, *Galić*, IT-98-29-A, AC, ICTR, 30 November 2006, para. 176; Judgment, *Brima et al.*, SCSL-04-16-T, TC II, SCSL, 20 June 2007, para. 772; Judgment, *Fofana and Kondewa*, SCSL-04-14-T, TC I, SCSL, 2 August 2007, para. 225; Appeal Judgment, *Sesay et al.*, SCSL-04-15-A, AC, SCSL, 26 October 2009, para. 164; Appeal Judgment, *Boškoski and Tarčulovski*, IT-04-82-A, AC, ICTY, 19 May 2010, para. 160; Judgment, *Case File 001/18-07-2007/ECCC/TC (Duch)*, E188, ECCC, 26 July 2010, para. 527; Appeal Judgment, *Kalimanzira*, ICTR-05-88-A, AC, ICTR, 20 October 2010, para. 213; Appeal Judgment, *Setako*, ICTR-04-81-A, AC, ICTR, 28 September 2011, para. 240; Appeal Judgment, *Bagosora and Nsengiyumva*, ICTR-98-41-A, AC, ICTR, 14 December 2011, para. 277; Appeal Judgment, *Ndindiliyimana et al.*, ICTR-00-56-A, AC, ICTR, 11 February 2014, paras 291 and 365.

²⁴ Finnin (n 12) 45.

²⁵ *Kordić and Čerkez* Appeal Judgment (n 23) para. 28; *Semanza* Appeal Judgment (n 23) paras 361 and 363; Appeal Judgment, *Kamuhanda*, ICTR-99-54A-A, AC, ICTR, 19 September 2005, para. 75; *Gacumbitsi* Appeal Judgment (n 23) paras 181–2; *Galić* Appeal Judgment (n 23) para. 176; *Brima et al.* Trial Judgment (n 23) para. 772; *Fofana and Kondewa* Trial Judgment (n 23) para. 225; Appeal Judgment, *Nahimana et al.*, ICTR-99-52-A, AC, ICTR, 28 November 2007, note 1162; Judgment, *Sesay et al.*, SCSL-04-15-T, TC I, SCSL, 2 March 2009, para. 273; *Dragomir Milošević* Appeal Judgment (n 23) para. 290; *Boškoski and Tarčulovski* Appeal Judgment (n 23) para. 164; *Duch* Trial Judgment (n 23) para. 527. Cassese, Finnin and Goy hold the same opinion (A Cassese, *International Criminal Law* (Oxford: Oxford University Press 2003) 193; Finnin (n 12) 55–6, Goy (n 11) 54). By contrast, Werle considers that a superior-subordinate relationship in the military sense is typically required (G Werle, *Principles of International Criminal Law* 2nd edn (The Hague: TMC Asser Press 2009) 181 nn 486); Diarra and D’Huart suggest that at least authority over the perpetrator is required (Diarra and D’Huart (n 2) 824); Weernink argues that a superior-subordinate relationship should be clearly separated from the ‘authority’ required for ordering (A Weernink, ‘*The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20, Judgment, Appeals Chamber (20 May 2005)’ (2007) 6 *Chinese Journal of International Law* 115, 121); and Ambos is of the opinion that this requirement is currently a controversial one (K Ambos, *La parte general del derecho penal internacional: bases para una elaboración dogmática* (Berlin: Konrad-Adenauer-Stiftung 2005) 274). See also C Del Ponte, ‘Investigation and Prosecution of Large-Scale Crimes at the International Level: The Experience of the ICTY’ (2006) 4 *Journal of International Criminal Justice* 539, 548.

²⁶ Judgment, *Strugar*, IT-01-42-T, TC II, ICTY, 31 January 2005, para. 331; *Semanza* Appeal Judgment (n 23) para. 361. See also *Gacumbitsi* Appeal Judgment (n 23) para. 182; Judgment, *Muvunyi*, ICTR-00-55A-T, TC II, ICTR, 12 September 2006, para. 467. See also V Hamilton and H Kelman, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (New Haven: Yale University Press 1989) 77; Boas et al. (n 12) 365, 369–70.

²⁷ *Semanza* Appeal Judgment (n 23) para. 363; *Kamuhanda* Appeal Judgment (n 25) para. 76; *Gacumbitsi* Appeal Judgment (n 23) para. 187. See also H Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart Publishing 2009) 136.

²⁸ *Boškoski and Tarčulovski* Appeal Judgment (n 23) para. 75; Appeal Judgment, *Renzaho*, ICTR-97-31-A, AC, ICTR, 1 April 2011, para. 320.

Ordering requires that an individual instructs the perpetrator to commit a crime. This implies in all cases a positive action, and excludes ordering by omission.²⁹ Consequently, an omission can never give rise to responsibility for ordering. However, an order need not be in a particular form to give rise to criminal responsibility. Orders entailing criminal responsibility can be oral or written,³⁰ explicit or implicit.³¹ For instance, an express order to conduct a lawful military operation may be accompanied by an implied order to commit a crime.

The existence of an order to commit a crime can be proved not only with direct evidence, but also with circumstantial evidence.³² If circumstantial evidence is used to prove the existence of an order, the latter must be the only reasonable conclusion from the proven facts.³³ In this regard, although the presence at the scene of the crime of the individual giving the order may be a relevant factor to deduce that he ordered the commission of the crime,³⁴ such presence is not required for responsibility to arise.³⁵ An individual's omissions can also be taken into account as circumstantial evidence to prove the existence of an order,³⁶ although the omissions alone cannot amount to an order.

Orders need not be transmitted directly to the perpetrator of the crime.³⁷ An order to commit a crime may be transmitted through several levels in a chain of

²⁹ Appeal Judgment, *Blaškić*, IT-95-14-A, AC, ICTY, 29 July 2004, para. 660; *Galić* Appeal Judgment (n 23) para. 176; *Sesay* et al. Appeal Judgment (n 23) para. 164; *Dragomir Milošević* Appeal Judgment (n 23) para. 267; *Bagosora and Nsengiyumva* Appeal Judgment (n 23) para. 277. See also *Nahimana* et al. Appeal Judgment (n 25) para. 481, referring to *Kordić and Čerkez* Appeal Judgment (n 23) para. 28; *Semanza* Appeal Judgment (n 23) para. 361; *Kamuhanda* Appeal Judgment (n 25) [75]; *Gacumbitsi* Appeal Judgment (n 23) para. 182; *Ntagerura* et al. Appeal Judgment (n 23) para. 365.

³⁰ Judgment, *Blaškić*, IT-95-14-T, TC, ICTY, 3 March 2000, para. 281; *Kamuhanda* Appeal Judgment (n 25) para. 76; *Boškoski and Tarčulovski* Appeal Judgment (n 23) para. 160; *Duch* Trial Judgment (n 23) para. 527.

³¹ Judgment, *Brđanin*, IT-99-36-T, TC II, ICTY, 1 September 2004, para. 270; *Dragomir Milošević* Appeal Judgment (n 23) para. 267. See also *Finnin* (n 12) 46.

³² *Kamuhanda* Appeal Judgment (n 25) para. 76; *Galić* Appeal Judgment (n 23) paras 171, 178, and 389; *Dragomir Milošević* Appeal Judgment (n 23) para. 265; *Boškoski and Tarčulovski* Appeal Judgment (n 23) para. 160; *Kalimanzira* Appeal Judgment (n 23) para. 213. See also *Blaškić* Trial Judgment (n 30) para. 281; *Brđanin* Trial Judgment (n 31) para. 270; Judgment, *Limaj* et al., IT-03-66-T, TC II, ICTY, 30 November 2005, para. 515; Judgment, *Marić*, IT-95-11-T, TC I, ICTY, 12 June 2007, para. 442; *Brima* et al. Trial Judgment (n 23) para. 772; Judgment, *Boškoski and Tarčulovski*, IT-04-82-T, TC II, ICTY, 10 July 2008, para. 400; *Sesay* et al. Appeal Judgment (n 23) para. 164; *Ndindiliyimana* et al. Appeal Judgment (n 23) para. 291.

³³ *Kalimanzira* Appeal Judgment (n 23) para. 213.

³⁴ Other factors relevant to infer the existence of an order to commit the crimes are (i) the number of illegal acts; (ii) the number, identity, and type of troops involved; (iii) the logistics involved; (iv) the widespread occurrence of the acts; (v) the tactical tempo of operations; (vi) the modus operandi of similar illegal acts; (vii) the officers and staff involved; and (viii) the location of the commanders at the time (Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), Annex to Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council (27 May 1994) UN Doc S/1994/674, para. 58).

³⁵ Appeal Judgment, *Kupreškić* et al., IT-95-16-A, AC, ICTY, 23 October 2001, para. 365; *Dragomir Milošević* Appeal Judgment (n 23) para. 290; *Boškoski and Tarčulovski* Appeal Judgment (n 23) note 347, para. 132.

³⁶ *Galić* Appeal Judgment (n 23) paras 177–8.

³⁷ Mudacumura arrest warrant decision (n 2) para. 63, referring to *Blaškić* Trial Judgment (n 30) para. 282; Judgment, *Kordić and Čerkez*, IT-95-14/2-T, TC III, ICTY, 26 February 2001, para. 388; Judgment, *Naletilić and Martinović*, IT-98-34-T, TC I, ICTY, 31 March 2003, para. 61; Judgment, *Đorđević*, IT-05-87/1-T, TC II, ICTY, 23 February 2011, para. 1871. See also *Brđanin* Trial Judgment (n 31) para. 270; *Strugar* Trial Judgment (n 26) para. 331; *Brima* et al. Trial Judgment (n 23) para. 772; Judgment, *Vujadin Popović* et al., IT-05-88-T, TC II, ICTY, 10 June 2010, para. 1012.

command.³⁸ Any intermediate superior transmitting an order is considered to be reissuing the order and, therefore, can be held responsible for ordering the commission of the crime.³⁹ Furthermore, any intermediate superior who impliedly consents to an order to commit a crime by taking no action to oppose it can be held responsible for ordering.⁴⁰

Under Article 25(3)(b) of the ICC Statute, an individual is responsible for ordering whenever the perpetrator reaches the execution phase of a crime in compliance with such individual's order. It is therefore necessary that the perpetrator commits or at least attempts the commission of the crime in carrying out or setting in motion the order.⁴¹ Consequently, proof of a 'causal link' between the order and the conduct of the perpetrator is required.⁴² However, it is not required for the order to be a necessary condition for the commission of the crime by the perpetrator.⁴³ All that is required is that the order has a direct and substantial effect on the commission of the crime.⁴⁴ While there is little ICC case law at this time interpreting ordering under Article 25(3)(b) of the ICC Statute, the case law of the ad hoc tribunals on ordering suggests that a substantial contribution to the crime may be contemplated.⁴⁵

23.2.1.3 Mental elements

Pursuant to Article 30(1) of the ICC Statute, the intent and knowledge envisaged in this provision are generally applicable to the elements of all crimes and modes of liability.⁴⁶ Hence, they apply to ordering under Article 25(3)(b) of the ICC Statute

³⁸ *Blaškić* Trial Judgment (n 30) para. 282. The ILC shared this opinion (Report of the ILC on the Work of its 48th Session (6 May–26 July 1996), Draft Code of Crimes against Peace and Security of Mankind, UN Doc A/51/10 (1996), Art 2, commentary para. 14).

³⁹ Judgment, *Kupreškić* et al., IT-95-16-T, TC II, ICTY, 14 January 2000, para. 827, and 862; *Brima* et al. Trial Judgment (n 23) para. 574; *Boškoski and Tarčulovski* Appeal Judgment (n 23) para. 167; *Duch* Trial Judgment (n 23) para. 527; Judgment, *Taylor*, SCSL-03-01-T, TC II, SCSL, 18 May 2012, para. 476.

⁴⁰ Judgment, *Akayesu*, ICTR-96-4-T, TC I, ICTR, 2 September 1998, paras 693–4.

⁴¹ *Goy* (n 11) 53–4.

⁴² *Blaškić* Trial Judgment (n 30) para. 278 uses the expression 'in furtherance of', and Judgment, *Stakić*, IT-97-24-T, TC II, ICTY, 31 July 2003, para. 445 refers to 'executing or otherwise furthering the implementation of the order'. Judgment and Sentence, *Semanza*, ICTR-97-20-T, TC III, ICTR, 15 May 2003, para. 382 and *Naletilić and Martinović* Trial Judgment (n 37) para. 61 also refer to 'executing' the order. See also *Strugar* Trial Judgment (n 26) para. 332; *Fofana and Kondewa* Trial Judgment (n 23) para. 225; *Sesay* et al. Trial Judgment (n 25) para. 273.

⁴³ *Strugar* Trial Judgment (n 26) para. 332; *Fofana and Kondewa* Trial Judgment (n 23) para. 225; *Sesay* et al. Trial Judgment (n 25) para. 273; *Popović* et al. Trial Judgment (n 37) para. 1013.

⁴⁴ *Mudacumura* arrest warrant decision (n 2) para. 63, referring to *Kamuhanda* Appeal Judgment (n 25) paras 75–6; *Nahimana* et al. Appeal Judgment (n 25) para. 481. See also *Gacumbitsi* Appeal Judgment (n 23) para. 185; *Nahimana* et al. Appeal Judgment (n 25) para. 492; *Boškoski and Tarčulovski* Appeal Judgment (n 23) para. 160; *Duch* Trial Judgment (n 23) para. 527; *Renzaho* Appeal Judgment (n 28) para. 315; Appeal Judgment, *Taylor*, SCSL-03-01-A, AC, SCSL, 26 September 2013, paras 368 and 589; *Ndindiliyimana* et al. Appeal Judgment (n 23) paras 291 and 365.

⁴⁵ *Mbarushimana* Confirmation Decision (n 1) para. 279, referring to *Kamuhanda* Appeal Judgment (n 25) para. 76; *Popović* et al. Trial Judgment (n 37) para. 1013.

⁴⁶ A Eser, 'Mental Elements—Mistake of Fact and Mistake of Law' in A Cassease et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press 2002) 933; D Piragoff and D Robinson, 'Article 30: Mental Element' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court—Observers' Notes, Article by Article* 2nd edn (Munich: C H Beck 2008) 851.

because the latter provision does not include any mental element in its definition of this mode of liability.⁴⁷

Accordingly, an individual may be held responsible for ordering the commission of a crime under the ICC Statute if he acts (i) with a purposeful will to have a crime committed and in the knowledge that such crime will be committed in the ordinary course of events following the execution of his order (*direct intent/dolus directus* in the first degree);⁴⁸ or (ii) solely with the awareness that the material elements of a crime will occur in the ordinary course of events following the execution of his order (*oblique or indirect intent/dolus directus* in the second degree).⁴⁹

No responsibility may arise for ordering under Article 25(3)(b) of the ICC Statute if the individual giving the order is merely negligent.⁵⁰ Conversely, neither Articles 25(3)(b) and 30(2) of the ICC Statute nor the ICC case law to date require the individual issuing the order to act driven by the ulterior intent/*dolus specialis* of the crime committed by the perpetrator carrying out his order.⁵¹ By contrast, due to the different interpretations of Article 30 of the ICC Statute made to date,⁵² it is still not settled whether an individual may be held liable for ordering under Article 25(3)(b) where he issues an order (i) with the awareness of the substantial likelihood that the material elements of the crime will

⁴⁷ Diarra and D'Huart (n 2) 823; Finnin (n 12) 180, 197; Goy (n 11) 55 and 57.

⁴⁸ Kordić and Čerkez Appeal Judgment (n 23) para. 29; Ntagerura et al. Appeal Judgment (n 23) para. 365; Nahimana et al. Appeal Judgment (n 25) para. 481; Boškoski and Tarčulovski Appeal Judgment (n 23) para. 68; Duch Trial Judgment (n 23) para. 528; Taylor Appeal Judgment (n 44) note 1289, and para. 589; Ndindiliyimana et al. Appeal Judgment (n 23) paras 297 and 300. This mental element is also referred to with the expressions *dol spécial*, *dolo intenzionale*, *dolo directo de primer grado*, *прямой умысел*, *直接故意*, and *Absicht*.

⁴⁹ Mudacumura arrest warrant decision (n 2) paras 63 and 67. See also Blaškić Appeal Judgment (n 29) para. 42; Kordić and Čerkez Appeal Judgment (n 23) para. 30; Strugar Trial Judgment (n 26) para. 333; Ntagerura et al. Appeal Judgment (n 23) note 733; Galić Appeal Judgment (n 23) paras 152 and 157; Nahimana et al. Appeal Judgment (n 25) para. 481; Appeal Judgment, Martić, IT-95-11-A, AC, ICTY, 8 October 2008, paras 221–3; Boškoski and Tarčulovski Appeal Judgment (n 23) paras 68 and 172; Duch Trial Judgment (n 23) para. 528; Judgment and Sentence, Kanyarukiga, ICTR-02-78-T, TC II, ICTR, 1 November 2010, note 1708; Renzaho Appeal Judgment (n 28) para. 315; Bagosora and Nsengiyumva Appeal Judgment (n 23) note 642; Taylor Appeal Judgment (n 44) note 1289 and para. 589; Ndindiliyimana et al. Appeal Judgment (n 23) paras 297 and 300. This mental element is also referred to with the expressions *dol général*, *dolo diretto*, *dolo directo de segundo grado*, *косвенный умысел*, *القصد غير المباشر*, *间接故意* and *direkter Vorsatz*. See also Finnin (n 12) 60; M Badar, *The Concept of Mens Rea in International Criminal Law: The Case of a Unified Approach* (Oxford: Hart Publishing 2013) 335.

⁵⁰ Lubanga Confirmation Decision (n 1) note 438; Bemba Confirmation Decision (n 1) para. 360.

⁵¹ Werle (n 25) 182; Goy (n 11) 55. Cf. Boas et al. (n 12) 352; R Clark, ‘Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Court’s First Substantive Law Discussion in the Lubanga Dyilo Confirmation Proceedings’ (2008) 19 *Criminal Law Forum* 519, 547; K Ambos, *Treatise on International Criminal Law: Foundations and General Part* vol. I (Oxford: Oxford University Press 2013) 163.

⁵² Reading Art 30 as inclusive of *dolus eventualis*, Cassese (n 25) 176; Piragoff and Robinson (n 46) 860 nn 22; M Badar, ‘The Mens Rea Enigma in the Jurisprudence of the International Criminal Court’ in L van den Herik and C Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff 2012) 534; Badar (n 49) 425. For the opposite view, E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: TMC Asser Press 2003) 51–2; W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press 2010) 476; Finnin (n 12) 172–3, 176, 185. For an ambivalent view, see J Olin et al. (n 2) 739–40.

result in the ordinary course of events from the execution of his order, and (ii) accepting or reconciling himself with this situation (conditional intent/*dolus eventualis*).⁵³

Pursuant to the case law of ICC Pre-Trial Chamber I, which includes conditional intent/*dolus eventualis* within Article 30 of the ICC Statute,⁵⁴ the mental element for ordering under the ICC Statute will be satisfied where an individual issues an order, and his acceptance of the commission of the ensuing crime can be inferred from the fact that he gave the order in the awareness of the substantial risk that the crime would be committed upon the implementation of the order. By contrast, pursuant to the case law of ICC Pre-Trial Chamber II, which excludes conditional intent/*dolus eventualis* from Article 30 of the ICC Statute,⁵⁵ it is necessary that an individual issues an order at least with the awareness of the virtual or practical certainty that the crime will be committed in the execution of the order.

Against this background, Trial Chamber I adopted a somewhat contradictory approach to the issue of conditional intent/*dolus eventualis*. On the one hand, it stated that this type of intent is excluded from Article 30(2) of the ICC Statute relying on the literal and contextual interpretation provided by ICC Pre-Trial Chamber II.⁵⁶ On the other hand, when defining the content of the expression ‘awareness that it [a consequence] will occur in the ordinary course of events’ provided for in Article 30(2) of the ICC Statute, it accepted that criminal liability may arise in cases of awareness of the substantial likelihood that the material elements of a crime will result from the conduct at hand (for instance, the execution of an order).⁵⁷

⁵³ *Stakić* Trial Judgment (n 42) paras 445 and 587; *Taylor* Appeal Judgment (n 44) note 1289 and para. 589. The standard defined by the ad hoc tribunals in other cases for a mental element lower than direct intent may include conditional intent/*dolus eventualis* ('ordering with such awareness [of the substantial likelihood that a crime will be committed] has to be regarded as accepting that crime'). See *Blaškić* Appeal Judgment (n 29) para. 42; *Kordić and Čerkez* Appeal Judgment (n 23) para. 30; *Martić* Appeal Judgment (n 49) paras 221–3; *Renzaho* Appeal Judgment (n 28) para. 315. For a consideration of this standard as not including conditional intent/*dolus eventualis*, see Boas et al. (n 12) 350. Conditional intent/*dolus eventualis* is also referred to with the expressions *dol éventuel*, *dolo eventuale*, *dolo eventual*, *القصد الاحتمالي*, and *bedingter Vorsatz*. The correspondence of the three mental elements in common-law systems and civil-law systems is discussed in Preparatory Commission for the International Criminal Court, Request from the Governments of Belgium, Finland, Hungary, Mexico, the Republic of Korea, and South Africa and the Permanent Observer Mission of Switzerland to the United Nations regarding the Text Prepared by the International Committee of the Red Cross on the Mental Element in the Common Law and Civil Law Systems and on the Concepts of Mistake of Fact and Mistake of Law in National and International Law (15 December 1999), PCNICC/1999/WGEC/INF/2/Add.4, 13.

⁵⁴ *Lubanga* Confirmation Decision (n 1) paras 352–4. See also *Katanga and Ngudjolo* Confirmation Decision (n 1) note 329; Decision on the Applications for Leave to Appeal the Decision on the Admission of the Evidence of Witnesses 132 and 287 and on the Leave to Appeal on the Decision on the Confirmation of Charges, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-727, PTC I, ICC, 24 October 2008, paras 15–16.

⁵⁵ *Bemba* Confirmation Decision (n 1) paras 360–9; *Ruto* et al. Confirmation Decision (n 1) paras 335–6. See also Concurring Opinion of Judge Van den Wyngaert to *Ngudjolo* Trial Judgment (n 1) paras 38–9 and 70.

⁵⁶ *Lubanga* Trial Judgment (n 1) para. 1011.

⁵⁷ Ibid., para. 1012 ('[T]he participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future. This prognosis involves consideration of the concepts of "possibility" and "probability", which are inherent to the notions of "risk" and "danger"... they must know the existence of a risk that the consequence will occur.... A low risk will not be sufficient'). For a detailed analysis of the treatment of the notion of conditional intent/*dolus eventualis* in the *Lubanga* Trial Judgment, see H Olásolo Alonso, *Tratado de Autoría y Participación en Derecho Penal Internacional* (Valencia: Tirant lo Blanch 2013) 152–4.

Pursuant to Article 30(3) of the ICC Statute, responsibility for ordering only arises where the individual issuing the order is aware that '[any relevant] circumstance exists'. Accordingly, the individual issuing the order must be aware (i) that he can exercise influence over the perpetrator to whom his order is addressed, (ii) that the order concerns an act that constitutes a crime or will lead to the commission of a crime, and (iii) that the perpetrator executing his order will act with the general mental element and any ulterior intent/*dolus specialis* required by the crime.⁵⁸ Article 30 seems also to require that the person giving the order be aware of the causal link between his order and the crime eventually committed.⁵⁹ However, the Court has still not addressed this issue.

Finally, the Court has not expressly clarified either whether the mental elements of ordering can be satisfied by proof of 'wilful blindness', i.e. by showing that the person who gave the order suspected that these circumstances existed but deliberately avoided taking steps to find out the truth.⁶⁰

23.2.1.4 Differences with perpetration

For some scholars, the concept of ordering provided for in Article 25(3)(b) of the ICC Statute, as well as in Articles 7(1) of the ICTY Statute, 6(1) of the ICTR Statute, and 6(1) of the SCSL Statute, is more related to the concept of indirect perpetration through organized structures of power (principal liability) than to the participation in crimes committed by third persons (accessorial liability), since ordering is based on the use of a hierarchical structure to ensure the commission of the crimes.⁶¹ Other scholars have even suggested that ordering under Article 25(3)(b) of the ICC Statute could indeed be considered a form of indirect perpetration.⁶²

However, since Article 25(3) of the ICC Statute as well as Articles 7(1) of the ICTY Statute, 6(1) of the ICTR Statute, and 6(1) of the SCSL Statute make an express distinction between 'ordering' and 'committing' a crime, it is necessary to determine the boundaries between indirect perpetration through organized structures of power, like the armed forces, the police, or a hierarchically organized armed group,⁶³ which gives rise to principal responsibility, and ordering as a form of accessorial liability.⁶⁴

⁵⁸ *Blaškić* Appeal Judgment (n 29) paras 40–2. See also Werle (n 25) 182 mn 488; Finnin (n 12) 195.

⁵⁹ *Mudacumura* arrest warrant decision (n 2) paras 63 and 67. See also *Duch* Trial Judgment (n 23) para. 528. Against requiring awareness of the causal link on the part of the accessory, see Finnin (n 12) 195–7.

⁶⁰ Supporting a broad possibility for the Court to make use of 'wilful blindness', see Eser (n 46) 931–3; Piragoff and Robinson (n 46) 861 mn 26. Supporting a limited possibility to resort to 'wilful blindness', see M Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective' (2008) 19 *Criminal Law Forum* 473, 496; Finnin (n 12) 174, 176, 185, 190.

⁶¹ Ambos (n 25) 196; Ambos (n 51) 163. See van Sliedregt (n 2) 108–9.

⁶² Van Sliedregt (n 52) 76; R Cryer et al. (eds), *An Introduction to International Criminal Law and Procedure* 2nd edn (Cambridge: Cambridge University Press 2010) 379.

⁶³ C Roxin, 'Straftaten im Rahmen organisatorischer Machtsapparate', *Golddammer's Archiv für Strafrecht* (GA) (1963) translated to English: C Roxin, 'Crimes as Part of Organized Power Structures' (2011) 9 *Journal of International Criminal Justice* 193, 202–4. See also Olásolo (n 27) 140–2.

⁶⁴ 'Ordering' is recognized in customary international law as a form of participation in the commission of the crime (A Eser, 'Individual Criminal Responsibility' in A Cassev et al. (eds), *The Rome Statute of*

The practice of the ICC so far shows that the existence of an order does not rule out indirect perpetration under Article 25(3)(a). For instance, in the *Muthaura and Kenyatta* case, Pre-Trial Chamber II stated that the commission of the crimes was found to have been triggered by precise instructions given by Francis Muthaura and Uhuru Kenyatta, and that such orders were ‘the most important contribution of both Mr Muthaura and Mr Kenyatta to the crimes’.⁶⁵ The orders, along with ‘additional forms of contribution’ to the crimes, such as the provision of financial and logistical support, provided substantial grounds to believe that they were criminally responsible as ‘indirect co-perpetrators’ under Article 25(3)(a) of the ICC Statute.⁶⁶ Similarly, in the *Ruto and Sang* case, Pre-Trial Chamber II found William Ruto to have given orders to commit the crimes.⁶⁷ The orders, along with Mr Ruto’s wider contribution to the commission of the crimes, led the Pre-Trial Chamber to eventually conclude that there were substantial grounds to believe that Mr Ruto was an ‘indirect co-perpetrator’ pursuant to Article 25(3)(a).⁶⁸

Conversely, there are two scenarios where individuals can be held responsible for ordering under Article 25(3)(b) without being considered indirect perpetrators under Article 25(3)(a). Firstly, instances where the individual who issues the order belongs to an organized structure of power not comprising the perpetrators of the crime, but has significant influence over the latter. Such individual cannot be an indirect perpetrator because those receiving the order are not part of the organization controlled by him. However, he is in a position of authority over the perpetrators to order the commission of the crimes. Second, cases where the individual who issues the order controls an organization comprising the perpetrators of the crime, but the organization has a limited number of members and therefore, unless the perpetrators are children, automatic compliance with the order is not guaranteed.⁶⁹ For instance, this scenario arises where the crimes are committed by paramilitary groups, small organized armed groups opposing the state and flexible terrorist organizations.

The Court has still not addressed whether indirect perpetration requires the relevant organization to have a culture of unlawful conduct.⁷⁰ If the Court answers this question in the affirmative, a third scenario will arise for individuals to be held responsible for ordering under Article 25(3)(b) without being considered indirect perpetrators

the International Criminal Court: A Commentary (Oxford: Oxford University Press 2002) 796; Ambos (n 25) 274; Werle (n 25) 181 nn 486). However, for Cassese (n 25) 194, ‘ordering’ is not a form of participation in the commission of a crime, but a preparatory act giving rise to liability on its own, regardless of whether the unlawful order is eventually carried out or not. It is submitted, however, that ICTR and ICTY case law does not sustain Cassese’s interpretation, since this case law requires that ordered crimes be committed pursuant to or supported by an order. See *Blaškić* Trial Judgment (n 30) para. 278; *Naletilić and Martinović* Trial Judgment (n 37) para. 61; *Semanza* Trial Judgment (n 42) para. 61; *Stakić* Trial Judgment (n 42) para. 445; *Kamuhanda* Appeal Judgment (n 25) para. 75; *Gacumbitsi* Appeal Judgment (n 23) para. 185.

⁶⁵ *Kenyatta et al.* Confirmation Decision (n 1) paras 375–6.

⁶⁶ *Ibid.*, paras 384, 398, and 404–6.

⁶⁷ *Ruto et al.* Confirmation Decision (n 1) paras 1903 and 197.

⁶⁸ *Ibid.*, paras 308–11, 319, and 349.

⁶⁹ The organization in this scenario will not amount to an organized structure of power. See *Katanga and Ngudjolo* Confirmation Decision (n 1) para. 518.

⁷⁰ In favour of a positive answer, C Roxin, *Täterschaft und Tatherrschaft* 7th edn (Berlin: De Gruyter 2000) 149. Supporting a negative answer, K Ambos, ‘The Fujimori Judgment. A President’s Responsibility for Crimes against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus’ (2011)

under Article 25(3)(a). According to this third scenario, ordering will be applicable where the individual issuing the order belongs to an organization comprising the perpetrators of the crime, but the organization does not have a culture of unlawful conduct (such as a regular police unit).

Lastly, it is important to note that an indirect perpetrator must always personally fulfil all the mental elements of the crime and must therefore act driven by any required ulterior intent/*dolus specialis*, whereas an individual ordering the commission of a crime need not act pursuant to the ulterior intent/*dolus specialis* required by the crime.⁷¹

23.2.2 Instigating

23.2.2.1 Introduction

Article 25(3)(b) of the ICC Statute attributes criminal responsibility to the individual who ‘solicits or induces the commission of such a crime which in fact occurs or is attempted’. The Court has noted that the notion of ‘instigating’ as found in the ICTY Statute is ‘roughly analogous to soliciting or inducing in Article 25(3)(b) of the [ICC] Statute’.⁷² In turn, the ICTY has found that ‘instigating’ requires ‘some kind of influencing the principal perpetrator by way of inciting, soliciting or otherwise inducing him or her to commit the crime’.⁷³ Similarly, for a number of scholars the criminal responsibility arising from soliciting, inducing, or inciting another individual to commit a crime can be described by the term ‘instigation’.⁷⁴

To date, the ICC has relied on instigating under Article 25(3)(b) in several cases. In the *Kony and Others* case, Pre-Trial Chamber II found reasonable grounds to believe that Joseph Kony and Vincent Otti induced the commission of rape in Uganda in 2003.⁷⁵ In the *Harun and Kushayb* case, Pre-Trial Chamber I found reasonable grounds to believe that Ahmad Harun personally encouraged the Militia/Janjaweed to attack civilians and induced the pillaging of shops, houses, and livestock in Darfur in 2003.⁷⁶ In the *Bemba and Others* case, Pre-Trial Chamber II found reasonable grounds to believe that Jean-Pierre Bemba had solicited or induced his associates to commit offences against

⁷¹ *Journal of International Criminal Justice* 154; S Bottke, ‘Criminalidad económica y derecho criminal económico en la República Federal de Alemania’ (1999) 4 *Revista Penal* 21, 25–6. The case law of the Court has still not addressed this issue, and therefore, has so far not required the existence of a culture of unlawful conduct for the application of the notion of indirect perpetration. See *Katanga and Ngudjolo* Confirmation Decision (n 1) paras 415–517.

⁷² See (n 51). ⁷³ *Mbarushimana* Confirmation Decision (n 1) note 661.

⁷⁴ Judgment, *Orić*, IT-03-68-T, TC II, ICTY, 30 June 2006, para. 271.

⁷⁵ Eser (n 64) 795; van Sliedregt (n 52) 77. See also Ambos (n 25) 275; Boas et al. (n 12) 371; Schabas (n 52) 432–3; Finnin (n 12) 62; Goy (n 11) 57; D Dimov, ‘Article 25. Individual Criminal Responsibility’ in P De Hert et al. (eds), *Code of International Criminal Law and Procedure, Annotated* (Ghent: Larcier 2013) 150.

⁷⁶ *Kony* arrest warrant (n 15) 13; *Otti* arrest warrant (n 15) 13.

⁷⁷ Decision on the Prosecution Application under Art 58(7) of the Statute, *Harun and Kushayb, Situation in Darfur, Sudan*, ICC-02/05-01/07-1-Corr, PTC I, ICC, 27 April 2007, paras 90–1 and 94; Warrant of arrest for Ahmad Harun, *Harun and Kushayb, Situation in Darfur, Sudan*, ICC-02/05-01/07-2-Corr, PTC I, ICC, 27 April 2007, 5 and 12. So far, this warrant remains unexecuted. For a critical analysis of the allegations of inducing the commission of the crimes in Darfur ratified by the Chamber against Mr Harun, see Olásolo (n 57) 653–4.

the administration of justice since early 2012, namely to present false or forged evidence, to coach Defence witnesses called before the ICC, and to transfer money to the latter during the trial held against him.⁷⁷ In the *Ruto and Sang* case, Trial Chamber V(a) gave notice that the legal characterization of the facts and circumstances described in the charges may be subject to change in the eventual judgment to accord with liability for soliciting or inducing because, *inter alia*, William Ruto allegedly (i) established a scheme of payment for the purposes of motivating and rewarding the perpetrators upon the successful killing of the civilian population and the destruction of their property, and (ii) encouraged them to commit the crimes with discriminatory rhetoric and promises of immunity in Kenya in 2007–8.⁷⁸

In the *Ntaganda* case allegations are pending before Pre-Trial Chamber II that Bosco Ntaganda, through his own behaviour and his failure to act, induced his subordinates to commit crimes of murder, attacks against the civilian population and protected objects, rape, sexual slavery, pillaging, destruction of property, and recruitment of children under the age of 15 in the DRC in 2002–3.⁷⁹ Similarly, in the *Laurent Gbagbo* case charges are pending before Pre-Trial Chamber I that Mr Gbagbo, encouraging his supporters and issuing the pertinent instructions, induced the commission of crimes of murder, rape, inhumane acts, and persecution in Côte d'Ivoire in 2010–11.⁸⁰

Lastly, in the *Katanga and Ngudjolo* judgment, Trial Chamber II made reference to the difference between instigation and indirect perpetration under Article 25(3)(a).⁸¹ Furthermore, in the *Mbarushimana* case the Court highlighted the distinction between instigating and the mode of liability envisaged in Article 25(3)(d).⁸²

23.2.2.2 Material elements

Instigating the commission of a crime has been defined in the case law of the ICC, the ICTY, the ICTR, the SCSL, and the ECCC as prompting another person to commit a crime.⁸³ In turn, commentators agree that soliciting and inducing refer to a situation where 'a person is influenced by another to commit a crime'.⁸⁴ Hence, a person

⁷⁷ *Bemba et al.* arrest warrant decision (n 17) 3–4, and paras 15 and 23.

⁷⁸ *Ruto and Sang* Regulation 55 notice decision (n 18) para. 44; *Ruto and Sang* Regulation 55 notice decision annex (n 18) paras 22 and 57.

⁷⁹ *Ntaganda* document containing the charges (n 19) 56, 60, and paras 155–6; *Ntaganda* Prosecution's submissions on confirmation (n 19) 13–14.

⁸⁰ See (n 20). ⁸¹ *Katanga* Trial Judgment (n 1) para. 1396.

⁸² *Mbarushimana* Confirmation Decision (n 1) paras 274, 278–81, 286, 289.

⁸³ *Katanga* Trial Judgment (n 1) para. 1396. See also *Akayesu* Trial Judgment (n 40) para. 482; *Blaškić* Trial Judgment (n 30) para. 280; Judgment, *Krstić*, IT-98-33-T, TC, ICTY, 2 August 2001, para. 601; Judgment, *Kvočka et al.*, IT-98-30/1-T, TC I, ICTY, 2 November 2001, paras 243 and 252; *Naletilić and Martinović* Trial Judgment (n 37) para. 60; Judgment, *Kajelijeli*, ICTR-98-44A-T, TC II, ICTR, 1 December 2003, para. 762; Judgment, *Kamuhanda*, ICTR-95-54A-T, TC II, ICTR, 22 January 2004, para. 593; Judgment, *Gacumbitsi*, ICTR-2001-64-T, TC III, ICTR, 17 June 2004, para. 279; *Kordić and Čerkez* Appeal Judgment (n 23) para. 27; *Limaj et al.* Trial Judgment (n 32) para. 514; Appeal Judgment, *Ndindabahizi*, ICTR-2001-71-A, AC, ICTR, 16 January 2007, para. 117; *Nahimana et al.* Appeal Judgment (n 25) para. 480; Appeal Judgment, *Karera*, ICTR-01-74-A, AC, ICTR, 2 February 2009, para. 317; *Duch* Trial Judgment (n 23) para. 522; *Taylor* Appeal Judgment (n 44) para. 589.

⁸⁴ K Ambos, 'Article 25: Individual Criminal Responsibility' in Triffterer (n 46) 753 nn 15. See also Eser (n 64) 796.

instigating, soliciting, or inducing the commission of a crime does not carry out any of its material elements.⁸⁵ If a person carries out any such elements, and prompts others to commit the remaining material elements of the crime, he will become a co-perpetrator.⁸⁶

The instigation of a crime may be carried out verbally, by other means of communication, and in many different ways,⁸⁷ even by omission.⁸⁸ Threats, bribery, as well as appeals to family bonds, friendship, group ideology, or even patriotism may instigate the perpetrator to commit a crime.⁸⁹

The instigation may be implicit or explicit.⁹⁰ Unlike the inchoate crime of ‘directly and publicly incit[ing] others to commit genocide’ under Article 25(3)(e) of the ICC Statute, instigation as a mode of liability under Article 25(3)(b) need not be ‘public’⁹¹ or ‘direct’.⁹² In fact, pursuant to ICTY and ICTR case law the instigator need not be present at the crime scene⁹³ and can instigate by intermediaries.⁹⁴ Likewise, instigation may be exerted over a specific individual, a larger audience, or even the public at large.⁹⁵ Although the perpetrator subject to the instigation must be sufficiently

⁸⁵ *Blaškić* judgment (n 30) para. 282; *Kordić and Čerkez* judgment (n 37) para. 388. See also Boas et al. (n 12) 361.

⁸⁶ Decision on the Defence Rule 98 bis Motion for Judgment of Acquittal, *Stakić*, IT-97-24-T, TC II, 31 October 2002, para. 107.

⁸⁷ Judgment, *Ndindabahizi*, ICTR-2001-71-I, TCI, ICTR, 15 July 2004, para. 456; Judgment, *Mpambara*, ICTR-01-65-T, TC I, ICTR, 11 September 2006, para. 18.

⁸⁸ *Blaškić* Trial Judgment (n 30) paras 270 and 280; *Kordić and Čerkez* Trial Judgment (n 37) para. 387; *Naletičić and Martinović* Trial Judgment (n 37) para. 60; *Kajelijeli* Trial Judgment (n 83) para. 762; *Kamuhanda* Trial Judgment (n 83) para. 593; *Brđanin* Trial Judgment (n 31) para. 269; *Limaj* et al. Trial Judgment (n 32) para. 514; *Orić* Trial Judgment (n 73) para. 273. On instigation by a superior’s consistent failure to prevent or punish the perpetrator’s crimes: Judgment, *Bagilishema*, ICTR-95-01A-T, TC I, ICTR, 7 June 2001, para. 50; Appeal Judgment, *Hadžihasanović and Kubura*, IT-01-47-A, AC, ICTY, 22 April 2008, para. 30; Appeal Judgment, *Strugar*, IT-01-42-A, AC, ICTY, 17 July 2008, para. 301; Sesay et al. Trial Judgment (n 25) para. 311. See also van Sliedregt (n 2) 108.

⁸⁹ As stated in the *Orić* Trial Judgment (n 73) para. 273, ‘[I]nstigation can be performed by any means’. See also *Blaškić* Trial Judgment (n 30) paras 270, 277, and 280; *Brđanin* Trial Judgment (n 31) para. 269; *Limaj* et al. Trial Judgment (n 32) para. 514. According to Ashworth, threats or any other kind of pressure may also constitute instigation (A Ashworth, *Principles of Criminal Law* 3rd edn (Oxford: Oxford University Press 1999) 481).

⁹⁰ *Blaškić* Trial Judgment (n 30) paras 270, 277, and 280; *Brđanin* Trial Judgment (n 31) para. 269; *Limaj* et al. Trial Judgment (n 32) para. 514; *Orić* Trial Judgment (n 73) para. 273; *Muvunyi* Trial Judgment (n 26) para. 464; *Brima* et al. Trial Judgment (n 23) para. 769; *Fofana and Kondewa* judgment (n 23) para. 223; *Boškoski and Tarčulovski* Appeal Judgment (n 23) para. 399; Sesay et al. Trial Judgment (n 25) para. 271; *Dorđević* Trial Judgment (n 37) para. 1870.

⁹¹ Appeal Judgment, *Akayesu*, ICTR-96-4-A, AC, ICTR, 1 June 2001, paras 474–83, reversing the finding of the Trial Chamber whereby any act of instigation must be public and direct (*Akayesu* Trial Judgment (n 40) paras 481–2). See also *Kajelijeli* Trial Judgment (n 83) para. 762; *Kamuhanda* Trial Judgment (n 83) para. 593; *Gacumbitsi* Trial Judgment (n 83) para. 279; Judgment and Sentence, *Muhimana*, ICTR-95-1B-T, TC III, ICTR, 28 April 2005, para. 504; *Orić* Trial Judgment (n 73) para. 273; *Muvunyi* Trial Judgment (n 26) para. 464; *Popović* et al. Trial Judgment (n 37) para. 1008. All these judgments follow the position adopted by the Appeals Chamber in *Akayesu*. See also Fininn (n 12) 68–9.

⁹² Id. See also Judgment, *Kayishema and Ruzindana*, ICTR-95-1-T, TC II, ICTR, 21 May 1999, para. 200; *Semanza* Trial Judgment (n 42) para. 381; *Nahimana* et al. Appeal Judgment (n 25) para. 679.

⁹³ *Nahimana* et al. Appeal Judgment (n 25) para. 660; *Boškoski and Tarčulovski* Appeal Judgment (n 23) note 347 and para. 132.

⁹⁴ *Brđanin* Trial Judgment (n 31) para. 359; *Orić* Trial Judgment (n 73) para. 273. See also Eser (n 64) 796; Ambos (n 84) 753 nn 15.

⁹⁵ *Semanza* Trial Judgment (n 42) paras 261 and 476–9; Judgment, *Nahimana* et al., ICTR-99-52-T, TCI, ICTR, 3 December 2003, para. 949; *Orić* Trial Judgment (n 73) para. 273; *Nahimana* et al. Appeal Judgment (n 25) para. 588. See also Badar (n 49) 332.

identified (i.e. by reference to the group or unit to which he belongs), he need not be individually identified.⁹⁶

According to the case law of the ad hoc and hybrid tribunals, the act of instigation, solicitation, or inducement must be a ‘factor substantially contributing to the commission of the crime’ by the perpetrator.⁹⁷ Hence, the person or group of persons prompted to commit the crime must have not already, and independently from the instigator, formed a definitive intent to commit the crime in question.⁹⁸ Nevertheless, the act of instigation is not required to be a necessary condition for the commission of the crime by the perpetrator.⁹⁹

The scarce case law of the Court to date on this mode of liability is consistent with this approach, suggesting that a substantial contribution to the crime may be contemplated under Article 25(3)(b) of the ICC Statute.¹⁰⁰ Such case law has also pointed out that a position of authority alone may not suffice to find responsibility for instigation.¹⁰¹

The instigated crime must be committed or attempted for responsibility to arise under Article 25(3)(b) of the ICC Statute.¹⁰² Only regarding the crime of incitement to commit genocide, the mere incitement without its actual commission, or attempted commission gives rise to individual criminal responsibility pursuant to Article 25(3)(e) of the ICC Statute.¹⁰³

23.2.2.3 Mental elements

Pursuant to Article 30(1) of the ICC Statute, the intent and knowledge envisaged in this provision applies to instigating under Article 25(3)(b) of the ICC Statute because the latter provision does not incorporate any mental element in its definition of this mode of liability.¹⁰⁴

⁹⁶ *Karera* Appeal Judgment (n 83) para. 318; *Boškoski and Tarčulovski* Appeal Judgment (n 23) para. 75.

⁹⁷ *Blaškić* Trial Judgment (n 30) para. 278; *Bagilishema* Trial Judgment (n 88) para. 30; *Kvočka* et al. Trial Judgment (n 83) para. 252; *Naletilić and Martinović* Trial Judgment (n 37) para. 60; *Kamuhanda* Trial Judgment (n 83) para. 590; *Kordić and Čerkez* Appeal Judgment (n 23) para. 27; *Limaj* et al. Trial Judgment (n 32) para. 514; *Orić* Trial Judgment (n 73) paras 271 and 274; *Gacumbitsi* Appeal Judgment (n 23) para. 129; *Fofana and Kondewa* Trial Judgment (n 23) para. 223; *Nahimana* et al. Appeal Judgment (n 25) para. 480; Appeal Judgment, *Fofana and Kondewa*, SCSL-04-14-A, AC, SCSL, 28 May 2008, para. 52; *Karera* Appeal Judgment (n 83) para. 317; *Sesay* et al. Trial Judgment (n 25) para. 271; *Duč* Trial Judgment (n 23) para. 522; *Taylor* Appeal Judgment (n 44) paras 368 and 589.

⁹⁸ This approach was adopted for the first time in *Stakić* Rule 98 bis Decision (n 86) para. 107. See also *Orić* Trial Judgment (n 73) para. 271.

⁹⁹ Id. See also *Kordić and Čerkez* Appeal Judgment (n 23) para. 27; *Orić* Trial Judgment (n 73) para. 274; *Gacumbitsi* Appeal Judgment (n 23) para. 129; *Fofana and Kondewa* Trial Judgment (n 23) para. 223; *Nahimana* et al. Appeal Judgment (n 25) paras 480, 502, and 660; *Karera* Appeal Judgment (n 83) para. 317; *Sesay* et al. Trial Judgment (n 25) para. 271; *Đorđević* Trial Judgment (n 37) para. 1870; *Boas* et al. (n 12) 363.

¹⁰⁰ *Mbarushimana* Confirmation Decision (n 1) para. 279, referring to *Kordić and Čerkez* Appeal Judgment (n 23) para. 27; *Gacumbitsi* Appeal Judgment (n 23) para. 129; *Boškoski and Tarčulovski* Trial Judgment (n 32) para. 399; *Popović* et al. Trial Judgment (n 37) para. 1009; *Đorđević* Trial Judgment (n 37) para. 1870. See also *Harun and Kushayb* arrest warrant decision (n 76) para. 91.

¹⁰¹ *Katanga* Trial Judgment (n 1) para. 1396.

¹⁰² *Blaškić* Appeal Judgment (n 29) para. 48; *Ndindabahizi* Appeal Judgment (n 83) para. 117.

¹⁰³ *Werle* (n 25) 169 mn 446, 180 mn 481; *Ambos* (n 84) 761 mn 34.

¹⁰⁴ See (n 47).

However, the interpretation of Article 30 of the ICC Statute as including or excluding conditional intent/*dolus eventualis* will affect the mental element required for instigation. If, following the case law of Pre-Trial Chamber I, conditional intent/*dolus eventualis* is read into Article 30,¹⁰⁵ an individual may be held responsible as an instigator in similar circumstances as those identified by the case law of the ad hoc tribunals. Accordingly, an individual will be an instigator if he acts with: (i) a purposeful will to provoke or induce the commission of the crime and the knowledge that such crime will be committed in the ordinary course of events following his conduct (direct intent/*dolus directus* in the first degree);¹⁰⁶ (ii) the sole awareness that the material elements of the crime will occur in the ordinary course of events following his acts or omissions prompting the commission of the crime (oblique or indirect intent/*dolus directus* in the second degree);¹⁰⁷ or at least (iii) the awareness of the substantial likelihood that the material elements of the crime will occur in the ordinary course of events following his conduct prompting the commission of the crime, and his acceptance of this situation (conditional intent/*dolus eventualis*).¹⁰⁸

In the latter scenario, the instigator's acceptance of the commission of the crime would be deduced from the fact that he prompts the perpetrator to commit the crime despite being aware of the substantial likelihood that the crime would be eventually committed.

By contrast, if conditional intent/*dolus eventualis* is excluded from Article 30 as concluded in the case law of Pre-Trial Chamber II,¹⁰⁹ it would be necessary for the instigator to carry out his instigating conduct with the awareness of the virtual or practical certainty that his conduct will bring about the commission of the crime.¹¹⁰

No responsibility may arise for instigating under Article 25(3)(b) of the ICC Statute if the individual acts negligently when prompting the commission of the crime. Moreover, consistently with relevant ICTY and ICTR case law¹¹¹ neither Articles 25 and 30 of the ICC Statute nor the ICC jurisprudence to date require the instigator to

¹⁰⁵ See (n 54).

¹⁰⁶ *Harun and Kushayb* arrest warrant decision (n 76) paras 93–4. See also *Kordić and Čerkez* Appeal Judgment (n 23) para. 29; *Nahimana* et al. Appeal Judgment (n 25) para. 480; *Sesay* et al. Trial Judgment (n 25) para. 271; Appeal Judgment, *Nchamihigo*, ICTR-2001-63-A, AC, ICTR, 18 March 2010, para. 61; *Boškoski and Tarčulovski* Appeal Judgment (n 23) para. 68; *Duch* Trial Judgment (n 23) para. 524; *Taylor* Appeal Judgment (n 44) note 1289 and para. 589. For additional expressions used to refer to this mental element, see (n 48).

¹⁰⁷ *Kordić and Čerkez* Appeal Judgment (n 23) paras 32 and 112; *Nahimana* et al. Appeal Judgment (n 25) para. 480; *Sesay* et al. Trial Judgment (n 25) para. 271; *Nchamihigo* Appeal Judgment (n 106) para. 61; *Boškoski and Tarčulovski* Appeal Judgment (n 23) para. 68; *Duch* Trial Judgment (n 23) para. 524; *Taylor* Appeal Judgment (n 44) note 1289 and para. 589. For additional expressions used to refer to this mental element, see (n 49).

¹⁰⁸ *Orić* Trial Judgment (n 73) para. 279 and note 773; *Boškoski and Tarčulovski* Appeal Judgment (n 23) para. 172; *Taylor* Appeal Judgment (n 44) note 1289 and para. 589. The standard defined by the ad hoc tribunals in other cases for a mental element lower than direct intent may include conditional intent/*dolus eventualis* ('Instigating with such awareness [of the substantial likelihood that a crime will be committed] has to be regarded as accepting that crime'). See *Kordić and Čerkez* Appeal Judgment (n 23) paras 32 and 112. See *Badar* (n 49) 332. For additional expressions used to refer to this mental element, see (n 53).

¹⁰⁹ See (n 55).

¹¹⁰ With regard to the position of ICC Trial Chamber I, see (nn 56–7).

¹¹¹ *Semanza* Trial Judgment (n 42) para. 388; *Orić* Trial Judgment (n 73) para. 279, note 772; Appeal Judgment, *Seromba*, ICTR-2001-66-A, AC, ICTR, 12 March 2008, paras 181–2; *Nchamihigo* Appeal Judgment (n 106) para. 61. See *Boas* et al. (n 12) 352.

act with the ulterior intent/*dolus specialis* of the prompted crime. Only the perpetrator of the crime must act pursuant to such ulterior intent/*dolus specialis*.¹¹²

Lastly, for responsibility to arise pursuant to Article 30(3) of the ICC Statute the individual prompting the perpetrator to commit the crime must also be aware that '[any relevant] circumstance exists'. Accordingly, the instigator must be aware that the prompted perpetrator acts with the general mental element and any ulterior intent/*dolus specialis* required by the definition of the crime.¹¹³ Article 30(3) seems also to require that the instigator be aware of the fact that his conduct is a factor substantially contributing to the commission of the crime. However, the Court has not addressed this issue yet.

23.2.2.4 Differences with ordering and perpetration

Instigation can be distinguished from ordering because the influence exercised by the instigator over the perpetrator is not related to a superior–subordinate relationship or an authority to order.¹¹⁴ Although family, religious, or friendship bonds, professional trust, or an ideological affinity may provide the possibility for the instigator to exert influence on the perpetrator, instigation does not presuppose any kind of authority or effective control of the instigator over the latter.¹¹⁵ Conversely, ordering requires the person issuing the order to be in a position of *de jure* (formal) or *de facto* (informal) authority over the perpetrator.¹¹⁶

Another difference between instigation and ordering lies with the type of relation required between the instigator and the perpetrator of the crime. Whereas ordering requires that the crime be committed executing or setting in motion the order, instigation only requires that the instigator's conduct be a substantially contributing factor to the commission of the crime.¹¹⁷

Lastly, an indirect perpetrator must personally fulfil all mental elements of the crime and must therefore act pursuant to the required ulterior intent/*dolus specialis*.¹¹⁸ By contrast, an individual instigating the commission of a crime need not act pursuant to the ulterior intent/*dolus specialis* required by the prompted crime.¹¹⁹

¹¹² Diarra and D'Huart (n 2) 823; Goy (n 11) 57. See Clark (n 51) 547; Badar (n 49) 333.

¹¹³ Werle (n 25) 181 nn 485, 182 nn 488.

¹¹⁴ *Nchamihigo* Appeal Judgment (n 106) para. 188; *Duch* Trial Judgment (n 23) para. 522. See also Cassese (n 25) 189; Ambos (n 51) 164.

¹¹⁵ *Brđanin* Trial Judgment (n 31) para. 359; *Semanza* Appeal Judgment (n 23) para. 257; *Orić* Trial Judgment (n 73) para. 272; *Popović* et al. Trial Judgment (n 37) para. 1008; *Dorđević* Trial Judgment (n 37) para. 1870.

¹¹⁶ See (n 26). See also Judgment, *Mrkšić* et al., IT-95-13/1-T, TC II, ICTY, 27 September 2007, para. 550; *Boškoski and Tarčulovski* Trial Judgment (n 32) para. 400; Finnin (n 12) 54–8.

¹¹⁷ See (nn 42–5 and 97–101).

¹¹⁸ *Katanga and Ngudjolo* Confirmation Decision (n 1) para. 527; *Al-Bashir* arrest warrant decision (n 1) para. 223; *Gaddafi and Al-Senussi* arrest warrant decision (n 1) para. 69; *L Gbagbo* arrest warrant decision (n 1) paras 75–6; *Blé Goudé* arrest warrant decision (n 1) paras 28 and 35; *Ruto* et al. Confirmation Decision (n 1) para. 292; *Kenyatta* et al. Confirmation Decision (n 1) para. 297; *S Gbagbo* arrest warrant decision (n 1) paras 28 and 35. See also *Lubanga* Confirmation Decision (n 1) para. 349; *Bemba* Confirmation Decision (n 1) para. 351.

¹¹⁹ See (nn 111–12).

23.2.3 Planning

23.2.3.1 Introduction

Unlike Articles 7(1) of the ICTY Statute, 6(1) of the ICTR Statute, and 6(1) of the SCSL Statute, Article 25(3) of ICC Statute does not expressly attribute criminal responsibility to the ‘planning’ of crimes.¹²⁰ Nonetheless, planning can be impliedly foreseen in Article 25(3)(b) of the ICC Statute, which refers to those who order, solicit, or induce the commission of crimes.¹²¹ Since the ICC has still not dealt with any case of planning under Article 25(3)(b),¹²² the discussion of this mode of liability is made on the basis of the case law of the ad hoc and hybrid tribunals.

23.2.3.2 Material elements

According to the case law of the ICTY, the ICTR, the SCSL, and the ECCC, responsibility for planning arises where one or more persons design an act or omission constituting a crime which is later perpetrated and such conduct has a substantial effect on the commission of the crime.¹²³ By contrast, pursuant to the literal tenor of Article 25(3)(b) and (f) of the ICC Statute, it would be sufficient that the execution phase of the planned crime be reached.

Whereas the initial case law of the ICTY required that the crimes be committed in the execution of the plan,¹²⁴ subsequently it has been clarified on appeal that it is only required that the planning be ‘a substantially contributing factor to the criminal conduct’.¹²⁵ The determination of whether a particular conduct amounts to a substantial contribution to the crime for the purposes of planning liability is assessed on a case-by-case basis in light of the evidence as a whole.¹²⁶

Responsibility may arise for planning the commission of a crime without the existence of a ‘direct’ connection between the individual planning the crime and the perpetrator thereof.¹²⁷ Moreover, the individual planning the crime need not be present

¹²⁰ *Taylor* Appeal Judgment (n 44) note 1358. See also van Sliedregt (n 2) 112.

¹²¹ Van Sliedregt (n 52) 78. As stated by V Morris and M Scharf, *The International Criminal Tribunal for Rwanda* (Ardsley: Transnational 1998) 236, the expression ‘planning’ refers to the first stage of a crime. However, Boas et al. (n 12) 371, and Goy (n 11) 58–9 argue that conduct characterized as ‘planning’ could be better covered by ‘aiding and abetting’ as envisaged in the ICC Statute.

¹²² The Court has ruled on allegations of planning the commission of crimes in several cases, but under Art 25(3)(a) of the ICC Statute. See *Banda and Jerbo* Confirmation Decision (n 1) para. 155.

¹²³ *Kordić and Čerkez* Appeal Judgment (n 23) para. 26; *Nahimana* et al. Appeal Judgment (n 25) para. 479; Appeal Judgment, *Brima* et al., SCSL-04-16-A, AC, SCSL, 22 February 2008, para. 301; *Sesay* et al. Appeal Judgment (n 23) para. 1170; *Dragomir Milošević* Appeal Judgment (n 23) para. 268; *Duch* Trial Judgment (n 23) para. 518; Appeal Judgment, *Kanyarukiga*, ICTR-02-78-A, AC, ICTR, 8 May 2012, para. 258; *Taylor* Appeal Judgment (n 44) para. 494. It is not required that the accused be the originator of the plan (*Boškoski and Tarčulovski* Appeal Judgment (n 23) note 418; *Taylor* Appeal Judgment (n 44) para. 494). See also Boas et al. (n 12) 355–6.

¹²⁴ *Blaškić* Trial Judgment (n 30) para. 278.

¹²⁵ *Kordić and Čerkez* Appeal Judgment (n 23) para. 26; *Dragomir Milošević* Appeal Judgment (n 23) para. 268. See also *Nahimana* et al. Appeal Judgment (n 25) para. 492; *Brima* et al. Appeal Judgment (n 123) para. 301; *Sesay* et al. Appeal Judgment (n 23) paras 687 and 1170; *Duch* Trial Judgment (n 23) para. 518; *Taylor* Appeal Judgment (n 44) para. 368.

¹²⁶ *Sesay* et al. Appeal Judgment (n 23) para. 769.

¹²⁷ Van Sliedregt (n 52) 80, referring to *Kordić and Čerkez* Trial Judgment (n 37) para. 386.

at the crime scene,¹²⁸ as those who plan the crimes are usually the perpetrator's superiors, with a better knowledge of the logistic and operational requirements for the execution of the crimes. Although the perpetrator implementing the plan need not be individually identified, he must be sufficiently identified (i.e. by reference to the group or unit to which he belongs).¹²⁹

23.2.3.3 Mental elements

Pursuant to Article 30(1) of the ICC Statute, the intent and knowledge envisaged in this provision apply to planning under Article 25(3)(b) of the ICC Statute because the latter provision does not provide for any mental element in its definition of this mode of liability.¹³⁰ As a result, an individual will be responsible for planning a crime if he acts with a purposeful will to have the designed crime committed and in the knowledge that such crime will be committed following his conduct (*direct intent/dolus directus* in the first degree).¹³¹ Responsibility for planning a crime will also arise if the individual acts solely with the awareness that the material elements of the crime will occur in the ordinary course of events when implementing his plan (*oblique or indirect intent/dolus directus* in the second degree).¹³²

Furthermore, planning a conduct with the awareness of the substantial likelihood that a crime will be committed when implementing the said plan implies the acceptance of the commission of the crime.¹³³ This in turn may indicate the existence of the planner's conditional intent/*dolus eventualis*.¹³⁴ As seen in previous sections, this will suffice for planning liability to arise pursuant to the case law of Pre-Trial Chamber I. By contrast, it will not suffice according to the case law of Pre-Trial Chamber II.¹³⁵ In any event, no responsibility may arise for planning under Article 25(3)(b) of the ICC Statute if the individual planning the conduct is merely negligent.

Similarly to instances of ordering and instigation,¹³⁶ those planning crimes involving an ulterior intent/*dolus specialis* are not required to act with such intent. Only the perpetrator of the planned crime must act pursuant to the required ulterior intent/*dolus specialis*.

¹²⁸ *Boškoski and Tarčulovski* Appeal Judgment (n 23) note 347 and para. 132.

¹²⁹ *Ibid.*, para. 75. ¹³⁰ See (n 47).

¹³¹ *Kordić and Čerkez* Appeal Judgment (n 23) para. 29; *Nahimana et al.* Appeal Judgment (n 25) para. 479; *Brima et al.* Appeal Judgment (n 123) para. 301; *Dragomir Milošević* Appeal Judgment (n 23) para. 268; *Boškoski and Tarčulovski* Appeal Judgment (n 23) para. 68; *Duch* Trial Judgment (n 23) para. 519; *Taylor* Appeal Judgment (n 44) para. 494. For additional expressions used to refer to this mental element, see (n 48).

¹³² *Kordić and Čerkez* Appeal Judgment (n 23) para. 31; *Nahimana et al.* Appeal Judgment (n 25) para. 479; *Brima et al.* Appeal Judgment (n 123) para. 301; *Martić* Appeal Judgment (n 49) note 553; *Dragomir Milošević* Appeal Judgment (n 23) para. 268; *Boškoski and Tarčulovski* Appeal Judgment (n 23) para. 68; *Duch* Trial Judgment (n 23) para. 519; *Taylor* Appeal Judgment (n 44) para. 494. For additional expressions used to refer to this mental element, see (n 49).

¹³³ *Kordić and Čerkez* Appeal Judgment (n 23) paras 31 and 976; *Taylor* Appeal Judgment (n 44) note 1289 and para. 494.

¹³⁴ *Badar* (n 49) 329. For additional expressions used to refer to this mental element, see (n 53).

¹³⁵ See (nn 54–5). ¹³⁶ See (nn 51, 111).

Pursuant to Article 30(3) of the ICC Statute, the planner must also be aware of the existence of any relevant circumstances. Accordingly, he must be aware that the perpetrator executing his plan acts with the general mental element required for the commission of the planned crime, and that he acts motivated by any ulterior intent/*dolus specialis* required by such crime. Article 30(3) seems also to require that the planner be aware of the fact that his conduct is a factor substantially contributing to the commission of the crime. However, as in the case of instigating, the Court has not addressed this issue yet.

23.2.3.4 Differences with ordering, instigating, and perpetration

The difference between planning and ordering lies with the fact that a position of authority is required only for ordering.¹³⁷ As a consequence, the ad hoc tribunals have considered planning to be fully encompassed by ordering where the set of facts to which the orders referred were essentially the same as those for which planning was found to have taken place.¹³⁸

Planning and instigating differ in the content of their material elements. While the former focuses on participation in the design of the crime, the latter consists of influencing the perpetrator through activities other than being involved in the design of the crime.

With regard to the distinction between planning and perpetration, it must be highlighted that individuals are not required to participate in the implementation of their plan in order to be criminally responsible for planning. Criminal responsibility for planning arises from participating in the formulation of a criminal plan or from endorsing a plan proposed by another individual.¹³⁹ As a form of accessorial liability, planning is limited to contributions during the design of a criminal plan and consequently, using the language of the ILC, cannot be a ‘decisive factor in the commission of the crimes’.¹⁴⁰ When those planning a crime also participate in the implementation of their plan, they will be responsible as co-perpetrators.¹⁴¹ Likewise, when the plan has been designed by a single individual who implements it through an organized

¹³⁷ *Kanyarukiga* Appeal Judgment (n 123) para. 258.

¹³⁸ *Kordić and Čerkez* Trial Judgment (n 37) para. 386; *Brđanin* Trial Judgment (n 31) para. 268; *Dragomir Milošević* Appeal Judgment (n 23) para. 274.

¹³⁹ *Bagilishema* Trial Judgment (n 88) para. 30. See also Judgment, *Aleksovski*, IT-95-14/1-T, TC I, ICTY, 25 June 1999, para. 61.

¹⁴⁰ Art 2(3)(e), commentary 14 of the Draft Code of Crimes against Peace and Security of Mankind (n 38), pointing out that the major role played by high-level government officials or military commanders who formulate a criminal plan is ‘often’ a decisive factor in the commission of the crimes covered by the Code. Sharing this point of view, see *United States of America v Altstoetter et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg*, Washington (1949–53), Vol. III, 954–1201; *Trial of Dr. Joseph Buhler*, Supreme National Tribunal of Poland, United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XIV, 23 (1949); van Sliedregt (n 52) 80.

¹⁴¹ *Kordić and Čerkez* Trial Judgment (n 37) para. 386; *Brđanin* Trial Judgment (n 31) para. 268. See also *Stakić* Rule 98 bis decision (n 86) para. 104; Boas et al. (n 12) 357.

structure of power, the individual will not be a mere planner but an indirect perpetrator who uses his subordinates to commit the planned crime.¹⁴²

Nevertheless, the ICTY has extended the scope of planning to include within it persons who not only elaborate a criminal plan, but also intervene during the execution of such plan. However, the criteria used by the ICTY to assess responsibility for planning are not entirely consistent in situations where the level of contribution is more significant during the planning of the crime than during its actual execution: whereas in some cases convictions for planning have been entered,¹⁴³ in other cases accused persons have been found responsible as co-perpetrators on the basis of the ‘joint criminal enterprise’ theory.¹⁴⁴

A final difference between planning and perpetration lies with the fact that planning does not require that the planner acts pursuant to the ulterior intent/*dolus specialis* of the crime.¹⁴⁵ As set out previously, this is explained by the fact that planning, ordering, and instigation are forms of accessory liability.

23.3 Aiding, Abetting, or Otherwise Assisting (Article 25(3)(c) of the ICC Statute)

23.3.1 Introduction

Pursuant to Article 25(3)(c) of the ICC Statute, an individual will be liable if he ‘aids, abets, or otherwise assists’ in the commission or attempted commission of a crime, ‘including providing the means for its commission’.¹⁴⁶ The ICC has so far understood aiding and abetting as a mode of accessory liability,¹⁴⁷ in a similar manner to the ICTY, the ICTR, and the SCSL understanding of aiding and abetting under Articles 7(1) of the ICTY Statute, 6(1) of the ICTR Statute, and 6(1) of the SCSL Statute.¹⁴⁸

The terms ‘aids’, ‘abets’, ‘otherwise assists’, and ‘providing the means’ are not defined in the ICC Statute. As a consequence, the meaning of such terms must be developed by the case law of the Court. Nevertheless, to date the Court has relied on aiding and abetting under Article 25(3)(c) in only two cases.¹⁴⁹ In the *Bemba* and

¹⁴² For the same opinion, see K Ambos, *Der Allgemeine Teil des Volkerstrafrechts: Ansätze einer Dogmatisierung* (Berlin: Duncker & Humblot 2002) 566. For an implied finding supporting the opposite point of view (responsibility for planning), see Appeal Judgment, *Krnojelac*, IT-97-25-A, AC, ICTY, 17 September 2003, paras 83–4.

¹⁴³ *Stakić* Rule 98 bis decision (n 86) paras 104–5.

¹⁴⁴ Appeal Judgment, *Kvočka* et al., IT-98-30/1-A, AC, ICTY, 28 February 2005, para. 97; Judgment, *Krajišnik*, IT-00-39-T, TC I, ICTY, 27 September 2006, para. 883; Appeal Judgment, *Krajišnik*, IT-00-39-A, AC, ICTY, 17 March 2009, para. 714.

¹⁴⁵ By contrast, an indirect perpetrator through an organized structure of power must personally fulfil all the mental elements of the crime at hand and must therefore act pursuant to the required ulterior intent/*dolus specialis*. See (n 118).

¹⁴⁶ This mode of liability is referred to in this chapter as ‘aiding and abetting’ because the ad hoc tribunals have dealt with both terms as a single concept. See Boas et al. (n 12) 307.

¹⁴⁷ *Lubanga* Trial Judgment (n 1) para. 9978; *Katanga* Trial Judgment (n 1) para. 1383–5. See also *Lubanga* Confirmation Decision (n 1) para. 320.

¹⁴⁸ Appeal Judgment, *Blagojević and Jokić*, IT-02-60-A, AC, ICTY, 9 May 2007, para. 192; *Taylor* Appeal Judgment (n 44) para. 351. See also *Duch* Trial Judgment (n 23) paras 517 and 532.

¹⁴⁹ The Court has ruled on allegations of assisting the commission of crimes in other cases, but under Art 25(3)(a) of the ICC Statute. See *Banda and Jerbo* Confirmation Decision (n 1) para. 155.

Others case, Pre-Trial Chamber II found reasonable grounds to believe that Jean-Jacques Mangenda, Fidèle Babala, and Narcisse Arido aided, abetted, or otherwise had assisted in the commission of offences against the administration of justice since early 2012, namely the coaching and bribing of Defence witnesses called before the ICC to provide false testimony, and/or the presentation of evidence that they knew was false or forged during the trial held against Jean-Pierre Bemba.¹⁵⁰ In turn, in the *Ruto and Sang* case, Trial Chamber V(a) gave notice that the legal characterization of the facts and circumstances described in the charges may be subject to change in the eventual judgment to accord with liability for aiding and abetting because, *inter alia*, William Ruto allegedly provided the perpetrators with food and weapons, contributed funds, and identified the targets of the attacks in Kenya in 2007–8.¹⁵¹

Moreover, in the *Mbarushimana* and *Ruto and Sang* cases, the Court highlighted the differences between aiding and abetting under Article 25(3)(c) and the mode of liability provided for in Article 25(3)(d) of the ICC Statute.¹⁵²

As a result, the ICC case law interpreting aiding and abetting under Article 25(3)(c) of the ICC Statute is very limited. Although scholars disagree as to whether the interpretation of aiding and abetting under the ICC Statute should follow the case law of the ad hoc tribunals,¹⁵³ the existing ICC case law has pointed out that the case law of the ad hoc tribunals may be of assistance for a better understanding of the material elements of aiding and abetting under Article 25(3)(c) of the ICC Statute.¹⁵⁴

23.3.2 Material elements

The ICTY, ICTR, and SCSL Appeals Chambers have stated that aiding and abetting consists of ‘acts or omissions which assist, encourage and/or lend moral support to the perpetration of a specific crime’.¹⁵⁵ The ad hoc and hybrid tribunals have also stated

¹⁵⁰ *Bemba et al.* arrest warrant decision (n 17) 4–6, paras 17–19 and 23.

¹⁵¹ *Ruto and Sang* Regulation 55 notice decision (n 18) para. 44; *Ruto and Sang* Regulation 55 notice decision annex (n 18) paras 56 and 103–7.

¹⁵² *Mbarushimana* Confirmation Decision (n 1) paras 274, 278–81, 286, and 289; *Ruto et al.* Confirmation Decision (n 1) para. 354.

¹⁵³ Supporting the ‘substantial’ contribution requirement established by the ad hoc tribunals, see Eser (n 64) 800–1; G Werle, ‘Individual Criminal Responsibility in Article 25 ICC Statute’ (2007) 5 *Journal of International Criminal Justice* 953, 969; Ambos (n 84) 756 nn 21; Schabas (n 52) 434–5; Kai Ambos’ Intervention in the Presentation of Evidence by the Defence, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-T-8-Red2-ENG, PTC I, ICC, 20 September 2011, 10, lines 11–16; Finnin (n 12) 146; Goy (n 11) 63–4; Dimov (n 74) 151. Against the requirement of a ‘substantial’ contribution, see Ambos (n 84) 757 nn 23; W Schabas, *An Introduction to the International Criminal Court* 4th edn (Cambridge: Cambridge University Press 2011) 228; A Kiss, ‘La contribución en la comisión de un crimen por un grupo de personas en la jurisprudencia de la Corte Penal Internacional’ (2013) 2 *InDret* 1, 16–17.

¹⁵⁴ *Mbarushimana* Confirmation Decision (n 1) para. 279, referring to Judgment, *Furundžija*, IT-95-17/1-T, TC II, ICTY, 10 December 1998, para. 249; Appeal Judgment, *Vasiljević*, IT-98-32-A, AC, ICTY, 25 February 2004, para. 102; *Blaškić* Appeal Judgment (n 29) para. 48. See also *Ruto et al.* Confirmation Decision (n 1) para. 354; *Katanga* Trial Judgment (n 1) para. 1618.

¹⁵⁵ Appeal Judgment, *Duško Tadić*, IT-94-1-A, AC, ICTY, 15 July 1999, para. 229(ii); Appeal Judgment, *Aleksovski*, IT-95-14/1-A, AC, ICTY, 24 March 2000, para. 162; *Krnojelac* Appeal Judgment (n 142) para. 33; *Vasiljević* Appeal Judgment (n 154) para. 102; *Blaškić* Appeal Judgment (n 29) paras 45–8; *Ntagerura et al.* Appeal Judgment (n 23) para. 370; Appeal Judgment, *Blagoje Simić*, IT-95-9-A, AC, ICTY, 28 November 2006, para. 85; *Blagojević and Jokić* Appeal Judgment (n 148) para. 127; Appeal Judgment,

that the support or assistance to the crime may be material or psychological, verbal or instrumental,¹⁵⁶ and close or geographically removed from the crime scene,¹⁵⁷ but must have a 'substantial effect' on the perpetration of the crime.¹⁵⁸ They have also found that the determination of the 'substantial' effect on the commission of the crime is a 'fact-based inquiry' to be made 'on a case-by-case basis in light of the evidence as a whole'.¹⁵⁹

However, according to ICTY, ICTR, and SCSL case law, the conduct of the aider and abettor need not be a necessary condition for the commission of the crime by the perpetrator.¹⁶⁰ No causal link is required to exist between the former and the

Muhimana, ICTR-95-1B-A, AC, ICTR, 21 May 2007, para. 189; *Brima et al.* Trial Judgment (n 23) para. 775; *Fofana and Kondewa* Trial Judgment (n 23) paras 228–9; *Nahimana et al.* Appeal Judgment (n 25) para. 482; *Seromba* Appeal Judgment (n 111) paras 44 and 139; Appeal Judgment, *Orić*, IT-03-68-A, AC, ICTY, 3 July 2008, para. 43; Appeal Judgment, *Muvunyi*, ICTR-00-55A-A, AC, ICTY, 29 August 2008, paras 79–80; *Karera* Appeal Judgment (n 83) para. 321; *Sesay et al.* Trial Judgment (n 25) para. 276–8; Appeal Judgment, *Mrkšić and Šljivančanin*, IT-95-13/1-A, AC, ICTY, 5 May 2009, paras 81 and 146; *Kalimanzira* Appeal Judgment (n 23) paras 74 and 86; Appeal Judgment, *Rukundo*, ICTR-2001-70-A, AC, ICTR, 20 October 2010, para. 52; Appeal Judgment, *Ntawukulilyayo*, ICTR-05-82-A, AC, ICTR, 14 December 2011, para. 214; *Taylor* Appeal Judgment (n 44) para. 401; Appeal Judgment, *Ndahimana*, ICTR-01-68-A, AC, ICTR, 16 December 2013, para. 147.

¹⁵⁶ *Furundžija* Trial Judgment (n 154) para. 231; *Orić* Trial Judgment (n 73) para. 282.

¹⁵⁷ *Blaškić* Appeal Judgment (n 29) para. 48; *Ntagerura et al.* Appeal Judgment (n 23) para. 372; *Simić* Appeal Judgment (n 155) para. 85; *Fofana and Kondewa* Appeal Judgment (n 97) para. 72; *Sesay et al.* Trial Judgment (n 25) para. 278; *Mrkšić and Šljivančanin* Appeal Judgment (n 155) para. 81; *Kalimanzira* Appeal Judgment (n 23) para. 87, and note 238; Appeal Judgment, *Lukić and Lukić*, IT-98-32/1-A, AC, ICTY, 4 December 2012, para. 425; *Taylor* Appeal Judgment (n 44) paras 370 and 480.

¹⁵⁸ See (n 155). See also Opinion and Judgment, *Duško Tadić*, IT-94-1-T, TC, ICTY, 7 May 1997, para. 688; *Furundžija* Trial Judgment (n 154) paras 233–5 and 249; *Aleksovski* Trial Judgment (n 139) para. 61; Judgment, *Rutaganda*, ICTR-96-3-T, TC I, ICTR, 6 December 1999, para. 43; Judgment and Sentence, *Musema*, ICTR-96-13-T, TC I, ICTR, 27 January 2000, para. 126; *Aleksovski* Appeal Judgment (n 155) para. 162; Appeal Judgment, *Delalić et al.*, IT-96-21-A, AC, ICTY, 20 February 2001, para. 352; Judgment, *Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, TC II, ICTY, 22 February 2001, para. 391; *Bagilishema* Trial Judgment (n 88) para. 33; Judgment, *Krnojelac*, IT-97-25-T, TC II, ICTY, 15 March 2002, para. 88; Judgment and Sentence, *Elizaphan and Gérard Ntakirutimana*, ICTR-96-10-T & ICTR-96-17-T, TC I, ICTR, 21 February 2003, para. 787; *Naletilić and Martinović* Trial Judgment (n 37) para. 63; *Kajelijeli* Trial Judgment (n 83) para. 766; *Kamuhanda* Trial Judgment (n 83) para. 597; *Brđanin* Trial Judgment (n 31) para. 271; *Kvočka et al.* Appeal Judgment (n 144) para. 90; *Gacumbitsi* Appeal Judgment (n 23) para. 140; *Ndindabahizi* Appeal Judgment (n 83) para. 117; Appeal Judgment, *Brđanin*, IT-99-36-A, AC, ICTY, 3 April 2007, para. 348; *Blagojević and Jokić* Appeal Judgment (n 148) para. 187; *Fofana and Kondewa* Appeal Judgment (n 97) para. 73; *Mrkšić and Šljivančanin* Appeal Judgment (n 155) para. 156; *Sesay et al.* Appeal Judgment (n 23) para. 1170; *Duch* Trial Judgment (n 23) para. 533; *Rukundo* Appeal Judgment (n 155) para. 52; Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, *Ayyash et al.*, STL-11-01/I/AC/R176bis, AC, STL, 16 February 2011, para. 226; *Lukić and Lukić* Appeal Judgment (n 157) para. 437; Appeal Judgment, *Perišić*, IT-04-81-A, AC, ICTY, 28 February 2013, note 99; *Taylor* Appeal Judgment (n 44) paras 362, 368, 385, 390, 475, 482; Appeal Judgment, *Šainović et al.*, IT-05-87-A, AC, ICTY, 23 January 2014, para. 1649. See also A Clapham, 'On Complicity' in M Henzelin and R Roth (eds), *Le droit pénal à l'épreuve de l'internationalisation* (Paris: LGDJ 2002) 253; J Rikhof, 'Complicity in International Criminal Law and Canadian Refugee Law: A Comparison' (2006) 4 *Journal of International Criminal Justice* 702, 706; Werle (n 25) 183 and note 254; Fininn (n 12) 135–7; Diarra and D'Huart (n 2) 825; Ambos (n 51) 164–5.

¹⁵⁹ *Blagojević and Jokić* Appeal Judgment (n 148) para. 134; *Fofana and Kondewa* Appeal Judgment (n 97) para. 75; *Kalimanzira* Appeal Judgment (n 23) para. 86; *Rukundo* Appeal Judgment (n 155) para. 52; *Ntawukulilyayo* Appeal Judgment (n 155) para. 214; *Lukić and Lukić* Appeal Judgment (n 157) para. 438; *Taylor* Appeal Judgment (n 44) para. 475.

¹⁶⁰ Appeal Judgment, *Kayishema and Ruzindana*, ICTR-95-1-A, AC, ICTR, 1 June 2001, para. 201; *Simić* Appeal Judgment (n 155) para. 85; *Brđanin* Appeal Judgment (n 158) para. 348; *Blagojević and Jokić* Appeal Judgment (n 148) paras 127 and 134; *Fofana and Kondewa* Trial Judgment (n 23) para. 229; *Sesay et al.* Trial Judgment (n 25) para. 277; *Rukundo* Appeal Judgment (n 155) para. 52; *Kalimanzira* Appeal Judgment (n 23) para. 86; *Ntawukulilyayo* Appeal Judgment (n 155) para. 214.

latter.¹⁶¹ Similarly, responsibility for aiding and abetting does not require that the aider and abettor has an effective control over the perpetrator, or that the former exercises any kind of authority or influence over the latter.¹⁶² Consequently, responsibility for aiding and abetting also arises if the perpetrator has not been identified,¹⁶³ or if the aider and abettor's participation is unknown to the perpetrator.¹⁶⁴

The ad hoc and hybrid tribunals have considered different types of contribution as sufficient to have a 'substantial effect' on the perpetration of the crimes. For instance, aiding and abetting has been found to take place where accused persons have (i) provided the weapons used to commit the crimes;¹⁶⁵ (ii) permitted the use of their resources, including subordinates under their command, for the commission of the crimes;¹⁶⁶ (iii) provided implied moral support or approval while being present at the crime scene;¹⁶⁷ (iv) prevented the victims from escaping the crime scene;¹⁶⁸ or (v) failed to prevent the commission of the crimes.¹⁶⁹

According to ICTY, ICTR, and SCSL case law, the aider and abettor's participation in the crime may take place before, during, or after the crime is committed.¹⁷⁰ It does

¹⁶¹ *Kajelijeli* Trial Judgment (n 83) para. 766; *Blaškić* Appeal Judgment (n 29) para. 48; *Simić* Appeal Judgment (n 155) para. 85; *Brđanin* Appeal Judgment (n 158) para. 348; *Mrkšić and Sljivančanin* Appeal Judgment (n 155) para. 81; *Rukundo* Appeal Judgment (n 155) para. 52; *Perišić* Appeal Judgment (n 158) note 98; *Taylor* Appeal Judgment (n 44) para. 480; *Ndahimana* Appeal Judgment (n 155) para. 149.

¹⁶² *Blagojević and Jokić* Appeal Judgment (n 148) para. 195; *Muhimana* Appeal Judgment (n 155) para. 189; *Rukundo* Appeal Judgment (n 155) para. 92. See also *Brima* et al. Appeal Judgment (n 123) para. 305; *Taylor* Appeal Judgment (n 44) para. 370.

¹⁶³ Appeal Judgment, *Krstić*, IT-98-33-A, AC, ICTY, 19 April 2004, para. 143; *Brđanin* Appeal Judgment (n 158) para. 355; *Duch* Trial Judgment (n 23) para. 534; *Taylor* Appeal Judgment (n 44) para. 370.

¹⁶⁴ *Tadić* Appeal Judgment (n 155) para. 229(ii); *Vasiljević* Appeal Judgment (n 154) para. 102; *Brđanin* Appeal Judgment (n 158) para. 349; *Kalimanzira* Appeal Judgment (n 23) para. 87. See also *Brima* et al. Appeal Judgment (n 123) paras 245 and 247; *Taylor* Appeal Judgment (n 44) para. 370.

¹⁶⁵ *Tadić* Trial Judgment (n 158) paras 680 and 684; *Brima* et al. Trial Judgment (n 23) para. 1941; *Kalimanzira* Appeal Judgment (n 23) paras 473–4; *Ndindiliyimana* et al. Appeal Judgment (n 23) para. 373.

¹⁶⁶ *Blagojević and Jokić* Appeal Judgment (n 148) paras 127, 131, and 134. See also *Krstić* Appeal Judgment (n 163) paras 137 and 144.

¹⁶⁷ *Kayishema and Ruzindana* Appeal Judgment (n 160) paras 201–2; *Blaškić* Appeal Judgment (n 29) para. 47; *Brđanin* Appeal Judgment (n 158) paras 273 and 277; *Brima* et al. Trial Judgment (n 23) paras 775, 1786, and 1940; *Fofana and Kondewa* Trial Judgment (n 23) para. 230; *Brima* et al. Appeal Judgment (n 123) para. 245; *Orić* Appeal Judgment (n 155) para. 42; *Muvunyi* Appeal Judgment (n 155) para. 80; *Sesay* et al. Appeal Judgment (n 23) para. 541; *Kalimanzira* Appeal Judgment (n 23) paras 74–5; *Lukić and Lukić* Appeal Judgment (n 157) para. 425; *Ndahimana* Appeal Judgment (n 155) para. 147. See also *Boas* et al. (n 12) 307–10; *Finnin* (n 12) 75–80.

¹⁶⁸ *Vasiljević* Appeal Judgment (n 154) paras 133–4.

¹⁶⁹ *Akayesu* Trial Judgment (n 40) paras 703–5; *Mpambara* Trial Judgment (n 87) para. 22. See also *Furundžija* Trial Judgment (n 154) paras 266–70; Judgment, *Delalić* et al., IT-96-21-T, TC II (quater), ICTY, 16 November 1998, para. 842; *Kalimanzira* Appeal Judgment (n 23) para. 74. See also W Schabas, 'Commentary' in A Klip and G Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunal: The International Criminal Tribunal for the former Yugoslavia 1997–1999*, vol 3 (Antwerp: Intersentia 2001) 753; *Cassese* (n 25) 189. Cf. *Boas* et al. (n 12) 310–15; *Diarra* and *D'Huart* (n 2) 826.

¹⁷⁰ *Blaškić* Appeal Judgment (n 29) para. 48; *Ntagerura* et al. Appeal Judgment (n 23) para. 372; *Simić* Appeal Judgment (n 155) para. 85; *Blagojević and Jokić* Appeal Judgment (n 148) para. 127; *Fofana and Kondewa* Trial Judgment (n 23) para. 229; *Ndahimana* et al. Appeal Judgment (n 25) para. 482; *Mrkšić and Sljivančanin* Appeal Judgment (n 155) para. 81; *Lukić and Lukić* Appeal Judgment (n 157) para. 425. As noted by G Fletcher, *Rethinking Criminal Law* 2nd edn (Oxford: Oxford University Press 2000) 645, aiding and abetting after the commission of the crime is aimed at ensuring the impunity of the perpetrators of the crime or the benefits from the proceeds of the crime.

not require a previous plan or agreement with the perpetrator.¹⁷¹ Hence, the assistance may even be provided after the commission of the crime on the aider and abettor's own initiative, in the absence of any prior agreement with the perpetrator.¹⁷² The contribution may therefore be temporally¹⁷³ and geographically¹⁷⁴ remote from the crime.

The drafting history of Article 25 (3)(c) of the ICC Statute shows that the drafters were cautious about including *ex post facto* aiding and abetting into such provision, and believed that a specific provision would be necessary to criminalize such conduct.¹⁷⁵ No explicit provision in this regard was incorporated into the final Statute, and scholars disagree as to the meaning of the statutory silence on this point.¹⁷⁶ To date, the Court has not clarified this issue because it has not dealt with contributions after the fact under Article 25(3)(c).¹⁷⁷

It must be highlighted that an aider and abettor may participate in a crime committed by one perpetrator or may extend his participation to all crimes committed by a group of co-perpetrators.¹⁷⁸ Nevertheless, in the case law of the ICTY the issue has arisen as to whether the acts carried out by the aider and abettor must be 'specifically directed' to assist the commission of the crime.

In the *Tadić* case, the ICTY Appeals Chamber explained the distinction between acting in pursuance of a common purpose or design to commit a crime, and aiding

¹⁷¹ *Tadić* Trial Judgment (n 158) para. 677; *Delalić* et al. Trial Judgment (n 169) paras 327–8; *Tadić* Appeal Judgment (n 155) para. 229(ii); *Krnojelac* Appeal Judgment (n 142) para. 33; *Duch* Trial Judgment (n 23) para. 534.

¹⁷² *Furundžija* Trial Judgment (n 154) para. 230; Judgment, *Haradinaj* et al., IT-04-84-T, TC I, ICTY, 3 April 2008, para. 145.

¹⁷³ *Tadić* Appeal Judgment (n 155) para. 229(ii); *Musema* Trial Judgment (n 158) para. 125; *Delalić* et al. Appeal Judgment (n 158) para. 352; *Orić* Trial Judgment (n 73) para. 681; *Brima* et al. Trial Judgment (n 23) para. 775; *Fofana and Kondewa* Appeal Judgment (n 97) paras 72 and 75; *Sesay* et al. Trial Judgment (n 25) para. 278; *Taylor* Appeal Judgment (n 44) para. 480.

¹⁷⁴ *Blaškić* Appeal Judgment (n 29) para. 48; *Strugar* Trial Judgment (n 26) para. 349; *Orić* Trial Judgment (n 73) paras 282, 285, and 681; *Ntagerura* et al. Appeal Judgment (n 23) para. 372; *Simić* Appeal Judgment (n 155) para. 85; *Brima* et al. Trial Judgment (n 23) para. 775; *Fofana and Kondewa* Appeal Judgment (n 97) paras 72 and 75; *Sesay* et al. Trial Judgment (n 25) para. 278; *Mrkšić and Šljivančanin* Appeal Judgment (n 155) para. 81; *Kalimanzira* Appeal Judgment (n 23) para. 87 and note 238; *Lukić and Lukić* Appeal Judgment (n 157) para. 425; *Perišić* Appeal Judgment (n 158) paras 39–40, and 42; *Taylor* Appeal Judgment (n 44) para. 480.

¹⁷⁵ Preparatory Committee on the Establishment of an ICC, 'Compilation of Proposals', UN Doc A/51/22, 13 September 1996, 83; Preparatory Committee on the Establishment of an International Criminal Court, 'Chairman's Text on Article B. Individual criminal responsibility', UN Doc A/AC.249/1997/WG.2/CRP.2/Add.2, 19 February 1997, 2 and note 2; Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997, Preparatory Committee on the Establishment of an ICC, UN Doc A/AC.249/1997/L.5, 12 March 1997, 21 and note 9.

¹⁷⁶ Arguing for the exclusion of complicity after the fact, see Schabas (n 52) 435; questioning complicity after the fact on the basis of the *travaux préparatoires* of the ICC Statute, see Diarra and D'Huart (n 2) 826; conditioning complicity after the fact to the provision of assistance before the completion of the crime, see Ambos (n 84) 767 nn 46; conditioning complicity after the fact to the principal perpetrator's awareness that such assistance will be provided, see Finnin (n 12) 89–90; and reading contributions after the fact in Article 25(3)(c), see Eser (n 64) 807.

¹⁷⁷ *Mbarushimana* Confirmation Decision (n 1) para. 286. See Dimov (n 74) 151.

¹⁷⁸ *Kvočka* et al. Appeal Judgment (n 144) para. 90. However, as concluded by the ad hoc tribunals, an aider and abettor cannot assist the very joint criminal enterprise pursuant to which the co-perpetrators commit the crimes because the latter is simply a means of committing a crime but not a crime in itself (*Kvočka* et al. Appeal Judgment (n 144) para. 91; *Krajisnik* Trial Judgment (n 144) para. 86).

and abetting the commission of a crime. Whereas participation in the former requires only to perform acts that are ‘in some way directed’ to the furtherance of the common plan or purpose, ‘[t]he aider and abettor carries out acts *specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime’.¹⁷⁹

Such distinction was subsequently endorsed in the *Vasiljević, Blaškić, Blagojević and Jokić, Mrkšić and Šljivančanin*, and *Lukić and Lukić* Appeal Judgments.¹⁸⁰ Furthermore, in the *Blagojević and Jokić* case, the ICTY Appeals Chamber emphasized that the reference to ‘specifically directed’ in *Tadić* was only made for the purpose of distinguishing joint criminal enterprise from aiding and abetting.¹⁸¹ As a consequence, it concluded that ‘specific direction’ is not an essential ingredient, but only an occasional implicit part of the material elements of aiding and abetting, namely providing assistance with a substantial effect on the commission of the crime.¹⁸² Hence, the analysis of aiding and abetting liability must focus on the level of assistance provided for the commission of the crime, and not on the degree of proximity between the aid and the crime.

By contrast, in the subsequent *Perišić* case, the ICTY Appeals Chamber, with Judge Liu dissenting, required as a material element of aiding and abetting that the aider and abettor provide aid ‘specifically directed’ to the commission of the crime by the perpetrator.¹⁸³ The Appeals Chamber concluded that explicit consideration of specific direction is required where the alleged aider and abettor is temporally or geographically remote from the crime scene,¹⁸⁴ particularly in cases where general assistance, which could be used for both lawful and unlawful activities, is provided. Therefore, in such cases, evidence establishing a direct link between the aid provided by an accused and the relevant crime committed by the perpetrator is necessary to enter a conviction for aiding and abetting.¹⁸⁵ As a result, the degree of proximity between the aid and the crime becomes a key factor for assessing aiding and abetting-liability.

In order to reach this conclusion in the *Perišić* case, the ICTY Appeals Chamber read the *Blagojević and Jokić* Appeal Judgment as stating that specific direction is a requisite element of aiding and abetting-liability, albeit one that may at times be satisfied by an implicit analysis of the substantial contribution.¹⁸⁶ It also concluded that the findings of the Appeals Chamber in *Mrkšić and Šljivančanin* and *Lukić and Lukić* that specific direction is ‘not an essential ingredient’ of the material elements of aiding and abetting were only ‘an attempt to summarise, in passing, the *Blagojević and Jokić*

¹⁷⁹ *Tadić* Appeal Judgment (n 155) para. 229(iii) (emphasis added).

¹⁸⁰ *Vasiljević* Appeal Judgment (n 154) para. 102(i); *Blagojević and Jokić* Appeal Judgment (n 148) para. 188, referring to *Tadić* Appeal Judgment (n 155) para. 229(iii); *Mrkšić and Šljivančanin* Appeal Judgment (n 155) para. 159; *Lukić and Lukić* Appeal Judgment (n 157) para. 424. See also *Blaškić* Appeal Judgment (n 29) para. 45.

¹⁸¹ *Blagojević and Jokić* Appeal Judgment (n 148) para. 185.

¹⁸² *Blagojević and Jokić* Appeal Judgment (n 148) para. 189; *Mrkšić and Šljivančanin* Appeal Judgment (n 155) para. 159; *Lukić and Lukić* Appeal Judgment (n 157) para. 424 (‘substantial effect’ of the aid provided on the crime committed suffices to establish a culpable link between the crime and the aider and abettor).

¹⁸³ *Perišić* Appeal Judgment (n 158) paras 36 and 41.

¹⁸⁴ *Ibid.*, paras 38–40, 42.

¹⁸⁵ *Ibid.*, paras 37–8 and 44 (need to establish a ‘direct link’ between the aid provided and the crime committed in order to demonstrate a culpable link).

¹⁸⁶ *Ibid.*, para. 33.

Appeal Judgment's holding that specific direction can often be demonstrated implicitly through analysis of substantial contribution'.¹⁸⁷

The position of the ICTY Appeals Chamber in *Perišić* was not subsequently endorsed by the SCSL Appeals Chamber in the *Taylor* case. After finding that no customary international law analysis had been carried out in *Perišić*, the SCSL Appeals Chamber, on the basis of an exhaustive review of post-Second World War case law and relevant state practice, concluded that customary international law does not require 'specific direction' for responsibility to arise as an aider and abettor.¹⁸⁸ It also found that the reference in the ICTY *Tadić* Appeal Judgment to 'specific direction' did not identify the latter as a material element of aiding and abetting, but was limited to explaining the differences between aiding and abetting and joint criminal enterprise.¹⁸⁹

After *Taylor*, the ICTY Appeals Chamber in the *Šainović and Others* case agreed with the SCSL Appeals Chamber that 'specific direction' is not an element of aiding and abetting under customary international law.¹⁹⁰ Furthermore, the ICTY Appeals Chamber found that its own analysis in *Perišić* was based on the flawed premise that the *Tadić* Appeal Judgment established a precedent with respect to specific direction, and concluded that the other judgments relied upon in *Perišić* did not clearly establish a specific direction requirement.¹⁹¹ As a result, with Judge Tuzmukhamedov dissenting, the ICTY Appeals Chamber rejected its findings in *Perišić*, and concluded that "specific direction" is not an essential ingredient of the material elements of aiding and abetting.¹⁹² By so doing and despite subsequently refusing to apply these legal findings to the *Perišić* case,¹⁹³ the Appeals Chamber has brought the focus of the analysis on aiding and abetting back to the level of assistance provided for the commission of the crime.

23.3.3 Mental elements

In addition to the generally applicable intent and knowledge provided for in Article 30 of the ICC Statute, Article 25(3)(c) of the ICC Statute expressly requires the 'purpose of facilitating the commission of such a crime' by the perpetrator.¹⁹⁴ Accordingly, an aider and abettor under the ICC Statute must have a purposeful will to bring about the crime (direct intent/*dolus directus* in the first degree),¹⁹⁵ or at least the will to assist in

¹⁸⁷ Ibid., paras 34–5 and 41.

¹⁸⁸ *Taylor* Appeal Judgment (n 44) paras 475–7, 481, and 486.

¹⁸⁹ Ibid., para. 478.

¹⁹⁰ *Šainović et al.* Appeal Judgment (n 158) para. 1649, referring to *Taylor* Appeal Judgment (n 44) paras 471–81.

¹⁹¹ Ibid., paras 1623–5.

¹⁹² Ibid., para. 1650.

¹⁹³ Decision on Motion for Reconsideration, *Perišić*, IT-04-81-A, AC, ICTY, 20 March 2014, denying a motion to reconsider filed by the Prosecutor 'based on Šainović appeals Chamber's unequivocal rejection of the *Perišić* appeals Chamber's articulation of the legal requirements for aiding and abetting'.

¹⁹⁴ Van Sliedregt (n 52) 88; Diarra and D'Huart (n 2) 827; Finnin (n 12) 180–3, 197.

¹⁹⁵ As stated by Ambos (n 84) 757 mn 23, '[t]his concept introduces a subjective threshold which goes beyond the ordinary *mens rea* requirement within the meaning of article 30'. See also Eser (n 64) 801; van Sliedregt (n 52) 93; Badar (n 60) 507; Diarra and D'Huart (n 2) 826–7; Dimov (n 74) 151. For a nuanced approach to the possible interpretation of this additional element, inferring purpose from knowledge, see Finnin (n 12) 183–4, 202. For additional expressions used to refer to this mental element, see (n 48).

the commission of the crime.¹⁹⁶ As a result, mere awareness that assistance in a crime will be the necessary outcome of one's conduct (oblique or indirect intent/*dolus direc-tus* in the second degree) does not suffice for responsibility to arise as an aider and abettor under Article 25(3)(c) of the ICC Statute.¹⁹⁷ Any other lower mental element, such as conditional intent/*dolus eventualis* or negligence, is not sufficient either.

In cases of crimes involving an ulterior intent/*dolus specialis*, it is submitted that the aider and abettor is not required to act with such ulterior intent/*dolus specialis*.¹⁹⁸ He only has to be aware that the perpetrator is driven by such intent.¹⁹⁹

¹⁹⁶ *Mbarushimana* Confirmation Decision (n 1) para. 274; *Taylor* Appeal Judgment (n 44) paras 449 and 451. See also *Presbyterian Church of Sudan v Talisman Energy Inc*, 582 F.3d 244 (2nd Circuit 2009) 259; A Reggio, 'Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for "Trading with the Enemy" of Mankind' (2005) 5 *International Criminal Law Review* 623, 646–7; H Olásolo, 'Developments in the Distinction between Principal and Accessorial Liability in Light of the First Case Law of the International Criminal Court' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff 2009) 353–4; N Farrell, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals', (2010) 8 *Journal of International Criminal Justice* 873, 882; Goy (n 11) 63; Kiss (n 153) 22, 26–7. Cf. *Doe VIII v Exxon Mobil Corporation*, 654 F.3d 11 (DC Circuit 2011) 46–7, 50.

¹⁹⁷ *Lubanga* Confirmation Decision (n 1) para. 337; *Mbarushimana* Confirmation Decision (n 1) paras 274, 281, and 289; Concurring Opinion of Judge Van den Wyngaert to *Ngudjolo* Trial Judgment (n 1) para. 25. Cf. *Tadić* Appeal Judgment (n 155) para. 229(iv); *Aleksovski* Appeal Judgment (n 155) para. 162; *Vasiljević* Appeal Judgment (n 154) para. 102(ii); *Blaškić* Appeal Judgment (n 29) paras 45–6 and 49–50; Appeal Judgment, *Elizaphan and Gérard Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, AC, ICTR, 13 December 2004, para. 508; *Kvočka* et al. Appeal Judgment (n 144) para. 88; *Ntagerura* et al. Appeal Judgment (n 23) para. 370; *Simić* Appeal Judgment (n 155) para. 86; *Brđanin* Appeal Judgment (n 158) para. 484; *Blagojević and Jokić* Appeal Judgment (n 148) paras 127 and 221; *Nahimana* et al. Appeal Judgment (n 25) para. 482; *Brima* et al. Appeal Judgment (n 123) paras 242–3; *Seromba* Appeal Judgment (n 111) para. 56; *Fofana and Kondewa* Appeal Judgment (n 97) para. 366; *Orić* Appeal Judgment (n 155) para. 43; *Muvunyi* Appeal Judgment (n 155) para. 79; *Karera* Appeal Judgment (n 83) para. 321; *Mrkšić and Šljivančanin* Appeal Judgment (n 155) paras 49 and 159; *Sesay* et al. Appeal Judgment (n 23) para. 546; *Duch* Trial Judgment (n 23) para. 535; *Rukundo* Appeal Judgment (n 155) para. 53; *Kalimanzira* Appeal Judgment (n 23) para. 86; *Ayyash* et al. Interlocutory decision on applicable law (n 158) para. 227; *Ntawukuliyayo* Appeal Judgment (n 155) para. 222; *Lukić and Lukić* Appeal Judgment (n 157) para. 440; *Taylor* Appeal Judgment (n 44) paras 414, 436–8, 446, 483; *Nahimana* Appeal Judgment (n 155) para. 157. See also Boas et al. (n 12) 319–21. See also *Ruto and Sang* Regulation 55 notice decision annex (n 18) para. 116, exclusively referring to the 'awareness and knowledge' of an accused who may be found guilty under Art 25(3)(c) of the Statute. For additional expressions used to refer to this mental element, see (n 49).

¹⁹⁸ *Krnojelac* Appeal Judgment (n 142) para. 52; *Vasiljević* Appeal Judgment (n 154) paras 102 and 142; *Krstić* Appeal Judgment (n 163) paras 140–1; *Blaškić* Appeal Judgment (n 29) para. 46; *Ntakirutimana* Appeal Judgment (n 197) paras 364 and 500–1; *Ntagerura* et al. Appeal Judgment (n 23) para. 370; *Simić* Appeal Judgment (n 155) paras 86 and 101; *Blagojević and Jokić* Appeal Judgment (n 148) para. 127; *Seromba* Appeal Judgment (n 111) para. 56; *Fofana and Kondewa* Appeal Judgment (n 97) para. 367; Appeal Judgment, *Haradinaj* et al., IT-04-84-A, AC, ICTY, 19 July 2010, para. 58; *Duch* Trial Judgment (n 23) para. 535; *Lukić and Lukić* Appeal Judgment (n 157) para. 458; *Taylor* Appeal Judgment (n 44) note 1286; *Nahimana* Appeal Judgment (n 155) para. 157. See also R Dixon et al. (eds), *Archbold: International Criminal Courts. Practice, Procedure and Evidence* (London: Sweet & Maxwell 2003) ss 10–15; Boas et al. (n 12) 321–4; Werle (n 25) 184 nn 492; Finnin (n 12) 183–4; Goy (n 11) 63; van Sliedregt (n 2) 129–30; Ambos (n 51) 166. Cf. Badar (n 49) 341–2; Clark (n 51) 547.

¹⁹⁹ *Vasiljević* Appeal Judgment (n 154) para. 102; *Krstić* Appeal Judgment (n 163) paras 140–1; *Blaškić* Appeal Judgment (n 29) para. 46; *Ntagerura* et al. Appeal Judgment (n 23) para. 370; *Simić* Appeal Judgment (n 155) para. 86; *Blagojević and Jokić* Appeal Judgment (n 148) para. 127. See also K Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press 2001) 245. The ICTY and ICTR Appeals Chambers have based the distinction between aiding and abetting genocide and complicity in genocide on whether the ulterior intent/*dolus specialis* to commit genocide is shared or not. Complicity comprises a broader scope of conduct than aiding and abetting. However, 'complicity in genocide' requires that the assistance to commit genocidal acts be driven by the ulterior intent/*dolus specialis*.

The intent required by Article 25(3)(c) of the ICC Statute marks an important difference with the case law of the ad hoc and hybrid tribunals on aiding and abetting. The initial case law of the ICTY established a low mental element for aiding and abetting, namely ‘aware[ness] that one of a number of crimes will probably be committed’ by the perpetrator.²⁰⁰ Following this interpretation, the SCSL does not require that the aider and abettor knows the specific crime committed by the perpetrator. As a result, accessory liability arises from the awareness of the aider and abettor of the *substantial likelihood* that his acts will assist in the commission of *a crime* by the perpetrator.²⁰¹

Nevertheless, the ICTY and ICTR case law on appeal has subsequently established that the required standard is *knowledge* that the conduct of the aider and abettor assists in the commission of *the specific crime* by the perpetrator.²⁰² This mental element is applicable to aiding and abetting one or more crimes, regardless of whether such crimes are committed by one or more persons.²⁰³

In the *Perišić* case the direct link required between the assistance and the crime eventually committed²⁰⁴ was found to involve considerations closely related to the mental elements.²⁰⁵ On the one hand, ‘specific direction’ was not interpreted to require that the aider and abettor share the perpetrator’s intent to have the crime committed.²⁰⁶ On the other hand, the element of ‘specific direction’ was applied in this case to require from the aider and abettor more than mere knowledge of the commission of crimes by

to destroy, in whole or in part, the attacked group. Consequently, a conduct different from aiding and abetting which is part of the broader conduct of complicity may give rise to criminal responsibility only where it is motivated by a genocidal intent. See *Krnojelac* Appeal Judgment (n 142) para. 52; *Krstić* Appeal Judgment (n 163) paras 140–2; Decision on Motion for Judgment of Acquittal, *Slobodan Milošević*, IT-02-54-T, TC III, ICTY, 16 June 2004, paras 290–7; *Ntakirutimana* Appeal Judgment (n 197) paras 500–1; Judgment, *Blagojević and Jokić*, IT-02-60-T, TC I (Section A), ICTY, 17 January 2005, paras 678–80; *Semanza* Appeal Judgment (n 23) para. 316; *Rukundo* Appeal Judgment (n 155) para. 53; *Kalimanzira* Appeal Judgment (n 23) para. 86. See also *Ayyash* et al. interlocutory decision on applicable law (n 158) note 343. See also *Boas* et al. (n 12) 324–7.

²⁰⁰ *Furundžija* Trial Judgment (n 154) para. 246; *Blaškić* Trial Judgment (n 30) para. 287; *Blaškić* Appeal Judgment (n 29) para. 50. See also *Simić* Appeal Judgment (n 155) para. 86; *Nahimana* et al. Appeal Judgment (n 25) para. 482; *Karera* Appeal Judgment (n 83) para. 321; *Šainović* et al. Appeal Judgment (n 158) para. 1772.

²⁰¹ *Brima* et al. Appeal Judgment (n 123) paras 243 and 245; *Fofana and Kondewa* Appeal Judgment (n 97) para. 366; *Sesay* et al. Appeal Judgment (n 23) para. 546; *Taylor* Appeal Judgment (n 44) para. 438. See also *Ayyash* et al. interlocutory decision on applicable law (n 158) para. 227.

²⁰² *Aleksovski* Appeal Judgment (n 155) para. 163; *Kayishema and Ruzindana* Appeal Judgment (n 160) para. 186; *Krnojelac* Appeal Judgment (n 142) para. 51; *Vasiljević* Appeal Judgment (n 154) para. 102; *Blaškić* Appeal Judgment (n 29) paras 45–6; *Ntagerura* et al. Appeal Judgment (n 23) para. 370; *Simić* Appeal Judgment (n 155) para. 86; *Blagojević and Jokić* Appeal Judgment (n 148) para. 127; *Orić* Appeal Judgment (n 155) para. 43; *Muvunyi* Appeal Judgment (n 155) para. 79; *Mrkšić and Šljivančanin* Appeal Judgment (n 155) para. 159; *Haradinaj* et al. Appeal Judgment (n 198) para. 58; *Kalimanzira* Appeal Judgment (n 23) para. 86; *Perišić* Appeal Judgment (n 158) note 99 and para. 48; *Ndahimana* Appeal Judgment (n 155) para. 157. See also *Ndindiliyimana* et al. Appeal Judgment (n 23) para. 317.

²⁰³ *Kvočka* et al. Appeal Judgment (n 144) para. 90.

²⁰⁴ See (n 183).

²⁰⁵ *Perišić* Appeal Judgment (n 158) para. 48. See also *Perišić* Appeal Judgment—Joint Separate Opinion of Judges Theodor Meron and Carmel Agius (n 158) paras 3–4; *Perišić* Appeal Judgment—Opinion séparée du Juge Ramaroson sur la question de la visée spécifique dans la complicité par aide et encouragement (n 158) paras 7, 9–10.

²⁰⁶ *Perišić* Appeal Judgment (n 158) para. 48.

the perpetrator.²⁰⁷ Nevertheless, in Šainović and Others the ICTY Appeals Chamber rejected its own findings in Perišić, and highlighted that only knowledge is required for aiding and abetting-liability to arise.²⁰⁸ Thus, the ad hoc and hybrid tribunals do not require that the aider and abettor share the perpetrator's intent to commit the crime.²⁰⁹

Lastly, pursuant to Article 30(3) of the ICC Statute, the aider and abettor must be aware that his conduct substantially contributes to the execution of the material elements of the crime by the perpetrator.²¹⁰ It is not necessary that the aider and abettor knows the identity of the perpetrator or of the victim of the crime.²¹¹

23.3.4 Differences with ordering, instigating, planning, and perpetration

Aiding and abetting is different from ordering in several aspects. The material elements of aiding and abetting may be an omission proper—as opposed to an act of tacit approval or encouragement.²¹² By contrast, ordering always requires a positive action.²¹³ Moreover, a position of authority need not be established for aiding and abetting,²¹⁴ unlike the strict requirement for ordering in this regard.²¹⁵ As a consequence, responsibility for aiding and abetting arises even if the perpetrator has not been identified, whereas at least the group or unit to which the perpetrator belongs must be determined before liability may be imposed for ordering.²¹⁶

Aiding and abetting also differs from ordering in that the former does not require a causal link between the conduct of the accessory and the commission of the crime.²¹⁷ Apparently, on this basis, the ad hoc tribunals consider that aiding and abetting is fully encompassed by ordering where the set of facts to which the order referred were

²⁰⁷ Ibid., 68–9, 71. Cf. *Doe I v Nestlé USA Inc* (9th Cir) Order, 19 December 2013. As a result, the understanding of the mental elements of aiding and abetting in the Perišić case is the closest one in the case law of the ad hoc tribunals to the combined requirements of Articles 25(3)(c) and 30(2) of the ICC Statute.

²⁰⁸ Šainović et al. Appeal Judgment (n 158) para. 1649. See also Taylor Appeal Judgment (n 44) para. 474 referring to para. 437. This divergent approach to the mental element of aiding and abetting appears to reflect the different understanding of the material elements of this mode of liability. See (nn 182, 185).

²⁰⁹ Aleksovski Appeal Judgment (n 155) para. 162; Krnojelac Appeal Judgment (n 142) para. 51; Vasiljević Appeal Judgment (n 154) para. 102(ii); Blaškić Appeal Judgment (n 29) paras 45–6 and 49; Seromba Appeal Judgment (n 111) para. 56; Karera Appeal Judgment (n 83) para. 321; Sesay et al. judgment (n 25) para. 280; Mrkšić and Šljivančanin Appeal Judgment (n 155) para. 159; Haradinaj et al. Appeal Judgment (n 198) para. 58; Lukić and Lukić Appeal Judgment (n 157) para. 428; Perišić Appeal Judgment (n 158) para. 48; Taylor Appeal Judgment (n 44) paras 436 and 483; Nahimana Appeal Judgment (n 155) para. 157; Šainović et al. Appeal Judgment (n 158) para. 1649.

²¹⁰ See Cf. Taylor Appeal Judgment (n 44) para. 439.

²¹¹ On the applicability of ‘wilful blindness’, see (n 60).

²¹² Blaškić Appeal Judgment (n 29) para. 47; Ntagerura et al. Appeal Judgment (n 23) para. 370; Simić Appeal Judgment (n 155) para. 85 and note 259; Brđanin Appeal Judgment (n 158) para. 274; Nahimana et al. Appeal Judgment (n 25) para. 482; Orić Appeal Judgment (n 155) para. 43; Mrkšić and Šljivančanin Appeal Judgment (n 155) paras 49, 134, and 154. Cf. G Boas, ‘Omission Liability at the International Criminal Tribunals—A Case for Reform’ in S Darcy and J Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press 2010) 210–12, 223–4.

²¹³ See (n 29).

²¹⁴ See (n 162).

²¹⁵ See (n 23).

²¹⁶ See (nn 28, 163).

²¹⁷ See (n 161).

essentially the same as those for which aiding and abetting was found to have taken place.²¹⁸

Nevertheless, ‘preparing’ illegal orders subsequently issued by another person could qualify as ‘aiding and abetting’ under Article 25(3)(c) of the ICC Statute, where the preparation of the illegal orders is directed to assist, encourage, or lend moral support to the commission of a crime, and has a ‘substantial effect’ on the perpetration thereof.²¹⁹ The transmittal or reissuance of illegal orders will be ‘ordering’ under Article 25(3)(b) of the ICC Statute, where such conduct adds an authoritative weight to the order or otherwise contributes to its implementation.²²⁰

Aiding and abetting is different from planning in that the former does not require any sort of agreement between the accessory and the perpetrator, whereas an agreement with the accessory is a requisite for planning.²²¹ Moreover, the perpetrator need not be identified in cases of aiding and abetting, whereas he must be sufficiently identified for planning.²²²

Lastly, aiding and abetting differs from instigating and planning, as well as from ordering, because the material elements of aiding and abetting may occur before, during, or after the crime, whereas the other modes of accessory liability require that the conduct of the accused precede the perpetration of the crime itself.²²³ Moreover, the mental elements of aiding and abetting under Article 25(3)(c) of the ICC Statute (‘purpose of facilitating the commission of such crime’) are more demanding than the ones required for ordering, instigating, or planning (‘awareness of the substantial likelihood that a crime would be committed’).²²⁴

Concerning the distinction between aiding and abetting and perpetration, it must be highlighted that the contribution of an aider and abettor must have a ‘substantial’, but not ‘essential’, effect on the commission of the crime.²²⁵ As a result, in the *Lubanga* case the Majority of ICC Trial Chamber I found that:

[A]rticle 25(3)(c) establishes the liability of accessories—those who aid, abet or otherwise assist in the commission or attempted commission of the crime. In the view of the Majority, principal liability ‘objectively’ requires a greater contribution than accessory liability. If accessories must have had a *substantial* effect on the commission of the crime to be held liable, then co-perpetrators must have had, pursuant to a systematic reading of this provision, more than a substantial effect.²²⁶

With regard to the mental elements, whereas a perpetrator may be held responsible for carrying out a criminal conduct without a purposeful will to commit a crime,²²⁷ an aider and abettor under the ICC Statute must have a purposeful will to bring about the prohibited result or the will to assist in the commission of the crime.²²⁸ Knowledge

²¹⁸ *Semanza* Appeal Judgment (n 23) paras 353 and 364; *Kamuhanda* Appeal Judgment (n 25) para. 77.

²¹⁹ Finnin (n 12) 52–3. ²²⁰ See (n 39). See also Finnin (n 12) 50.

²²¹ See (nn 123, 171–2). Cf. Boas et al. (n 12) 371, and Goy (n 11) 58–9, who argue that conduct characterized as ‘planning’ can be covered by ‘aiding and abetting’ as envisaged in the ICC Statute.

²²² See (nn 129, 163). ²²³ *Nahimana* et al. Appeal Judgment (n 25) para. 482.

²²⁴ See (nn 53, 108, 133–4). ²²⁵ *Lubanga* Trial Judgment (n 1) paras 997–9.

²²⁶ Ibid., para. 997 (footnotes omitted) (emphasis in the original). ²²⁷ See (nn 54, 57).

²²⁸ See (nn 195–6).

that one's conduct assists in the commission of the crime is only sufficient to incur liability under Article 25(3)(d) of the ICC Statute for contributing to the commission of a crime by a group of persons acting with a common purpose.²²⁹ From this point of view, the ICC Statute has apparently adopted a higher standard than the ICTY and the ICTR on the mental elements of aiding and abetting, compared with that required for perpetration.²³⁰

Lastly, it is important to note that the distinction under the ICC Statute between aiding and abetting and perpetration stems from the express reliance by the ICC case law on the 'control over the crime' theory to distinguish between principals and accessories.²³¹ By contrast, the case law of the ad hoc and hybrid tribunals applies a subjective approach to distinguish between principals and accessories.²³² As a result, the distinction between aiding and abetting and perpetration in these tribunals is based on the lower mental element required for aiding and abetting.²³³

²²⁹ *Mbarushimana* Confirmation Decision (n 1) paras 274 and 289, note 658. This finding suggests that unless a requisite superior–subordinate relationship exists to charge responsibility under Art 28 of the ICC Statute, Art 25(3)(d) of the ICC Statute is the only legal basis to hold an individual criminally responsible before the Court for acting merely with knowledge of the criminal intentions of the co-perpetrators.

²³⁰ Šainović et al. Appeal Judgment (n 158) para. 1648. See also Eser (n 64) 800–1; Ambos (n 84) 757 mn 23; Schabas (n 153) 228.

²³¹ See (n 1). See also Olásolo (n 27) 291–6, 316–30.

²³² *Brđanin* Appeal Judgment (n 158) para. 431; Sesay et al. Appeal Judgment (n 23) paras 474–5; *Taylor* Appeal Judgment (n 44) para. 382. This distinction between principals and accessories is mainly made considering the attitude vis-à-vis the crime of each person involved in the commission of the crime, namely the degree of intent with which the contribution to the crime is made. See Olásolo (n 27) 32–3; Olásolo (n 196) 347–51, 353, 357–8.

²³³ *Tadić* Appeal Judgment (n 155) para. 229(iv); *Vasiljević* Appeal Judgment (n 154) para. 102; *Krajišnik* Trial Judgment (n 144) para. 885. The mental element for aiding and abetting before the ad hoc tribunals is lower than the one required for perpetration, namely 'intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose are likely to be committed'. See also Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, *Milutinović* et al., IT-99-37-AR72, AC, ICTY, 21 May 2003, para. 20; *Brđanin* Appeal Judgment (n 158) para. 365. Following this approach, before the ad hoc tribunals a person who aids and abets the commission of a crime by a group of persons involved in a 'joint criminal enterprise' (i.e. persons sharing a common purpose) becomes a co-perpetrator of the crimes committed in the execution of the common purpose only if, in addition to being aware of the fact that he is supporting the commission of said crimes with his significant but unsubstantial assistance, he shares the common purpose of the co-perpetrators (*Delalić* et al. Trial Judgment (n 169) para. 328; *Krstić* Appeal Judgment (n 163) para. 137; *Blagojević and Jokić* Trial Judgment (n 199) paras 712–13, 723–4; *Kvočka* et al. Appeal Judgment (n 144) para. 90). In turn, the co-perpetrators' will to bring about the prohibited result can be said to 'compensate' their low material contribution to the crime ('the accused must possess the requisite intent... although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes') (*Brđanin* Appeal Judgment (n 158) paras 429–30; *Krajišnik* Appeal Judgment (n 144) paras 662 and 675. See also *Dorđević* Trial Judgment (n 37) para. 1863; Appeal Judgment, *Gotovina and Markač*, IT-06-90-A, AC, ICTY, 16 November 2012, para. 89).

23.4 Conclusions

The Court considers all forms of liability envisaged in Article 25(3)(b) and (c) of the ICC Statute (ordering, instigating, planning, and aiding and abetting) to be forms of accessoryial liability.

Their common nature as accessoryial forms of liability explains that the Court has found that a substantial—not essential—effect or contribution to the commission of the crime is the link required between the crime and the conduct of the person ordering, instigating, planning, or aiding and abetting such crime. Nevertheless, during its first ten years of activities the Court has also recognized relevant differences in the material and mental elements of each form of accessoryial liability.

The material elements envisaged in Article 25(3)(b) and (c) of the ICC Statute are very broad and as a consequence the Court has found relevant differences in the way in which accessories may make their contribution to the commission of a crime. The most obvious difference relates to the moment of such contribution. Accessories can either issue instructions for a given course of action, prompt a particular behaviour, and/or design a conduct for the commission of a crime *before* such crime is committed (Article 25(3)(b)), or they can assist, encourage, or lend moral support to the commission of a crime *before, during, and even after* the crime has been perpetrated (Article 25(3)(c)). Less obvious differences in the material elements envisaged in Article 25(3)(b) and (c) of the ICC Statute concern the accessory's authority over the perpetrator of the crime, the degree of identification by the accessory of the perpetrators of the crime, and the degree of connection of the accessory with the perpetrator.

Regarding the required degree of authority of the accessory over the principal, the Court has found that the accessory must make use of his/her 'position of authority' over the perpetrator only in cases of liability for ordering under Article 25(3)(b) of the ICC Statute. Instigators, planners, and aiders and abettors are not required to enjoy the same degree of influence over the perpetrators to be found responsible. Similarly, the Court requires the existence of a causal link between the accessory's action and the crime committed by the perpetrator only to find liability for ordering. In cases of instigation, the Court appears to have followed the approach of the ad hoc and hybrid tribunals in demanding only that the instigator's conduct have an actual effect on the commission of the crime by the perpetrator. In cases of liability for aiding and abetting under Article 25(3)(c) of the ICC Statute, proof of the cause–effect relationship between the accessory's contribution and the perpetration of the crime is not required.

Regarding the accessory's connection with the perpetrator, ordering requires the identification of those who perpetrated the crimes pursuant to the accessories' orders. By contrast, the Court has still not clarified whether the same degree of identification of the perpetrators is required in order to attribute liability for instigating and planning under Article 25(3)(b) of the ICC Statute, and for aiding and abetting under Article 25(3)(c) of the ICC Statute. The practice of the ad hoc and hybrid tribunals suggests that the identification of the perpetrators is not necessary to determine liability for aiding and abetting. In a similar fashion, the Court has not yet determined

whether the aider and abettor's conduct must be directly linked with the commission of the crime. Nevertheless, the most recent jurisprudence of the ad hoc and hybrid tribunals refuting the need for the aider and abettor's assistance to be specifically directed to the commission of a crime suggests that a direct link between the crime and the aider and abettor's conduct is not required.

Finally, the mental elements of ordering, instigating, planning, and aiding and abetting are the same, namely intent and knowledge as provided for in Article 30(1) of the ICC Statute. Nevertheless, during its first ten years of activities the Court has provided different interpretations of this provision, accepting and rejecting liability for conditional intent/*dolus eventualis*. Moreover, to date the Court has still not clarified the degree of intent required by Article 25(3)(c) of the ICC Statute for liability to arise as an aider and abettor. It is submitted that this provision requires a high degree of intent, but it is still unsettled in the practice of the Court whether a contribution to the crime made with a degree of intent somehow lower than direct intent/*dolus directus* in the first degree may give rise to criminal liability as an aider and abettor.

24

The ICC and Common Purpose— What Contribution is Required under Article 25(3)(d)?

*Kai Ambos**

Article 25(3)(d) of the ICC Statute has not yet been the object of much academic or jurisprudential debate,¹ but the few authors who have attempted to make sense of the provision have had serious problems in doing so and have therefore fiercely criticized it.² This chapter will not deal with all the possible aspects and problems but will rather focus, after some general preliminary remarks, on the quality or nature of the contribution required by Article 25(3)(d). Some other issues of the provision are only dealt with insofar as they relate to the contribution issue.

24.1 Preliminary Remarks: Key Features of Article 25(3)(d) and Necessary Delimitations

Article 25(3)(d) constitutes an almost verbatim copy of a provision of a 1997 anti-terrorism convention³ and stands, as to its normative approach, unprecedented in international criminal law as well as in customary international law.⁴ It represents a compromise that tries to combine the strong opposition of state delegations to any

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¹ See for references to the relevant case law the following text and A Kiss, ‘La contribución en la comisión de un crimen por un grupo de personas en la jurisprudencia de la Corte penal Internacional’ (2013) 2 *InDret* 1, 3–4. For a summary of ICL jurisprudence with regard to cover-ups and concealment of crimes, including recent decisions of the ICC concerned with that question and the legal nature of such behaviour, see M Kearney, ‘Any Other Contribution? Ascribing Liability for Cover-Ups of International Crimes’ (2013) 24 *Criminal Law Forum* 331.

² Perhaps the most radical critique has been voiced by J Ohlin, ‘Joint Criminal Confusion’ (2009) 12 *New Criminal Law Review* 406 arguing that it is ‘nearly impossible to devise a holistic interpretation’ of the provision and that therefore it should be revised, at 406, 408, and 410. Critically also A Eser, ‘Individual Criminal Responsibility’ in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press 2002) 803; C Burchard, ‘Ancillary and Neutral Business Contributions to “Corporate-Political Crime”’ (2010) 8 *Journal of International Criminal Justice* 919, 942.

³ Art 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings, UN Doc A/RES/52/164 (1997), (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256. See Eser (n 2) 802; see also K Ambos, ‘Article 25’ in O Triffterer and K Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court* 3rd edn (München: C H Beck 2015) margin no (mn) 28.

⁴ G Werle and F Jessberger, *Principles of International Criminal Law* 3rd edn (Oxford: Oxford University Press 2014) 196, 219; G Werle, *Völkerstrafrecht* 3rd edn (Tübingen: Mohr Siebeck 2012) 242.

form of anticipated or organizational/collective liability with the need to have a form of *individual* participation in collective criminal enterprises, which is in line with the principles of legality and culpability.⁵

Taking into account the history and wording of the provision, subparagraph (d) encompasses neither any form of conspiracy nor membership liability. As to conspiracy, contrary to its antecedent provisions in the 1991 and 1996 Draft Codes of the ILC, subparagraph (d) now clearly requires *direct participation* in, at the very least, the (attempted) *commission* of a crime that falls under the ICC's jurisdiction.⁶ Thus, from a simple literal interpretation, it becomes clear that subparagraph (d) does not include any form of anticipated liability, i.e. liability that, as in the classical case of conspiracy, is based on the mere agreement to commit a crime (the 'meeting of minds'), independent of its eventual execution.⁷

As to criminal responsibility for mere *membership* in a criminal or terrorist organization, the wording of subparagraph (d) even more clearly shows that the provision does not encompass this form of criminal responsibility, but, quite to the contrary, requires a *concrete contribution* to the (attempted) execution of a crime. Indeed, the drafters of the Statute clearly opted for a model of *individual* responsibility, ie a model of imputation where the individual *contribution* to a criminal result is the *indispensable prerequisite* for any kind of criminal liability. In fact, the exemplary historic provision contained in Article 10 of the Statute of the International Military Tribunal of Nuremberg (IMT),⁸ which criminalized members of the SS and other Nazi entities (declared criminal by the IMT), was neither based in (historic) customary law, nor did it plant a seed for the later development of any such customary norm.⁹ For this very reason Article 10 was not used as a basis for criminal responsibility by the drafters of the ICC Statute.¹⁰ While national law¹¹ typically provides for this type of

⁵ See generally on these principles in ICL: K Ambos, *Treatise of International Criminal Law. Volume I: Foundations and General Part* (Oxford: Oxford University Press 2013) 87ff.

⁶ This clearly follows from the *travaux préparatoires*, see P Saland, 'International Criminal Law Principles' in R Lee (ed.), *The ICC, The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer Law International 1999) 199ff. Swedish Diplomat Per Saland was chairman of Working Group 3 on General Principles during the Rome Conference; this author was a member of this working group as part of the German delegation.

⁷ See Eser (n 2) 802; Ambos (n 3) mn 28; Werle and Jessberger (n 4) 263.

⁸ Statute of the International Military Tribunal of Nuremberg (reprinted in (1945) 39 *American Journal of International Law Sup* 259). Art 10 reads: 'In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned' (emphasis added). The Statute of the International Military Tribunal for the Far East (reprinted in N Boister and R Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford University Press 2008) 7–11) did not contain such a provision.

⁹ See K Ambos, *Der Allgemeine Teil des Völkerstrafrechts* 2nd edn (Berlin: Duncker & Humblot 2004) 103; A Cassese, *International Criminal Law* 2nd edn (Oxford: Oxford University Press 2008) 34.

¹⁰ Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute').

¹¹ See e.g. Art 278 Austrian Penal Code; ss 129, 129a German Penal Code (*Strafgesetzbuch*); s 11 UK Terrorism Act; Art 416 Italian *Codice Penale* ('Quando tre o più persone si associano allo scopo di commettere più delitti, coloro che promuovono o costituiscono od organizzano l'associazione sono puniti, per ciò solo, con la reclusione da tre a sette anni. Per il solo fatto di partecipare all'associazione, la pena è della reclusione da uno a cinque anni'); Art 68(a) Botswana Penal Code ('Any person who is a member of an unlawful society is guilty of an offence and is liable to imprisonment for a term not exceeding

membership liability, modern ICL, as demonstrated in the ICC Statute, does not do so out of respect for the principle of culpability. It follows from a literal interpretation of Article 25(3)(d) that any ‘person’ (para 3) who contributes to a group crime incurs criminal responsibility. This person need not be a member of the group, nor does membership preclude criminal liability. Thus, both members and non-members of the respective group may incur criminal responsibility if they perform the relevant contribution and the other requirements are met.¹²

Joint criminal enterprise (JCE) liability can only be compared to subparagraph (d) with regard to its common purpose element—the *Lubanga* Pre-Trial Chamber (PTC) and the *Katanga* Trial Chamber (TC) are right in this regard¹³—but subparagraph (d) does not constitute a fully fledged common purpose liability¹⁴ giving prevalence to the collective element (common purpose) over the individual one (individual contribution).¹⁵ In fact, as said before, a concrete individual contribution is required, and therefore subparagraph (d) constitutes a form of assistance to a group crime.¹⁶ Apart from that, the subjective requirements of JCE, especially its extended form of JCE III, are also different from subparagraph (d).¹⁷

seven years’); and Art 288 Brazilian Penal Code (‘Associarem-se mais de três pessoas, em quadrilha ou bando, para o fim de cometer crimes: Pena—reclusão, de um a três anos’; see for the dominant interpretation L Prado, *Curso de Direito Penal Brasileiro*, vol. 3, Parte Especial, Arts 250 a 359-H, 6th edn (São Paulo: Revista dos Tribunais 2010) 189–90: ‘Não é necessário que a quadrilha ou bando tenha cometido algum delito para que o delito se concretise; pune-se o simples fato de se figurar como integrante da associação’; see also Art 2 of the recent Brazilian Law No 12.850 of 2 August 2013.

¹² See also Decision on the Confirmation of Charges, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-465-Red, PTC I, ICC, 16 December 2011 (‘*Mbarushimana* Confirmation Decision’) paras 272–5; Jugement Rendu en Application de l’Article 74 du Statut, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436, TC II, ICC, 7 March 2014 (‘*Katanga* Trial Judgment’) para. 1631 (‘...que l’accusé appartienne au groupe...ne constitue pas un élément déterminant...’); for the same result with a good discussion Ohlin (n 2) 410–16; also Kiss (n 1) 26ff (focusing on a literal interpretation); previously Ambos (n 5) 168.

¹³ Decision on the Confirmation of Charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-803-tEN, PTC I, ICC, 29 January 2007 (‘*Lubanga* Confirmation Decision’) para. 335: ‘...closely akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY...’; *Katanga* Trial Judgment (n 12) para. 1625 (referring to the criteria developed by the ICTY, in particular with regard to the identical ‘common purpose’ element). On the structural similarity see also Ohlin (n 2) 408–9 (‘alternative theories for establishing complicity in collective criminality’).

¹⁴ As wrongly suggested by the *Mbarushimana* Prosecution, cf. Ms Solano, Transcript, ICC-01/04-01/10-T-7- Red-ENG WT 19-09-2011 1-86 NB PT, 42 line 12; see also *ibid.*, 33 line 18 and 35 line 11 to 38 line 15. See also A Heyer, *Grund und Grenze der Beihilfestrafbarkeit im Völkerstrafrecht* (Köln: Institute for International Peace and Security Law 2013) 452, 513 convincingly explaining that while the common purpose of subparagraph (d) refers to the collective act (*Gesamttat*) to be implemented by the group, the JCE’s common purpose refers to the common aim of the persons who are part of the criminal enterprise.

¹⁵ For the same result *Katanga* Trial Judgment (n 12) para. 1619 arguing that under Art 25(3)(d) the accused is only responsible for the crimes he contributed to (‘...uniquement des crimes à la commission desquels il aura contribué.’), not for all crimes forming part of the JCE.

¹⁶ Cf. Ambos (n 3) nn 49–50; conc L Yaneva and T Kooijmans, ‘Divided Minds in the Lubanga Trial Judgement: A Case against the Joint control theory’ (2013) 13 *International Criminal Law Review* 789, at 802; Werle and Jessberger (n 4) 205.

¹⁷ For a discussion see K Ambos, ‘Joint Criminal Enterprise and Command Responsibility’ (2007) 5 *Journal of International Criminal Justice* 159, 173; *id.* (n 5) 172–4; Ohlin (n 2) 414–15 also seems to agree that JCE is not covered by subparagraph (d). See also Heyer (n 14) 125ff.

Let us conclude these preliminary remarks with some reflections on the essential factors of delimitation between subparagraph (d) and subparagraphs (a) and (c). As to subparagraph (a), the relevant form of perpetration constitutes *co-perpetration*. To this end, the necessary objective threshold makes the difference: while co-perpetration requires (joint) control over the crime, resulting in the ability to frustrate its commission by omitting one's contribution,¹⁸ subparagraph (d) does not set such a distinguished high objective standard, but rather serves as a residual mode of (accomplice) liability in which the participant's influence is regarded insufficient to frustrate the crime's commission.¹⁹

As to ordinary *complicity* pursuant to subparagraph (c), things are more complicated. The most obvious difference between these forms of accessory liability lies on the subjective level, because subparagraph (c) demands the contribution to be made with the '*purpose of facilitating*' the commission of a crime, i.e. more is required than general intent, as in subparagraph (d).²⁰ On the objective level, subparagraph (d)'s

¹⁸ For more details see Ambos (n 5) 150ff.; in the same vein Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06 A 5, AC, ICC, 1 December 2014, para. 7, 434 ff. The underlying control theory has, however, recently come under fire, for an excellent nuanced critique see J Ohlin et al., 'Assessing the control theory' (2013) 26 *Leiden Journal of International Law* 725 (arguing with regard to co-perpetration in favour of a mixed objective-subjective approach taking into account several factors, at 730–4); less convincing Yaneva and Kooijmans (n 16) 789ff (ultimately advocating a subjective—common intent—approach, at 827). In any case, the control theory can be considered as settled case law after its recent confirmation by the majority in *Katanga* Trial Judgment (n 12) para. 1382, 1393 ff (Minority Opinion of Judge Christine Van den Wyngaert, *Jugement rendu en application de l'article 74 du Statut, Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436-AnxI, TC II, ICC, 7 March 2014, paras 279–81) and the Lubanga Appeals Chamber, op. cit., para. 469. The majority in *Katanga* argues, at paras 1393–5, that this theory, being objective and subjective at the same time, constitutes the 'seul critère...pour permettre de distinguer entre les auteurs d'un crime et les complices', fits best to Art 25(3) ('le plus conforme à l'article 25') and makes a distinction between the different forms of participation possible ('rendre opérationnelle la distinction entre les auteurs d'un crime et les complices'); for this reason the Chamber decides to retain this theory (para. 1382 ['... il n'y a pas lieu de s'écarte de l'interprétation... fondée sur la théorie du contrôle sur le crime.'], para. 1396 ['...entend donc retenir le critère du contrôle']). The Chamber then applies this theory to define perpetrators ('auteurs') as persons 'qui ont un contrôle sur la commission dudit crime et qui ont connaissance des circonstances de fait leur permettant d'exercer ce contrôle' (para. 1396) and the indirect perpetrator ('auteur indirect') as 'celui qui a le pouvoir de décider si et comment le crime sera commis dans la mesure où c'est lui qui en détermine la perpétration' (ibid., emphasis in the original, fn omitted) while the accomplice ('complice') 'n'exerce pas un tel contrôle' (ibid.). The Lubanga Appeals Chamber discusses the control theory in the context of co-perpetration (para. 434 ff) and considers it a convincing theory to delimitate perpetration and secondary participation (para. 469); it dismisses the domestic analogy argument first advanced by Judge Fulford as being beside the point, since the Chamber only applies and interprets Art 25(3)(a) and in doing so does not act 'in a vacuum, but...needs to be aware of and can relate to concepts and ideas found in domestic jurisdictions' (para. 470).

¹⁹ For this correct view see *Lubanga Confirmation Decision* (n 13) para. 337; see also thereafter Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-02/11-373, PTC II, ICC, 23 January 2012 ('Ruto et al. Confirmation Decision') para. 354 (with respect to Joshua Arap Sang; in the same vein *Katanga* Trial Judgment (n 12) para. 1618 ('complicité résiduel'), 1633 ('...crime ne doit pas nécessairement dépendre de cette contribution ni même être conditionnée par celle-ci.').

²⁰ See H Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8 *Journal of International Criminal Justice* 851, who (also) refers to subparagraph (d) as a 'rescue clause' with respect to subparagraph (c). See also *Lubanga Confirmation Decision* (n 13) para. 337 and Ambos (n 3) nn 33–34 and 49–50; Werle and Jessberger (n 4) 220.

reference to ‘a crime by a group of persons acting with a common purpose’, i.e. the already mentioned collective (group) common purpose element, marks its difference from subparagraph (c)’s exclusively individual focus.²¹ Indeed, it is fair to say that while subparagraph (c) criminalizes individual assistance to single acts, subparagraph (d) covers the individual assistance to a collective crime in the sense of a *Gesamttat* (collective or global act, *hecho global*).²² This led the ICTY to state in *Furundzija* that these provisions confirm the distinction between aiding and abetting a crime and participation in a common criminal plan as ‘two separate categories of liability for criminal participation’.²³ This, of course, begs the question of whether the individual contribution as such, which is required in both provisions, is to be understood identically. This brings us to the focus of this chapter: subparagraph (d) requires at least a contribution (‘contributes’) to a collective (attempted) commission of a crime.²⁴ Further, this contribution has to be ‘intentional’. Thus, a two-fold objective-subjective nexus must connect the alleged contribution to the alleged criminal results. But what kind of objective contribution is required, exactly?²⁵

24.2 The Key Issue: What Objective Contribution is Required?

As to the definition of a ‘contribution’ within the meaning of subparagraph (d), two questions must be distinguished. First, the question of the *factual nature* of this contribution with regard to its relevance/impact on the main crime, and, second, the question of its *legal nature* (its lawfulness or unlawfulness). Each of these questions will be discussed separately because they must be distinguished for methodological reasons.

²¹ It is controversial whether the common purpose of the group may also be per se lawful but the group uses criminal means to achieve it (in this vein *Katanga* Trial Judgment (n 12) para. 1627 [‘groupe ne doit pas non plus poursuivre un objectif uniquement criminel pas plus qu’il n’est exigé que son objectif final soit criminel’]) or whether the common purpose must be exclusively or at least predominantly criminal (in this vein *Van den Wyngaert* (n 18) para. 286 [‘criminal component...inherent part of the common plan’]). This reminds us of a similar discussion with regard to the ‘common plan’ element in Art 25(3)(a) alternative 2, cf. *Ambos* (n 5) 152.

²² In the same vein *Cassese* (n 9) 213; see also recently *Heyer* (n 14) 451, 453 (who considers this collective act as an objective condition of punishability); for the same result *Yaneva* and *Kooijmans* (n 16) at 802.

²³ Judgment, *Furundzija*, IT-95-17/1-T, TC, ICTY, 10 December 1998, paras 216, 249.

²⁴ Pursuant to a literal reading of subparagraph (d), the contribution goes to the (attempted) commission, not directly to the crime (ambiguously *Mbarushimana* Confirmation Decision (n 12) para. 285: ‘contribution to the crimes committed or attempted’; inconsistent *Katanga* Trial Judgment (n 12), on the one hand referring to the commission [e.g. para. 1632], on the other, directly to the crime [e.g. para. 1635]). As a consequence, there need not be a direct causal relationship between the contribution and the crime (cf. *Kiss* (n 1) 14, 31).

²⁵ On the further (subjective) requirements of Art 25(3)(d) see *Ambos* (n 5) 168–9 and now *Katanga* Trial Judgment (n 12) para. 1637ff. If one argues that the required intent only refers to the act of contributing as such, but not to the commission of the crime, this (attempted) crime is turned into an objective condition of punishability (*objektive Bedingung der Strafbarkeit*) which need not be the object of the mental element (cf. *Burchard* (n 2) 943). Crit *Heyer* (n 14) 123 who, however, as already stated (n 22), qualifies the collective crime (*Gesamttat*) itself as such an objective condition (452).

24.2.1 The factual nature of the contribution

The factual nature of the contribution has been the object of controversy in the recent case law. The *Mbarushimana* PTC I thoroughly dealt with subparagraph (d) as the first Chamber of the ICC,²⁶ and compared subparagraph (d) to the—structurally similar—JCE liability. While admitting that these modes of liability are not identical, the fact that both focus on group criminality was considered sufficient by the Chamber to apply the ‘JCE significance standard’ to subparagraph (d).²⁷ The Chamber thus argued that the contribution ‘cannot be just any contribution’ and employs the ‘significance’ standard as a minimum threshold ‘below which responsibility ... does not arise’.²⁸ As a result, the contribution must ‘be at least significant’.²⁹ As to the concrete assessment of a contribution as ‘significant’, the PTC proposed a case-by-case analysis of the person’s conduct in the given context taking into account several factors.³⁰ In *casu*, PTC I—with Judge Monageng dissenting³¹—held that the defendant’s actions, performed essentially as the FDLR³² secretary general issuing press releases and directing media campaigns from France, did not amount to significant contributions to the alleged FDLR crimes in the Democratic Republic of Congo (DRC)³³.

The *Katanga* TC essentially adopted the same approach as the *Mbarushimana* PTC. It also requires a ‘contribution significative’ to be analysed ‘crime para crime’³⁴ and on a case-by-case basis.³⁵ A contribution is ‘significant’ if it influences the commission of the crime as to its occurrence and way of commission,³⁶ but the crime must not depend on the contribution or be conditioned by it.³⁷ The contribution may assist the perpetrators or other participants in an objective or subjective sense.³⁸ However, there need neither be a ‘direct link’ between the accomplice’s conduct (contribution) and

²⁶ *Mbarushimana* Confirmation Decision (n 12) paras 268 ff. ²⁷ Ibid., paras 280–2.

²⁸ Ibid., para. 283. On this standard with regard to JCE recently R DeFalco ‘Contextualizing *Actus Reus* under Article 25(3)(d) of the ICC Statute’ (2013) 5 *Journal of International Criminal Justice* 715, 718 ff (unclearly speaking of an ‘inherently contextual nature of the word “significant”’, 721).

²⁹ *Mbarushimana* Confirmation Decision (n 12) para. 285: ‘person must make a significant contribution’.

³⁰ Ibid., para. 284: ‘(i) the sustained nature of the participation after acquiring knowledge of the criminality of the group’s common purpose, (ii) any efforts made to prevent criminal activity or to impede the efficient functioning of the group’s crimes, (iii) whether the person creates or merely executes the criminal plan, (iv) the position of the suspect in the group or relative to the group and (v) perhaps most importantly, the role the suspect played vis-à-vis the seriousness and scope of the crimes committed’.

³¹ Ibid., Dissenting Opinion of Judge Sanji Mmasenono Monageng, paras 39ff (arguing that the crimes committed by the FDLR soldiers can be imputed to the leadership circle, including Mbarushimana, paras 56 ff, 65 ff, who contributed to the soldiers’ crimes ‘by encouraging them to stay in their ranks, continue the military efforts and remain faithful to the FDLR’s goal’, paras 101, 134–5).

³² Forces Démocratiques de la Libération du Rwanda.

³³ *Mbarushimana* Confirmation Decision (n 12) paras 303, 315, 320, 339.

³⁴ *Katanga* Trial Judgment (n 12) para. 1632. ³⁵ Ibid., para. 1634.

³⁶ *Katanga* Trial Judgment (n 12) para. 1632 (‘de nature à influer sur la commission du crime’) and 1633 (‘influé soit sur la survenance du crime soit sur la manière dont il a été commis, soit sur les deux’).

³⁷ Ibid., para. 1633 (‘ne doit pas nécessairement dépendre de cette contribution ni même être conditionnée par celle-ci’).

³⁸ Ibid., para. 1635 (‘apportée à une personne qui soit ou non auteur du crime’, ‘réliée soit aux éléments matériels des crimes...soit à leurs éléments subjectifs.’).

the conduct of the physical perpetrators of the (main) crime³⁹ nor a spatial proximity between the accomplice and the crime.⁴⁰

Thus, in essence, both the *Mbarushimana* PTC and the *Katanga* TC, driven by a liberal, culpability-based approach, try to avoid an overly broad interpretation of the contribution requirement. However, it remains unclear whether this puts such a requirement on an equal footing with the substantial contribution requirement of subparagraph (c). On the one hand, the *Mbarushimana* PTC states with regard to subparagraphs (b) and (c) ‘that a substantial contribution to the crime may be contemplated’;⁴¹ on the other, it implicitly suggests that the significance standard is lower than the substantiality one.⁴²

In contrast, the *Kenya* PTC II, with regard to defendant Joshua Arap Sang, explicitly held that ‘subparagraph (d) is satisfied by a less than “substantial” contribution’.⁴³ It justifies this interpretation with the residual, ‘catch all’ character of subparagraph (d) and the wording ‘[i]n any other way’.⁴⁴ *In casu*, the Chamber confirmed the charges against Sang for his alleged broadcasting of hate messages and false news via Kass FM, a regional radio station, which inflamed the violent atmosphere.⁴⁵

The majority of the Appeals Chamber rejected the Prosecution Appeal against the non-confirmation, but said nothing on the nature of the contribution, adducing procedural reasons.⁴⁶ Yet, in a Separate Opinion, Argentinean Judge Fernández de Gurmendi took issue with the significance standard, arguing that it made a difference with regard to the additional evidence to be brought by the prosecutor under Article 61(8) of the Statute.⁴⁷ As to the issue at hand, she argued that the wording ‘in any other way’ entails that ‘there should not be a minimum threshold or level of contribution’.⁴⁸ In contrast, the PTC’s reference to the gravity threshold of Article 17(1)(d) was misplaced since this aspect is only relevant in connection with the admissibility procedure;⁴⁹ similarly, the JCE comparison is irrelevant since it has no basis in the ICC Statute.⁵⁰ Finally, the judge did not see the addition of the qualifier ‘significant’ as providing a solution to the problems posed by the so-called neutral contributions, ie the ones which could be made by every landlord, grocer, utility provider,

³⁹ Ibid, para. 1635 (‘il n’est pas nécessaire d’établir un lien direct entre le comportement du complice et celui de l’auteur matériel’).

⁴⁰ Ibid., para. 1636 (‘proximité avec le crime n’est pas un critère pertinent’).

⁴¹ *Mbarushimana* Confirmation Decision (n 12) para. 279.

⁴² Ibid., para. 282 (discussing JCE and stating that it requires ‘a lower threshold of contribution than aiding and abetting’).

⁴³ *Ruto et al.* Confirmation Decision (n 19) paras 350 ff, at 354 (quoting this author in n 560 in support of this restrictive view held in O Triffterer (ed, *Commentary on the Rome Statute of the ICC* 2nd edn (München: C H Beck 2008) mn 25).

⁴⁴ Ibid., para. 354. ⁴⁵ Ibid., para. 355.

⁴⁶ 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’, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-514, AC, ICC, 30 May 2012, paras 65–9 (arguing that even if the PTC erred with regard to the significance of the contribution, this would not have materially affected the decision, as the PTC found that the group element of Art 25(3)(d) was lacking and that Mr Mbarushimana did not contribute at all to the alleged crimes, and that therefore addressing the merits would lead to ‘a purely academic discussion’).

⁴⁷ Ibid., Separate Opinion of Judge Silvia Fernández de Gurmendi, paras 5–15, at 5.

⁴⁸ Ibid., paras 8–9. ⁴⁹ Ibid., para. 10; see also Kiss (n 1) 15–16.

⁵⁰ Ibid., para. 14; in a similar vein Kiss (n 1) 18.

secretary, janitor, or even every taxpayer who all, in one way or another, may causally contribute to a group crime.⁵¹ We will return to this issue later.

Summing up this case law, there is neither agreement as to the hierarchical relationship between the forms of participation in Article 25(3), including in relation to subparagraphs (c) and (d),⁵² nor as to the quantum or degree of the contribution required in subparagraph (d). As to the latter issue we have, arguably, three possibilities: a substantial contribution within the meaning of subparagraph (c), a ‘significant’ contribution, or a less than substantial/significant contribution.⁵³ These three possibilities are, however, predicated on two assumptions that need further attention. First, it is assumed that ordinary assistance within the meaning of subparagraph (c) requires a ‘substantial’ contribution.⁵⁴ This sounds plausible since the principles of culpability and *ultima ratio* (*de minimis* criminal law intervention)⁵⁵ demand a minimum threshold to be surpassed in order for the behaviour to incur international criminal responsibility.⁵⁶ Such an interpretation also follows from an analysis of the ILC drafts and of the consolidated jurisprudence of the ad hoc Tribunals, which have defined aiding and abetting by way of the substantial standard. Accordingly, a contribution is considered substantial ‘if the criminal act most probably would not have occurred in the same way had not someone acted in the role that the suspect in fact assumed’.⁵⁷

The second assumption concerns the meaning of the significance standard and, therefore, goes to the core of our issue. Interestingly, the relevant case law does not speak to the relationship between ‘substantial’ and ‘significant’, apart from assigning, in a somewhat stereotypical fashion, the former to the contribution in aiding and abetting and the latter to the contribution in a JCE.⁵⁸ As noted, the *Mbarushimana*

⁵¹ Ibid., paras 11–12.

⁵² In favour of a hierarchy: Judgment Pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012, paras 996 ff; *Mbarushimana* Confirmation Decision (n 12) para. 279; *Ruto et al.* Confirmation Decision (n 19) para. 354; in the same vein Werle and Jessberger (n 4) 196–7; Kiss (n 1) 16; *contra Lubanga*, ibid., Separate Opinion of Judge Adrian Fulford, paras 8 ff; Concurring Opinion of Judge Christine Van den Wyngaert, Judgment pursuant to Art 74 of the Statute, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-4, TC II, ICC, 19 December 2012, paras 22 ff; *Katanga* Trial Judgment (n 12) para. 1386 with fn 3185 (distinguishing between the recognition of different forms of participation in Art 25(3) and a value and blame based hierarchy between these forms which is to be rejected for the lack of the assignation of differing sentences: ‘la distinction proposée entre la responsabilité de l'auteur du crime et celle du complice ne constitue en aucun cas une “hiérarchie de culpabilité” pas plus qu'elle n'édicte, même implicitement, une échelle des peines.’ [fn omitted]); crit also Ohlin et al. (n 18) 740 ff. See generally on the structure of Art 25(3) Ambos (n 5) 145 ff.

⁵³ This latter position would do without any qualifier for the contribution and would have to extract a minimum threshold from the term ‘contribution’ itself, in this vein Kiss (n 1) 15 ff.

⁵⁴ See previously Ambos (n 3) nn 21–22; see also W Schabas, *The International Criminal Court. A Commentary on the Rome Statute* (Oxford: Oxford University Press 2010) 434 ff.

⁵⁵ On the *ultima ratio* principle as a limitation to the criminalization of ‘ancillary and neutral’ business contributions to core crimes Burchard (n 2) 933–4.

⁵⁶ This is, of course, controversial because, arguably, the *ultima ratio* principle does not affect the threshold of wrongfulness and thus the minimum threshold for the contribution but only may have an impact on the final sentence.

⁵⁷ Opinion and Judgment, *Tadić*, IT-94-1-T, TC, ICTY, 7 May 1997, para. 688; for further case law see Ambos (n 5) 128 ff.

⁵⁸ See only Judgment, *Vasiljević*, IT-98-32-A, AC, ICTY, 25 February 2004, para. 102; Judgment, *Gotovina and Markač*, IT-06-90-A, AC, ICTY, 16 November 2012, para. 149; Judgment, *Stanišić and Simatović*, IT-03-69-T, TC I, ICTY, 30 May 2013, paras 1258, 1261; Judgment, *Simba*, ICTR-01-76-A, AC,

PTC only implicitly suggests that ‘significant’ requires a lesser contribution than ‘substantial’ when referring to the former in relation to JCE by stating that it requires ‘a lower threshold of contribution than aiding and abetting’.⁵⁹ But, is there a relevant difference between the two standards at all? In fact, instead of elaborating on the alleged difference, the ILC and the case law of the ad hoc Tribunals have continuously invoked the significant qualifier to define the substantial standard. Thus, Article 2(3)(d) of the ILC Draft Code of 1996 requires (with regard to ‘aiding and abetting’) that any contribution be ‘direct and substantial’; further, it is stated that the respective contribution should facilitate the commission of a crime in ‘some significant way’.⁶⁰ The ICTY adopted these same criteria in *Tadić*,⁶¹ and in several decisions the Tribunal has used the term ‘significant’ to define the term ‘substantial’.⁶² The ICTR has taken the same approach.⁶³ Finally, while the *Katanga* TC does not explicitly refer to the substantial qualifier, its definition of ‘significant’ as having an influence on the commission of the crime is not substantially different from the ‘substantial’ standard of the case law.⁶⁴

Against this background it is fair to assume that there is no difference—or at least no substantial (!) difference—between the substantial and significant standards. What is clear from the case law, however, is that minimal contributions—called ‘infinitesimal’ by the *Mbarushimana* PTC⁶⁵—should be exempted from criminal responsibility notwithstanding their possible subsumption under subparagraph (c) or (d). Even Judge Fernández de Gurmendi, while rejecting the significance standard, does not want to therefore subsume *any* contribution—however minimal it may be—under subparagraph (d). Indeed, she does not ignore the issue of ‘infinitesimal’ contributions but wants to address it as a (normative) problem of the legal nature of the contribution, i.e. ‘by analysing the normative and causal links between the contribution and the crime’.⁶⁶ We will return to this

ICTR, 27 November 2007, para. 303; Judgment, *Zigiranyirazo*, ICTR-01-73-T, TC III, ICTR, 18 December 2008, para. 383; Judgment, *Mpambara*, ICTR-01-65-T, TC I, ICTR, 11 September 2006, para. 17.

⁵⁹ *Mbarushimana* Confirmation Decision, as quoted in n 42.

⁶⁰ ILC, 1996 *Draft Code of Crimes against the Peace and Security of Mankind*, Yearbook of the International Law Commission 1996, vol. 2 (pt 2), 24 (para. 10).

⁶¹ See (n 57).

⁶² See e.g. *Furundzija* judgment (n 23) paras 217 ff, 233–4 (‘The suggestion made in the... cases is...that the acts of the accomplice make a *significant* difference...’ [233]; ‘The position under customary international law seems therefore to be...that the assistance must have a *substantial effect*’ [234] [emphases added]); Judgment, *Blagojević & Jokić*, IT-02-60-A, AC, ICTY, 9 May 2007, paras 195, 199; Judgment, *Aleksovski*, IT-95-14/1-T, TC, ICTY, paras 61, 65; Judgment, *Krnojelac*, IT-97-25-T, TC II, ICTY, 15 March 2002, paras 88–9; Judgment, *Vasiljević*, IT-98-32-T, TC II, ICTY, 29 November 2002, para. 70.

⁶³ Judgment, *Seromba*, ICTR-2001-66-I, TC, ICTR, 13 December 2006, paras 307–8 (regarding the approving spectator); in the same vein Judgment and Sentence, *Bisengimana*, ICTR 00-60-T, TC II, ICTR, 13 April 2006, paras 33–4. With regard to the Special Court for Sierra Leone (SCSL) see Judgment, *Sesay* et al., SCSL-04-15-T, TC I, SCSL, 2 March 2009, paras 268, 2115; but see also Judgment, *Sesay* et al., SCSL-04-15-A, AC, SCSL, 26 October 2009, paras 687–8 (‘An accused’s “significant” contribution may denote a lesser degree of impact on the crime than “substantial” contribution’, 688, footnote omitted).

⁶⁴ Compare with the definition given supra in the main text corresponding to (n 57).

⁶⁵ *Mbarushimana* Confirmation Decision (n 12) para. 277: ‘Without some threshold level of assistance, every landlord, every grocer, every utility provider, every secretary, every janitor or even every taxpayer who does anything which contributes to a group committing international crimes could satisfy the elements of 25(3)(d) liability for their infinitesimal contribution to the crimes committed.’

⁶⁶ *Mbarushimana* (n 46), Separate Opinion of Judge Silvia Fernández de Gurmendi, para. 12; in the same vein Kiss (n 1) 19 (‘establecer si existe un vínculo normativo entre la conducta y el resultado que permita verificar la tipicidad de la contribución’). DeFalco (n 28) 728 ff fails to understand the

point later. Thus, the only remaining question is whether there should be a difference between subparagraphs (c) and (d) with regard to the quantum of the contribution or whether they should be treated equally. More concretely speaking, if for subparagraph (c) a ‘substantial’—or for that matter ‘significant’—contribution is required (which, as I said before, seems to be beyond any reasonable doubt), should this standard then also apply to subparagraph (d), leaving to one side the other differences between these two subparagraphs, especially with regard to the subjective requirements, or should something less than substantial/significant be required?

I am, of course, aware that my earlier view that the expression ‘in any other way’ displays the lowest objective threshold within the different modes of attribution of Article 25⁶⁷ implies a lower threshold for subparagraph (d) and has indeed been interpreted in this sense.⁶⁸ Upon further reflection I must, however, confess that I fail to see a normatively convincing reason to continue to defend this view.⁶⁹ Specifically, I am no longer convinced that such a distinction can be based on the expression ‘in any other way’ in subparagraph (d) for the simple fact that subparagraph (c) uses similar and essentially identical language (‘otherwise assists’), with the Spanish version practically using identical wording (‘algún modo’ v ‘algún otro modo’).⁷⁰ Apart from that, it can be plausibly argued, as did the *Ruto* defence, that the term ‘any’ only refers to the type, but not to the degree of the contribution.⁷¹ I am equally unconvinced that the difference can be derived

predominantly normative nature of the criterion proposed by Fernández de Gurmendi when he states that it appears ‘substantially the same’ as the significance standard. The distinction can only be captured by distinguishing between the factual and legal nature of the contribution as proposed here. Also, while it is correct to argue that neither approach is ‘textually warranted’ by subparagraph (d) (DeFalco, 733), this does not answer the substantial question regarding the nature of the contribution but only shows that a mere textual interpretation of criminal law norms rarely yields normatively convincing results (see previously my critique on Judge Fulford’s dissenting opinion in the Lubanga Trial Judgment: K Ambos, ‘The First Judgment of the ICC (*Prosecutor v Lubanga*): A Comprehensive Analysis of the Legal Issues’ (2012) 12 *International Criminal Law Review* 115, 143–4).

⁶⁷ Ambos (n 43) mn 25.

⁶⁸ See *Ruto* et al. Confirmation Decision (n 19). See in the same vein Eser (n 2) 802 ff; H Satzger, *Internationales und Europäisches Strafrecht* 6th edn (Baden-Baden: Nomos 2013) para. 15 mn 63; E van Sliekdregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: T M C Asser Press 2003) 107; Werle and Jessberger (n 4) 219 and Werle (n 4) 242 calling it the ‘least grave’ mode of liability. Also S Manacorda and C Meloni, ‘Indirect Perpetration Versus Joint Criminal Enterprise—Concurring Approaches in the Practice of International Criminal Law?’ (2011) 9 *Journal of International Criminal Justice* 159, 176 refer to the ‘lowest degree of responsibility’.

⁶⁹ For a similar view H Vest, *Völkerrechtsverbrecher Verfolgen: ein abgestuftes Mehrebenenmodell systemischer Tatherrschaft* (Bern: Stämpfli and others 2011) 349, who argues that subparagraph (d), due to its lower subjective standard as compared to subparagraph (c), could even cover contributions which may, in objective terms, be more serious than those covered by subparagraph (c). Apparently also against such a limitation of Art 25(3)(d) is Kearney (n 1) 367–70, who argues that Art 25(3)(d) could instead be applied to prosecute cover-ups and denial of ongoing crimes even without the existence of a prior agreement, because such *ex post facto* conduct could constitute contributions in the sense of Art 25(3)(d)’s ‘[i]n any other way’.

⁷⁰ For a different view Kiss (n 1) 17 (arguing that the term ‘otro’ implies that lesser contributions not yet included in the previous subparagraphs are covered [‘debe necesariamente captar contribuciones que no estén ya incluidas en los apartados anteriores.’]). However, Kiss does not analyse the other authentic languages (not even the English version). They confirm that deriving a substantial difference from the wording amounts to an overstatement. Indeed, a virtually identical terminology is used in the French, Russian, Chinese, and Arabic versions of the Statute: toute autre forme—toute autre manière; каким-либо иным образом—любым другим образом; 以其他方式—以任何其他方式; بطريقة أخرى—ای طریقہ اخر .

⁷¹ Defence Response to Prosecution’s Submissions on the law of indirect co-perpetration under Art 25(3)(a) of the Statute and the application for notice to be given under Regulation 55(2) with respect to

from a terminological distinction between assistance and contribution, giving the latter term a broader meaning.⁷² If assistance is defined by contributions of a certain quality, as I understand it, a possible distinction between these terms is irrelevant; the only relevant question is what kind of contribution, in qualitative and quantitative terms, is needed to have a criminally relevant assistance? Of course, the term contribution can be defined broadly,⁷³ but the key question remains: when do one or more contributions amount to a criminally relevant assistance?

Thus, in substance, both subparagraphs (c) and (d) provide for assistance liability with the ensuing question of the nature of the respective contribution(s).⁷⁴ While assistance as a secondary, accessorial participation in crime can certainly be of less importance than a primary, perpetrator-like contribution within the meaning of subparagraph (a), in particular in the case of co-perpetration, it is hardly plausible to make a further distinction between the forms of assistance pursuant to subparagraphs (c) and (d). As a consequence, while there is a clear hierarchy between perpetrator-like contributions (subparagraph (a)) and secondary contributions (subparagraphs (c) and (d)), such a hierarchy is less clear with regard to distinctions within the latter and cannot plausibly be explained by their necessary *objective* contributions alone.

In any case, the two fundamental principles of ICL that support a restrictive interpretation of assistance liability within the meaning of Article 25(3) apply equally to assistance under subparagraph (c) or (d): on the one hand, the principle of culpability and, on the other, the policy choice to focus on cases of a certain minimum (considerable) gravity as expressed in the preamble of the Rome Statute (in particular its para 4) and, more importantly, in Articles 17(1)(d) and 53(1)(b)–(c) and (2)(b)–(c) of the Statute.⁷⁵ Gravity is, contrary to Judge Fernández de Gurmendi's view,⁷⁶ not only a concept relevant in admissibility proceedings, but an overarching principle or idea that represents the said policy choice. Thus, this rationale also plays a role with regard to the modes of liability to be prosecuted before the Court. Of course, the gravity of a crime is normally not determined by one single contribution, but by the multiple incidents which constitute a situation or a case; it is for this reason that although a number of incidents (including the ensuing minimal contributions) may pass the gravity threshold at the admissibility stage, that does not preclude us from invoking

William Samuel Ruto's individual criminal responsibility, *Ruto and Sang*, ICC-01/09-01/11-443, TC V, ICC, 25 July 2012, para. 10 (25 July 2012) (arguing that '[T]his is clear given that the Statute reads "in any other way" contributes to the commission of a crime'); conc DeFalco (n 28) 732–3.

⁷² Cf. Burchard (n 2) 942 (arguing, relying on the *Oxford Advanced Learner's Dictionary*, that 'contribute' means 'to be one of the causes of [something]' whereas 'assisting' means 'to help [something] to happen more easily').

⁷³ For example as encompassing 'the facilitation of merely contextual and general conditions that ultimately feed into the commission of a crime by a group' (Burchard (n 2) 942).

⁷⁴ For the same view apparently Heyer (n 14) who, albeit interpreting subparagraph (d)'s wording as indicating the lowest threshold (513), sees no phenomenological difference between the forms of assistance (515).

⁷⁵ Here, regarding a case, Art 53(2)(b) referring back to Art 17(1)(d) and Art 53(2)(c) ICC Statute are especially relevant. For the different gravity standards see I Stegmiller, *The Pre-Investigation Stage of the ICC* (Berlin: Duncker & Humblot 2011) 332 ff, 425 ff; K Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court* (Heidelberg: Springer 2010) 44 ff.

⁷⁶ See (n 49).

the gravity rationale at the later confirmation or trial stage with regard to a mode of liability.⁷⁷ For assistance within the meaning of subparagraphs (c) and (d), this means that, as I argue, the respective contribution must have a certain gravity.

There is an additional consideration that speaks in favour of a restrictive interpretation of assistance liability under both subparagraphs (c) and (d): what is required for criminal responsibility to ensue—and this is particularly relevant in this context—is a certain *normative relationship or nexus between the alleged contributing conduct and the criminal result*, a relationship that in any case goes beyond a purely naturalistic causal nexus. For this reason, modern criminal law doctrine applies the *theory of objective imputation or attribution (imputación objetiva,⁷⁸ objektive Zurechnung)*, which requires that the given conduct increases the (non-permitted) risk (for the protected legal interest) and this risk realizes itself in the commission of the crime.⁷⁹ If one applies this theory, which is essentially about the *fair imputation* of criminal results to those agents who are truly responsible,⁸⁰ to secondary participation (accessorial liability),⁸¹ a contribution is only punishable if (i) it creates a higher risk for the protected legal interest by having a substantial impact on the actual commission of the (main) crime, or (ii) it manifests itself in the commission of the crime insofar as this particular (higher) risk has been ‘realized’ (had a comprehensible impact on the commission; this requirement contains normative causal elements).⁸² While this theory has not yet been explicitly recognized by the ICC, the *Bemba* PTC invoked the theory of risk increase in the context of command responsibility with regard to the consequences of the superior’s failure to intervene. According to the Chamber, it suffices for the commander’s liability that his non-intervention increased the risk of the commission of the subordinates’ crimes.⁸³

Finally, in practical terms, it is difficult, if not impossible to find a meaningful definition for contributions that are less than substantial or significant. In fact, it is commonly agreed upon that the relevance of the contribution depends on its impact on the

⁷⁷ For a different view Kiss (n 1) 16.

⁷⁸ S Mir Puig, *Derecho Penal Parte General* 8th edn (Barcelona: Reppertor 2010) 250 ff.

⁷⁹ See C Roxin, *Strafrecht. Allgemeiner Teil*, vol. I, 4th edn (München: C H Beck 2006) 371 ff. For an English explanation see K Ambos, ‘Toward a Universal System of Crime: Comments on George Fletcher’s *Grammar of Criminal Law*’ (2007) 28 *Cardozo Law Review* 2647, 2664 ff. Compare for the Italian doctrine G Fiandaca and E Musco, *Diritto penale: Parte generale* 6th edn (Bologna: Zanichelli 2009) 234. The doctrine is also widely accepted in Latin America, see for example for Brazil: Prado (n 11) 82. On the French ‘causalité adéquate’, see X Pin, *Droit Pénal Général* 5th edn (Paris: Dalloz 2012) 145 ff.

⁸⁰ Cf. G Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown 1978) 495 speaks of *fair accountability* within a theory of normative attribution; see also A von Hirsch, ‘Extending the Harm Principle: “Remote” Harms and Fair Imputation’ in A Simester and A Smith (eds), *Harm and Culpability* (Oxford: Clarendon Press, 1996/repr 2003) 259, 265 ff. For a normative tendency in attribution in common law see also K Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford: Oxford University Press 1991) 88 ff; see also the proximate cause theories understood as normative theories, for references cf. Ambos (n 79) 2666 with n 110.

⁸¹ See e.g. U Murmann, *Grundkurs Strafrecht* 2nd edn (München: C H Beck 2013) para. 27 mn 127 with further references.

⁸² Cf. Ambos (n 5) 165.

⁸³ Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC 01/05-01/08-424, PTC II, ICC, 15 June 2009, para. 425. For a critique see K Ambos, ‘Critical Issues in the *Bemba Confirmation Decision*’ (2009) 22 *Leiden Journal of International Law* 715, 721 ff.

main crime. To be more concrete, one can say that the contribution must have some relevance with regard to the alleged main crime. A further elaboration or specification must be left to the case law. If this is so, what else should then remain for a less than substantial contribution?

24.2.2 The legal nature of the contribution

A contribution to a criminal enterprise, e.g. the running of a concentration camp, may consist of a normal economic activity which is *per se* lawful, e.g. the selling of food, petrol, or other ordinary marketable commodities to the camp. This kind of assistance is discussed in scholarly writings, albeit almost exclusively in civil law jurisdictions, under the concept of ‘neutral’ (i.e. *per se* lawful) acts of assistance.⁸⁴ The gist of the issue is whether and when such neutral acts of assistance can be qualified as criminally relevant contributions. The answer is relatively simple and in the affirmative if the assistant violates rules that prohibit the provided assistance, for in this case the act of assistance is no longer ‘neutral’ in the first place. Take for example, the case of an arms dealer who sells arms to a regime which is the object of an United Nations (UN) arms embargo.⁸⁵ In contrast, the answer is more difficult in the truly hard cases, i.e. where the assistance is indeed, as such, lawful, as, for example, in our initial example of selling food to a concentration camp.

Given the obvious relevance of this issue for ICL,⁸⁶ it needs to be investigated in greater detail and in a more comprehensive fashion than possible in this chapter. At this juncture only some preliminary reflections can be presented. While the *Mbarushimana* PTC did not address the issue under the heading of ‘neutral’ acts, the Chamber was driven by the very same concerns of overcriminalization as its recourse to the significance standard to exclude ‘infinitesimal’ contributions⁸⁷ shows. In fact,

⁸⁴ C Roxin, *Strafrecht. Allgemeiner Teil*, vol. II (München: C H Beck 2003) 206ff; for a good summary of the German discussion W Joecks, ‘§ 27’ in W Joecks and K Miebach (eds), *Münchener Kommentar zum StGB*, vol. I, 2nd edn (München: C H Beck 2011) 1265–76 mn 48–89. For an analysis of neutral acts in macrocriminal contexts compare P Rackow, *Neutrale Handlungen als Problem des Strafrechts* (Frankfurt am Main: Peter Lang 2007). The discussion also takes place in other jurisdictions, although less intensive than in Germany: for Italy see M Bianchi, ‘La “complicità” mediante condotte “quotidiane”’ (2009) 12 *L'indice penale* 37–86; for Spain see J-M Landa Gorostiza, *La complicidad delictiva en la actividad laboral “cotidiana”: contribución al “límite mínimo” de la participación frente a los “actos neutros”* (Granada: Gomares 2002); for Brazil: L Greco, *Cumplicidade através de ações neutras: a imputação objetiva na participação* (Rio de Janeiro: Renovar 2004). See also K Ambos, ‘Beihilfe durch Alltagshandlungen’ (2000) 32 *Juristische Arbeitsblätter* 721, 721–5; in Spanish ‘La complicidad a través de acciones cotidianas o externamente neutrales’ (Julio 2001) 2^a Época No 8 *Revista de Derecho Penal y Criminología (Universidad Nacional de Educación a Distancia. Facultad de Derecho, Madrid)* 195–206. See from an ICL perspective Kiss (n 1) 19–20 with further references; from the perspective of an international economic criminal law see Heyer (n 14) 131ff.

⁸⁵ See in this respect on the Dutch *Van Anraat* case H van der Wilt, ‘Genocide v. War Crimes in the Van Anraat Appeal’ (2008) 6 *Journal of International Criminal Justice* 557, 563 ff. While van Anraat was only convicted for complicity in Saddam Hussein’s crimes he also violated the UN embargo which was implemented in the Netherlands by the ‘Sanctiewet’.

⁸⁶ See for a very useful compilation of relevant international and national case law Kiss (n 1) 22–6; more detailed Heyer (n 14) 173 ff; see for the relevance with regard to (corporate) business activities Burchard (n 2) 919 ff.

⁸⁷ *Mbarushimana* Confirmation Decision (n 12) para. 277 (as quoted in n 65).

the Chamber's examples of potentially criminally liable assistants (landlord, grocer, utility provider, etc) all refer to persons whose normal economic, commercial, or social activity may be the object of criminalization if no reasonable threshold of assistance within the meaning of subparagraph (d)—and equally, one should add, subparagraph (c)—can be established. Of course, it is questionable whether the significance standard has enough normative potential to play this role; in any case, the methodologically correct approach would have been to discuss the problem under the heading of 'neutral' acts—Judge Fernández de Gurmendi is right in this regard.⁸⁸ However, what is clear from both the PTC's and Fernández de Gurmendi's view is that some threshold is needed. In the context of the *legal* nature of the contribution, such a threshold cannot be found by making recourse to mere naturalistic or factual criteria alone or, even worse, a judge's—highly subjective—intuition.⁸⁹ Rather, and here again Fernández de Gurmendi's separate opinion goes in the right direction, one must analyse 'the normative and causal links between the contribution and the crime'.⁹⁰

Of course, the reference to normative, value-based criteria alone does not help to decide concrete cases. Indeed, the long-expected 'Guiding Principles on Business and Human Rights' drafted by Harvard Human Rights Professor John Ruggie in his capacity as UN Secretary General Special Representative on this issue, only refer, with concern to criminal law standards, to the general ICL jurisprudence on aiding and abetting as 'knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime'.⁹¹ Ruggie had previously concluded that 'it is not possible to specify exacting tests for what constitutes complicity even within the legal sphere'.⁹² Also, Alejandro Kiss, legal officer at the ICC Chambers, in an important academic contribution

⁸⁸ *Mbarushimana* (n 46), Separate Opinion of Judge Silvia Fernández de Gurmendi, para. 12; in the same vein Kiss (n 1) 19.

⁸⁹ In this sense, however, DeFalco (n 28) 730–1 arguing that the 'acts of this grocer are *intuitively* non-criminal' (emphasis added).

⁹⁰ *Mbarushimana* (n 46), Separate Opinion of Judge Silvia Fernández de Gurmendi, para. 12; in the same vein Kiss (n 1) 19–20 (stressing the normative, value-based character of the assessment of the contribution).

⁹¹ Report of the Special Representative of the Secretary General on the issue of human rights and trans-national corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, and Remedy' Framework, Human Rights Council, Seventeenth Session, UN Doc A/HRC/17/31 (21 March 2011), Principle 17, 17. Also note that Ruggie did not focus on individual criminal responsibility but on the *corporate* responsibility of the respective companies. Focusing on the individual criminal responsibility in business cases A Heyer, 'Corporate Complicity under International Criminal Law: A Case for Applying the Rome Statute to Business Behaviour' (2012) 6 *Human Rights and International Legal Discourse* 14, 47–55, concluding that prosecuting agents of business corporations will prove difficult but nevertheless possible under the current ICL regime.

⁹² Clarifying the Concepts of 'Sphere of influence' and 'Complicity', Human Rights Council, Eighth Session, UN Doc A/HRC/8/16 (15 May 2008) para. 33 (also stressing that the ICL practice on aiding and abetting provides the 'clearest guidance'). This report provides a more detailed analysis of the respective ICL practice (paras 35–44). Further, Ruggie discusses the different (legal and non-legal) understandings of complicity with regard to business involvement in human rights violations (paras 26 ff) and stresses 'due diligence' on the part of the companies to avoid complicity (paras 4, 17, 19, 23). See also the Report Protect, Respect, and Remedy: a Framework for Business and Human Rights, Human Rights Council, Eighth Session, UN Doc A/HRC/8/5 (7 April 2008) paras 73 ff.

on our topic from an ICL perspective, is forced to admit that it is yet too early to identify convincing normative criteria.⁹³

Be that as it may, what is clear is that there must be some minimum threshold in order to exempt socially desirable and legitimate conduct from criminalization. In other words, criminal conduct should be limited to a significant deviation from standard social or commercial behaviour in order to capture really wrongful and blameworthy conduct.⁹⁴ As previously argued, conduct that violates specific prohibitions (conduct norms) cannot be considered ‘socially desirable and legitimate’ and thus qualifies, if all other requirements are met, as criminally relevant assistance within the meaning of subparagraphs (c) and (d). With regard to other *per se* lawful conduct, a mixed objective-subjective approach should be followed. On the objective level, the risk-based approach of the theory of objective or fair imputation requires that the respective contributing conduct should at least increase the risk with regard to the commission of the main crime. That risk must be realized through the commission of the (main) crime (murder) or, in other words, the risk-creation or increase must be causal for the commission of this crime in the sense of a specific risk.⁹⁵ On the subjective level, responsibility should depend on the agent’s knowledge and specific purpose pursued with the contribution.⁹⁶ This is an alternative test in line both with the general intent requirement of Article 30 of the ICC Statute (applicable to the ‘intentional’ contribution and excluding lower mental standards, especially *dolus eventualis*)⁹⁷ and with Article 25(3) (d)(i) and (ii): either the agent is aware that the contribution increases the risk that the (collective) crime be committed, or he or she acts with the respective purpose.⁹⁸ In this regard the ‘specific direction’ standard, developed by the ICTY with regard to aiding and abetting liability⁹⁹ and recently invoked by ICC Judge Van den Wyngaert in our context,¹⁰⁰ may indeed be relevant in that it must be proved that the accused’s assistance was ‘specifically directed’ to the (criminal) common purpose.¹⁰¹

⁹³ Kiss (n 1) 26. See also see Burchard (n 2) 935 ff (concluding at 945 that it is ‘unclear whether the ICC Statute’s modes of participation actually encompass...business contributions to “corporate-political core crime”’).

⁹⁴ See previously Ambos (n 5) 165. See also Burchard (n 2) 920 with n 6 (arguing that ‘in order to criminalize a contribution to a crime, it must normatively have a socially unacceptable and injurious relation to the crime’).

⁹⁵ In a similar vein advocating a specific risk creation (‘*tatspezifisches Risiko*’) cf. Heyer (n 14) 516, 545, 547–8, 554–7. The further requirement of personal responsibility for that risk is, in my view, redundant since it is implicit in the concept of an objective (personal) imputation (attribution).

⁹⁶ See previously Ambos (n 5) 165; conc. Werle and Jessberger (n 4) 218–19.

⁹⁷ Cf. Ambos (n 5) 276 ff.

⁹⁸ I draw here on Roxin’s approach (n 84) of a ‘*deliktischer Sinnbezug*’ (the giving of a criminal meaning to the contribution by the agent).

⁹⁹ Judgment, *Perišić*, IT-04-81-A, AC, ICTY, 28 February 2013, para. 44 (‘*specifically directed assistance*’); previously e.g. *Vasiljević* (n 58) para. 102; but *contra* Judgment, *Šainović* et al., IT-05-87-A, AC, ICTY, 23 January 2014, paras 1621ff; crit also Judgment, *Taylor*, SCSL-03-01-A, AC, SCSL, 26 September 2013, paras 475ff. Judge Van den Wyngaert (n 18) quotes this jurisprudence indiscriminately in fn 404. See also J Jones et al., *Milestones in International Criminal Justice: Recent Legal Controversies at the UN Yugoslav Tribunal*, Chatham House (2013), 5 ff; K Ambos and O Njikam, ‘Charles Taylor’s Criminal Responsibility’ (2013) 11 *Journal of International Criminal Justice* 789, 799 ff.

¹⁰⁰ Judge Christine Van den Wyngaert (n 18) para. 287 with fn 406 (referring to the significance standard in relation to Art 25(3)(d) and the term ‘neutral’ contributions as employed by Judge Fernández de Gurmendi).

¹⁰¹ In a similar vein Judge Christine Van den Wyngaert (n 18) para. 287 (‘whether someone’s assistance is specifically directed to the criminal or non-criminal part of a group’s activities’).

Criminal responsibility may also depend on the nature of the collective crime or the criminal enterprise. Thus, for example, applying this test previously¹⁰² to contributions to the running of a concentration camp, I distinguished between the nature of the camp as a pure extermination camp ('pure' criminal enterprise) and a mixed camp (mixed criminal enterprise) where other (labour) activities also existed and the detainees had a realistic chance of survival, i.e. their death was only a 'side effect' of the inhumane conditions of the camp and the forced labour. In the former case, criminal responsibility for external or indirect contributions, i.e. taking place from outside the camp, which do not directly relate to the destructive purpose of the camp (such as the delivery of potassium cyanide does), depends on the knowledge of the supplier: if he is aware of the criminal purpose of the concentration camp and therefore of the criminal impact of his contribution, he incurs criminal responsibility. In the case of contributions to a 'mixed' enterprise, criminal responsibility is predicated on the proof of an identifiable individual contribution to concrete crimes.

24.3 Conclusion

This brief inquiry has produced the following findings:

- i. There is no substantial difference between the forms of assistance in subparagraphs (c) and (d) of Article 25(3) ('otherwise assists' versus '[i]n any other way contributes').
- ii. Both subparagraphs (c) and (d) require a minimum threshold of assistance. This follows from the principles of culpability and *ultima ratio* of criminal law.
- iii. The key issue is, therefore, not the alleged or apparent difference between subparagraphs (c) and (d), but the definition of their minimum threshold. Insofar, the factual and the legal nature of the contribution must be distinguished.
- iv. As to the factual contribution, quantitative criteria must be used and further developed.
- v. The legal nature of the contribution refers to the problem of so-called neutral acts of assistance. Here it is necessary to further develop normative criteria drawing on relevant international and national case law and scholarly writings. A good starting point is a distinction between lawful and unlawful acts. Further, one should focus on the specific risk creation by the respective contribution with regard to the legal interests violated.

¹⁰² K Ambos, 'Prosecution of Former Nazi Camp Guards: About Restoring Society's Trust in Law and Participation in a Criminal Enterprise' (EJIL: Talk!, 20 May 2013) <<http://www.ejiltalk.org/prosecution-of-former-nazi-camp-guards-about-restoring-societys-trust-in-law-and-participation-in-a-criminal-enterprise/>> accessed 28 August 2013.

25

Command Responsibility under Article 28 of the Rome Statute

Alejandro Kiss*

25.1 Introduction

After the Second World War, the legal interpretation of concepts and notions explaining the attribution of criminal liability in the field of humanitarian and international criminal law reached a turning point. The existing concepts were never conceived to address cases of individuals in high positions of authority, responsible for mass criminality. In reality, as is well known, even when addressing plain domestic criminality, concepts such as commission, induction, and complicity fail to provide any clear-cut guidance for application and this shortcoming persists when applied to international crimes. The usual difficulties and grey areas, which are inherent to the interpretation of the modes of liability, are exacerbated by the complexity of the illegal conduct in question, the indirect nature of the intervention, and the widespread harm that typically results from them. The tools developed in the framework of ordinary criminal law needed to be rethought, which led judges and academics to develop legal interpretations, all with the intention of defining the contours of these concepts in a manner that would ensure a consistent, systematic, and fair jurisprudence. Understandably, the resulting legal constructions are sophisticated and fair labelling came at the expense of simplicity.

The doctrine of ‘command responsibility’ evolved in parallel to the aforementioned efforts. Some of the *sui generis* aspects thereof result from the limitations of the ordinary modes of liability in capturing the wrongdoing of commanders and superiors. There is a plethora of literature and jurisprudence, particularly since the experiences of the ad hoc Tribunals, dealing with the most contentious aspects of this mode of liability, but nonetheless they remain unclear and, still today, prominently discussed.¹

This chapter will focus on the issues which involve the most significant practical consequences including the superior–subordinate relationship and the requirement of effective control, the duties imposed on commanders and superiors, the role of causation, and the mental element.

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¹ C Meloni, ‘Command Responsibility, Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?’ (2007) 5 *Journal of International Criminal Justice* 619; B Bonafé, ‘Finding a Proper

25.2 Development of this Mode of Liability

The development of notions that underpin command responsibility may be traced to antiquity.² Several important precedents have contributed to shaping the main features of this mode of liability and, in spite of the time that has elapsed, their finger-print remains perceptible today.³ The responsibility of superiors for failure to prevent crimes committed by subordinates was affirmed by these precedents,⁴ as was the principle that such a failure may lead to responsibility for the offences as if the commanders had committed the crimes themselves.⁵

Article 3 of the Fourth Hague Convention of 1907 holds particular importance amongst these precedents. This Article, which was absent in the 1899 version of the Convention, set out the principle of *responsible command*, according to which '[a] belligerent party... shall be responsible for all acts committed by persons forming part

Role for Command Responsibility' (2007) 5 *Journal of International Criminal Justice* 599; A Cassese, *International Criminal Law* (Oxford: Oxford University Press 2003) 200–13; R Arnold/O Triffterer, 'Article 28: Responsibility of Commanders and Other Superiors' in O Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* 2nd edn (München: C H Beck 2008) 795; K Ambos, 'Superior Responsibility' in A Cassese et al., *The Rome Statute of the International Criminal Court* vol. I (Oxford: Oxford University Press 2002) 805.

² Commentators indicate that as early as 500 BC, the 'oldest military treaties in the world' written by *Sun Tzu* in China contain references to a rudimentary notion of commanders' responsibility; see W Parks, 'Command Responsibility for War Crimes' (1973) 62 *Military Law Review* 1, 3.

³ In 1439 the King of France, Charles VII of Orleans, called 'the victorious', promulgated an ordinance which contained principles that foreshadow Arts 86 and 87 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted on 8 June 1977, entered into force 7 December 1978) 1125 UNTS 4 ('API'), provisions that have been important landmarks in the legal development towards Art 28 of the Rome Statute. The ordinance set out the following: 'The King orders that each captain or lieutenant to be held responsible for the abuses, ills, and offenses committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed of abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to these Ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offense, as if he had committed it himself and be punished in the same way as the offender would have been.' See L Green, 'War Crimes, Crimes against Humanity and Command Responsibility' (1997) 50 *Naval War College Review* 26.

⁴ The superior's failure to prevent crimes committed by subordinates as the basis of criminal liability appeared in the 1474 Trial against Peter von Hagenbach on charges of murder, rape, perjury, and other crimes against 'the laws of god and men', conducted by an ad hoc tribunal composed of 28 judges of the Holy Roman Empire. Peter von Hagenbach was convicted for crimes that he, as a knight, had the duty to prevent. G Gordon, 'The Trial of Peter von Hagenbach: Reconciling History, Historiography, and International Criminal Law' (2012) <<http://ssrn.com/abstract=2006370>> or <<http://dx.doi.org/10.2139/ssrn.2006370>> 32 and 33, accessed 12 May 2014.

⁵ The responsibility of an individual in a position of authority for crimes committed by another person was known already in Roman law. Pursuant to Ulpiano's rule, those who ordered the commission of a murder must be held responsible as if they had committed murder themselves ('*mandator coedis pro homitida habetur*'). If a slave committed a crime ordered by his owner, both were considered to have perpetrated the crime, see T Mommsen, *El Derecho Penal Romano* vol. II (T. Dorado Montero tr., Madrid: La España Moderna 1999) 208. The 'Fuero Juzgo', a translation of the 'Liber Juridicum' that ruled the Iberian Peninsula during Visigoth domination, Book VI.V. number XII described, in old Spanish, the notion that those who order servants to commit murder shall be punished more severely than the servant who executed the murder: 'el que manda o conseia fazer omezillio, es mas enculpado que aquél que lo faze de fecho, por ende establecemos especialmiente que si el siervo dize que so señor le

of its armed forces'.⁶ In addition, Article 1(1) of the Regulations Respecting the Laws and Customs of War on Land stipulated that an army, a militia, and volunteer corps be 'commanded by a person responsible for subordinates'.⁷ As discussed later in the chapter, this Convention constitutes an important landmark in the development of command responsibility.

As set out in one particularly thoughtful and well-documented study, 'command has always imposed responsibility: yet few instances are recorded prior to the end of World War II where that responsibility was either criminal or international in nature'.⁸ Immediately after the War, the situation did not change substantially. It is true that, at the time, important developments occurred in relation to the establishment of international criminal law and the codification of international humanitarian law. The Nuremberg Statute, the 1949 Geneva Conventions, and the 1949 Genocide Convention established that individuals may be held criminally responsible for international crimes, and the contours of criminal responsibility in relation to crimes of this nature started to be delineated. Conspicuous by its absence from this legislation, however, is a definition of command responsibility.⁹ It is also notable that no such definition is found in the precursors to the drafting of the ICC Statute, namely the drafts produced between 1949 and 1954 in the framework of the ILC.

The Nuremberg trials and the follow-up proceedings developed on the responsibility of individuals.¹⁰ Save for a handful of cases, commanders were not called to responsibility for failing to control or taking measures to prevent the crimes. As mentioned, the Statute of the IMT at Nuremberg did not even contain an explicit provision on

mandó matar...deve recibir c.c. azotes...é los seniores que lo mandaron fazer devem seer descabezados', H Dobranich, *El Derecho Penal en el Fuego Juzgo* vol. XII (Buenos Aires: Arias 1924) 63. As set out here, the 1439 ordinance promulgated by the King of France stated that: 'the captain shall be deemed responsible for the offense, as if he had committed it himself and be punished in the same way as the offender would have been'. In addition, the 1775 American Military Code, called the American Articles of War, set out in Article XII: 'Every officer, commanding in quarters or on a march, shall keep good order, and, to the utmost of his power, redress all such abuses or disorders which may be committed by any officer or soldier under his command: If upon any complaint [being] made to him, of officers or soldiers beating, or otherwise ill-treating any person, or of committing any kind of riot, to the disquieting of the inhabitants of this Continent; he, the said commander, who shall refuse or omit to see justice done on the offender or offenders, and reparation made to the party or parties injured, as far as the offender's wages shall enable him or them, shall, upon due proof thereof, be punished as ordered by a general court-martial, in such manner as if he himself had committed the crimes or disorders complained of.' Journals of the Continental Congress 1774–9, vol. II, 111–23. Edited from the original records in the Library of Congress by Worthington Chauncey Ford; Chief, Division of Manuscripts; Washington, DC: Government Printing Office, 1905 <http://avalon.law.yale.edu/18th_century/contcong_06-30-75.asp> accessed 22 October 2013.

⁶ Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227 ('Fourth Hague Convention of 1907').

⁷ Annex to the Convention: Regulations respecting the laws and customs of war on land—Section I: On belligerents—Chapter I: The qualifications of belligerents—Regulations: Art 1.

⁸ Parks (n 2) 19. ⁹ Triffterer (n 1) 803.

¹⁰ K Ambos, 'Responsabilidad penal individual en el Derecho penal supranacional. Un análisis juríprudencial. De Núremberg a La Haya', *Revista Penal* 5 <<http://www.uhu.es/revistapenal/index.php/penal/article/viewFile/95/90>> accessed 5 August 2014; A Kiss, 'La contribución en la comisión de un crimen por un grupo de personas en la jurisprudencia de la Corte Penal Internacional' (2013) *Indret* 1, 23 *et seq.* <<http://www.indret.com/pdf/964.pdf>> accessed 5 August 2014, Triffterer (n 1) 803.

command responsibility and, in the limited relevant instances, commanders were prosecuted on the basis of the 1907 Hague Convention and its regulations, which referred that the armed forces must be commanded by a person responsible for his subordinates.¹¹ The relevant post-Second World War jurisprudence will be addressed in more detail later in this chapter; it suffices to say at this stage that, after Nuremberg, command responsibility attracted attention mainly in situations where none of the traditional modes of liability could be established.¹²

The 1977 Additional Protocol I to the Geneva Conventions (API) reflects for the first time in the international arena¹³ the trend towards imposing liability on superiors for an omission to interfere with the commission of crimes. Article 86 of API creates an obligation to repress and suppress grave breaches of the Geneva Conventions when these are ‘the result’ of a ‘failure to act’ when ‘under a duty to do so’. The API sets out that the fact that a breach was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach. Pursuant to Article 87, military commanders are obliged to prevent, suppress, and report breaches of the Conventions. In order to prevent and suppress the breaches, commanders have the duty to ensure that members of the armed forces under their command are aware of their obligations under the Conventions and API. If a Commander is aware that persons under his control are going to commit or have committed a breach, they are obliged to initiate the necessary steps to prevent the breaches, and, where appropriate, to initiate disciplinary or penal action.

The principles embraced by Articles 86 and 87 of API have made their way into the Rome Statute in much more explicit terms than the Statutes of the ad hoc Tribunals. These Statutes all contain virtually identical wording:¹⁴

The fact that any of the acts referred to in articles 2 to 5 of the present Statute were committed by a subordinate does not relieve his superior of criminal responsibility if he 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.¹⁵

¹¹ Triffterer (n 1) 810. ¹² Ibid., 814.

¹³ The 1968 Convention on Non-statutory Limitations for War Crimes and Crimes against Humanity (adopted 26 November 1968, entered into force on 11 November 1970) 754 UNTS 73, acknowledged the responsibility of state authority beyond the traditional modes of liability to cover those who ‘merely tolerate’ the commission of crimes, thus accepting liability for omissions.

¹⁴ The responsibility of superiors is set out in Art 7(3) Statute of the ICTY, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, Annex, Art 6(3) Statute of the ICTR, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Annex, and Art 6(3) Statute of the SCSL, Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the SCSL (signed 16 January 2002, entered into force 12 April 2002) 2178 UNTS 138, Annex (‘SCSL Statute’).

¹⁵ Art 3(2) SCSL Statute sets out: ‘With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes set forth in article 2 of this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (a) The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such

The ad hoc Tribunals have had various opportunities to interpret their respective provisions. It is established jurisprudence that the following elements are required to substantiate command responsibility:

- 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.¹⁶

25.3 Commanders and Forces, Superiors and Subordinates

Not every individual who has the capacity to prevent crimes under the jurisdiction of the Court may be called to responsibility under the Rome Statute. Such responsibility requires the individual to hold a special position vis-à-vis the legal interests protected by the Statute. Those who hold these positions are called ‘guarantors’. In the jurisprudence of the ad hoc Tribunals, this idea has been expressed as follows:

[A] material ability to prevent and punish may also exist outside a superior–subordinate relationship relevant for Article 7(3) of the Statute. For example, a police officer may be able to ‘prevent and punish’ crimes under his jurisdiction, but this would not as such make him a superior (in the sense of Article 7(3) of the Statute) vis-à-vis any perpetrator within that jurisdiction.¹⁷

The guarantor position is traditionally sustained two-fold; first, individuals may have a special obligation to protect certain interests, persons, and objects from attacks. They may be called to responsibility if these legally protected interests are harmed. Second, some individuals may be tasked with the supervision of objects or persons which may become a source of danger to the rights of others. These individuals may be called to responsibility if harm arises from these sources.¹⁸

The special duties imposed on commanders and superiors are based on the experience that their forces and subordinates are a source of danger.¹⁹ Accordingly, they are guarantors pursuant to the first modality. In relation to the second modality, international jurisprudence has moved to extend the guarantor position to encompass duties

crimes; (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and (c) 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.’

¹⁶ Judgment, *Blaškić*, IT-95-14-A, AC, ICTY, 29 July 2009, para. 484 (‘*Blaškić Appeal Judgment*’). See also Judgment, *Nahimana, Barayagwiza and Ngeze*, ICTR-99-52-A, AC, ICTR, 28 November 2007, para. 484 (‘*Nahimana Appeal Judgment*’); Judgment, *Dragomir Milošević*, IT-98-29/1-A, AC, ICTY, 12 November 2009, para. 280 (‘*D Milošević Appeal Judgment*’).

¹⁷ Judgment, *Halilović*, IT-01-48-A, AC, ICTY, 16 October 2007, para. 59 (‘*Halilović Appeal Judgment*’).

¹⁸ A Kaufmann, *Die Dogmatik der Unterlassungsdelikte* (Göttingen: Schwartz 1959) 283 *et seq.*

¹⁹ Arnold (n 1) 825; K Ambos, ‘Joint Criminal Enterprise and Command Responsibility’ (2007) 5 *Journal of International Criminal Justice* 159, 177; K Ambos, *Treatise on International Criminal Law: Foundation and General Part* vol. I (Oxford: Oxford University Press 2013) 207.

relating to the protection of interests (and not only to sources of danger). It has been held, in instances of occupied territory, that a commanding General is charged with the duty of maintaining peace, punishing crime, and protecting lives and property within the area of his command.²⁰

The language of Article 28 of the Rome Statute specifies the agents who, by virtue of their position, are obliged to carry out what is prescribed by the duty. Duties are imposed upon *military commanders and persons effectively acting as military commanders*, pursuant to Article 28 paragraph (a), with respect to crimes committed by *forces* under their control. Superior and subordinate relationships not described in paragraph (a), commonly referred to as *civilian superiors or non-military superiors*, are governed by Article 28 paragraph (b), which imposes duties upon superiors with respect to crimes committed by *subordinates* under their control.

The distinction between military commanders, persons effectively acting as military commanders, and non-military superiors may become a crucial issue at the ICC. The responsibility of non-military superiors requires higher *actus reus* and *mens rea* standards compared to the responsibility of military commanders and persons effectively acting as such. As set out later in this chapter, as regards the mental element, the reason for the responsibility of civilian superiors to require higher standards²¹ is that in military settings, there is a strict punishment system that ensures a greater degree of control over subordinates. A punishment system of that nature does not usually exist with respect to civilian settings and this impacts on the authority that can be predicated from non-military superiors.²²

When establishing whether superiors had the required authority, the Tokyo and the Nuremberg jurisprudence as well as the findings of the United Nations War Crimes Commission emphasized the *de jure* position of the superior.²³ By contrast, the ad hoc Tribunals looked at the superior's real authority and control over the subordinates.²⁴ The *de jure* position of authority was considered, at most, an indication of effective control.²⁵

A 'commander' has been defined as a person who, in the framework of a hierarchical system of power, possesses the structural ability to issue orders to other persons who,

²⁰ Judgment of 19 February 1948, *United States of America v Wilhelm List et al.*, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (Vol. XI/2, Washington: United States Government Printing Office) 1271 ('The Hostage Trial').

²¹ This was inspired by a US proposal during the drafting history of the Statute, see under the subhead 'Military commanders and persons effectively acting as such—"should have known"'.

²² N Karsten, 'Distinguishing Military and Non-Military Superiors, Reflections on the *Bemba* Case at the ICC' (2009) 7 *Journal of International Criminal Justice* 983, 988 *et seq.*

²³ Ambos, 'Superior Responsibility' (n 1) 831.

²⁴ Judgment, *Delalić et al.*, IT-96-21-A, AC, ICTY, 20 February 2011, para. 300 ('Čelebići Appeal Judgment').

²⁵ The ICTY Appeals Chamber clarified that in Čelebići, it did not reverse the burden of proof, but simply acknowledged that the possession of *de jure* authority constitutes *prima facie* a reasonable basis for assuming that an accused has effective control over his subordinates. Thus, the burden of proving beyond reasonable doubt that the accused had effective control over his subordinates ultimately rests with the Prosecution. Judgment, *Hadžihasanović and Kubura*, IT-01-47-A, AC, ICTY, 22 April 2008, para. 21 ('Hadžihasanović and Kubura Appeal Judgment'). See also Judgment, *Orić*, IT-03-68-A, AC, ICTY, 3 July 2008, paras 91-2 ('Orić Appeal Judgment'); Judgment, *Blagojević and Jokić*, IT-02-60-A, AC, ICTY, 9 May 2007, para. 302 ('Blagojević and Jokić Appeal Judgment'); *Halilović* Appeal Judgment (n 17) para. 85.

because of this very hierarchy, will comply with the orders.²⁶ A ‘military’ commander is a person within a military organization who is entitled to give orders to soldiers, who are duty bound to obey.²⁷

In the jurisprudence of the ICC, the term ‘military commander’ has been indicated to refer to persons who are formally or legally appointed to carry out a military commanding function (i.e. *de jure* commanders).²⁸ In turn, in the jurisprudence of the ICC, the notion of a ‘person effectively acting as a military commander’ was interpreted to apply to those who are not elected by law to carry out a military commander’s role, but who nonetheless perform it *de facto*.²⁹ It is necessary that such a person ‘effectively acts’ as a military commander and not only carries out ‘similar functions’.³⁰

Clearly, it is unnecessary for the entity’s qualification as ‘military’ that it is incorporated into the regular armed forces of a state. Paramilitary and irregular armed forces as well as national liberation movements may be properly characterized as ‘military’ forces. Indeed, it was expressly accepted during the preparatory works that the language in the Rome Statute included persons who controlled irregular forces, such as warlords.³¹ They may be appointed military commanders in accordance with the internal practices or regulations of the non-governmental military group or they may effectively act as such.

Command responsibility may attach to commanders and superiors at the highest levels of leadership as well as to commanders with only a few men under their control.³² The superior–subordinate relationship is not limited to the immediate superior

²⁶ B Burghardt, *Die Vorgesetztenverantwortlichkeit nach Völkerstrafrecht und deutschem Recht* (s. 4 VStGB), ZIS 11/2010 705, 169 *et seq.*; Ambos, *Treatise* (n 19) 209. A decision of the German Federal High Court which interpreted para. 4 of the VStGB, a provision that incorporated sections of Art 28 of the Rome Statute in the domestic law, held that military commanders are those who have the possibility, which is factually executable and eventually grounded in law, to issue binding orders and to impose compliance with these orders. *Bundesgerichtshof Beschluss AK 3/10 vom 17. Juni 2010*.

²⁷ C Meloni, *Command Responsibility in International Criminal Law* (The Hague: T M C Asser Press 2010) 155.

²⁸ Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, ICC, 15 June 2009, para. 408 (*Bemba Confirmation Decision*).

²⁹ *Bemba Confirmation Decision* (n 28) para. 408 *et seq.*; the word ‘law’ in this jurisprudence must be interpreted, in context, to include the regulations or practices of a non-governmental armed group.

³⁰ Of a different view—Arnold (n 1) 824.

³¹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC, 22 June 1998, A/CONF.183/C.1/WGGP/L.7.

³² See Judgment, *Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, TC, ICTY, 22 February 2001, para. 398. In addition, the commentary to Art 87 of the API spells out this idea, as follows: ‘3553. According to the sponsors of the proposal which was behind the rule under consideration here: “in its reference to ‘commanders’, the amendment was intended to refer to all those persons who had command responsibility, from commanders at the highest level to leaders with only a few men under their command”. This is quite clear. There is no member of the armed forces exercising command who is not obliged to ensure the proper application of the Conventions and the API. As there is no part of the army which is not subordinated to a military commander at whatever level, this responsibility applies from the highest to the lowest level of the hierarchy, from the Commander-in-Chief down to the common soldier who takes over as head of the platoon to which he belongs at the moment his commanding officer has fallen and is no longer capable of fulfilling his task.’ Y Sandoz et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers 1987) <<http://www.icrc.org/ihl.nsf/COM/470-750113?OpenDocument>> accessed 5 April 2013. It was indicated, with regard to the statement that ‘commanders’ refers to all those persons ‘from commanders at the highest level to leaders with only a few men under their command’, that it was uncontested and some delegations would even have wished this clarification to have been included in the text of the API in order to avoid any ambiguity, as the word ‘commander’ is not always understood in the same way in the armies of different countries.

of a subordinate but may extend through any number of levels in the hierarchy to reach a higher-placed individual.³³ Likewise, the superior can himself be subordinate to another commander.³⁴ As a result, a chain of liability based on the principle of command responsibility may extend to reach all those who failed to discharge their duties.³⁵ At the end of the chain is the subordinate/executor of the crime. Though the superior–subordinate relationship must be established, it is unnecessary to identify the individuals who committed the crimes.³⁶ A superior can be liable for crimes committed by unidentified perpetrators as long as their membership of a group is referenced.³⁷

It is not unusual in military settings that the authority will be delegated. However, delegation does not automatically absolve an individual of criminal responsibility—unless it is partial, precise, and specific and the delegated persons are really in a position to fulfil the delegated functions.³⁸ In addition, in order to absolve himself from responsibility, the delegating authority needs to have the power to confer upon the delegated authority the relevant competence and to terminate, by delegating his authority, his competence to exercise control properly over the subordinates. If this is not the case, then the ‘delegating’ authority may still be called to responsibility.

Important as it is, the distinction between commanders, persons effectively acting as military commanders, and other superiors may not be easy in certain cases. Not even the military rank of a person is a determinative feature in the decision on whether responsibility arises under Article 28 paragraphs (a) or (b). Indeed, a person without military rank may effectively act as a military commander. In turn, the existence of such a rank does not necessarily lead to responsibility as a military commander under paragraph (a);³⁹ crimes may be committed by ‘subordinates’ under the authority of an individual holding military status even if they do not qualify as ‘forces’ under his command. An individual may be held responsible both as a commander and a superior even with respect to the same base crimes if committed jointly, for instance, by forces and subordinates under his control.

³³ Ambos, ‘Superior Responsibility’ (n 1) 856.

³⁴ Ibid., 856.

³⁵ This scenario may pose a number of issues with regard to the (quasi) causality determination. Indeed, as will be explored later, causality requires a finding that the crimes would not have been committed but for the superior’s omission to discharge his duties. If the superiority is exercised by a collegial body, or the line of non-military authority becomes blurred in the usual confusion of war situations, there may be instances whereby the crimes would have been committed even if, among the superiors, some would have acted in accordance with their obligation. If this test were applied to each superior in isolation, none of them would be responsible for the crimes committed as a result of his failure to exercise control properly. This problem, which is well known in relation to crimes of omission, may be solved by resorting to the rules of mutual attribution when the requirements for co-perpetration are made out. The availability of such a remedy is at least unclear in relation to command responsibility, as it would result, combining Articles 25(3)(a) and 28, in some sort of ‘joint command responsibility’.

³⁶ *Blagojević and Jokić* Appeal Judgment (n 25) para. 287; Judgment, *Delić*, IT-04-83-T, TC I, ICTY, 15 September 2008, para. 56 (*Delić Trial Judgment*); Judgment, *Orić*, IT-03-68-T, TC II, ICTY, 30 June 2006, para. 305 (*Orić Trial Judgment*). The Appeals Chamber held that ‘notwithstanding the degree of specificity with which the culpable subordinates must be identified, in any event, their existence as such must be established. If not, individual criminal liability under Article 7(3) of the Statute cannot arise’, *Orić* Appeal Judgment (n 25) para. 35.

³⁷ *Orić* Appeal Judgment (n 25) para. 35.

³⁸ Ambos, ‘Superior Responsibility’ (n 1) 859.

³⁹ Karsten (n 22) 992 *et seq.*

Some commentators propose that guidance in deciding between ‘command’ or ‘superior’ responsibility may be found in the nature of the institution, unit, or organization in which the superior holds his position. Certain entities or units incontrovertibly belong to the military, such as the official armed forces of a state, whereas other institutions perform functions that are clearly not military by nature, such as political parties or administrative and bureaucratic organs of a state and private enterprises (like a private radio station). These examples lead to the superior responsibility of civilians.⁴⁰

This guidance possesses some practical value. However, there remain certain examples—not unusual in the field of command responsibility—such as camp wardens and civilian police officers, which escape clear-cut categorization.⁴¹ Relevant considerations to be taken into account, according to this thesis, are (i) whether the purpose of the unit is to participate in armed conflict; and (ii) the risk that the entity may generate international crimes.⁴² The latter aspect does not possess indicative value, for if international crimes were committed, they would necessarily be preceded by a risk of commission.⁴³

Military commanders are responsible for failures to prevent or repress crimes committed by ‘forces’, whereas, in relation to non-military commanders, the crimes are committed by ‘subordinates’. The ‘forces’ under the command of the military commander are a subgroup within the broader notion of ‘subordinates’. The term ‘forces’ is neither defined in the Statute nor in the Elements of Crimes. However, useful guidance can be found in the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.⁴⁴ For instance, failure to prevent crimes committed by civil members of military aircraft crews, war correspondents, supply contractors, members of labour units, or services responsible for the welfare of

⁴⁰ Ambos, ‘Superior Responsibility’ (n 1) 848. In relation to the superior responsibility of the leaders of a political party, see Judgment, *Nahimana*, ICTR-99-52-T, TC I, ICTR, 3 December 2003, para. 976.

⁴¹ Karsten (n 22) 996 *et seq.* According to the *Bemba* Confirmation Decision (n 28) para. 410, military-like commanders may generally encompass superiors who have authority and control over regular government forces such as armed police units or irregular forces (non-government forces) such as rebel groups and paramilitary units, including, *inter alia*, armed resistance movements and militias that follow a structure of military hierarchy or a chain of command.

⁴² Y Ronen, ‘Superior Responsibility of Civilian for International Crimes Committed in Civilian Settings’ (2010) 43 *Vanderbilt Journal of Transitional Law* 313, 349, and 353; Karsten (n 22) 1002—in the view of this commentator, the purposive criterion is the most persuasive.

⁴³ A Kiss, *El delito de peligro abstracto* (Buenos Aires: Ad Hoc 2011) 60 *et seq.*

⁴⁴ Art 13 of that Convention, in defining the ‘protected persons’, includes members of the armed forces of a Party to a conflict as well as members of militias or volunteer corps forming part of such armed forces, members of other militias, and members of other volunteer corps, including those of organized resistance movements provided they (a) are commanded by a person responsible for his subordinates; (b) have a fixed distinctive sign recognizable at a distance; (c) carry arms openly; and (d) conduct their operations in accordance with the laws and customs of war. The convention also provides examples of persons who accompany the armed forces ‘without actually being members thereof’, such as civil members of military aircraft crews, war correspondents, supply contractors, members of labour units, or services responsible for the welfare of the armed forces. Members of crews, including masters, pilots, and apprentices of the merchant marine, and the crews of civil aircraft of the parties to the conflict, as well as inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

the armed forces would not trigger *command* responsibility according to the definition in this Convention. The same can be said in relation to crimes committed by the inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units.

Although known since the post-Second World War jurisprudence,⁴⁵ the necessary relationship between superiors and subordinates in *civilian* settings has never been easy to prove.⁴⁶ The ad hoc Tribunals show limited instances of convictions in such settings.⁴⁷ The jurisprudence of the ICTY has insisted that the responsibility of non-military superiors requires a degree of control similar to that of the military superiors.⁴⁸ It has been recognized that inherent to the power to issue orders is the ability to punish, and that civilians do not have the disciplinary power which is usual in the military. However, in relation to the responsibility of non-military superiors, that ability to punish has been considered unessential. Instead, the capacity to report the facts to the authorities has been considered sufficient.⁴⁹

The most representative example has emerged from the ICTR case of *Prosecutor v Nahimana*. The accused was a former university lecturer, Director of the Rwandan Ministry of Information, and founder and director of a private radio station (RTLM). He was convicted to 30 years' imprisonment for failing to prevent or punish the broadcasting of criminal discourse by RTLM staff.⁵⁰ In these broadcasts, the audience was induced to take measures against the enemy.⁵¹

The decision on the confirmation of charges in the *Bosco Ntaganda* case has held him responsible as a military commander for crimes committed by civilians. Civilians accompanied members of the UPC/FPLC in almost all military operations; they transported supplies, and burned and pillaged the roofs of houses under the orders of UPC/FPLC commanders. Ntaganda provided weapons to some civilians and ordered them

⁴⁵ Ambos, 'Superior Responsibility' (n 1) 829 and 830. Indeed, in *Phol et al.*, one of the convicted accused was a civilian and in *US v Brandt et al.* it has been stated that civilians may be held responsible as superiors. The Judgment of 4 November 1948 given by the International Military Tribunal of Tokyo ('Tokyo Judgment') has confirmed the Nuremberg jurisprudence that superior responsibility may be attributed to members of the civilian government.

⁴⁶ The degree of control over subordinates in non-military setting needs to be similar to that exercised by military commanders; see Judgment, *Delalić et al.*, IT-96-21-T, TC, ICTY, 16 November 1998, para. 355 ('Čelebići Trial Judgment'). Moreover, especially in this context, it is important to distinguish between authority and the 'ability to convince, prompt or to influence'; see G Mettraux, *The Law of Command Responsibility* (Oxford: Oxford University Press 2012) 183.

⁴⁷ The ICTY jurisprudence contains no conviction of this nature and the cases concerning persons without a military rank charged as superiors were all related to operations in military settings; see Ronen (n 42) 324 *et seq.* The difficulty of proving the necessary relationship is reflected in the jurisprudence of the ICTR, which has endorsed the application of superior responsibility to non-military leaders, but has in practice usually rejected it, because the superior-subordinate relationship could not be established beyond reasonable doubt; see Bonafé (n 1) 610.

⁴⁸ Čelebići Trial Judgment (n 46) para. 378; Judgment, *Bagilishema*, ICTR-95-1A-T, TC I, ICTR, 7 June 2001, para. 42 ('*Bagilishema* Trial Judgment') reversed by the Appeals Chamber, in that the control exercised by the non-military superior must be of the same degree as that exercised by a military commander, but not necessarily of the same nature; see Judgment (Reasons), *Bagilishema*, ICTR-95-1A-A, AC, ICTR, 3 July 2002, para. 55.

⁴⁹ Judgment, *Aleksovski*, IT-95-14/1-T, TC I bis, ICTY, 25 June 1999, para. 78 ('*Aleksovski* Trial Judgment').

⁵⁰ *Nahimana* Appeal Judgment (n 16) para. 822.

⁵¹ Ibid.

to kill Lendus.⁵² The decision concluded that Bosco Ntaganda had effective control over the civilians, as he had the capacity to order them to take part in the hostilities.⁵³

25.4 Effective Command, Authority, and Control

Pursuant to Article 28(a), the commander or the person effectively acting as such must have effective command (and control) or authority (and control). Article 28(b) prescribes that the superior must have effective authority (and control).

‘Effective control’ is defined as the material ability to prevent or punish the commission of the crime.⁵⁴ A lower standard such as the simple ability to exercise influence over forces or subordinates, even if such influence turned out to be substantial, has been considered insufficient.⁵⁵ A commander or a superior who is vested with *de jure* authority but has no effective control over his or her subordinates would not incur criminal responsibility, whereas a *de facto* superior who lacks a formal appointment but, in reality, has effective control over the perpetrators of offences could incur criminal responsibility.⁵⁶

The ‘control’ has been considered an umbrella term, encompassing both the ‘authority’ and the ‘command’.⁵⁷ According to the *Bemba* Confirmation Decision, the alternative ‘effective authority and control’ does not add or provide a different meaning to the text.⁵⁸ The term ‘effective command’ has been understood to reflect ‘effective authority’ not least because, in the English language, the word ‘command’ is defined as ‘authority, especially over armed forces’.⁵⁹ The term ‘effective authority’ has been interpreted to refer to the modality, manner, or nature according to which a military or military-like commander exercises ‘control’ over his forces or subordinates.⁶⁰

In distinguishing the notion of ‘control’ from ‘command’ and ‘authority’, it is useful to recall the various ways by which, in social life, a person may express his wish that someone else does or abstains from doing something, such as ordering, requesting, asking, pleading, warning, etc. For instance, the imperative sentence ‘hand over the money or I will shoot you’, describes a situation whereby the gunman coerces the victim and the latter is in the gunman’s power. To secure compliance, the gunman threatens to do something a normal man would regard as harmful and renders keeping the money a less eligible choice. The appeal to threats to back orders is distinct from situations where the orders are given by a person occupying a

⁵² Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, *Ntaganda, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-309, PTC II, ICC, 9 June 2014, para. 18.

⁵³ Ibid., para. 166.

⁵⁴ *Bemba* Confirmation Decision (n 28) para. 415.

⁵⁵ *Bemba* Confirmation Decision (n 28) para. 415; *Hadžihasanović and Kubura* Appeal Judgment (n 25) para. 214.

⁵⁶ *Celebić* Appeal Judgment (n 24) para. 197. See also Judgment, *Strugar*, IT-01-42-T, TC II, ICTY, 31 January 2005, para. 363 (*Strugar Trial Judgment*); Judgment of 27 October 1948, *United States of America vs Wilhelm von Leeb et al.*, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (Vol. XI/1, Washington: United States Government Printing Office) 543–4 (“The High Command Case”).

⁵⁷ Ambos, *Treatise* (n 19) 210. Ambos recalls that ‘command’ is said to imply a material ability to issue orders and directives backed by threats, whereas ‘authority’ implies a rather formal right to act legally; see also Ambos, ‘Superior Responsibility’ (n 1) 857.

⁵⁸ *Bemba* Confirmation Decision (n 28) para. 412.

⁵⁹ Ibid., para. 413.

⁶⁰ Ibid.

position of pre-eminence—typical in the army or a body of disciples. In this second category of orders, the imperative embodies primarily an appeal not to fear but to respect the authority.⁶¹ The relevance of this consideration becomes clear when recalling that, in defining the notion of ‘commission’ of a crime and distinguishing it from secondary liability, the jurisprudence of the Court has resorted invariably to the concept of ‘control over the crime’; a notion that has been upheld by the ICC Appeals Chamber.⁶² This is characterized as the ability to decide whether and how the crime would be committed.⁶³ Control over the crime can be had through control over the will of the person who executes the crime, for instance because the executor acted by mistake or under duress, or was insane.⁶⁴ If the executor of the crime happens to be a subordinate, he may have acted under the ‘effective control’ of the superior, who induced him to commit unlawful conduct by mistake or under duress. However, in such circumstances, compliance would not be motivated by an appeal to authority (or command).

In any event, although ‘effective control’ can be had through mechanisms distinct from an appeal to authority and command, when addressed specifically under Article 28 the concept is tailored by the superior–subordinate relationship between the suspect and the forces or subordinates. Hence it becomes relevant whether the superior has the power to issue orders and instructions to subordinates, the nature of the orders the superior has the capacity to issue, as well as whether or not his orders are actually followed.⁶⁵ This relationship was as decisive in the early Nuremberg jurisprudence⁶⁶ as it is today in the recent jurisprudence of the ad hoc Tribunals and the ICC.⁶⁷

⁶¹ H L A Hart, *The Concept of Law* (Oxford: Oxford University Press 1961) 18 *et seq.*

⁶² Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Situation in the Democratic Republic of Congo, ICC-01/04-01/06-3121-Red, AC, ICC, 1 December 2014, para. 472. See for also instance Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, PTC II, ICC, 23 January 2012, ICC-01/09-01/11-373, para. 291.

⁶³ Judgment pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, TC I, ICC, 14 March 2012, para. 1003 ('Lubanga Judgment').

⁶⁴ Decision on the confirmation of charges, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-717, PTC I, ICC, 30 September 2008, paras 488 and 495 ('Katanga and Ngudjolo Confirmation Decision').

⁶⁵ Judgment, *Strugar*, IT-01-42-C, AC, ICTY, 17 July 2008, para. 254 ('Strugar Appeal Judgment').

⁶⁶ Superiors were held not responsible in relation to crimes, because they were committed by persons outside their control or direction. For instance, in the case of Paul Rostock, a German official, Chief of the Office for Medical Science and Research under Third Reich Commissioner Karl Brandt and the Dean of the Medical Faculty of the Berlin University, the Prosecution alleged that, as he knew, camp inmates were being experimented on with Malaria, Spotted Fever, Lost (Mustard) Gas, and other diseases. In this knowledge he continued to work on research projects concerning scientific investigations, resulting in further experiments on human beings. The Prosecution alleged that he failed to exercise his authority in an attempt to stop or check criminal experiments. The Tribunal concluded that no experiments were conducted by any person or organization which was under Rostock's control or direction. The accused was therefore found not guilty and released from custody; *Judgment, United States of America v Karl Brandt et al. ('The Medical Case')*, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* Vol. II (Washington: United States Government Printing Office 1946–9), case against Paul Rostock, 208–10.

⁶⁷ In a recent instance, the ICTY Appeals Chamber reversed a conviction and entered an acquittal for the reason that it could not establish the accused's ‘effective control’. The ICTY Appeals Chamber acquitted the most senior officer of the Yugoslav Army, the Chief of the General Staff Mr Perišić, for the charge of failing to punish the crimes related to the shelling of Zagreb in May 1995 by the Army of the Serbian Krajina. The Appeals Chamber found that the evidence in the record on Perišić's effective control over the perpetrators was contradictory and reversed Perišić's conviction. The Perišić Appeals Chamber found some evidence suggesting that at the time Zagreb was shelled, Perišić had effective control over the

A finding that a superior had ‘effective control’ is eminently case-specific. According to the *Bemba* Confirmation Decision, factors that may indicate the existence of effective control include (i) the suspect’s official position; (ii) his power to issue orders; (iii) the capacity to ensure compliance with the orders; (iv) his position within the military structure and the actual tasks that he carried out; (v) his capacity to order forces or units under his command, whether under his immediate command or at lower levels, to engage in hostilities; (vi) his capacity to re-subordinate units or make changes to the command structure; (vii) his power to promote, replace, remove, or discipline any member of the forces; and (viii) his authority to send forces to locations where hostilities take place and withdraw them at any given moment.⁶⁸

Commentators propose that superior responsibility applies only if the ‘effective control’ is rooted in a hierarchical structure or organization to which the superior and the subordinate belong.⁶⁹ The ‘organization’ is defined as a social reality upon which the interpersonal relationships among its members are crystallized or stabilized, beyond the specific situational background.⁷⁰ Though in cases where the existence of this structure is not made out, international jurisprudence rejects the liability of superiors, holding that such superiors do not have effective control over subordinates but at most ‘substantial influence’.⁷¹ This seems to be the right approach, for although superior-subordinate relationships are ordinarily underpinned by a hierarchical organization, the determinative feature is the existence of effective control and not the existence of an organization. Effective control may, in some instances, be exercised with respect to

perpetrators: he was involved in disciplinary proceedings, he could influence promotions and terminations of soldiers involved, and, more broadly, he could influence the operations of the SVK (Judgment, *Perišić*, IT-04-81-A, AC, ICTY, 28 February 2013, para. 114 (*‘Perišić Appeal Judgment’*)). However, other evidence suggested that he did not have effective control over the subordinates. Indeed, the shelling of Croatians was performed by the forces under the command of Čeleketić (para. 98). Perišić instructed Čeleketić not to shell Zagreb and the latter, instead, complied with the contrary orders of RSK President Martić (para. 116). The Appeals Chamber reasoned that, considered in isolation, this failure to obey Perišić’s instruction might be dismissed as an exceptional instance of *disobedience* or rebellion. Yet no evidence proved beyond reasonable doubt that he *ever issued a command order* to a VJ soldier serving in the SVK prior to the shelling of Zagreb. Similarly, there is no conclusive evidence as to Perišić’s exercise of the relevant disciplinary powers prior to the fall of the RSK. The Appeals Chamber considered that a reasonable alternative interpretation of the record is that Perišić could influence, but did not possess effective control over, the Zagreb Perpetrators at the time of the shelling of Zagreb. Thus, it was not the sole reasonable inference from the totality of the circumstantial evidence in this case that Perišić had effective control (para. 118). On this basis, the accused’s conviction was reversed (para. 120).

⁶⁸ *Bemba* Confirmation Decision (n 28) para. 418. The jurisprudence of the ICTY has dealt with these factors in several decisions: Judgment, *Halilović*, IT-01-48-T, TC I, ICTY, 16 November 2005, para. 58 (*‘Halilović Trial Judgment’*); *Halilović* Appeal Judgment (n 17) para. 207; Judgment, *Kordić and Čerkez*, IT-95-14/2-T, TC, ICTY, 26 February 2000, paras 418 and 421 (*‘Kordić and Čerkez Trial Judgment’*); *Strugar* Trial Judgment (n 56) paras 393–7, 406, 408, 411, and 413; *Strugar* Appeal Judgment (n 65) para. 256; *Blaškić* Appeal Judgment (n 16) para. 69; *D Milošević* Appeal Judgment (n 16) para. 280; *Hadžihasanović and Kubura* Appeal Judgment (n 25) para. 199; Judgment, *Muvunyi*, ICTR-00-55A-T, TC III, ICTR, 11 February 2010, para. 497; *Čelebići* Trial Judgment (n 46) para. 767; Judgment, *Brima et al.*, SCSL-04-16-T, TC II, SCSL, 20 June 2007, para. 788; *Orić* Appeal Judgment (n 25) para. 159.

⁶⁹ Karsten (n 22) 994 argues that leaders of loosely joined or spontaneously assembled groups do not have superior responsibility, since the entity they belong to needs to have a degree of stability; see also S Sivakumaran, ‘Command Responsibility in Irregular Groups’ (2012) 10 *Journal of International Criminal Justice* 1129, 1135, and 1137; Burghardt (n 26) 705.

⁷⁰ Burghardt (n 26) 705.

⁷¹ Ibid., 160.

conduct not strictly covered by an organizational framework. In these circumstances, which are discussed in greater detail hereunder there is no reason to deny superior responsibility if the effective control over the subordinates is substantiated.⁷²

In the military, subordinates are said to be permanently on duty and subject to internal disciplinary systems. In turn, with respect to civilians, it is submitted that they are subject to the authority and control of superiors only within work-related activities⁷³ and not beyond them.⁷⁴ This idea finds some support in the language of Article 28(b)(ii), which sets out that the crimes must concern activities that were within the effective responsibility and control of the superior. However, as it seems to me, this is a formalistic reading of the superior's duties based on a narrow conceptualization of his position of guarantee. In the first place, the commission of international crimes will necessarily occur outside the framework of what may be the legitimate object of a working relationship. Moreover, there are situations in which human relationships such as employment, church, or affiliation to unions of workers may degenerate in ties of strong dependence, compatible with superior–subordinate relationships. This dependence may provide superiors with a degree of control such that they can urge employees into participating in political demonstrations or organized action, or even going as far as taking part in constitution clash forces. A context of mass violence and atrocity crimes, extreme poverty, or lack of state authority, such as in territories controlled by organized crime and drug trafficking, would be fertile to links of this type. Those who, taking advantage of this context, have the capacity to enmesh themselves and dictate aspects of their subordinates' lives outside of the strict boundaries of the work relationship may be responsible as civilian superiors, provided they had the material ability to prevent the commission of the relevant crimes.

In relation to military contexts, it has been proposed that individuals belonging to the military are permanently on duty and therefore, superiors should be considered to have effective control over their subordinates at all times. This argument is also overly formalistic and cannot be persuasive. The required control needs to be *effective* as opposed to *formal*.

Finally, two positions have been defended with regard to the timing at which the superior must have had effective control over his subordinates. According to one view, the determinative factor is the time of the commission of the crime. A different view considers that the superior must have effective control at the time he fails to exercise his powers to prevent or to punish. This issue, which was discussed at length in the

⁷² Leaders may rely on guerrilla groups or private subcontractors to impose their political goals. In instances where they do not pertain to the group or the subcontracted militia, the effective authority and control would not necessarily be predicated upon the organizational structure. However, there is no reason to detract from the possibility of incurring into command responsibility if they nonetheless exercised effective authority and control over the executors. See Arnold (n 1) 826 (in relation to *state* authorities). I believe that this notion can be expanded to non-state leaders, such as for instance cartel leaders who may rely on subcontracted militias, guerrilla, or paramilitary groups.

⁷³ Ronen (n 42) 340 *et seq.*

⁷⁴ T Wu and Y-S Kang, 'Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and its Analogues in United States Law' (1997) 38 *Harvard International Law Journal* 272, 295; H Vest, *Völkerrechtsverbrecher verfolgen. Ein abgestuftes Mehrebenenmodell systemischer Tatherrschaft* (Bern: Stämpfli Verlag AG 2011) 504, 258–9; Ambos, *Treatise* (n 19) 212; Arnold (n 1) 841 argues that such activities undertaken by subordinates escape the sphere of the superior's competence.

jurisprudence of the ad hoc Tribunals,⁷⁵ has found a definite answer in the wording of the Rome Statute. The effective control must have existed at least at the time the crimes were about to be committed, which means that the superior must have been already in control over the forces before the crimes were committed.⁷⁶ This means, in addition, that if he lost effective control over his subordinates at any stage prior to the point in time when the subordinates were at least about to commit the crimes, the superior cannot be held liable. This idea is addressed in further detail in the following section.

25.5 Duties on Commanders and Superiors

In the framework of the ad hoc Tribunals, superior responsibility is responsibility for a plain omission.⁷⁷ A superior's responsibility is limited to his own omission in failing to act, and in neglecting his duty with regard to crimes committed by subordinates. Causality between the superior's omission and the crimes committed by the subordinates is not required.⁷⁸ Under this model, the superior should not be understood to share the same responsibility as the subordinate who commits the crime,⁷⁹ and cannot be viewed as if he had committed the crime himself.⁸⁰

In turn, causality is a requirement in Article 28 and this impacts on the very nature of command and superior responsibility. This feature and the consequences thereof⁸¹ play a role in the conceptualization and differentiation of the basic forms of superior responsibility. The basic forms of command responsibility have been convincingly distinguished in the literature as follows: (i) intentional failure to prevent; (ii) negligent failure to prevent; (iii) intentional failure to punish; and (iv) negligent failure to punish.⁸² The analysis in the next section, although taking this differentiation into account, proceeds by looking into the duties which are imposed on the superiors, as follows: (a) the duty to exercise control properly; (b) the duty to prevent; and (c) the duty to repress or submit.

⁷⁵ *Orić* Trial Judgment (n 36) para. 335; *Kordić and Čerkez* Trial Judgment (n 68) para. 446, and in Decision on Joint Challenge to Jurisdiction, *Hadžihasanović et al.*, IT-01-47-PT, TC, ICTY, 12 November 2002, paras 37, 51, 180 *et seq.*, 202 ('Hadžihasanović Jurisdiction Trial Decision'). It is also supported by the dissenting opinions of Appeals Judges Shahabuddeen and Hunt in Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility, *Hadžihasanović et al.*, IT-01-47-AR72, AC, ICTY, 16 July 2003 ('Hadžihasanović Jurisdiction Appeal Decision'), Partial Dissenting Opinion of Judge Shahabuddeen, para. 1; Separate and Partially Dissenting Opinion of Judge David Hunt, paras 7 *et seq.*; Judgment, *Sesay, Kallon and Gbao*, SCSL-04-15-T, TC I, SCSL, 2 March 2009, para. 299.

⁷⁶ *Bemba* Confirmation Decision (n 28) para. 419.

⁷⁷ *Halilović* Trial Judgment (n 68) para. 78.

⁷⁸ *Blaškić* Appeal Judgment (n 16) para. 77; *Halilović* Trial Judgment (n 68) para. 78; *Hadžihasanović and Kubura* Appeal Judgment (n 25) para. 40.

⁷⁹ *Halilović* Trial Judgment (n 68) para. 78

⁸⁰ *Orić* Trial Judgment (n 36) para. 293.

⁸¹ This needs to be reflected in a lower penalty for commanders as well as in the manner that the convictions are expressed in the relevant judgments; H Olásolo, *Tratado de Autoría y Participación en Derecho Penal Internacional* (Valencia: Tirant lo Blanch 2013) 825 *et seq.*

⁸² Meloni, 'Command Responsibility, Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' (n 1) 633 *et seq.*; V Nerlich, 'Superior Responsibility under Article 28 ICC Statute, For What Exactly is the Superior Held Responsible?' (2007) 5 *Journal of International Criminal Justice* 668 *et seq.*; Meloni, *Command Responsibility in International Criminal Law* (n 27) 197.

25.5.1 Failure to exercise control

Article 28 is structured around a two-fold set of duties on commanders and superiors which need to be carefully distinguished. A primary, more ‘general’ duty is infringed upon when commanders and superiors *fail to exercise control properly* over their forces and subordinates. Second, a more specific duty is infringed once they *fail* to take all necessary and reasonable measures within their powers to *prevent* crimes, *repress* the crimes, or *submit the matter* to the competent authorities.

As set out here, these two duties are interrelated and in some scenarios relevant to Article 28 there is a ‘continuum’ between them. When the superior had the required competence, capacity, and knowledge to prevent the crimes and he failed to do so, he would not have exercised control properly over his subordinates. Failure by the superior to *prevent* the crimes embodies the most symptomatic manifestation of the failure to control properly. Conversely, in relation to the specific duty to repress, differentiating between the general and the specific duty is crucial, for if the superior sufficiently discharged his general duty to exercise control properly, he should not be held responsible even if he subsequently failed to repress or submit the matter.⁸³

The general duty to exercise control properly is operative even before subordinates are committing or about to commit the crimes. Although the content of this duty is entirely dependent on the situational background, there are a number of factors that may be found indicative in this inquiry. These include whether the superior took measures to inform, educate, supervise, and control the subordinates;⁸⁴ promote awareness of the Geneva Conventions and the additional Protocols;⁸⁵ establish the necessary lines of communication and reporting between the top and the bottom of the chain of command;⁸⁶ and establish a regime of internal discipline.⁸⁷

25.5.2 Duty to ‘prevent’ the commission of the crimes

Prevent means ‘to hinder or impede’.⁸⁸ Failure to fulfil the duty to prevent is not simply configured by failure to take action. An omission is not simply ‘absence of action’. If, for instance, a window is closed in a room, one can logically neither close it on that occasion nor abstain from closing it. In addition, acts that are beyond human ability cannot be done by a person in as much as they cannot be abstained from.⁸⁹ Hence, an omission requires something more than the failure to take action.

⁸³ Nerlich (n 82) 678; for a different view, Meloni, *Command Responsibility in International Criminal Law* (n 27) 166 and 175.

⁸⁴ Triffterer (n 1) 807.

⁸⁵ See Art 87(2) API (n 3) and para. 3558 of the Commentary (n 32), stating the following: ‘If, as in many armies, the commander of a unit is responsible for the instruction of his men, it will be up to him to ensure, primarily through the commissioned and non-commissioned officers under his command, that his unit gets proper training. He will ensure that this is done either periodically or expressly before an engagement by drawing particular attention, where necessary, to the sort of action to be avoided, taking into account the situation or the morale of the troops (the probable presence of civilians in the neighbourhood of the military objective and the conduct to be observed towards them, the attitude towards an adversary wishing to surrender or with regard to recognized signs etc.).’

⁸⁶ Meloni, *Command Responsibility in International Criminal Law* (n 27) 169 and fn. 140.

⁸⁷ Commentary to Art 87 of the API (n 32) para. 3549.

⁸⁸ See Black’s *Law Dictionary* 9th edn (Saint Paul: West Publishing 2009).

⁸⁹ G Henrik Von Wright, *Norma y acción, una investigación lógica* (Madrid: Editorial Tecnos 1979) 62.

As set out in a report by the ILC, a military commander may contribute directly to the commission of crimes by his subordinates when he orders them to carry out a criminal act, such as killing an unarmed civilian. He may also order his subordinates to refrain from performing an act which the subordinates have a duty to perform, such as refraining from providing food for prisoners of war which results in their starvation.⁹⁰ Under these circumstances, the base crimes may be hindered by simply giving or not giving the relevant orders. However, contributions of this type are better captured by commission, ordering, aiding and abetting, etc. If, instead, what is attributed to the superior is no more than his failing to prevent or repress the unlawful conduct, we are in the field of superior responsibility.⁹¹ The issue is highly controversial in the 'grey areas'. It is recognized that except for 'ordering',⁹² every mode of liability can be satisfied by omission.⁹³ Hence, the ontological finding that the superior simply failed to take action does not predetermine the responsibility as a commander. This leads to complicated issues of delimitation, in particular between aiding and abetting by omission and command responsibility.⁹⁴ The most recent jurisprudence of the ad hoc Tribunals rejects cumulative convictions as a participant and as a superior with relation to the same base crimes.⁹⁵ Thus, a proper differentiation is even more critical in practice.

The ICC has considered this question in the decision on the confirmation of charges against Laurent Gbagbo. The Chamber confirmed alternative legal characterizations

⁹⁰ 1996 Report of the ILC on the work of its forty-eighth session on the Draft Code of Crimes against the Peace and Security of Mankind, A/CN.4/SER.A/1996/Add.1, 24.

⁹¹ Ibid.

⁹² Judgment, *Galić*, IT-98-29-A, AC, ICTY, 30 November 2006, para. 176.

⁹³ See the analysis in Olásolo (n 81) 760 *et seq.*

⁹⁴ Meloni, *Command Responsibility in International Criminal Law* (n 27) 216 *et seq.*; Olásolo (n 81) 760 *et seq.*; Burghardt (n 26) 698 *et seq.* An accused's failure to prevent the crime, or 'non-interference', can be considered to amount to tacit approval and encouragement of the crime. The tacit approval and encouragement of the crime may be considered aiding and abetting, when such conduct substantially contributed to the crime. See Judgment, *Brđanin*, IT-99-36-A, AC, ICTY, 3 April 2007, para. 273. In the cases where this category was applied, the accused held a position of authority, he was physically present at the scene of the crime, and his non-intervention was seen as tacit approval and encouragement; see *Aleksovski* Trial Judgment (n 49) para. 87; Judgment, *Kayishema and Ruzindana*, ICTR-95-1-T, TC II, ICTR, paras 201–2 ('*Kayishema and Ruzindana* Appeal Judgment'); Judgment, *Akayesu*, ICTR-96-4-T, TC I, ICTR, 2 September 1998, para. 706 ('*Akayesu* Trial Judgment'). See also Judgment, *Furundžija*, IT-95-17/1-T, TC, ICTY, 10 December 1998, paras 205–7 ('*Furundžija* Trial Judgment'), discussing the *Synagogue* case. According to the *Furundžija* Trial Judgment, para. 232, '[w]hile any spectator can be said to be encouraging a spectacle—an audience being a necessary element of a spectacle—the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals'. In cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence at (or very near to) the crime scene, especially if considered together with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it.

⁹⁵ Judgment, *Kordić and Čerkez*, IT-95-14/2-A, AC, ICTY, 17 December 2004, paras 34 and 35; Judgment, *Kajeljeli*, ICTR-98-44A-A, AC, ICTR, 23 May 2005, para. 81; previously, for instance in Judgment, *Kambanda*, ICTR 97-23-A, AC, ICTR, 19 October 2000, cumulative convictions had been accepted. Conversely, recent jurisprudence considers command responsibility as a factor to be taken into account in the determination of the sentence. The Rome Statute, in Art 28, sets out that this article applies '[i]n addition to other grounds of criminal responsibility'. It is unclear what the purpose of this sentence is and the drafting history of this provision does not offer any clarification. In my view, given this sentence, cumulative convictions cannot be rejected *ad initum* in the framework of the Statute. This issue cannot be discussed here in any detail. As set out in para. 9 of the General Introduction to the Elements of Crimes, '[a] particular conduct may constitute one or more crimes'. In turn, Arts 20 and 21(3), embracing the '*ne bis in idem principle*', play a significant role in this determination.

of the same facts proposed by the prosecutor.⁹⁶ It confirmed Gbagbo's responsibility under commission of, ordering of, and contribution to the crime in any other way; however, his responsibility as a military commander was not confirmed. The Judges found that the narrative of the facts did not point to Gbagbo's criminal responsibility based on his mere failure to prevent or repress the crimes committed by others pursuant to Article 28 of the Statute.⁹⁷ Even though the evidence indicated a failure on the part of Gbagbo to prevent violence or to take adequate steps to investigate and punish the authors of the crimes, this failure was seen as an inherent component of the deliberate effort to achieve the purpose of retaining power at any cost, including through the commission of crimes.⁹⁸ Given the circumstances of the case, the Chamber considered it convenient not to confirm Gbagbo's responsibility as a military commander.⁹⁹

The intentional failure to prevent occurs when the superior knows that crimes are being committed or are about to be committed by his subordinates and fails to take all necessary and reasonable measures within his powers to prevent such crimes. It has been considered to reflect in nature (i) principal liability,¹⁰⁰ (ii) a separate crime of omission,¹⁰¹ and (iii) complicity.¹⁰²

⁹⁶ Decision on the Confirmation of Charges against Laurent Gbagbo, *Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-656-Red, PTC I, ICC, 12 June 2014, paras 227 and 228; 260 *et seq.*

⁹⁷ Ibid., para. 263.

⁹⁸ Ibid., para. 264.

⁹⁹ Pursuant to the usual rules of 'concurrency of offences', in principle, the most serious forms of intervention displace the less serious. The forms of participation are displaced by perpetration, and 'ordering and inducing' displace 'aiding and abetting'; see G Jakobs, *Derecho Penal Parte General, Fundamentos y teoría de la imputación*, tr. Joaquín Cuello Contreras y José Luis Serrano González de Murillo 2nd edn (Madrid: Marcial Pons 1997) 1060; H-H Jesckeck/T Weigend, *Tratado de Derecho Penal, Parte General*, tr. Miguel Olmedo Calderete (Albolote: Comares 2002) 792. In relation to the concurrence between an action and an omission, see the critical remarks in Kaufmann (n 18) 239 n 363.

¹⁰⁰ This position has been reflected in the most remote legal precedents of command responsibility, see (n 5). The scenarios where the commander commits the crimes individually by omission (commission by omission) do not engage command responsibility. In turn, co-perpetration, as well as indirect perpetration, require elements which would not be fulfilled by the superior's plain failure to take measures to prevent the crimes. Co-perpetration requires an essential contribution to the common plan, which resulted (all contributions taken together and not each contribution in isolation) in the material elements of the crime. Typically, the superior would contribute to the crime by not preventing it and knowledge by the co-perpetrators that no measures to stop the crimes will be taken by the superior, who has effective control over the executors, may embrace a psychological contribution to the crime. These contributions alone would usually be insufficient to establish the level of contribution to the common plan that is required for co-perpetrators. The notions of indirect perpetration and 'control over the organization' as adopted in the jurisprudence of the Court include an element of control over the crime through control over those who execute the crimes, the subordinates; see *Katanga and Ngudjolo Confirmation Decision* (n 64) paras 497 *et seq.* Command responsibility, in relation to the crimes the subordinates decided to commit and the superior, having knowledge about them, failed to prevent, does not incorporate these elements.

¹⁰¹ According to Ambos, the crimes committed by the subordinates are neither an element of the crime nor a pure objective condition to punish the superior. Instead, they constitute the 'point of reference' of the superior's failure of supervision—which should explain that a causal relationship must exist; Ambos, 'Superior Responsibility' (n 1) 851. The superior commits a genuine offence of omission, based on his dereliction of a duty of supervision; Ambos, *Treatise* (n 19) 207. Critical, Meloni, 'Command Responsibility, Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' (n 1) 198 and 299. Ambos argues that although the commander is *blamed* for his failure to supervise, he is not only *punished* for this but also for the actual crimes of his subordinates—and this combines a direct and an indirect (victorious and accomplice) liability. It is difficult to reconcile this position with the wording of Rule 145 of the Rules of Procedure and Evidence. Accordingly, any sentence of imprisonment must reflect the *culpability* of the convicted person. The convicted person cannot be punished beyond what is the subject of the legal judgment of blameworthiness. The interpretation that command responsibility embodies a crime of plain omission must be rejected in the framework of the Rome Statute for the reason that the law required 'causality'.

¹⁰² Meloni, *Command Responsibility in International Criminal Law* (n 27) 198; Nerlich (n 82) 673.

As interpreted by other commentators, the concept of command responsibility presents its most striking similarities with respect to the concept of assistance.¹⁰³ It is important to keep in mind that only principals, and not assistants or accomplices, should be blamed for ‘the crimes’. Accomplices, as accessories to the crimes, are blamed for their participation in the crimes committed by someone else (the principal). That an assistant is blamed for the crime of the principal perpetrator suggests an ‘extensive understanding’ of the notion of perpetration, according to which all those who have introduced a condition for a criminal result should themselves be held responsible for the crimes, and the rules of accessory liability work to restrict the scope of liability. In the literature, however, a different interpretation known as the ‘restrictive notion of perpetration’ is predominant. According to this interpretation, only those individuals who commit the crimes are blamed for them. Other persons may be punished in addition to the perpetrator if the law prescribes special rules establishing such liability (ordering, instigation, aiding and abetting, etc.) and their liability may be ‘accessorial’, depending on whether the perpetrator acts.¹⁰⁴ The responsibility of superiors is also accessorial, for it depends on whether the subordinate is about to commit the crime. They are not responsible for the crimes, but they are made responsible only for their contribution to the crime committed by the principal arising from their failure to exercise control properly. The negligent failure to prevent the subordinates’ crime, if it is also to be assimilated to assistance, encounters longstanding problems of legal interpretation¹⁰⁵ which have lead to interesting developments in the framework of command responsibility.¹⁰⁶

¹⁰³ Nerlich (n 82) 673; Olásolo (n 81) 829; E van Sliedregt, *Individual Criminal Responsibility in International Criminal Law* (Oxford: Oxford University Press 2012) 200. A Report of the ILC sets out that in circumstances where the superior has actual knowledge that his subordinates are committing or about to commit crimes, he may be considered ‘to be an accomplice to the crime under general principles of criminal law relating to complicity’. General Assembly, Official Records, Fifty-first Session, Supplement No. 0 (A/51/10) 38. It has to be noted that the Preparatory Committee and the Zutphen draft reflected the following language: ‘In addition to other (types of complicity) (modes of participation) in crimes under this Statute, a commander is also criminally responsible (*as an aider or abettor*) for such crimes committed by forces under his command as a result of his failure to exercise proper control’; Preparatory Committee on the establishment of the ICC, A/AC.249/1 85 (UK Proposal); A/AC.249/L.4 (Canadian Proposal) 15.

¹⁰⁴ Lubanga Judgment (n 63) para. 998; Jakobs, *Theorie der Beteiligung*, Mohr Siebeck 2014, p. 11 et seq.

¹⁰⁵ There are at least two points that need to be considered carefully. First, a negligent failure to prevent may not contribute to the base crime to the same degree, from an objective perspective, as the intentional failure to prevent the crime. Indeed, in circumstances where the subordinates know that the superior is not preventing them from committing the crimes although he knows of their occurrence, the superior may be contributing to the crime psychologically—a factor which is absent in scenarios where the superior made a negligent omission. Second, old criminal law theories postulate that negligent contributions to crimes committed with intent should not be considered *causal*, since the intervention of an intentional agent breaks the causal relationship (a theory called in German/Spanish doctrine ‘*Regressiverbot*’ or ‘*prohibición de regreso*’); see reference in G Jakobs, *Strafrecht. Allgemeiner Teil. Studienausgabe. Die Grundlagen und die Zurechnungslehre* (Berlin: de Gruyter 1993) 24/7; and G Stratenwerth and L Kuhlen, *Strafrecht Allgemeiner Teil, Die Straftat* 4th edn (München: Vahlen 2000) 15/70. A person that sets out a negligent condition, for example by leaving a loaded gun on a table, should not be responsible for the murder committed by someone who steals the gun from his house; Stratenwerth and Kuhlen, 15/71. However, if the crime is committed by the person’s own child, the penal response may be a different precisely because the of the person’s position with respect to the legal interests protected as a guarantor.

¹⁰⁶ Nerlich (n 82) 672 *et seq.* has proposed the most innovative scientific development in this context. In his view, the superior should not be attributed the subordinates’ conduct but only the results of such

As to the specific measures a superior is called to take, it has been insisted that they depend upon the particular circumstances of the case. It has been argued that they involve questions of evidence rather than substantive law.¹⁰⁷ The following considerations need to be taken into account when finding that a specific measure was necessary and reasonable:

- i. A superior cannot be asked for more than what is possible and in his or her power;
- ii. The superior's powers are informed by the degree of effective control over the conduct of subordinates at the time a superior is expected to act;
- iii. Not *all* measures but only those which are necessary and reasonable to prevent subordinates from the prospective crime must be undertaken;
- iv. The more grievous and/or imminent the potential crimes of subordinates appear to be, the more attentive and quicker the superior is expected to react.¹⁰⁸

Academic literature and the case law of the ICTY offer a number of examples of specific measures that were expected from superiors, which include securing reports that military actions have been carried out in accordance with international law;¹⁰⁹ issuing orders aimed at bringing the relevant practices into accord with the rules of war;¹¹⁰ securing the implementation of the orders issued; taking more active steps than the issuance of routine orders;¹¹¹ issuing special (as opposed to routine) orders and protesting against or criticizing criminal action;¹¹² taking disciplinary measures against the commission of atrocities;¹¹³ or reporting to and/or insisting before a superior authority that immediate action be taken.¹¹⁴ If there were mechanisms beyond giving orders within the superior's powers to prevent

conduct. Van Sliedregt (n 103) 200 and 206 regards this scenario 'as a compromise solution', providing for a crime of plain omission; the same conclusion can be found in Ambos, *Treatise* (n 19) 220. In my view, whether or not isolating the subordinate's conduct really solves the issues of imputation, the language of Art 28 (a)(ii) and (b)(iii) makes it difficult to accommodate this thesis. The law uses the language: the commander or the superior failed to prevent 'their commission'; it does not say: failed to prevent 'the consequences' or even 'the crimes'.

¹⁰⁷ *Orić* Trial Judgment (n 36) para. 329; *Orić* Appeal Judgment (n 25) para. 177.

¹⁰⁸ Ibid.

¹⁰⁹ *Strugar* Trial Judgment (n 56) para. 374; Judgment, *Hadžihasanović and Kubura*, IT-01-47-T, TC, ICTY, 15 March 2006, para. 153 ('*Hadžihasanović and Kubura* Trial Judgment'). See also *The Hostage Trial* (n 20) 1290.

¹¹⁰ *Hadžihasanović and Kubura* Trial Judgment (n 109) para. 153; *Strugar* Trial Judgment (n 56) para. 374. See also *The Hostage Trial* (n 20) 1311.

¹¹¹ *Tokyo* Judgment (n 45) 452: 'The duty of an Army commander in such circumstances is not discharged by the mere issue of routine orders.... His duty is to take such steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out'; *Hadžihasanović and Kubura* Trial Judgment (n 109) para. 153; *Strugar* Trial Judgment (n 56) para. 374.

¹¹² *Hadžihasanović and Kubura* Trial Judgment (n 109) para. 153; *Strugar* Trial Judgment (n 56) para. 374. See also *High Command Case* (n 56) 623.

¹¹³ *Hadžihasanović and Kubura* Trial Judgment (n 109) para. 153; *Strugar* Trial Judgment (n 56) para. 374. See also *Tokyo* Judgment (n 45) 452.

¹¹⁴ *Orić* Trial Judgment (n 36) para. 331; *Hadžihasanović and Kubura* Trial Judgment (n 109) paras 153 *et seq.*; *Strugar* Trial Judgment (n 56) para. 374; *Halilović* Trial Judgment (n 68) para. 89. See also *Tokyo Judgment* (n 45) 447–8.

the crimes, then he should have brought them into operation. Appropriate measures might include postponing military operations, suspending, excluding, or redeploying violent subordinates, and conducting military operations in a manner such as to lower the risk of specific crimes or remove opportunities for their commission.¹¹⁵

In principle, the fact that subordinates ignore the orders received from their superiors points to a lack of effective control. However, the orders need to be ‘genuine’ and they need to be followed by consistent implementing practices. Particularly when the subordinates act under a culture of impunity, superiors will not have taken sufficient and reasonable measures to prevent the crimes if they issue formal orders not to commit crimes whilst openly carrying out a practice which is wholly contradictory to what is ordered.

An example of the said situation can be found in the *Lubanga Judgment*. Although analysing the responsibility of the accused under Article 25(3)(a), the Judgment dealt with a defence contention that the accused was opposed to the recruitment of children under the age of 15 into the UPC and took steps to ensure that children were demobilized. He formally prohibited the recruitment practice, ordered counter measures,¹¹⁶ and followed up on such orders, by requesting implementation reports¹¹⁷ and issuing supplementary demobilization decrees.¹¹⁸ The Chamber concluded that the implementation of these orders had not been demonstrated, not even on a *prima facie* basis.¹¹⁹ In spite of these orders, so reasoned the Chamber, children continued to be recruited and re-recruited into the FPLC throughout the period of the charges. The UPC/FPLC did not cooperate with NGOs working in the area of demobilization, and human rights workers were threatened in the field. The accused used children under the age of 15 as his bodyguards, and participated in speeches and rallies attended by conscripted and enlisted children under the age of 15.¹²⁰ The Chamber considered that these factors tended to undermine the suggestion that the accused’s orders not to conscript or enlist children, and to demobilize those children present in the militias, were meant to be implemented.¹²¹

25.5.3 Duty to repress or submit the matter to the competent authorities for investigation and prosecution

The content of the duty to punish or submit the matter to the competent authorities for investigation and prosecution has been dealt with extensively in the jurisprudence of the ad hoc Tribunals under the statutory notion of ‘duty to punish’. When there is a reasonable suspicion that a subordinate has committed a crime,¹²² the superior is

¹¹⁵ Olásolo (n 81) 805; Sivakumaran (n 69) 1140.

¹¹⁶ *Lubanga Judgment* (n 63) para. 1281. The 21 and 30 October 2002 demobilization instructions are discussed at para. 1292. The latter was read out by radio (para. 1299).

¹¹⁷ Ibid., paras 1304 *et seq.*

¹¹⁸ Ibid., paras 1313 *et seq.*

¹¹⁹ Ibid., para. 1321.

¹²⁰ Ibid., paras 1346–8.

¹²¹ Ibid., para. 1348.

¹²² *Orić Trial Judgment* (n 36) para. 336.

bound to investigate it (or have it investigated).¹²³ Once the facts are established, a superior empowered to sanction the perpetrators must do so.¹²⁴ If he is not the competent authority,¹²⁵ he must submit the matter to the competent authority.¹²⁶ The superior has the duty to take active steps to ensure that the perpetrators are brought to justice.¹²⁷

There are certain requirements that need to be fulfilled in order for the statutory duty to repress to become operative. First, the subordinate's conduct must be a crime under the jurisdiction of the ICC. For instance, the *planning* of a crime is not *per se* punishable under the Rome Statute—save for the crime of aggression (in respect of which the ICC cannot exercise its jurisdiction yet). Thus, failure to repress the mere planning of a crime cannot lead to liability under Article 28. Second, such conduct must be punishable under the domestic law that the superior is called to apply, since if the domestic law does not criminalize the conduct, the superior would be unable to repress it.

It is accepted that the superior must have had effective control of the relevant subordinates at the time when measures of investigation and punishment are to be taken against them.¹²⁸ However, whether such a link is necessary with regard to the time at which the crime was committed has been subject to discussion. Superiors may have the power to punish crimes committed before they acquired authority over the forces.¹²⁹ If, for instance, a change of command following the commission of a crime

¹²³ Judgment, *Boškoski and Tarčulovski*, IT-04-82-T, TC II, ICTY, 10 July 2008, para. 418 ('*Boškoski and Tarčulovski Trial Judgment*'); see also Judgment, *Mrkšić et al.*, IT-95-13/1-T, TC II, ICTY, 27 September 2007, para. 568 ('*Mrkšić Trial Judgment*'); *Strugar Trial Judgment* (n 56) para. 376; Judgment, *Limaj et al.*, IT-03-66-T, TC II, ICTY, 30 November 2005, para. 529 ('*Limaj Trial Judgment*').

¹²⁴ The sanctions may be criminal or disciplinary in nature. The sanction cannot be disproportional—low in relation to the wrong that is the subject of the punishment. Examples of disciplinary sanctions include reprimands, warnings, confiscation of weapons, demotion, and dismissal from the group; financial sanctions including fines, suspension of pay, and compensation to victims; curtailing of movement, ranging from detention to house arrest; corporal sanctions, such as drill exercises or beatings; and criminal sanctions, including capital punishment; see Sivakumaran (n 69) 1143.

¹²⁵ In principle, a person cannot be found guilty both for having failed to punish the crime and for having failed to submit the matter to the competent authorities for investigation and prosecution. The superior is either the competent authority to punish the crimes or he is not, and in the latter case he is required to submit the matter. However, in the unlikely scenario that aspects of the conduct fall under his authority whereas other aspects do not, he may infringe both the duty to repress and the duty to submit the matter.

¹²⁶ *Halilović Appeal Judgment* (n 17) para. 182, affirming *Halilović Trial Judgment* (n 68) paras 97 and 100; *Mrkšić Trial Judgment* (n 123) para. 568; *Limaj Trial Judgment* (n 123) para. 529; *Kordić and Čerkez Trial Judgment* (n 68) para. 446. See also *Boškoski and Tarčulovski Trial Judgment* (n 123) para. 418; Judgment, *Blaškić*, IT-95-14-T, TC, ICTY, 3 March 2000, para. 335 ('*Blaškić Trial Judgment*'); *Strugar Trial Judgment* (n 56) para. 376.

¹²⁷ See e.g. High Command Case (n 56) 623. The superior need not conduct the investigation or dispense the punishment in person, Judgment, *Kvočka et al.*, IT-98-30/1-T, TC, ICTY, 2 November 2001 ('*Kvočka Trial Judgment*') para. 316; *Halilović Trial Judgment* (n 68) para. 100. He must at least ensure that the matter is investigated, *Halilović Trial Judgment* (n 68) para. 97, and transmit a report to the competent authorities for further investigation or sanction; see *Blaškić Appeal Judgment* (n 16) para. 632; *Blaškić Trial Judgment* (n 126) paras 302, 335, and 464; *Kordić and Čerkez Trial Judgment* (n 68) para. 446; *Kvočka Trial Judgment*, para. 316; Judgment, *Stakić*, IT-97-24-T, TC II, ICTY, 31 July 2003, para. 461; Judgment, *Brđanin*, IT-99-36-T, TC II, ICTY, 1 September 2004, para. 279 ('*Brđanin Trial Judgment*'); *Halilović Trial Judgment* (n 68) paras 97 and 100.

¹²⁸ *Ibid.*, para. 335; *Hadžihasanović and Kubura Trial Judgment* (n 109) paras 194 *et seq.*

¹²⁹ This was the position taken in *Kordić and Čerkez Trial Judgment* (n 68) para. 446, and in *Hadžihasanović Jurisdiction Trial Decision* (n 75) paras 180 *et seq.* and 202. It is also supported by the

has taken place in a military setting, there should be no reason to tolerate the crimes to go unpunished. This situation arose in the *Hadžihasanović* case before the ICTY. The Trial Chamber affirmed superior responsibility and the decision was reversed on appeal. The Appeals Chamber took the view that, with regard to the duty to punish, the superior must have had control over the perpetrators of a relevant crime both at the time of its commission and at the time that measures to punish were to be taken.¹³⁰ The language of the Rome Statute endorses this same position. Indeed, according to the *chapeaux* of Article 28(a) and (b), the commander's and superior's responsibility for crimes committed by their subordinates requires that these are the result of the superior's failure to exercise control properly. Hence, the superior needs to have exercised effective control over subordinates at the time when the crimes were committed or about to be committed as well as at the time when the superior failed to repress those crimes. If, after the crimes were committed a new superior assumes command, he may be under the duty to punish such crimes according to domestic law or international humanitarian law. However, a breach of such a duty does not generate responsibility under the Rome Statute.¹³¹ In other words, the scenario known as *successor superior responsibility* does not lead to liability under the Rome Statute.¹³²

The Rome Statute refers to the superior's failure to 'repress' the crimes. According to the *Bemba* Confirmation Decision, the duty to 'repress' encompasses two separate duties arising at two different stages of the commission of crimes. First, the duty to repress includes a duty to stop ongoing crimes from continuing to be committed. Second, the duty to repress encompasses an obligation to punish forces after the commission of crimes.¹³³ In relation to the first duty, 'repress' means to interrupt a possible chain effect, which may lead to other similar events. It has been said that the stopping of crimes relates to the period between their prevention (the before aspect) and their punishment (the after aspect) and constitutes the 'during' aspect.¹³⁴ Arguably, however, the 'interruption' aspect may also be characterized as the intervention during the execution of the subordinates' crimes in order to prevent either (inchoate) crimes from evolving into completed crimes, or continuous or enduring crimes from continuing.¹³⁵

dissenting opinions of Appeals Judges Shahabuddeen and Hunt in *Hadžihasanović* Jurisdiction Appeal Decision (n 75), Partial Dissenting Opinion of Judge Shahabuddeen, para. 1; Separate and Partially Dissenting Opinion of Judge David Hunt, paras 7 *et seq.*

¹³⁰ *Hadžihasanović* Jurisdiction Appeal Decision (n 75) paras 37 *et seq.* and 51, deciding by majority; *Halilović* Appeal Judgment (n 17) para. 67; *Perišić* Appeal Judgment (n 67) para. 87.

¹³¹ For a different view, see Van Sliedregt (n 103) 192 *et seq.*, suggesting that a gap in the line of responsibility does not exist, since these omissions can be punished in accordance with domestic law. However, she suggests that the superior successor scenario may be covered in Art 28 by the duty to report the matter to the competent authority, since in her view, the duty to report is incumbent upon the superior who exercised effective control at the time the report should have been made and not necessarily at the time when the crimes were committed (at 198). In my view, the requirement that the superior exercised control properly over the subordinates at the time the crimes were committed results from the language of the *chapeaux* of Art 28(a) and (b)—the crimes should be the result of the superior's failure to properly exercise control. The requirement is applicable to all the scenarios under the *chapeau*, including the failure to submit the matter to the competent authorities for investigation and prosecution.

¹³² Ambos, *Treatise* (n 19) 219 *et seq.*; Olásolo (n 81) 787 *et seq.*, analyses, and rejects, the proposition that an omission of this kind can be considered under Art 25(3)(c) and (d) of the Statute.

¹³³ *Bemba* Confirmation Decision (n 28) para. 439.

¹³⁴ Sivakumaran (n 69) 1143.

¹³⁵ Triffterer (n 1) 820.

The advantage of this interpretation is that it links the duty to repress to findings of ‘blameworthiness’ associated with the conduct of subordinates. This dissolves overlaps and clarifies the type and the scope of measures expected from the superior under the duty to repress—for instance, measures taken to cut troop supplies may not be relevant to repressing ongoing crimes but to preventing their continuance. As set out earlier, the term ‘repress’ does not find its source in the ICTY/R Statutes, which refer to ‘prevent’ and ‘punish’, but in Articles 86 and 87 of the API containing the terms ‘prevent’, ‘repress’, and ‘suppress’. The interpretation I have suggested is closer to the interpretation that has been given to the terms ‘prevent’ and ‘repress’ in the commentary to the API, where the duty to prevent extends to crimes that are being committed and the duty to repress refers rather to ‘punishment’.¹³⁶

The notions of ‘competence’ and ‘authority’ are deeply rooted in legal philosophy. The competence to investigate and prosecute a crime must be based on a rule investing the person with the relevant powers. These rules establish that the relevant individual has the power to exercise jurisdiction over cases and issue decisions, following a set of required formalities. They are constitutive to the judicial authority, in the sense that no person can legally investigate, prosecute, or judge if not by virtue of such a norm and to the extent determined by the norm.¹³⁷ However, in the context of irregular armed groups, the question as to who is the competent authority has particular features. There is jurisprudence to the effect that if there was a disciplinary system available which could have been employed by the superior, this would provide an appropriate means of repression even in circumstances where the system is not advanced in the sense of not being properly codified and formally sanctioned by competent authorities.¹³⁸ It has been held unrealistic to suggest that these groups should submit offenders to those state’s authorities against which they are fighting.¹³⁹ Indeed, under these circumstances, requiring such a course might be *unreasonable* or, because the state disciplinary system finds a substitute within the irregular force, it might be *unnecessary*.

25.5.4 Taking all necessary and reasonable measures within the commander’s or superior’s powers

Article 28 does not encompass an obligation to obtain a ‘result’, in the sense that the crimes are indeed hindered or repressed. The superior is bound to take measures to

¹³⁶ Indeed, the Commentary to Art 86 of the API (n 32) refers at 3548 to the following: ‘Using relatively broad language, the clause requires both preventive and repressive action. However, it reasonably restricts the obligation upon superiors to “feasible” measures, since it is not always possible to *prevent* a breach or *punish* the perpetrators.... Such responsibility continues if, while knowing that breaches are committed, [those responsible] refrain from taking the appropriate measures that are in their power to *prevent* further breaches in the future’ (emphasis added). Hence, although Art 86 of the API refers to notions of ‘prevention’ and ‘repression’, the concept of repression is linked to ‘punishment’. In addition, refraining from taking appropriate measures in circumstances where breaches are being committed is captured under failure to *prevent* rather than failure to *repress*.

¹³⁷ C Alchourrón and E Bulygin, *Introducción a la metodología de las ciencias jurídicas y sociales* (Buenos Aires: Editorial Astrea 1987) 239.

¹³⁸ Judgment, Brima et al., SCSL-04-16-T, TC II, SCSL, 20 June 2007, para. 1739.

¹³⁹ Sivakumaran (n 69) 1146.

prevent the crimes. He is also bound to take measures to punish the crimes; ‘taking measures’ not only qualifies *prevention* but also *repression*.¹⁴⁰ A superior is not required to perform the impossible¹⁴¹ but is only required to take all measures that are necessary, reasonable, and within his powers.

The question as to what measures meet this standard is eminently case-specific.¹⁴² Required are those measures ‘appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent or punish)’ and ‘reasonably falling within the material powers of the superior’.¹⁴³ Whether the measures were disciplinary, criminal, or a combination of both cannot in and of itself be determinative of whether a superior has discharged his duty.¹⁴⁴

There may be measures which are necessary though insufficient, in isolation, to prevent or punish the crimes. By requiring *all* necessary measures to be taken, the law aims at ensuring that there is a set of required conditions that, taken together, are sufficient to ensure that the crimes will not occur or that they will be repressed.

Measures would not be *reasonable* if requiring the superior to take them would be disproportionate. The proportionality determination should take into account at least two dimensions. First, it should account for the probability of occurrence of the anticipated crimes and the real capacity of the relevant measures to prevent or lessen the crimes. Second, it should take into account any consequences that may arise, in a conflict situation, from the execution of the required measures such as strategic disadvantages in a combat situation. Indeed, gaining military advantage in order to win battles may be a necessary step to protecting the subordinates, the civilians, or the values that lead to the armed confrontation. These factors cannot be overlooked and they should be part of this equation.

The measures that are within the superior’s powers are not exclusively those which, by law, the superior is allowed to execute. It is not determinative whether the superior had the ‘explicit legal capacity’ to take such measures if it is proven that he had the material ability to act.¹⁴⁵

25.5.5 The ‘crimes committed’ by forces or subordinates

The responsibility of commanders and superiors attach, as per the language of the Rome Statute, to crimes ‘committed’ by the subordinates. This calls into question whether command responsibility may only be applied in relation to crimes

¹⁴⁰ Although this is not clear from Arts 86 and 87 of the API, para. 3548 of the Commentary (n 32) to these provisions insists that the clause requires both preventive and repressive action and that it reasonably restricts the obligation upon superiors to ‘feasible’ measures, since it is not always possible to prevent a breach or punish the perpetrators. In addition, it insists, it is a matter of common sense that the measures concerned are described as those ‘within their power’ and only those.

¹⁴¹ *Blaškić* Appeal Judgment (n 16) para. 417, citing *Čelebići* Trial Judgment (n 46) para. 395.

¹⁴² *Hadžihasanović and Kubura* Appeal Judgment (n 25) para. 142.

¹⁴³ *Orić* Appeal Judgment (n 25) para. 177; *Halilović* Appeal Judgment (n 17) para. 63.

¹⁴⁴ *Hadžihasanović and Kubura* Appeal Judgment (n 25) para. 33.

¹⁴⁵ *Čelebići* Trial Judgment (n 46) para. 76. See also *Boškoski and Tarčulovski* Trial Judgment (n 123) para. 415.

attributable to subordinates under ‘commission’ *stricto sensu*, or whether, in a broader understanding of the term ‘commission’, the subordinate’s attribution of responsibility under other modes of liability such as ordering, soliciting or inducing, aiding and abetting, or otherwise assisting, etc. can also be taken into account.

The ICTY Appeals Chamber endorsed the position that the superior can be held responsible for his subordinates’ planning, instigating, ordering, committing, or otherwise aiding and abetting a crime.¹⁴⁶ The issue is not merely theoretical. In the *Krnojelac* case before the ICTY, the accused was convicted as a superior for the actions of camp guards who permitted individuals from outside the camp to enter and mistreat detainees, thereby (‘at the least’) aiding and abetting them in that mistreatment.¹⁴⁷

Some commentators suggest that such an interpretation is acceptable in the framework of the Rome Statute;¹⁴⁸ other commentators indicate that Article 28 becomes operative only if the subordinates ‘perpetrated’ the crimes,¹⁴⁹ and finally, others require the subordinates to have performed an ‘essential role’.¹⁵⁰ Admittedly, the term ‘commission’ is used in the framework of the Rome Statute both in a general¹⁵¹ and in a restrictive manner.¹⁵² Conceptually, in circumstances where the subordinates do not commit *stricto sensu* the crimes, they do not decide (control) whether and how the crimes will be committed. In circumstances where the subordinates merely induce or assist others (civilians, for instance) in the commission of crimes, the superior would either lack the material ability to prevent any such crimes¹⁵³ or his omission would not be causal to the result. Under these circumstances, to hold the superior responsible for the crimes is not convincing. However, accessories may be even essential to the crimes without becoming perpetrators. The superior of such an accessory, who is ‘essential’ although not a perpetrator, would have the material ability to prevent the crimes and, provided the crimes are committed or attempted, the omission may still be regarded ‘causal’. With these limitations in place, I find it acceptable that the commander may be brought to accountability even if the subordinate has not committed the crime *stricto sensu*.

Article 28(a)(i) and (b)(i) set out, when regulating the superior’s mental element, that the subordinates need to be committing or about to commit the crime. It is tempting to interpret the term ‘about to commit the crime’ as requiring the subordinates to

¹⁴⁶ ‘Commission’ by a subordinate as used in Art 7(3) must be understood in a broad sense, to encompass all modes of liability listed in Art 7(1); see *Nahimana* Appeal Judgment (n 16) paras 485–6; *Orić* Appeal Judgment (n 25) para. 21; *Blagojević and Jokić* Appeal Judgment (n 25) paras 280–2.

¹⁴⁷ Judgment, *Krnojelac*, IT-97-25-T, TC II, ICTY, 15 March 2002, para. 319 (*Krnojelac* Trial Judgment).

¹⁴⁸ Nerlich (n 82) 669.

¹⁴⁹ Ambos, *Treatise* (n 19) 214.

¹⁵⁰ Meloni, *Command Responsibility in International Criminal Law* (n 27) 151.

¹⁵¹ In the definitions of genocide, crimes against humanity, and war crimes, the Statute uses the word ‘committed’—unlike the Elements of Crimes, where mostly the word ‘perpetrator’ is used. Such general understanding is reflected in the exclusion of jurisdiction over persons under 18 according to Art 26; in the definition of the mental element pursuant to Art 30(1) as well as in relation to superior orders and prescription of law under Art 33. Moreover, considering the procedural law, a warrant of arrest under Art 58(1)(a) and the confirmation of charges under Art 61(7) proceed with respect to a person that ‘committed’ a crime under the jurisdiction of the Court; or each of the crimes charged. This reflects undoubtedly a general use of the notion of ‘commission’.

¹⁵² There is clearly a restrictive use of ‘commission’ throughout Art 25, save perhaps for para. (2) and arguably para. (3)(e).

¹⁵³ See the analysis made by Van Sliedregt (n 103) 189 *et seq.*

have started the execution of the crime by means of a substantial step, following the language of Article 25(3)(f) and the notions underpinning this provision.¹⁵⁴ In relation to the duty to repress, it is clear that, since the subordinate's conduct must be a crime under the jurisdiction of the Court, they should be deemed to commit at least an inchoate crime. However, the same consideration does not necessarily apply to the 'failure to prevent'.¹⁵⁵

This question is important not least because if the superior lost effective control over his subordinates at any stage prior to the point in time when the subordinates were at least 'about to commit the crimes', the superior cannot be held liable. Notably, the different versions of the Statute do not reflect the same notion. In the English version, the wording 'about to commit' indicates that the commission will 'commence soon' or that it is 'imminent', thereby seemingly focusing on objective elements—either the temporal proximity or the existence of sufficient conditions (imminence) for a result (the subordinates' crimes) to occur. In its Spanish version, the Statute reads '*se proponían cometerlos*'. This version stresses the mental element; the forces need to already have the intention or the purpose to commit the crimes. However, temporal proximity or imminence is not suggested. In turn, the French version does not reflect any specific objective or subjective limitations, and refers to '*allaient commettre*'.

25.6 Proof of Causation

One of the most critical questions in relation to superior responsibility in the framework of the Rome Statute is whether causality between the superior's failure to control and the base crimes is a necessary requirement. According to an old principle in criminal law, a result can only be attributed to an individual if his conduct has caused that result.¹⁵⁶ A conduct has caused a result if this would not have occurred but for the conduct. Causality is mostly understood to require that the conduct must be '*conditio sine qua non*' of the result (but for test) and that all conditions are equal in the sense of the equivalence theory.¹⁵⁷ When applied to omissions, the 'but for test' means that but for

¹⁵⁴ Some commentators are of the view that the subordinate's attempt to commit a crime does not lead to the responsibility of the superior; Mettraux (n 46) 79; Arnold (n 1) 827.

¹⁵⁵ It is argued that two different formulations in the same law cannot have the same meaning. 'About to commit' shall be defined differently than 'attempt to commit'. See Triffterer (n 1) 820.

¹⁵⁶ Stratenwerth and Kuhlen (n 105) 104.

¹⁵⁷ F Dencker, *Kausalität und Gesamttat* (Berlin: Duncker and Humblot 1996) 25. Because all conditions are equal, according to this notion, even conduct that has produced a result in an extremely remote, unusual, and causal manner shall be considered a cause. However, not every factor that meets the 'but-for' causation standard should be deemed sufficient for the outer circle of attribution; see G Fletcher, *Rethinking Criminal Law* (Oxford: Oxford University Press 2000). Proposals have been made to identify, among all conditions which are necessary to cause a result, those most 'efficient', 'proximate', or 'facilitating' (as opposed to conditions that run contrary to causation) and to hold only these as 'causes'; see E Samson, *Cursos causales hipotéticos en Derecho Penal, una contribución sobre la causalidad de la complicidad* (Hammurabi 2003) 14 and 15. In Anglo-American Law, doctrine and jurisprudence discuss the concept of 'proximate cause', and in German law, cases of remote effects have been handled under the doctrine of 'social adequacy' or, according to modern doctrines, 'objective imputation'. The notion of 'social adequacy' negates causality when the result is the consequence of a completely extraordinary and unforeseeable course of events. However, there are instances when the law not only 'does not prohibit',

the individual's failure to act, the result would not have occurred.¹⁵⁸ Whether causality is a requirement in crimes of omission is an issue that has been prominently discussed in academia.¹⁵⁹ Some believe that the result can be attributed to conduct in spite of the lack of causality—Attribution is guided by normative considerations.¹⁶⁰ Others reformulate the notion of causality in a manner that ensures its applicability in cases where, as they trust, the attribution should be confirmed. They speak, in cases of omission, about quasi-causality, hypothetic causality, possible causality, or potential causality.¹⁶¹

Unlike the causality relationship between an act and a result, whereby in most cases it can be established with certainty whether the act caused the result, in crimes of omission the causality relationship is hypothetical. This is because the connection involves mentally figuring out an act that has not been executed, that would have set out a course of events that has not taken place which would have prevented a result that, in fact, did occur and, thus, no judgment of certainty can be predicated but only a judgment of (a higher or lower) probability.¹⁶² The hypothetical causality is established if the conduct that the individual failed to perform would have made it *possible* for the unwished result not to occur, in the sense that it would have *reduced the risk* that the unwished result would occur.¹⁶³ Put otherwise, the agent's failure to discharge his duties shall have *increased the risk* of the result's occurrence.¹⁶⁴ As to the required level of *risk*, opinions are divided over whether it is sufficient that the failed conduct would have *reduced the risk* of the unwished result;¹⁶⁵ the result should not have occurred

but at the same time incentivizes conduct from which it is usual and foreseeable that unwished results may result. For example, the production of vehicles is incentivized even though, admittedly, it produces numerous fatal victims in traffic accidents. This suggests that the linkage between a conduct and a result involves a balance between the interest in preserving the freedom which may be affected by a prohibition (to produce vehicles) and the interest in preserving legally protected values (life). Modern doctrine requires normative considerations for a finding on the attribution of a result, in addition to but-for causality, see H Frister, *La imputación objetiva, Causalidad riesgo e imputación* (Hammurabi 2009) 501 et seq.; or independently.

¹⁵⁸ Fletcher (n 157) 371.

¹⁵⁹ E Gimbernat Ordeig, *La causalidad en la omisión impropia y la llamada 'omisión por comisión'* vol. III (ADPCP 2000) 41 et seq. (see his references at fn 25). It has been argued that causality requires that the individual sets out real causal energy which is absent in crimes of omission. The most notorious version of this theory militated against the position that omissions do not set forth any causal energy, that the individual who omits 'actively' disables his impulses to become active, and such activity would have prevented the relevant result. This interpretation, called 'theory of interference' (K Binding, *Die Normen und ihre Übertretung* vol. II (Leipzig: Verlag von Wilhelm Engelmann 1872) 516 et seq.) is no longer seriously argued. Although loudly debated for more than 200 years, this discussion has been labelled amongst the most sterile in the criminal law science; see Kaufmann (n 18) 76.

¹⁶⁰ Jakobs, *Strafrecht. Allgemeiner Teil. Studienausgabe. Die Grundlagen und die Zurechnungslehre* (n 105) 7/26.

¹⁶¹ C Roxin, *Strafrecht Allgemeiner Teil Band II: Besondere Erscheinungsformen der Straftat* (München: C H Beck 2003) 13/52.

¹⁶² Ordeig (n 159) 50.

¹⁶³ Stratenwerth and Kuhlen (n 105) 13/54.

¹⁶⁴ Ambos, *Treatise* (n 19) 215.

¹⁶⁵ Stratenwerth and Kuhlen (n 105) 13/54. Against this notion it is argued that it holds against, and not in favour, of the accused the possibility that the result would have occurred anyway, even if the individual had acted in conformity with his duty. This conflicts with the *in dubio pro reo* principle. In addition, as a result, these crimes are transformed into endangering crimes; see Ordeig (n 159) 68 et seq.

with a degree of *probability bordering to certainty*,¹⁶⁶ or that the result should not have occurred with *certainty*.¹⁶⁷

A plausible line of defence that rejects command responsibility based on lack of causality may be raised on the assumption that the crimes would have occurred even if the superior had taken the required action. This engages the different understandings of the notions of ‘result’ and ‘causality’. An *abstract* understanding defines the ‘result’ from a pure conceptual legal perspective: i.e. the death of a person, or the burning of a house. Accordingly, if, in the situation, there were already enough conditions for a person to die or the house to burn, those who add conditions which complement the existing causes (they administer more poison to a dying person or add further fuel to a fire) would not have caused the result. A *concrete* understanding of the ‘result’, which reflects the predominant position in legal literature,¹⁶⁸ would look at the concrete circumstances, leaving out of the equation only those factors which are collateral and inessential. Accordingly, even if, in a given situation, there were already enough conditions for a result to occur, a modification in the course of events, in the causal chain leading up to the result, may be considered a ‘cause’. A concrete understanding of these notions makes it unnecessary, in relation to crimes of omission, to establish that the result would have failed altogether had the individual discharged his duty. This verification, applied to Article 28, means that the superior’s omission does not necessarily lack causality for the reason that, in the abstract, crimes of the same type would have occurred even if the superior had taken the required action.

There is an argument which suggests that, whatever the theoretical discussion on causality in crimes of omission may dictate, the language of Article 28 makes it a requirement. It is required that the *crimes* be the *result* of the commander’s or superior’s *failure to exercise control properly* over forces or subordinates, and hence causality appears as a requirement by law.¹⁶⁹ Such language is not present in the Statutes of the ad hoc Tribunals, and these tribunals have rejected the causality requirement—command responsibility has been interpreted as responsibility for the plain omission.¹⁷⁰

¹⁶⁶ This is the predominant position in academia and in the German jurisprudence; see for instance Bundesgerichtshof, *Neue Zeitschrift für Strafrecht* 1985, 27. Arguments similar to those discussed in the previous footnote can be raised against this interpretation. In addition, this notion is criticized from the perspective that it becomes of difficult application if what is necessary in order to avoid an unwished consequence is the intervention of a third person; see Ordeig (n 159) 52. However, as has been rightly argued to the contrary, it cannot be a valid defence against the finding of quasi-causality that a third person may not have acted according to the law; I Puppe and W Schild, *Nomos Kommentar zum Strafgesetzbuch* (Baden-Baden: Nomos 2001) prior to s. 13, n 119.

¹⁶⁷ E Mezger, *Strafrecht, ein Lehrbuch* (Berlin: Duncker and Humblot 1933) 138; R Hertzberg, ‘Die Kausalität beim unechten Unterlassungsdelikt’ (1971) *Monatsschrift für Deutsches Recht* 883. Against this notion it is argued that because the causality relationship is indeed hypothetical, no judgment of certainty can be predicated but only a judgment of probability; see Ordeig (n 159) 64.

¹⁶⁸ Jakobs, *Strafrecht. Allgemeiner Teil. Studienausgabe. Die Grundlagen und die Zurechnungslehre* (n 105) 7/15.

¹⁶⁹ Ambos, ‘Joint Criminal Enterprise and Command Responsibility’ (n 19) 178; Ambos, *Treatise* (n 19) 215; Nerlich (n 82) 675; Meloni, *Command Responsibility in International Criminal Law* (n 27) 193.

¹⁷⁰ Halilović Trial Judgment (n 68) para. 54; Hadžihasanović and Kubura Trial Judgment (n 109) paras 75 and 191. See also Orić Trial Judgment (n 36) para. 293.

Another interpretation of the law, which is equally plausible from a grammatical point of view, links the term *result* to the *superior's criminal responsibility*.¹⁷¹ In this interpretation, causality between the superior's omission and the subordinates' crimes is not an explicit requirement in Article 28. Instead, the law is read to indicate that the superior's criminal responsibility (and not necessarily the base crime) results from the superior's failure to exercise control properly. However, this interpretation has never been discussed or envisaged during the negotiations of the Rome Statute. In fact, the drafting development of this provision tends to reject this interpretation.¹⁷² Hence, the interpretation according to which the expression *result* links *the crimes* and *the failure to exercise control properly* is preferable.

This interpretation, however, needs to take into account that, because this language is included in the *chapeaus* to (a) and (b) of Article 28, causality should be understood as a requirement as regards all modalities of superior responsibility. Thus, the relationship between the general duty *to exercise control properly* and the specific duty *to prevent, to punish, and to submit the matter* needs to be clarified in a manner that avoids the unacceptable conclusion that the failure to repress a crime is required to have caused that crime. Indeed, since the superior's failure to punish is necessarily subsequent to the commission of crimes, a causality relationship between the two cannot be required.¹⁷³

As set out here, the duties to exercise control properly and the duty to take all necessary and reasonable measures to prevent, repress, and submit the matter can be and need to be clearly distinguished.¹⁷⁴ Importantly, the general duty to exercise control

¹⁷¹ *Amicus Curiae Observations on Superior Responsibility Submitted Pursuant to Rule 103 of the Rules of Procedure and Evidence, Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-406, Amnesty International, 20 April 2009, para. 39.

¹⁷² See the language used in various proposals of the Preparatory Committee and the Zutphen draft, which suggests more clearly that the 'criminally responsible' is connected to 'crimes committed by forces': 'In addition to other (types of complicity) (modes of participation) in crimes under this Statute, a commander is also criminally responsible (as an aider or abettor) for such crimes committed by forces under his command as a result of his failure to exercise proper control'; Preparatory Committee on the establishment of the ICC, A/AC.249/1 85 (UK Proposal); A/AC.249/L.4 (Canadian Proposal) 15. The Zutphen draft suggests a similar conclusion: '[In addition to other forms of responsibility for crimes under this Statute, a [commander] [superior] is criminally responsible] [A [commander] [superior] is not relieved of responsibility] for crimes under this Statute committed by [forces] [subordinates] under his or her command [or authority] and effective control as a result of the [commander's] [superior's] failure to exercise properly this control'; Report of the Inter-sessional meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, A/AC.249/1998/L.13 4 February 1994, 55.

¹⁷³ *Bemba Confirmation Decision* (n 28) para. 424; Meloni, *Command Responsibility in International Criminal Law* (n 27) 173 and 175.

¹⁷⁴ The superior's 'failure to exercise control properly' has been argued to set out a sufficient causal chain that may be interrupted by necessary and reasonable measures, to be taken at the time the duties to prevent and repress become operative. Provided the former are not discharged, these second omissions would confirm and strengthen the causal connection; O Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?' (2002) 15 *Leiden Journal of International Law* 176, 196 *et seq.* This interpretation is precisely aimed at addressing the inconsistency that arises when causality between the crimes and the dereliction of the duty to repress those crimes is considered a requirement. However, it is questionable whether a failure to repress and submit the matter can display any confirmation or strengthening effect in the causality of crimes which have already been committed; Meloni, *Command Responsibility in International Criminal Law* (n 27) 173 and 174. In another attempt to make sense of the causality requirement as regards the duty to repress, it has been proposed that causality should not be established between the failure of the superior and the crimes of the

properly does not relate in an equivalent parallel manner to the specific duties to prevent on the one hand, and repress on the other. Indeed, there is a continuum between the failure to exercise control properly and the failure to take measures to prevent the crimes.¹⁷⁵ I believe that failure to take reasonable and necessary measures within the superior's powers to prevent the crimes is the most serious manifestation of improper control.¹⁷⁶ This continuum is disrupted in relation to the duty to repress the crimes, which arises only after the crimes have been committed. The failure to repress is entirely inconclusive as to the existence of the previous omission, i.e. the failure to exercise control properly. Therefore, these two omissions need to be established separately and, as per the language of the law, the crimes need to be the result of the superior's failure to exercise control properly and not the result of his failure to repress.

Finally, it needs to be pointed out that commanders and superiors cannot be held responsible for having 'attempted' not to prevent the commission of crimes by subordinates. If, for instance, the superior had the wrong perception that his troops were committing crimes and did nothing to prevent them, he cannot be held responsible. In the framework of the Rome Statute, only those who attempt to 'commit' a crime can incur inchoate liability—cases of command or superior liability are not covered.

25.7 Mens Rea Requirements

In setting out the *mens rea* requirement applicable to commanders and superiors, Article 28 refers to three different standards whereby the individual (i) had knowledge of, (ii) should have known about, or (iii) consciously disregarded information which clearly indicated that the subordinates were committing or about to commit the crimes.

In the context of command responsibility, the acts and conduct performed by the subordinates and the results are, in relation to the superior, a 'consequence'.¹⁷⁷ Article 30(1) requires that the material elements of the crime be committed with intent and knowledge, and 'knowledge' is defined in Article 30(3) as awareness that a circumstance exists or a consequence will occur in the ordinary course of events. The same provision specifies that intent and knowledge are required 'unless otherwise provided'. Article 28 expressly provides 'otherwise' by lowering the *mens rea*

subordinates but between the omission of the superior and the impunity of the subordinates; Mettraux (n 46) 89. However, in this interpretation, the *impunity of the perpetrators* and no longer *the crimes* would have to be demonstrated as the *result* of the commander's or superior's *failure to exercise control properly*. Thus, I am not sure this interpretation can be said to follow from an ordinary reading (see ibid., 85) of the *chapeau* of Art 28.

¹⁷⁵ Accordingly, it should be unnecessary to prove that a sufficient causal chain has been put in motion by means of a dereliction of the duty to control subordinates properly in advance of the dereliction of the specific duty to prevent the crimes.

¹⁷⁶ The reverse reasoning would not be acceptable. As set out here, the ability to prevent a crime is not necessarily a prerequisite to proving effective control; see *Perišić* Appeal Judgment (n 67) para. 88. A superior may have been unable to prevent a crime and nonetheless may still have had effective control over his subordinates.

¹⁷⁷ Kiss, 'La contribución en la comisión de un crimen por un grupo de personas en la jurisprudencia de la Corte Penal Internacional' (n 10) 23.

requirements in relation to one material element: the crime committed by the forces/subordinates. In this respect, it is sufficient that a commander under Article 28(a) should have known or a superior under Article 28(b) consciously disregarded information which clearly indicated that the forces or the subordinates were committing or about to commit the crimes. This necessarily implies that Article 28 also ‘provides otherwise’ as regards the subjective side of the ‘causality’ element. It would be nonsensical not to require knowledge of the crimes committed by the forces/subordinates but to require knowledge that the omission caused those crimes. Article 28 does not provide specific *mens rea* considerations with respect to any other material element and therefore, pursuant to Article 30(1), these elements must be committed with intent and knowledge.

It is possible that the base crime requires some kind of special intent, such as the ‘intent to destroy’ in the crime of genocide. However, it is unnecessary that the superior possesses any special intent or specific subjective element required in the base crime. The superior need not share the special intent to destroy the group but it is sufficient that he knew (should have known or consciously disregarded information indicating that) the subordinates were acting with this intention.¹⁷⁸ This is compatible with a view that will be addressed later, according to which only principals are blamed for ‘the crime’ and accessories are blamed for their participation in the crime—commanders and superiors are made responsible for crimes committed by their subordinates, as a result of their failure to exercise control properly.

As indicated, Article 28’s distinction between military and non-military was based on the understanding that the mental requirements for liability of non-military leaders should be higher than for their military counterparts. According to a US proposal made during the negotiations of the Rome Statute,¹⁷⁹ military commanders could be held responsible under a negligence standard (should have known), whereas for non-military superiors, knowledge was required. A compromise counterproposal from Argentina, Canada, and Germany opened a midway between the knowledge and the negligence standards discussed for non-military superiors—they need to have consciously disregarded information which clearly enabled them to conclude in the circumstances of the time that subordinates were committing or about to commit a crime.¹⁸⁰ A subsequent proposal ended with what is the current language of Article 28(b)(i).¹⁸¹ The interpretation below, of the notions ‘should have known’ and ‘consciously disregarded information which clearly indicated’, will take into account this drafting history.

25.7.1 Knowledge

The ‘intent’ requirement is defined, in Article 30, by reference to conduct, consequence, and circumstance. Pursuant to Article 30(2)(a), a person has intent if he or

¹⁷⁸ Ambos, *Treatise* (n 19) 221.

¹⁷⁹ Ambos, ‘Superior Responsibility’ (n 1) 848.

¹⁸⁰ Ibid.

¹⁸¹ UN Doc A/CONF183/C.1/WGGP/L.7 (1998). The requirement that the information was indicated ‘clearly’ was introduced later in the negotiations.

she ‘means to engage in the conduct’. Under Article 30(2)(b), in relation to a consequence, it is sufficient that the individual ‘is aware that [the consequence] will occur in the ordinary course of events’. Finally, by Article 30(3) ‘knowledge’ ‘means awareness that a circumstance exists or a consequence will occur in the ordinary course of events’.¹⁸²

As set out earlier, commanders and superiors may incur criminal liability if they *knew* that their forces and subordinates were committing crimes or about to commit crimes. The acts and conduct performed by the subordinates and the results thereof are, in relation to the superior, considered to be ‘consequences’.¹⁸³ As such, ‘knowledge’ in relation to a consequence can only be predicated once it has already occurred. In relation to the superior’s failure to prevent the crime, it is necessary that the crime will not have occurred, or be completed or exhausted by the time the superior failed to prevent it. At the time an individual acts, or fails to act, the law does not require more than awareness, based on her knowledge of how events ordinarily develop, that the consequence *will occur* in the future. The knowledge that a consequence will occur in the future involves a prognosis, based on the rules of causality and general experience, asserting the existence of a ‘possibility’ or a ‘probability’ that, if an individual acts or fails to act and the events follow their ordinary course, the consequence will occur. The ICC Appeals Chamber has clarified that absolute certainty about a future occurrence can never exist; therefore the standard for the foreseeability of events is virtual certainty.¹⁸⁴ Instead, it would be wrong to require *certainty* in this equation, for such a finding would need to take into account not only ‘the ordinary course of events’, but also exceptional and abnormal developments.

At the inception of this mode of liability, a finding that the commander knew about the crimes was based on two factors: (i) his official position of authority; and (ii) the notorious and widespread character of the crimes committed by the subordinates. In circumstances where a great number of offences were committed and a reasonable man could come to no other conclusion than that the accused must have known of the commission of the offences, ‘constructive notice’ was affirmed. This was the standard set in the Judgment of the International Military Tribunal for the Far East, in the case of *US v Soemu Toyoda*.¹⁸⁵ At the time, however, the jurisprudence may have been

¹⁸² *Lubanga Judgment* (n 63) para. 1007.

¹⁸³ Kiss, ‘La contribución en la comisión de un crimen por un grupo de personas en la jurisprudencia de la Corte Penal Internacional’ (n 10) 23.

¹⁸⁴ Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Situation in the Democratic Republic of Congo, ICC-01/04-01/06-3121-Red, AC, ICC, 1 December 2014, para. 447; *Lubanga Judgment* (n 63) para. 1012.

¹⁸⁵ The Tribunal found that in the absence of proof beyond reasonable doubt that the accused ordered his troops to commit atrocities, command responsibility required (i) that the atrocities were actually committed; and (ii) notice of the commission thereof. Such notice may be either (i) actual notice, as in the case of an accused who actually sees the commission or who is informed about it shortly afterwards; or (ii) constructive notice, in the sense that such a great number of offences were committed within his command that a reasonable man could come to no other conclusion than that the accused must have known of the commission of the offences or the existence of a routine for their commission that was understood and acknowledged; International Military Tribunal for the Far East in the case of *US v Soemu Toyoda*, 6 September 1949 (vol. 39, Official Transcript of Record of Trial) 5005 *et seq.*

less sophisticated on whether ‘knowledge’ was considered presumed/established from these factors or, instead, whether they served as a factual basis for circumstantial evidence.¹⁸⁶ Today, *constructive* knowledge would not be permissible to affirm that the superior knew about the subordinate’s crimes.¹⁸⁷ More recent jurisprudence is clear to the effect that the superior needs to possess *actual* knowledge with regards to all material elements of the crimes. The actual knowledge of the accused may be established by way of direct or indirect evidence.¹⁸⁸ However, circumstantial evidence must be distinguished from a ‘presumption’.¹⁸⁹ The latter would not be admissible¹⁹⁰ to the extent that it involves a reversal of the burden of proof or imposes on the accused an onus of rebuttal.

The *Bemba* Confirmation Decision has listed a number of factors that may be considered indicative of the superior’s knowledge, and the widespread nature of the crimes is indeed included:

These factors include the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the means of available communication, the modus operandi of similar acts, the scope and nature of the superior’s position and responsibility in the hierachal structure, the location of the commander at the time and the geographical location of the acts. Actual knowledge may be also proven if, ‘a priori, [a military commander] is part of an organised structure with established reporting and monitoring systems’. Thus, the Chamber considers that these factors

¹⁸⁶ In NMT Case 4, *USA v Pohl et al.*, 18 officials of the SS Economic and Administrative Main Office were charged with crimes that occurred in the concentration and labour camps of the SS in Germany and the occupied territories. According to the prosecution, approximately ten million persons were imprisoned in these camps. In addition to Pohl, a few defendants were charged with responsibility for crimes allegedly committed by their military units while they were on active military duty (see <http://nuremberg.law.harvard.edu/php/docs_swi.php?DI=1&text=pohl#trial_chronology> accessed 13 March 2015). This was the case with regard to the conviction of Karl Mummerthey, an SS Officer who was made business manager of a large establishment of brickworks, quarries, and ceramic industries. The establishment used concentration camp labour: up to 15,000 inmates at one time. Several thousand persons died in these camps as a result of inadequate work conditions, beatings, and starvation. The accused asserted that he could see nothing illegal or improper in all Hitler’s doings and in all of the Gestapo’s doings. He argued that he did not know about what was happening in the labour camps under his jurisdiction. The Tribunal found that this contention did not exonerate him, for he was under a ‘duty to know’. However, this finding would be necessary to establish responsibility in spite of the fact that the accused did not know. The Tribunal made it clear that the accused managed enterprises based strictly on concentration camp labour force, he received reports from the managers, and he visited and inspected the camps where the poor physical condition of the inmates was obvious; on a daily basis, inmate workers passed by the very building where the accused had his office. The US NMT Tribunal asserted that he ‘couldn’t help knowing’; he ‘could not have failed to know’; and that he ‘could not but be aware’. Today, a Tribunal would probably enter a finding of *knowledge* based on all these facts.

¹⁸⁷ Ambos, *Treatise* (n 19) 221; Meloni, *Command Responsibility in International Criminal Law* (n 27) 181.

¹⁸⁸ *Strugar* Trial Judgment (n 56) para. 368; *Hadžihasanović and Kubura* Trial Judgment (n 109) para. 94; *Čelebić* Trial Judgment (n 46) paras 383 and 386. See also *Brđanin* Trial Judgment (n 127) para. 278; *Krnojelac* Trial Judgment (n 147) para. 94; *Kordić and Čerkez* Trial Judgment (n 68) para. 427.

¹⁸⁹ Kiss, *El delito de peligro abstracto* (n 43) 95 *et seq.*

¹⁹⁰ *Strugar* Trial Judgment (n 56) para. 368; *Hadžihasanović and Kubura* Trial Judgment (n 109) para. 94; *Čelebić* Trial Judgment (n 46) para. 386. See also *Brđanin* Trial Judgment (n 127) para. 278; *Krnojelac* Trial Judgment (n 147) para. 94; *Kordić and Čerkez* Trial Judgment (n 68) para. 427.

are instructive in making a determination on a superior's knowledge within the context of article 28 of the Statute.¹⁹¹

In the jurisprudence of the Court, the idea has gained credence that a literal interpretation of the law, particularly the use of the words 'will occur' in Article 30(2)(b) as opposed to 'may occur', excludes the concept of *dolus eventualis*.¹⁹² This implies that a low risk, perceived by the accused at the time he acted, that the consequence (the subordinate's crime) would occur in the ordinary course of events would be insufficient; what is required is virtual certainty.¹⁹³ These considerations, which have been developed in the framework of crimes of 'commission', are applicable to situations where the accused failed to act.

This needs to be distinguished from the (objective) question of quasi-causality in crimes of omission. The omission is quasi-causal of a result if the agent's failure to discharge his duties has *increased the risk* of the result's occurrence.¹⁹⁴ Following a majority view, there needs to be a degree of *probability bordering on certainty* that the result should not have occurred had the guarantor acted.¹⁹⁵ This describes the 'objective side' of the hypothetical link between the omission and the crime, which engages verification by an external observer and not necessarily by the suspect himself.¹⁹⁶ In turn, under the *knowledge* modality in Article 28, all material elements of the crime need to be committed with intent and knowledge and this includes the quasi-causality link. If the suspect, having a vacillating perception, attached a low probability to the assumption that the crimes may follow from his abstention, he will not have omitted with *knowledge*.

There is a clear degree of inconsistency in accepting the criminalization of negligent commanders but rejecting *dolus eventualis*. The rejection of *dolus eventualis* opens an unsystematic gap in the continuum between negligence, advertent negligence, *dolus eventualis*, and *dolus directus* of the second and of the first degree with respect to the material element of 'crimes committed by the subordinates'. In theory, this gap could be filled by creating an ad hoc notion of 'knowledge' in command responsibility, one that would integrate the concept of *dolus eventualis*. Notably, the mental element in Article 30(2) and (3) is solely defined 'for the purposes of this article'. Another option, that would privilege certainty over consistency, is to treat the relevant cases under negligence.

Finally, the individual needs to act with intent and knowledge with respect to the following material elements: his position, whether as a commander, a person acting as a military commander, or a superior; the fact that he has command, authority, or control over his forces or subordinates; and the fact that he has failed to exercise control

¹⁹¹ *Bemba* Confirmation Decision (n 28) para. 434.

¹⁹² Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Situation in the Democratic Republic of Congo, ICC-01/04-01/06-3121-Red, AC, ICC, 1 December 2014, paras 447–9; *Lubanga* Judgment (n 63) para. 1007; *Bemba* Confirmation Decision (n 28) paras 364–9.

¹⁹³ Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Situation in the Democratic Republic of Congo, ICC-01/04-01/06-3121-Red, AC, ICC, 1 December 2014, para. 447. *Lubanga* Judgment (n 63) para. 1012. ¹⁹⁴ Ambos, *Treatise* (n 19) 215

¹⁹⁵ Stratenwerth and Kuhlen (n 105) 166.

¹⁹⁶ The external observer will identify the existence of a general rule, of natural causality or general experience, which would explain how the act that has not taken place would have impacted on the unwished consequence.

properly. These material elements are all ‘circumstances’ in the sense of Article 30(3) and thus the superior needs to be aware of their existence.

If the commander, upon analysis of the information at his disposal, makes the mistaken conclusion that his forces are not committing crimes, he cannot be held liable under Article 28 for having *knowingly* omitted. However, such a mistake under Article 32(1) may lead to an assessment of his responsibility under the ‘should have known’ standard.¹⁹⁷

25.7.2 Military commanders and persons effectively acting as such— ‘should have known’

The ‘should have known’ standard corresponds to a *negligence* standard. A person who negligently acts or omits, fails to perceive the risk associated to his actions or omissions, although he or she should have perceived it. That the commander failed to perceive a risk involves at least three scenarios: (i) the commander was in possession of information containing relevant facts upon which he should have inferred the associated risk; (ii) the commander was not in possession of such information, although in light of the information that he did possess he should have been alarmed so as to conduct additional investigations in order to ascertain whether the offences were being committed; (iii) the commander was not even in possession of alarming information.

As a preliminary point, following the Nuremberg and ICTY jurisprudence, the relevant information only needs to have been provided or available to the commander, or ‘in the possession of’ the commander. It is not required that he actually acquainted himself with the information.¹⁹⁸ This is consistent with the interpretation given to Article 86(2) of API; according to the commentary, this provision means that a superior cannot absolve himself from responsibility by pleading ignorance of reports addressed to him, or by invoking temporary absence as an excuse.¹⁹⁹

In *The Hostage Trial*, the US Military Tribunal sentenced Wilhelm List, a military commander that performed as the highest authority of the German armed forces in the Balkans during the occupation of Yugoslavia and Greece. The occupation triggered a guerrilla resistance whose members tortured and mutilated German prisoners and organized sabotage missions that increasingly threatened the German position in the area. List ordered ‘[r]uthless and immediate measures against the insurgents, against their accomplices and their families. (Hanging, burning down of villages involved, seizure of more hostages, deportation of relatives, etc., into concentration camps).’²⁰⁰ One of his subordinates (Franz Boehme) ordered that, ‘(a) [f]or each killed or murdered German soldier or Volksdeutsche (men, women or children) one hundred prisoners or hostages, (b) [f]or each wounded German soldier or Volksdeutsche 50 prisoners or hostages’²⁰¹ The Tribunal held that List knew or ought to have known

¹⁹⁷ Ambos, ‘Superior Responsibility’ (n 1) 870.

¹⁹⁸ Blaškić Appeal Judgment (n 16) para. 61 *et seq.* and 406; Čelebić Appeal Judgment (n 24) para. 239; Hostages case, Trial of Wilhelm List and Others, Law Reports of Trials of Major War Criminals Vol. Viii p. 34, United States Military Tribunal, Nuremberg, 8 July 1947 to 19 February 1948.

¹⁹⁹ Commentary to Art 86 of the API (n 32) para. 3545 quoting ‘The Hostage Trial’. Similar reasoning in the High Command Case (n 56) 603.

²⁰⁰ Ibid. ²⁰¹ Ibid.

that such an order was illegal and that, as the commanding general of an occupied territory, he was charged with the duty of maintaining peace, punishing crime, and protecting lives and property within the area of his command. The accused argued that he had no knowledge of many of the unlawful killings of innocent inhabitants which took place, because he was absent from the headquarters. The Tribunal found that a commanding general of occupied territory is ‘charged with notice of occurrences taking place within [his territory of command]’. He has the power to require:

adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense.²⁰²

According to this and other precedents in the Nuremberg jurisprudence, the commander had the duty to conduct inquiries²⁰³ and the duty to know,²⁰⁴ which implies searching for the information about possible crimes. Lack of knowledge based on his failure to search for such information would not relieve him of criminal liability.

The Nuremberg jurisprudence also contains precedents where the obligations contingent upon the commanders have been interpreted in a more ‘restrictive’ manner. Indeed, in the *High Command* case, the Tribunal insisted that there must be a personal dereliction and that the commander’s failure to properly supervise his subordinates must constitute criminal negligence on his part. His negligence needs to reach a degree such that it amounts to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.²⁰⁵

Article 86(2) of API seems to have set out a threshold which is more akin to the one reflected in the quoted paragraphs of the *High Command* precedent than ‘The Hostage Trial’ jurisprudence. The provision required that the superiors at least ‘*had information which should have enabled them to conclude* in the circumstances at the time’ that the subordinate was committing a crime.²⁰⁶ A proposal of Working Group A of Committeee

²⁰² *The Hostage Trial* (n 20) 1271.

²⁰³ General Tribunal of the Military Government of the French Zone of Occupation in Germany, *Judgment Rendered on 30 June 1948 in the Case versus Hermann Roechling and Others Charged with Crimes against Peace, War Crimes and Crimes against Humanity*, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* Vol. XIV (Washington: United States Government Printing Office) Appendix B, 1088.

²⁰⁴ Superior Military Government Court of the French Occupation Zone in Germany, *Judgment of 25 January 1949 in the Case Versus Hermann Roechling and Others Charged with Crimes against Peace, War Crimes, and Crimes against Humanity. Decision on Writ of Appeal against the Judgment of 30 June 1948*, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* Vol. XIV (Washington: United States Government Printing Office) Appendix B, 1106.

²⁰⁵ *The High Command Case* (n 56) 543–4 and 603. The Tribunal also stated that any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use on his own behalf.

²⁰⁶ Whereas the English text reads ‘information which should have enabled them to conclude’, the latter reads ‘*des informations leur permettant de conclure*’, which literally means ‘information enabling them to conclude’. Pursuant to Art 102 of API, the two texts are equally authentic. Some jurisprudence suggests that the French version is truer to the object and purpose of the text; see *Blaškić Trial Judgment* (n 126) para. 326.

I submitted the following wording: ‘if they knew or *had the possibility of knowing* in the circumstances at the time’.²⁰⁷ Confronting this proposal, which was not adopted, with the actual text of Article 86(2) it becomes clear that what is required is that the information enabling the superior to conclude that the crimes were being committed was in the superior’s possession. He needs to have the information enabling him to conclude that crimes were being committed, as opposed to having (alarming) information enabling him to conclude that more information was needed. Indeed, the commentary to API restating the findings made in the *High Command* case quoted, established that ‘the negligence must be so serious that it is tantamount to malicious intent’.²⁰⁸

The Statutes of the ICTY, ICTR, and SCSL contain the ‘had reason to know’ standard. According to the jurisprudence of the Appeals Chamber of the ICTY, it is sufficient that, at the critical time, the commander or the superior had general information in his possession which would put him on notice of possible unlawful acts committed by his subordinates.²⁰⁹ The superior does not need to be aware of a ‘strong risk’ that his subordinates would commit crimes;²¹⁰ it is enough that he possessed information sufficiently alarming to justify further inquiry.²¹¹ A superior would not incur criminal responsibility for neglecting to acquire knowledge of the acts of his subordinates, unless sufficiently alarming information was available to him.²¹² The Tribunal provided examples of types, sources, and degrees of specificity of the required information.²¹³

²⁰⁷ CDDH, Official Records, Vol. X, CDDH/I/321/Rev.1, 21 April–11 June 1976, 153.

²⁰⁸ The commentary to Art 86 to API expands on this notion as follows: 3541 ‘However, this does not mean that every case of negligence may be criminal. For this to be so, the negligence must be so serious that it is tantamount to malicious intent, (27) apart from any link between the conduct in question and the damage that took place.’ The commentary adds that ‘[(27) p.1012] In a 1952 trial (“USA v Schultz”) the United States Court of Military Appeals decided that mere negligence did not constitute a universally recognized basis for criminal responsibility (cf. B.M. Carnahan, “The Law of War in the United States Court of Military Appeals”, XX 3–4, *RDPMDG*, 1981, 343–344). Art 15 of the Swiss Military Penal Code provides that “commet un crime ou un délit par négligence celui qui, par une imprévoyance coupable, agit sans se rendre compte ou sans tenir compte des conséquences de son acte. L’imprévoyance est coupable quand l’auteur de l’acte n’a pas usé des précautions commandées par les circonstances et par sa situation personnelle” (anyone who, as a result of criminal negligence, acts without realizing or taking into account the consequences of his act is committing an offence. Such lack of foresight is criminal when the perpetrator of the act has not used precautions required by the circumstances and by his personal situation (translated by the ICRC)).’ Commentary (n 32).

²⁰⁹ *Ćelebić* Appeal Judgment (n 4) paras 235 and 238. *Strugar* Appeal Judgment (n 65) para. 298; *Hadžihasanović and Kubura* Appeal Judgment (n 25) para. 28. The Commentary to API refers to ‘reports addressed (to the superior), ... the tactical situation, the level of training and instruction of subordinate officers and their troops, and their character traits’ as potentially constituting the information referred to in Art 86(2) of the API. Commentary (n 32).

²¹⁰ See *Strugar* Appeal Judgment (n 65) para. 304. ²¹¹ Ibid., para. 298.

²¹² *Ćelebić* Appeal Judgment (n 24) para. 232. See also *Blaškić* Appeal Judgment (n 16) para. 406; *Hadžihasanović and Kubura* Trial Judgment (n 109) para. 96.

²¹³ The superior’s actual knowledge of crimes previously committed by subordinates and his failure to punish them is not, by itself, sufficient to conclude that the commander knew that similar offences would be committed by the same perpetrators. However, such failure may be relevant to determine whether ‘a superior possessed information that was sufficiently alarming to put him on notice of the risk that similar crimes might subsequently be carried out by subordinates and justify further inquiry.’ The ICTY Appeals Chamber maintained that, ‘[a]s to the form of the information available to him, it may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system. This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers

The Rome Statute spells out the ‘should have known’ standard in relation to commanders. According to the *Bemba* Confirmation Decision, the ICTY ‘had reasons to know’ and Article 28 ‘should have known’ thresholds are not identical;²¹⁴ they differ in that the latter requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability at the time of information concerning the commission of the crime.²¹⁵ In the academic literature, opinions are divided.²¹⁶

I believe the Rome Statute has gone further in the scope of liability than the Statutes of the ad hoc Tribunals. A joint reading of Article 28(a)(i) and (b)(i) suggests that the commander cannot escape responsibility for the reason that the information at his disposal did not clearly point to his force’s commission of crimes (unlike non-military superiors, for whom it is required that they ‘consciously disregarded information’ and that the information ‘clearly indicated’ the commission of crimes). This means that the commanders have a duty to obtain the relevant information. It has been recognized that they are responsible for the establishment of a system of reporting and vigilance and they cannot benefit from a failure to discharge this duty that results in the unavailability of the relevant information.²¹⁷

However, if in spite of the existence of an operational system of reporting and monitoring the alarming information is absent, there is an issue as to whether the omission can still be criminalized as negligent. This is a discussion that has been ongoing for many years, indeed more than 200, under the heading ‘unconscious or inadvertent negligence’. Those who oppose the criminalization of unconscious negligence highlight the *ultima ratio* character of criminal law, the lack of need to punish certain infractions, and the inevitability of human mistake.²¹⁸ The arguments in favour of criminalization can also be traced to antiquity. These support the wrongdoing of

under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge’; *Čelebići* Appeals Judgment (n 24) para. 235. In addition, knowledge about past crimes does not necessarily indicate knowledge that crimes would be committed in the future. However, depending on the circumstances, knowledge about past crimes may indicate that the superior had reason to know, since it may qualify as ‘alarming’ information, demanding the superior’s responsibility to inquire; see *Hadžihasanović and Kubura* Appeal Judgment (n 25) paras 30 *et seq.* In addition, a finding that a ‘superior’s failure to punish a crime of which he has knowledge automatically constitutes sufficiently alarming information under the “had reason to know” standard, irrespective of the circumstances of the case’ would amount to an error of law. Moreover, ‘a superior’s failure to punish a crime of which he has actual knowledge is likely to be understood by his subordinates at least as acceptance, if not encouragement, of such conduct with the effect of increasing the risk of new crimes being committed’; see *Hadžihasanović and Kubura* Appeal Judgment (n 25) paras 30 and 31.

²¹⁴ *Bemba* Confirmation Decision (n 28) 432. ²¹⁵ Ibid., 433.

²¹⁶ The two standards ('should have known' and 'had reason to know') correspond to each other, according to Ambos, *Treatise* (n 19) 224. The two standards differ substantially, according to Meloni, *Command Responsibility in International Criminal Law* (n 27) 184 and 185; G Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court' (2000) 25 *Yale Journal of International Law* 89.

²¹⁷ Meloni, *Command Responsibility in International Criminal Law* (n 27) 184 and 185.

²¹⁸ See A Koch, ‘Zur Strafbarkeit unbewusster Fahrlässigkeit, Ein Streifzug durch zwei Jahrhunderte deutscher Strafrechtsdogmatik’ (2010) *Zeitschrift für Internationale Strafrechtsdogmatik* 175 (quoting Karl Ferdinand Hommel 1722–81) 177 <http://www.zis-online.com/dat/artikel/2010_3_423.pdf> accessed 6 August 2014.

unconscious negligence in the failure to make efforts, which, where possible and necessary, prevent harm.²¹⁹ It has been even held that unconscious negligence is not per se less serious than conscious negligence. Those acting under conscious negligence do advert to the risk attached to their conduct, but they make a wrong prognosis as to the inevitability of the unwished result.²²⁰ In turn, unconscious negligence involves an element of indifference before the legally protected interests.²²¹

Throughout the drafting history of Article 28 the delegates included, as a material element of the crime in cases where the commander or the superior ‘should have known’ about the crimes, the requirement that the crimes were widespread ‘due to the widespread commission of offences’.²²² Clearly, the text of Article 28 has not reflected this requirement.²²³ The jurisprudence of the Court has, quite rightly, pointed to this factor as being an indication of knowledge²²⁴ (or lack thereof) instead of an objective requirement.

25.7.3 Superiors—‘consciously disregarded information which clearly indicated’

As set out in the previous section with respect to military commanders and persons effectively acting as such, they may be made liable even if they did not perceive the risk associated with their omissions. This standard is different from the purpose, knowledge, and recklessness standards by which it is indeed required that the suspect is aware of the risk.²²⁵

Article 28(b)(i) poses a higher threshold for the liability of non-military superiors compared to military commanders. Accordingly, the person must have at least consciously disregarded information which clearly indicated that the subordinates were committing or about to commit the crimes. This means that information must exist which *clearly* indicates the commission of crimes. General information about the commission of crimes, which may be sufficient in relation to military commanders to at least trigger the duty to conduct further investigations, would not be

²¹⁹ Ibid., 180 (quoting Ernst Ferdinand Klein 1744–1810).

²²⁰ Ibid., 181.

²²¹ Stratenwerth and Kuhlen (n 105) 13/31.

²²² Preparatory Committee on the establishment of the ICC, A/AC.249/1 85 (UK Proposal); A/AC.249/L.4 (Canadian Proposal) 15; A/AC.249/1997/WG.2/CRP.3; A/AC.249/L.5, 23; A/AC.249/L.13, 55; A/CONF.183/2/Add.1 51.

²²³ The Prosecution’s case in the Yamashita Trial was based on the inference that ‘the crimes were so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by the accused, or secretly ordered by the accused’. The commission accepted the principle, as follows: ‘It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.’ Trial of General Tomoyuki Yamashita, Case No. 21, IV Law Reports of Trials of War Criminals 1, United States Military Commission, Manila, 8 October–7 December 1945 <<http://lawofwar.org/Yamashita%20Commission.htm>> accessed 18 March 2013.

²²⁴ Bemba Confirmation Decision (n 28) para. 434.

²²⁵ Ambos, *Treatise* (n 19) 224.

sufficient under Article 28(b)(i). In addition, such information must be *consciously* disregarded.

Unlike with military commanders, it is insufficient that the information was available to the superior, who must have actually acquainted himself with the information.

25.8 Brief Concluding Words

Much remains to be said about the responsibility of superiors, as shown in the analysis set out above. It is too early to envisage how the Court will deal with the objective and subjective requirements of this mode of liability. However, since it is one that involves most of the more debated issues in the general part of criminal law (such as imputation, omission, causality, intention and negligence) the legal interpretations to be made will necessarily affect the system of attribution of criminal liability as a whole. This will necessarily add to the sophistication that, at the expense of simplicity, is being shown by the fair labeling-guided interpretation of the modes of liability at the ICC.

Rethinking the Mental Elements in the Jurisprudence of the ICC

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26.1 Introductory Observations: The (Quest for) Balance between Intent, Specificity, and Proportionality

In the framework of a still lively debate on the mental element of core international crimes, Ohlin has recently made the groundbreaking remark that in consequence of the notion of intent that has been developing at the ICTY, a conflation between the international humanitarian law cardinal principles of distinction¹ and of proportionality² would be ongoing.³ During the negotiations leading to the codification of these principles in the Additional Protocols to the Geneva Conventions⁴, the diplomatic delegations apparently emphasized the existence of a close link between the domain of the rule of distinction and the state of mind of the agent⁵. In this vein, the Ukrainian representative stated that to-be Article 51 Additional Protocol I ‘widens the scope of protection for the civilian population and individual civilians, who under no circumstances shall be the object of the attack [and that]...paragraph 2 explicitly prohibits acts or threats of violence the *primary purpose* of which is to spread terror among the civilian population’.⁶ According to Ohlin, the principle of distinction would only come into play in situations of clear will to hit civilians, prescribing that this action must be considered as illegal per se.⁷ Lacking such a purposive element, it would still be a violation of the principle of proportionality, yet on the additional condition that

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¹ Generally on the principle of distinction, see J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* vol. I (Cambridge: Cambridge University Press 2009) 3 ff.

² Generally on the principle of proportionality, *ibid.*, 46 ff.

³ J Ohlin, ‘Targeting and the Concept of Intent’ (2013) Cornell Law Faculty Working Papers Paper 104.

⁴ See Arts 48, 51(2), and (5)(b), 57 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (signed 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3; Art 13(2) Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) (signed 8 June 1977, entered into force 7 December 1978) 1125 UNTS 659.

⁵ See Ohlin (n 3) 35ff.

⁶ Ukrainian Soviet Socialist Republic, in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict (1974–7)* vol. 6, 201 (emphasis added).

⁷ Ohlin (n 3) 20.

the collateral damage was disproportionate to the expected military advantage.⁸ This latter scenario if committed in the context of international armed conflict would in turn constitute grave breaches of the Geneva Conventions if the agent carried out the strike with ‘the knowledge (not only the presumption) that such attack *will cause* excessive losses in kind’.⁹

What in more recent years has been emerging from the ICTY jurisprudence, however, is a far different reading of the relative fields of the ‘two tracks’¹⁰ of distinction and of proportionality. Since the landmark *Galić* case, the Yugoslavia Tribunal has consistently applied to the war crime of ‘attacks against civilians’ a lower form of intent which a reader may perceive—depending on his or her own legal background—as akin to the civil law concept of *dolus eventualis* or to the common law concept of recklessness. In this sense, it has been held more than once that criminal responsibility for violation of the duty of distinction could be established based on a mental element satisfied in situations where the agent, without seeking to bring about the result, nonetheless foresaw it as a possibility.¹¹ The practical outcome of the ICTY approach has been the elision of the requirement of disproportion even in relation to scenarios of plain collateral damage where the causation of harm among civilians was considered as an undesired, and not even nearly inevitable, effect of a strike aiming at military objectives.¹²

While it can certainly have been a wish to ensure accountability in front of mass-scale human rights violations to inspire this jurisprudence of the Yugoslavia Tribunal, the text of the ICC Statute¹³ does not seem at first sight to have followed the path of over-criminalization of the principle of specificity. Has this literal approach opened the door to impunity even for agents that the common collective consciousness would label as war criminals? This is the crucial question to now be investigated.

26.2 The Default Rule of Article 30 ICC Statute: A Groundbreaking Step in the History of ICL or the Source of Irresolvable Interpretative Uncertainties?

26.2.1 Anatomy of the default rule of Article 30 ICC Statute

For the first time in the history of international criminal law Article 30 ICC Statute has set out a definition of the mental element normally triggering criminal responsibility

⁸ Ibid.

⁹ M Bothe et al., *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* 2nd edn (The Hague: Martinus Nijhoff 2013) 586. See also the recent work by L Moir, ‘Grave Breaches and Internal Armed Conflicts’ (2009) 7 *Journal of International Criminal Justice* 763 (arguing that grave breaches can be committed in the context of internal armed conflict); Ohlin (n 3) 37 ff.

¹⁰ Ohlin (n 3) 7 ff.

¹¹ Judgment, *Galić*, IT-98-29-T, TC I, ICTY, 5 December 2003, para. 54, affirmed in Judgment, *Galić*, IT-98-29-A, AC, 30 November 2006, para. 140. Subsequently, Judgment, *Strugar*, IT-01-42-A, AC, 17 July 2008, para. 270; Judgment, *Marić*, IT-95-11-T, TC I, 12 June 2007, para. 72; Judgment, *Perišić*, IT-04-81-T, TC I, 6 September 2011, para. 100.

¹² See Ohlin (n 3) 9.

¹³ Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute').

for core international crimes. This norm, which is applicable and binding within the jurisdiction of the ICC, prescribes in its paragraph (1) that:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

Although at first glance this formulation could appear to refer to two different and cumulative types of mental element ('intent and knowledge'), one belonging to the aspect of will and the other to the sphere of cognition, it is now widely accepted that the text is meant to point to volition and awareness as both being necessary components of the (one) mental element of intent.¹⁴ This said, it can nonetheless be underlined that the delegations in Rome could and should have come up with a more straightforward wording. Not only in criminal systems of civil law countries is the term 'knowledge' (*Wissen, rappresentazione, conscience*) generally understood as an element of intent alongside the requirement of volition (*Wollen, volontà, volonté*).¹⁵ In criminal systems of common law countries the term 'knowledge' can even indicate a kind of intent, namely intent based on foresight of the consequence in terms of practical certainty.¹⁶ In comparative criminal law, 'knowledge' figuratively finds its place within (and not outside) the circle of intent, either as a part (civil law) or as a form of it (common law)¹⁷.

The meaning of Article 30(1) ICC Statute is further specified by paragraphs (2) and (3) of the same provision, which read as follows:

2. For the purpose of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

¹⁴ See, *inter alia*, Decision on the confirmation of charges, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-717, PTC I, ICC, 30 September 2008 ('Katanga and Ngudjolo confirmation decision'), para. 529; Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, ICC, 15 June 2009 ('Bemba confirmation decision'), para. 357; K Ambos, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung* (Berlin: Duncker and Humblot 2002) 758; A Eser, 'Mental Elements—Mistake of Fact and Mistake of Law' in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* vol. 1 (Oxford: Oxford University Press 2002) 907; S Finnin, *Elements of Accessorial Modes of Liability: Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court* (Leiden: Martinus Nijhoff 2012) 161; S Finnin, 'Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: a Comparative Analysis' (2012) 61 *International & Comparative Law Quarterly* 325, 336; G Werle, *Völkerstrafrecht* 3rd edn (Tübingen: Mohr Siebeck 2012) 431 (English edition: G Werle, *Principles of International Criminal Law* 2nd edn (The Hague: T M C Asser Press 2009)).

¹⁵ See, *inter alia*, É-A Garçon, *Code pénal annoté* (Paris: Sirey 1952) Art 1 para. 77 (on France); H-H Jescheck and T Weigend, *Lehrbuch des Strafrechts: allgemeiner Teil* 5th edn (Berlin: Duncker and Humblot 1996) 293 (on Germany); G Fiandaca and E Musco, *Diritto penale: parte generale* 6th edn (Bologna: Zanichelli 2009) 354 ff. (on Italy).

¹⁶ See s. 2.02(2)(b) MPC (on the USA); M Badar, *The Concept of Mens Rea in International Criminal Law: the Case for a Unified Approach* (Oxford: Hart Publishing 2013) 107–12.

¹⁷ On this aspect see also S Porro, *Risk and Mental Element. An Analysis of National and International Law on Core Crimes* (Baden-Baden: Nomos 2014) 176.

3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.

It is noteworthy that these latter paragraphs address the definition of intent in relation not to the offence as a whole, but to the material elements of conduct, result, and attendant circumstances separately (the correspondence principle).¹⁸ This represents an important shift from an ‘offence-based’ to an ‘element-based’ approach to *mens rea*,¹⁹ finding a precedent in section 2.02 of the US Model Penal Code. Historically, the move from ‘offence-based’ to ‘element-based’ analysis of culpability issues has been prompted by the will to establish ‘a rational, clear, and just system of criminal law’.²⁰ The possibility for the legislator to assign a particular mental requirement to each material element of a given crime enhances the precision of the offence definition, thereby providing fair notice of the scope of criminal prohibitions and reducing the room for extensive interpretation.²¹

Under the ICC Statute, the correspondence principle has to be applied by taking into consideration that mental requirements are: (i) defined in Article 30 ICC Statute; (ii) set out in the definition of particular crimes (e.g. genocidal acts are those committed ‘with intent to destroy’); (iii) set out in the Elements of Crimes.²² This principle imposes that a requirement of *mens rea* must extend to all material elements of the offence. In other words, unless some form of culpability can be proved in regard to each material element of the offence, no valid conviction may be obtained²³.

26.2.2 The concept of *dolus directus* of the first degree

Article 30 ICC Statute touches upon the crucial aspect of intent in respect of the material element of result more than once. Not only letter (b) of paragraph (2) provides expressly that a person satisfies the condition of intent ‘[i]n relation to a consequence’, if ‘that person means to cause that consequence or is aware that it will occur in the ordinary course of events’.²⁴ Due to the already mentioned conjunctive reference to ‘intent and knowledge’ in paragraph (1), it is of relevance to the definition of intent in

¹⁸ The correspondence principle has expressly been endorsed by the House of Lords in *B v DPP* [2000] 1 All ER 833.

¹⁹ *Bemba* confirmation of charges (n 14) para. 356, endorsing, *inter alia*, M Badar, ‘The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective’ (2008) 19 *Criminal Law Forum* 473, 475ff. See also K Heller, ‘The Rome Statute of the International Criminal Court’ in K Heller and M Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford: Stanford Law Books 2011) 603; Finnin, *Elements of Accessorial Modes of Liability* (n 14) 161; Finnin, ‘Mental Elements under Article 30 of the Rome Statute of the International Criminal Court’ (n 14) 337; Badar (n 16) 384ff.

²⁰ P Robinson and J Grall, ‘Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond’ (1983) 35 *Stanford Law Review* 681, 685. See also Model Penal Code and Commentaries (Official Draft and Revised Comments) vol. I/1, The American Law Institute (1980), 231ff. From an English law perspective see J Horder, ‘A Critique of the Correspondence Principle in Criminal Law’ (1999) *Criminal Law Review* 759; B Mitchell, ‘In Defence of a Principle of Correspondence’ (1999) *Criminal Law Review* 195.

²¹ Robinson and Grall (n 20) 703 ff. ²² Badar (n 16) 385.

²³ Model Penal Code and Commentaries (n 20) 229, note 1.

²⁴ The term ‘consequence’ is to be understood in this context as a synonym of ‘result’. Ambos (n 14) 765.

regard to result also the statement in paragraph (3) that “knowledge” means awareness that...a consequence will occur in the ordinary course of events’.

Let us consider the first alternative of Article 30(2)(b) ICC Statute addressing the state of mind of a person who ‘means to cause’ the result. At first sight, the level of mental element underlying this formula could seem to be equivalent to the standard of acting purposely in section 2.02 US Model Penal Code, or of *Absicht* as a kind of intent in German criminal law. Both purposes in the USA and *Absicht* in Germany are types of mental element satisfied if the agent aimed to bring about the criminal result, or to put it differently if he or she clearly wanted it to be the outcome of his or her conduct. On the other hand, the awareness of whatever degree of likelihood of the result is sufficient to attain these thresholds of purpose or of *Absicht*. Consequently, in the USA or in Germany even the recognition of a low criminal risk can justify a finding of intent, provided the agent consciously desired the unlawful consequence as his or her (final or intermediary) goal.²⁵ An example of this scenario would be an agent who, aiming to kill another person, administered to the victim a substance which he or she knew in one case out of a thousand provokes a deadly allergic reaction.

Yet, in the system of the ICC Statute could such a weak cognitive dimension establish what the early practice of the ICC has termed as *dolus directus* of the first degree referring to Article 30(2)(b) first alternative ICC Statute?²⁶ If the cumulative mention of ‘intent and knowledge’ in Article 30(1) ICC Statute is taken seriously, this question should without doubt receive a negative answer. Due to the interplay between the definition of knowledge in paragraph (3) of the article at stake and the definition of intent in its paragraph (2), under strict interpretation a person who purposefully aimed to bring about the result without having sufficient degree of knowledge would not satisfy this kind of mental element²⁷. Finnin has illustrated the practical impact of this by inviting us to

consider the case of an accused who plants an improvised explosive device (or ‘IED’, which have a notoriously low success rate), which he or she intends to initiate remotely when civilians come within range. It is the perpetrator’s conscious object to kill those civilians; however, unless it could be shown that he or she *knew* (at the time the device was initiated) that the device would explode successfully and thereby

²⁵ On purpose in US criminal law see s. 2.02(2)(a) MPC; *United States v United States Gypsum Co.*, 438 US 422, 445 (US 1978); *United States v Bailey*, 444 US 394, 404 (US 1980). On *Absicht* in German criminal law see BGHSt 21, 83, para. 4; Detlev Sternberg-Lieben, ‘15 StGB’ in A Schönke and H Schröder (eds), *Strafgesetzbuch: Kommentar* 28th edn (München: Beck 2010) para. 66; J Wessels and W Beulke, *Strafrecht: allgemeiner Teil* 43rd edn (Heidelberg: C F Müller 2013) para. 211; in English: M Badar, ‘*Mens Rea—Mistake of Law and Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals*’ (2005) 5 *International Criminal Law Review* 203, 222ff; Badar (n 16) 136ff; Porro (n 17) 28ff.

²⁶ Decision on the confirmation of charges, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-803-tEN, PTC I, ICC, 29 January 2007, para. 338 (‘Lubanga confirmation decision’), para. 351; *Katanga and Ngudjolo* confirmation decision (n 14) para. 529; *Bemba* confirmation decision (n 14) para. 358; Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Muthaura, Kenyatta and Ali*, *Situation in the Republic of Kenya*, ICC-01/09-02/11-382-Red, PTC II, ICC, 23 January 2012, para. 411.

²⁷ See, *inter alia*, *Bemba* confirmation decision (n 14) para. 358; Ambos (n 14) 770; Finnin (n 14) 165; Finnin, ‘Mental Elements under Article 30 of the Rome Statute of the International Criminal Court’ (n 14) 342 ff; Porro (n 17) 191.

result in the death of those civilians, the perpetrator would not satisfy this gradation of intent.... This obviously represents an unexpected and undesired consequence of the conjunctive ‘intent and knowledge’ wording of Article 30.²⁸

26.2.3 The requirement of awareness that the result ‘will occur in the ordinary course of events’; its (complex) relation with the area of conscious risk-taking

26.2.3.1 The terms of the debate—knowledge, dolus eventualis, and recklessness

Since the adoption of the ICC Statute, it has been a major dilemma confronting international legal practitioners and commentators what meaning should be ascribed to the phrasing ‘aware that it [i.e., the consequence or result] will occur in the ordinary course of events’ that appears in Article 30(2)(b) second alternative ICC Statute and is substantially repeated in Article 30(3) second alternative ICC Statute.

According to some voices, the formula used would not accommodate any mental standard lower than the awareness of result as a practical certainty²⁹ that would satisfy the condition of knowledge in section 2.02 US Model Penal Code, or of *direkter Vorsatz* as a kind of intent in German criminal law. Both knowledge in the USA and *direkter Vorsatz* in Germany are types of mental element that require the actor not to

²⁸ Finnin, *Elements of Accessorial Modes of Liability* (n 14) 165; Finnin, ‘Mental Elements under Article 30 of the Rome Statute of the International Criminal Court’ (n 14) 343.

²⁹ See, *inter alia*, Partly Dissenting Opinion of Judge Anita Ušacka to *Katanga and Ngudjolo* confirmation decision (n 14) para. 22; *Bemba* confirmation decision (n 14) para. 359 ff; Judgment pursuant to Art 74 of the Statute, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012 (*Lubanga* trial judgment), para. 1011; A Greenawalt, ‘Rethinking Genocidal Intent: the Case for a Knowledge-Based Interpretation’ (1999) 99 *Columbia Law Review* 2259, 2269; K Ambos, ‘General Principles of Criminal Law in the Rome Statute’ (1999) 10 *Criminal Law Forum* 1, 21ff; R Clark, ‘The Mental Element in International Criminal Law: the Rome Statute of the International Criminal Court and the Elements of Offences’ (2001) 12 *Criminal Law Forum* 291, 334; Ambos (n 14) 771; Eser (n 14) 915 ff, 932 ff; E van Sliekdregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: T M C Asser Press 2003) 51 ff; J van der Vyver, ‘The International Criminal Court and the Concept of *Mens Rea* in International Criminal Law’ (2004) 57 *University of Miami International and Comparative Law Review* 57, 70 ff; G Fletcher and J Ohlin, ‘The Commission of Inquiry on Darfur and its Follow-up: A Critical View. Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’ (2005) 3 *Journal of International Criminal Justice* 539, 553; G Werle and F Jeßberger, ‘Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law’ (2005) 3 *Journal of International Criminal Justice* 35, 41 ff, 53; R Clark, ‘Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Court’s First Substantive Law Discussion in the *Lubanga Dyilo* Confirmation Proceedings’ (2008) 19 *Criminal Law Review Forum* 519, 524 ff, in particular 529; E Podgor and R Clark, *Understanding International Criminal Law* 2nd edn (Newark: LexisNexis 2008) 232; D Piragoff and D Robinson, ‘Article 30—Mental Element’ in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court—Observers’ Notes, Article by Article* 2nd edn (München: C H Beck 2008) 533–4; Werle, *Principles of International Criminal Law* (n 14) paras 408 and 413; R Cryer et al., *An Introduction to International Criminal Law and Procedure* 2nd edn (Cambridge: Cambridge University Press 2010) 385 ff; Modes of Liability and the Mental Element: Analyzing the Early Jurisprudence of the International Criminal Court, War Crimes Research Office—American University Washington College of Law (2010), 69 ff; Heller (n 19) 604; Finnin, *Elements of Accessorial Modes of Liability* (n 14) 172 ff; Finnin, ‘Mental Elements under Article 30 of the Rome Statute of the International Criminal Court’ (n 14) 349, 358; Badar (n 16) 392.

have pursued the unlawful consequence as his or her conscious objective, but nonetheless to have been substantially sure that his or her conduct would bring it about.³⁰ From a psychological point of view, it can be agreed with von Bar that a certain outcome can reasonably be described as ‘wanted’ not only if it is aimed at, but also if it is inevitably linked to the goal sought.³¹ In relation to the default rule of Article 30 ICC Statute, Werle and Jessberger have argued that the minimum requirement for criminal responsibility would be

that in the perpetrator’s perception at the time of the act, carrying out the conduct would cause the consequence, unless extraordinary circumstances intervened. Thus, it is not enough for the perpetrator to merely anticipate the possibility that his or her conduct would cause the consequence. This follows from the words ‘will occur'; after all, it does not say ‘may occur’.³²

Also Ohlin appears to have shared this opinion when he stated that ‘[t]he reference to “ordinary course of events” neatly tracks the common law definitions of purpose and knowledge, and certainly suggests a mental state requirement far more demanding than mere recklessness’.³³

Others, in contrast, have supported the different view that the default rule of Article 30 ICC Statute would accommodate also some forms of conscious risk-taking that in domestic criminal systems would meet the standard of *dolus eventualis*, or even that of recklessness.³⁴ In this direction, Jescheck has asserted that the requirement of awareness that the result ‘will occur in the ordinary course of events’ in Article 30 ICC Statute would include ‘the concept of *dolus eventualis* used in continental European legal theory’.³⁵ In a similar vein, Triffterer has opined that in the system of the ICC Statute, ‘in principle, *dolus eventualis* is sufficient’.³⁶ Cassese has maintained that Article 30 ICC Statute ‘does not expressly refer to recklessness or culpable negligence, although recklessness (*dolus eventualis*) may be held to be encompassed by the definition of intent laid down in paragraph 2’.³⁷

³⁰ On knowledge in US criminal law see s. 2.02(2)(ii) MPC; *United States v United States Gypsum Co.* (n 25) 445; *United States v Bailey* (n 25) 404. On *direkter Vorsatz* in German criminal law see Jescheck and Weigend (n 15) 298ff; Claus Roxin, *Strafrecht: allgemeiner Teil*, vol. II, 4th edn (München: C H Beck 2006) s. 12, paras 18ff; Wessels and Beulke (n 25) para. 213; in English: Badar, ‘*Mens Rea—Mistake of Law and Mistake of Fact in German Criminal Law*’ (n 25) 224 ff; Badar (n 16) 138ff; Porro (n 17) 29 ff.

³¹ C von Bar, ‘*Dolus eventualis?*’ (1898) 18 *Zeitschrift für die gesamte Strafrechtswissenschaft* 534, 536 ff.

³² Werle and Jeßberger (n 29) 41. ³³ Ohlin (n 3) 23.

³⁴ See, *inter alia*, Lubanga confirmation decision (n 26) paras 352 ff; Katanga and Ngudjolo confirmation decision (n 14) para. 251 note 329; O Triffterer, ‘Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such’ (2001) 14 *Leiden Journal of International Law* 399, 403 ff; F Mantovani, ‘The General Principles of International Criminal Law: the Viewpoint of a National Criminal Lawyer’ (2003) 1 *Journal of International Criminal Justice* 26, 32; H-H Jescheck, ‘The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute’ (2004) 2 *Journal of International Criminal Justice* 38, 45; Badar, ‘The Mental Element in the Rome Statute of the International Criminal Court’ (n 19) 506; T Weigend, ‘Intent, Mistake of Law, and Co-Perpetration in the Lubanga Decision on the Confirmation of Charges’ (2008) 6 *Journal of International Criminal Justice* 471, 484; A Cassese, *International Criminal Law* 3rd edn (Oxford: Oxford University Press 2013) 56; A Gil Gil, ‘*Mens Rea* in Co-Perpetration and Indirect Perpetration According to Article 30 of the Rome Statute. Arguments against Punishment for Excesses Committed by the Agent or the Co-Perpetrator’ (2014) 14 *International Criminal Law Review* 82, 86, 107.

³⁵ Jescheck (n 34) 45.

³⁶ Triffterer (n 34) 403.

³⁷ A Cassese, *International Criminal Law* 2nd edn (Oxford: Oxford University Press 2008) 73.

Even though it cannot be concealed that the civil law notion of *dolus eventualis* is highly controversial, in 1955 the German Federal Supreme Court (*Bundesgerichtshof*) put forward a definition of this type of mental element that has since enjoyed wide acceptance.³⁸ The case, which later became known as '*Leather belt*', concerned two individuals, Kai und Jochen, who once deliberated to stun and rob Meinhard, an acquaintance of theirs. In principle they wished to avoid a deadly outcome. However, after having drugged and then hit Meinhard with a sandbag without managing to make him unconscious, Kai and Jochen strangled him with a leather belt. They certainly recognized a risk that the victim could have died as a result, and this possible consequence was unpleasant to them. Nevertheless, in order to accomplish the robbery they were ready to put Meinhard 'out of action' at all costs. Upholding the Court of Assize's position, the Federal Supreme Court affirmed Kai und Jochen's intent to kill in form of *dolus eventualis*. In the opinion of the *Bundesgerichtshof*, *dolus eventualis* (German: *bedingter Vorsatz*) would be satisfied in situations where the agent had knowledge of the realization of the offence in terms of possibility and consented to this outcome in the legal sense (German: *den Erfolg billigen, sich damit abfinden*). The element of consent in the legal sense would mean that the person took into account the occurrence of the crime as a real eventuality and included it in his or her plan of action. On the other hand, it would be irrelevant how the agent inwardly felt about the offence. To put the point differently, it can be said that a crime could be considered as approved in the legal sense even if the person perceived it as undesirable.³⁹

Perhaps more straightforward is the definition of the common law notion of recklessness emerging from the US Model Penal Code. Section 2.02(2)(c) of this latter text states that

[a] person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

As Fletcher has pointed out, such a formulation breaks ground in the direction of a normative theory of guilt.⁴⁰ According to this approach, the conception of blameworthiness for a wrongdoing should not be reduced to a state of intention, consciousness, or lack thereof, but should also include an evaluation by the legal system concerning the reproachability of the agent's attitude. The notion of recklessness, far from being limited to a state of mind in relation to the substantial and unjustifiable risk

³⁸ BGHSt 7, 363.

³⁹ Ibid., 368 ff. On *dolus eventualis* or *bedingter Vorsatz* in German criminal law see also Jescheck and Weigend (n 15) 299 ff; Roxin (n 30) s. 12 paras 21 ff; Sternberg-Lieben (n 25) para. 84; in English: V Krey, *German Criminal Law: General Part*, vol. 2 (Stuttgart: Kohlhammer 2002–3) para. 358; Badar, 'Mens Rea—Mistake of Law and Mistake of Fact in German Criminal Law' (n 25) 225 ff; Badar (n 16) 139 ff; Porro (n 17) 30, 34 ff.

⁴⁰ G Fletcher, *The Grammar of Criminal Law: American, Comparative, and International*, vol. 1 (Oxford: Oxford University Press 2007) 326.

determining the existence of a wrongdoing, imposes that the actual risk-taking be compared with the normative ideal of the law-abiding person in the actor's situation.⁴¹

From the wording used in section 2.02(2)(c) US Model Penal Code it can reasonably be derived that in order to fulfil the subjective dimension of recklessness in US criminal law, the agent is only demanded to have acted in spite of the awareness of the possibility of the unlawful consequence. Unlike *dolus eventualis*, in other words, recklessness would not include on its face discrete elements of will such as the requirement of having consented to the offence.⁴²

Yet, among legal commentators it is not uncontroversial whether the difference between *dolus eventualis* and recklessness should indeed be considered as one of substance. As Ohlin explains, '[t]here are two positions regarding how to translate *dolus eventualis* into common law terms. Either it accords with the common law concept of recklessness, or it is a distinct mental state that resides above recklessness but below knowledge'.⁴³ In either case, in light of the substantial proximity between these two notions it is striking to observe again with Fletcher that civil law countries, with the possible exception of France, 'draw the distinction between intentional and negligent conduct by including *dolus eventualis* within the contours of intending a particular result'.⁴⁴ In other words, *dolus eventualis* is regarded as a kind of intent satisfying the components of volition and knowledge that define the highest type of mental element. Roxin justifies the belonging of *dolus eventualis* to the realm of intent by explaining that an agent who included the realization of the crime as a real eventuality in his or her plan of action must also have taken a 'decision in favour of a possible violation of the legal good' (German: '*Entscheidung für die mögliche Rechtsgüterverletzung*').⁴⁵ However, quite different is the position of recklessness within the doctrine of *mens rea* in common law countries, which consider this latter standard to be a form of negligence.⁴⁶ In the system of the ICC Statute where the normal requirement for criminality is intent, such a dogmatical divergence can give rise to obvious ambiguities relating to the general boundaries of criminal liability.

26.2.3.2 The early practice of the ICC

26.2.3.2.1 The Lubanga Decision on the confirmation of charges

Already in its first decision on the confirmation of charges in 2007 the ICC had to tackle the central issue of interpretation of the requirement of awareness that the result 'will occur in the ordinary course of events'. The case concerned the Congolese national Lubanga Dyilo, a former alleged leader of the *Union des Patriotes Congolais* and Commander-in-Chief of its military division, the *Forces patriotiques pour la libération du Congo*, accused of conscripting and enlisting children under the age of 15 and using them to actively participate in hostilities.⁴⁷

⁴¹ Ibid., 326 ff. ⁴² See Badar (n 16) 112.

⁴³ Ohlin (n 3) 11. See also Finnin, *Elements of Accessorial Modes of Liability* (n 14) 159 ff; Finnin, 'Mental Elements under Article 30 of the Rome Statute of the International Criminal Court' (n 14) 330.

⁴⁴ G Fletcher, *Rethinking Criminal Law* (Boston: Little Brown 1978) 445.

⁴⁵ Roxin (n 30) s. 12 para. 23. ⁴⁶ Fletcher (n 44) 443.

⁴⁷ Lubanga confirmation decision (n 26).

In *Lubanga*, PTC I of the ICC showed itself to be mindful of the jurisprudence on *mens rea* of the ICTY and the ICTR, that although pursuant to Article 21 ICC Statute is not a primary source of law before the ICC. The ad hoc ICTY and ICTR have repeatedly held that for the condition of intent to be fulfilled, it would not be necessary that the agent perceived the unlawful outcome to be an almost inevitable consequence of his or her conduct. Quite the contrary, in the view of the ICTY and the ICTR there would exist a lower form of intent called ‘indirect intent’, which would be satisfied in cases where the person acted despite having recognized the probability of the result occurring⁴⁸ or, according to a minority approach, even only its possibility.⁴⁹ It was seemingly in light of this case law that PTC I of the ICC asserted that the volitional element mentioned in Article 30(1) ICC Statute would encompass besides *dolus directus* of the first degree and *dolus directus* of the second degree⁵⁰ also a notion of *dolus eventualis*.⁵¹ In the opinion of the Pre-Trial Chamber, *dolus eventualis* would pertain to ‘situations in which the suspect (a) is aware of the risk that the objective elements of the crime *may* result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it’.⁵²

It is apparent that this latter concept is built upon the idea of acceptance, a state of mind that can have various nuances and that Michaels has attempted to define as follows:

[a] person acts acceptingly with respect to a material element of an offense when the person acts recklessly with respect to that element and...if the element involves the result of the person's conduct, the person would have so acted had he been practically certain that the conduct would cause such a result.⁵³

In Michaels' view, acceptance and knowledge would ‘represent the same level of culpability’ as in both cases the agent’s ‘knowledge that she would cause the harm was not sufficient to stop him or her from acting’.⁵⁴ This description of acceptance closely resembles the so-called Frank’s formula in German criminal law, developed in the 1930s in relation to the proof of intent or *Vorsatz*. According to the Frank’s formula, the question to be answered in order to affirm or deny intent is the following:

[h]ow would the perpetrator have behaved with sure knowledge of the circumstances of the offence?... If one comes to the result that the perpetrator would also have acted with certain knowledge, then... *Vorsatz* is to be affirmed; if one comes to the result that with certain knowledge he would have refrained from action, then *Vorsatz* is to be rejected.⁵⁵

⁴⁸ See, *inter alia*, Judgment, *Nahimana, Barayagwiza and Ngeze*, ICTR-99-52-A, AC, ICTR, 28 November 2007, paras 480 and 481; Judgment, *Dragomir Milošević*, IT-98-29/1-A, AC, ICTY, 12 November 2009 (*D. Milošević, appeals judgment*), para. 268.

⁴⁹ See, *inter alia*, Judgment, *Blaškić*, IT-95-14-A, AC, ICTY, 29 July 2004, para. 33; Judgment, *Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, AC, ICTR, 13 December 2004, para. 467.

⁵⁰ *Lubanga* confirmation decision (n 26) para. 351.

⁵¹ Ibid., para. 352.

⁵² Ibid. (emphasis added, notes omitted).

⁵³ A Michaels, ‘Acceptance: The Missing Mental State’ (1998) 71 *Southern California Law Review* 953, 961.

⁵⁴ Ibid., 967.

⁵⁵ R Frank, *Das Strafgesetzbuch für das deutsche Reich* 18th edn (Tübingen: J C B Mohr 1931) 190. German to English translation from Michaels (n 53) 1026.

Also the Egyptian Court of Cassation seems to have adopted an analogous test in regard to the concept of *dolus eventualis* (*al qasd al ehtmali*) by maintaining that:

[t]he key issue for deciding if *dolus eventualis* is established or not is to ask the following question: while undertaking the intended act, did the perpetrator want to do it even if this act goes beyond its original purpose to perform another criminal consequence that actually happened and was not originally intended? If the answer is in the affirmative, *dolus eventualis* is established. If the answer is negative, then the whole matter is nothing more than an error that may be punishable or not depending on whether the conditions establishing an error are present.⁵⁶

PTC I of the ICC put forward in *Lubanga* what appears to be an even more extensive interpretation of the element of acceptance, applicable at least on the plan of evidence and distinguishing between two different scenarios. The Pre-Trial Chamber stated:

Firstly, if the risk of bringing about the objective elements of the crime is *substantial* [that is, there is a likelihood that it ‘will occur in the ordinary course of events’], the fact that the suspect accepts the idea of bringing about the objective elements of the crime can be inferred from:

- i. the awareness by the suspect of the substantial likelihood that his or her actions or omissions would result in the realisation of the objective elements of the crime; and
- ii. the decision by the suspect to carry out his actions or omissions despite such awareness.

...Secondly, if the risk of bringing about the objective elements of the crime is low, the suspect must have clearly or expressly accepted the idea that such objective elements may result from his actions or omissions.⁵⁷

This passage is noteworthy at least in a two-fold respect. On the one hand, PTC I of the ICC seems to have implied that literally interpreted, the requirement of awareness that the result ‘will occur in the ordinary course of events’ in Article 30 ICC Statute would not refer to a threshold of practical certainty, but a lower standard of *substantial* criminal risk.⁵⁸ It has remained to some extent unclear, however, what degree of likelihood below the level of nearly inevitable this element of ‘substantiality’ would point to. On the other hand, the Pre-Trial Chamber further expanded the notion of intent applicable within the jurisdiction of the ICC by opining that even the recognition of a low criminal risk might satisfy the default rule of Article 30 ICC Statute, provided the agent expressly accepted the unlawful consequence. Such an express acceptance would in particular be lacking in situations where the person decided to adopt a dangerous behaviour, but believing that no harmful outcome would follow thanks to his or her expertise.⁵⁹ In the words of PTC I of the ICC, ‘[t]his would be the case of a taxi driver taking the risk of driving at a very high speed on a local road, trusting that nothing would happen on account of his or her driving expertise’.⁶⁰

⁵⁶ Case no. 1853 of 25 December 1930.

⁵⁷ Ibid., paras 353–4 (emphasis added, notes omitted).

⁵⁸ See also Porro (n 17) 183.

⁵⁹ *Lubanga* confirmation decision (n 26) para. 355 fn 437.

⁶⁰ Ibid.

26.2.3.2.2 The *Katanga and Ngudjolo* Decision on the confirmation of charges and subsequent jurisprudence

The interpretation of intent formulated in the *Lubanga* Decision on the confirmation of charges, after having been endorsed in principle at the pre-trial stage in *Katanga and Ngudjolo*⁶¹ with Judge Anita Ušacka dissenting⁶², was however rejected by PTC II of the ICC in 2009. The case concerned Bemba Gombo, a former Vice-President of the DRC and the President and Commander-in-Chief of the *Mouvement de Libération du Congo*, who has been accused of a number of crimes against humanity and of war crimes perpetrated between October 2002 and March 2003 in the CAR⁶³. Declining to confirm the charges involving the alleged criminal responsibility of the defendant under the mode of liability of co-perpetration, the Pre-Trial Chamber reasoned as follows:

- (i) literally interpreted, the wording ‘[a result] will occur’ indicates an event that is ‘inevitably’ expected to happen.⁶⁴ Had the drafters of the ICC Statute intended to convey an idea of possibility, they could have employed the phrasing ‘may occur’ or ‘might occur’;⁶⁵
- (ii) the formula ‘in the ordinary course of events’ expresses that the likelihood of occurrence borders with certainty;⁶⁶
- (iii) altogether this lays down a requirement more demanding than the notion of *dolus eventualis* generally agreed upon, which imposes the foresight of the result in terms of simple possibility.⁶⁷

It was based on such premises that PTC II of the ICC concluded in *Bemba* that in the system of the ICC Statute, the threshold of intent should only be considered as attained if the agent was aware that the material elements of the offence would have been virtually certain, or in other words an almost inevitable outcome of his or her act.⁶⁸ By so doing, the Pre-Trial Chamber excluded from the realm of Article 30 ICC the leading notion of *dolus eventualis*. It should nonetheless be underlined with Ambos that ‘one must not overlook the fact that the “commonly agreed” standard invoked by the Chamber is by no means the only one. In fact, there are other, more

⁶¹ *Katanga and Ngudjolo* confirmation decision (n 14) para. 251 note 329. The interpretation of intent formulated in the *Lubanga* confirmation decision was endorsed in principle only, because the charges were confirmed on the basis of the higher standard of awareness that the offence would inevitably have followed from the act accomplished.

⁶² Partly Dissenting Opinion of Judge Anita Ušacka to *Katanga and Ngudjolo* confirmation decision (n 14) para. 22. This opinion stressed ‘the fundamental difference between the perpetrator’s cognitive awareness that the action will result with certainty and an awareness that undertaking a course of conduct carries with it an unjustifiable risk of producing harmful consequences’.

⁶³ *Bemba* confirmation decision (n 14).

⁶⁴ Ibid., para. 362. See also Werle and Jeßberger (n 29) 41; (n 16) 397.

⁶⁵ *Bemba* confirmation decision (n 14) para. 363. See also Badar (n 16) 398.

⁶⁶ *Bemba* confirmation decision (n 14) para. 362. See also Badar (n 16) 397.

⁶⁷ *Bemba* confirmation decision (n 14) para. 363. See also Badar (n 16) 398.

⁶⁸ *Bemba* confirmation decision (n 14) para. 369.

cognitive concepts of *dolus eventualis* (requiring awareness or certainty as to the consequence) and these may indeed be included in article 30'.⁶⁹

In 2012 the early practice of the ICC addressed again the meaning of the requirement of awareness that the result 'will occur in the ordinary course of events' in its first trial judgment on the *Lubanga* case.⁷⁰ TC I of the ICC apparently declared to accept the narrow interpretation of the concept of intent proposed in *Bemba Gombo*,⁷¹ adding, however, in paragraph 1012 of the judgment the following significant specification:

[i]n the view of the Majority of the Chamber, the 'awareness that a consequence will occur in the ordinary course of events' means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future. This prognosis involves consideration of the concepts of 'possibility' and 'probability', which are inherent to the notions of 'risk' and 'danger'. Risk is defined as 'danger, (exposure to) the possibility of loss, injury or other adverse circumstance'. The co-perpetrators only 'know' the consequences of their conduct once they have occurred. At the time the co-perpetrators agree on a common plan and throughout its implementation, they must know the existence of a *risk* that the consequence will occur. As to the degree of risk, and pursuant to the wording of Article 30, it must be no less than awareness on the part of the co-perpetrator that the consequence 'will occur in the ordinary course of events'. A low risk will not be sufficient.⁷²

In his separate opinion, Judge Fulford described this latter passage as 'potentially confusing'.⁷³ It is worth quoting his relevant statement in full:

I consider it is unhelpful to investigate whether the requirement of awareness (on the part of the accused) that a crime will be committed 'in the ordinary course of events' is to be equated with a 'possibility', a 'probability', a 'risk', or a 'danger' (see paragraph 1012 of the Judgment). Put otherwise, the Chamber's decision as to whether the accused was aware that something will happen in the ordinary course of events is not assisted by asking the question as to whether he was aware of the possibility, the probability, the risk or the danger that it would occur. The words are plain and readily understandable.⁷⁴

In an even more critical spirit, Judge van der Wyngaert asserted in her concurring opinion to the *Ngudjolo Chui* trial judgment that

reliance on 'risk' as an element under article 30 of the Statute is tantamount to accepting *dolus eventualis* dressed up as *dolus directus* second degree. Besides direct intent, article 30 of the Statute only allows for criminal responsibility when the perpetrator fully expects that the material elements of a crime 'will occur in the ordinary course

⁶⁹ K Ambos, 'Critical Issues in the *Bemba* Confirmation Decision' (2009) 22 *Leiden Journal of International Law* 715, 718.

⁷⁰ *Lubanga* trial judgment (n 29).

⁷¹ Ibid., para. 1011.

⁷² Ibid., para. 1012 (emphasis added, fnn omitted).

⁷³ Separate Opinion of Judge Adrian Fulford, *Lubanga* trial judgment (n 29) para. 15.

⁷⁴ Ibid.

of events.' Accordingly, any reference to risk-taking by the accused is out of place in this context.⁷⁵

It is here submitted that paragraph 1012 of the *Lubanga Dyilo* trial judgment appears indeed to use a contradictory language. On the one hand, TC I of the ICC employed in its argument the terms 'risk' or 'danger', which—as the Trial Chamber mentioned itself—refer in general English to a dimension of mere possibility, as opposed to substantial certainty, of unwelcome events. On the other hand, however, the Trial Chamber also seemed to treat such an aspect of bare likelihood as equivalent to the standard of *dolus directus* of the second degree, which corresponds to the awareness of the consequence in terms of substantial certainty. Yet, in both civil law and common law countries it is widely accepted that the conscious adoption of a behaviour that the agent knew might bring about an unlawful outcome should be regarded as a state of mind less serious than awareness of the result as nearly inevitable. The difference between the two mental states is mirrored in US criminal law in the dichotomy between knowledge and recklessness, and in German criminal law in the dichotomy between *direkter Vorsatz* and *bedingter Vorsatz* or *dolus eventualis*. The psychological underpinning of these qualifications is that we can perceive as 'wanted' a consequence that albeit not deliberately pursued, was nonetheless surely connected with our aim. The same does not hold true in relation to a possibly undesired outcome. Taking an example of Von Bar, let us imagine that a person wishes to undertake a pleasure trip which he or she knows will cost him or her a considerable sum of money. Although the agent can consider the expense as disagreeable, he or she 'wants' it as a mean to pay for his or her holiday. In contrast, if an agent decides to climb a mountain while aware that thereby he or she could possibly get sick or injured, it is realistic to assume that he or she hopes that the adverse consequence will not occur.⁷⁶

Nevertheless, in March 2014 also TC II of the ICC adjudicating upon *Katanga* affirmed to adhere to the narrow interpretation of the notion of intent put forward in *Bemba*.⁷⁷ In a straightforward fashion and without resorting to the concept of risk-taking, on this occasion the Court confirmed that the literal formulation of Article 30 ICC Statute does not accommodate attitudes below the threshold of awareness of the result as a substantial certainty. In the words of the Trial Chamber,

the form of this criminal intent requires the person to have known that realizing the acts will necessarily bring about the particular consequence, unless an unexpected intervention or an unforeseen event impede it. To put it differently, it is nearly impossible for him to foresee that the consequence will not occur.⁷⁸

⁷⁵ Concurring Opinion of Judge Christine Van den Wyngaert, Judgment pursuant to Art 74 of the Statute, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-4, TC II, ICC, 19 December 2012, para. 38 (notes omitted).

⁷⁶ Von Bar (n 31) 536 ff.

⁷⁷ Jugement Rendu en Application de l'Article 74 du Statut, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07, TCII, ICC, 7 March 2014, para. 776.

⁷⁸ Ibid., para. 777 (unofficial translation by Sara Porro).

From the statement it can be inferred that the second form of intent in the ICC Statute would essentially correspond to knowledge pursuant to section 2.02 US Model Penal Code, or to *direkter Vorsatz* in German criminal law.

In December 2014 the Appeals Chamber of the ICC finally pronounced itself on the interpretation of the default rule of Article 30 ICC Statute, denying—implicitly and perhaps surprisingly—that whatsoever divergence would at present exist in this regard among the Trial Chambers of the ICC.⁷⁹ The *Lubanga Dyilo* appeals judgment confirmed the view put forward in *Bemba*, that in Article 30 ICC Statute ‘the standard for the foreseeability of events is virtual certainty’.⁸⁰ It thus excluded the notion of *dolus eventualis* from the default mental element, and held that the same subjective threshold had already emerged from the *Lubanga Dyilo* trial judgment. Almost trivializing the use of the term ‘risk’ by TC I of the ICC in *Lubanga Dyilo*,⁸¹ the Appeals Chamber argued that [t]he Trial Chamber, in defining the requisite level of “risk”, specified [...] that this entailed an “awareness on the part of the co-perpetrators that the consequence will occur in the ‘ordinary course of events’” and distinguished this from a “low risk”. The Appeals Chamber concluded that the Trial Chamber ‘did not deviate from the requirements of article 30(2)(b) and (3) of the Statute’.⁸² In this reasoning, the Appeals Chamber seems to imply that the *Lubanga Dyilo* trial judgment did not entail an error of law on the part of TC I by using the term ‘risk’ in paragraph 1012. The Appeals Chamber suggests that the term was superfluously added to the fundamental holding that cases of awareness of result below the threshold of virtual certainty are to be excluded from the realm of Article 30 ICC Statute.

26.2.3.3 Liability for more serious consequences?

In the jurisprudence of the Yugoslavia Tribunal on killing it is not unusual to come across associations of intent in respect to the lesser-included offence of substantial bodily harm, and of negligence in respect to the more serious consequence of death. In *Kvočka*, for instance, the ICTY Appeals Chamber has asserted that ‘the Prosecutor bears the onus of proving...the intent of the accused...a) to kill the victim; or b) to wilfully cause serious bodily harm which the perpetrator should reasonably have known might lead to death’.⁸³ To take another example, the *Dragomir Milošević* appeal judgment has stated that [t]o satisfy the *mens rea* for murder it is further required that there was an act or omission, with the intention to kill (*animus necandi*) or to inflict grievous bodily harm, in the reasonable knowledge that it might lead to death’.⁸⁴

The limitation of intent to a lesser-included offence and the application of a lower standard of *mens rea* to a more severe consequence lead to the expansion of the scope of criminal responsibility. A defendant can be held liable not only for those outcomes

⁷⁹ Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his conviction, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-A-5, AC, ICC, 1 December 2014 ('Lubanga appeal judgment') paras 441 ff.

⁸⁰ Ibid., para. 447.

⁸¹ *Lubanga* trial judgment (n 29) para. 1012.

⁸² *Lubanga* appeal judgment (n 79) para. 450.

⁸³ Judgment, *Kvočka, Radić, Žičić, and Prcić*, IT-98-30/1-A, AC, ICTY, 28 February 2005, para. 261.

⁸⁴ *D Milošević*, appeals judgment (n 48) para. 108.

of his or her act that he or she actually foresaw, but also for more serious events causally related to the conduct that the agent could have not anticipated at all, but that a reasonable person would have predicted. It is here agreed with Ashworth that this can be regarded as conflicting with the already mentioned principle of correspondence, according to which a requirement of *mens rea* must extend to all material elements of the offence.⁸⁵ However, it is also interesting to mention that the Law Reform Commission of Western Australia holds the view that

the correspondence principle ‘remains very much an ideal, if anything, rather than an accurate descriptive generalisation about crimes’. . . . Therefore, instead of precise correspondence there should be ‘close proximity’ between the mental element and the harm done.... An intention to cause a permanent injury to health does not correspond with harm caused. On the other hand, an intention to cause an injury likely to endanger life corresponds closely with the resulting harm of death.⁸⁶

Associations of intent in respect to a lesser-included offence, and of negligence in respect to a more serious consequence find an underpinning in the German category of ‘*erfolgsqualifizierte Delikte*’ or offences qualified by the result, which are numerous in the German Code of Crimes against International Law or *Völkerstrafgesetzbuch*. The provisions on crimes against humanity and on war crimes in this Act aggravate the sentence if certain underlying offences resulted in the victim’s death, or in a few cases serious injury.⁸⁷

It is interesting to raise the issue as to whether in the system of the ICC Statute, criminal responsibility may be attached to more serious consequences ensuing from a lesser-included offence that the agent realized intentionally. Insofar as the default rule of Article 30 ICC Statute applies, it is submitted that this question should receive a decisively negative answer. There can be no doubt that the requirement of awareness that the result ‘will occur in the ordinary course of events’ in Article 30(2)(b) second alternative ICC Statute imposes an element of cognition in respect of the actual outcome of the conduct accomplished.

26.2.4 The requirement of ‘awareness that a circumstance exists’; the doctrine of wilful blindness

Article 30(3) first sentence first alternative ICC Statute provides that in relation to attendant circumstances, knowledge ‘means awareness that a circumstance exists’. It has already been mentioned that in the article in question, the term ‘knowledge’ is to be understood in the sense of cognition as a necessary requirement of the mental element of intent. Furthermore, it should be underlined that concerning attendant circumstances the notion of intent consists solely in cognition, as these surrounding facts can be foreseen or recognized, but not properly ‘wanted’.⁸⁸

⁸⁵ A Ashworth, *Principles of Criminal Law* 2nd edn (Oxford: Oxford University Press 1995) 261.

⁸⁶ Review of the Law of Homicide: Final Report, Law Reform Commission of Western Australia (2007), 46 (notes omitted), citing Horder (n 20) 759, 770.

⁸⁷ See ss 7(3) and 8(4), 11(2), and 12 (2) VStGB.

⁸⁸ Porro (n 17) 189.

Under strict interpretation, Article 30(3) first sentence first alternative ICC Statute seems to suggest that the concept of intent in relation to attendant circumstances applicable and binding within the jurisdiction of the ICC should be limited to situations where the agent was actually aware of the relevant facts.⁸⁹ To put the point differently, it can be argued that the formulation of the ICC Statute appears to have excluded from the notion of intent not only cases of ‘constructive knowledge’, i.e. where a reasonable person would have known about the surrounding fact, but also scenarios of awareness of ‘high probability’ of its existence.⁹⁰ This further means that the delegations in Rome seem to have not acknowledged the common law doctrine of wilful blindness⁹¹, which, according to a narrow interpretation that Williams has proposed, would pertain to situations

[w]here it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This and this alone, is wilful blindness.⁹²

At the level of criminal policy, however, Sullivan has observed that ‘should reliable means to resolve one’s suspicions be available, we are faced with something more than mere suspicion’.⁹³ On this basis he has maintained that ‘wilful blindness is appropriately considered a form of culpability equivalent to proof of explicit knowledge. Accordingly, extension of the legal meaning of knowledge to encompass wilful blindness falls within the legitimate scope of judicial interpretation’.⁹⁴

When addressing Article 30(3) first sentence first alternative ICC Statute, the ICC will have to decide whether to favour a rigorous respect of the principle of legality over practical considerations, or vice versa.

26.3 The Default Rule of Article 30 ICC Statute between Applicability and Non-applicability

26.3.1 The (controversial) meaning of the opening clause ‘Unless otherwise provided’

In sum, the analysis in the previous section reveals that the notion of intent pursuant to Article 30 ICC Statute could be significantly narrower than the interpretation of the

⁸⁹ Essentially in this sense, *inter alia*, Badar, ‘The Mental Element in the Rome Statute of the International Criminal Court’ (n 19) 496 ff; Heller (n 19) 604; Finnin, *Elements of Accessorial Modes of Liability* (n 14) 173 ff; Finnin, ‘Mental Elements under Article 30 of the Rome Statute of the International Criminal Court’ (n 14) 350 ff; Badar (n 16) 399; Porro (n 17) 189 ff.

⁹⁰ See also Badar (n 16) 399.

⁹¹ The term ‘wilful’ is used here, following the spelling of ICC Statute.

⁹² G Williams, *Criminal Law: the General Part* 2nd edn (London: Stevens and Sons 1961) 159.

⁹³ R Sullivan, ‘Knowledge, Belief, and Culpability’ in S Shute and A Simester, *Criminal Law Theory: Doctrines of the General Part* (Oxford: Oxford University Press 2002) 214.

⁹⁴ Ibid., 225.

homonymous concept in the ICTY jurisprudence, to which Ohlin has traced back an alleged conflation between the International Humanitarian Law cardinal principles of distinction and of proportionality.⁹⁵ Yet, it emerges as an almost natural question whether in the system of the ICC Statute this concept of intent applies to the war crimes of attack affecting civilians provided for in Articles 8(2)(b)(i) and (iv) and 8(2)(e)(i) ICC Statute.

It is generally accepted that the wording ‘Unless otherwise provided’ appearing at the very beginning of Article 30 ICC Statute allows the Court to derive exceptions to intent from other provisions of the Statute.⁹⁶ However, at least in the scholarship it is, on the other hand, still controversial whether diverging standards of mental element could also arise from the Elements of Crime⁹⁷, or even from customary international law.⁹⁸ The early practice of the ICC appears on its part to have embraced the view that both the ICC Statute and the Elements of Crime can provide ‘otherwise’ in the sense of the opening clause of Article 30 ICC Statute. The Court has relied on paragraph (2) of the General Introduction to the Elements of Crime, which in the relevant part reads as follows:

[a]s stated in article 30, 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. Where no reference is made in the Elements of Crime to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies....

⁹⁵ Ohlin (n 3).

⁹⁶ See, *inter alia*, Lubanga confirmation decision (n 26) paras 356 ff; Bemba confirmation decision (n 14) paras 136, 353; Clark, ‘The Mental Element in International Criminal Law’ (n 29) 321; Eser (n 14) 898, 933; Werle and Jeßberger (n 29) 43 ff; J Ohlin, ‘Joint Criminal Confusion’ (2009) 12 *New Criminal Law Review* 406, 414; Werle, *Principles of International Criminal Law* (n 14) 416 ff; Cryer et al. (n 29) 386; W Schabas, *The International Criminal Court: a Commentary on the Rome Statute* (Oxford: Oxford University Press 2010) 474; K Ambos, *Internationales Strafrecht* 3rd edn (München: C H Beck 2011), s. 7, para. 64; Finnin, ‘Mental Elements under Article 30 of the Rome Statute of the International Criminal Court’ (n 14) 351 ff; Cassese et al. (n 34) 56.

⁹⁷ In the affirmative sense, *inter alia*, Lubanga confirmation decision (n 26) paras 356 ff; Bemba confirmation decision (n 14) paras 136 and 353; Clark, ‘The Mental Element in International Criminal Law’ (n 29) 321; H von Hebel and M Kelt, ‘General Principles of Criminal Law and Elements of Crimes’ in R Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers 2001) 30, 36 ff; Werle and Jeßberger (n 29) 45 ff; Badar, ‘The Mental Element in the Rome Statute of the International Criminal Court’ (n 19) 501; Werle, *Principles of International Criminal Law* (n 14) 416, 419 ff; Cryer et al. (n 29) 386; Schabas (n 92) 474 ff; Finnin, ‘Mental Elements under Article 30 of the Rome Statute of the International Criminal Court’ (n 14) 353 ff. Against this view, *inter alia*, Ambos (n 14) 789; Eser (n 14) 898, 933; Ambos (n 96) s. 7, para. 64 read together with s. 6, para. 30.

⁹⁸ In the affirmative sense, *inter alia*, K Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press 2003) 11 ff; Werle and Jeßberger (n 29) 45ff; Werle, *Principles of International Criminal Law* (n 14) para. 416; Finnin, *Elements of Accessorial Modes of Liability* (n 14) 179 ff; Finnin, ‘Mental Elements under Article 30 of the Rome Statute of the International Criminal Court’ (n 14) 354, 359. Against this view, *inter alia*, Concurring Opinion of Judge Christine van der Wyngaert to Ngudjolo trial judgment (n 75) para. 9 fn 16; Cryer et al. (n 29) 386; Ohlin (n 96) 414.

26.3.2 Intent, attack against civilians, and collateral damage

Articles 8(2)(b)(i) and 8(2)(e)(i) ICC Statute criminalize the act of '[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities' (violation of the principle of distinction). Article 8(2)(b)(iv) ICC Statute considers the following as a war crime: '[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated' (violation of the principle of proportionality). In order to verify whether or not the ICC Statute has reiterated the over-criminalization of the breach of the rule of distinction reproached to the jurisprudence of the Yugoslavia Tribunal⁹⁹, the key problem to be solved is how to interpret the word 'intentionally' appearing in Articles 8(2)(b)(i) and 8(2)(e)(i) ICC Statute, and substantially repeated in the third Element of Crime to the corresponding crimes.

At first glance, this adverb 'intentionally' seems to just confirm the default rule on the mental element of Article 30 ICC Statute, that is, to impose that the agent was aware that the conduct would 'in the ordinary course of events' affect civilians. However, it should also be noted that such an interpretation would create a significant overlap between the crime of attack against civilians and that of collateral damage provided for in Article 8(2)(b)(iv) ICC Statute. The latter offence explicitly pertains to cases where the person knew that the strike would have caused incidental harm among civilians, yet on the additional condition that such a loss was disproportionate to the foreseen military advantage. An alternative interpretation could thus be taken into consideration that would keep the domains of each of the crimes in question clearly distinct, while at the same time being faithful to the original limitation of the principle of distinction to situations of clear will to hit civilians. This would assign to the word 'intentionally' in Articles 8(2)(b)(i) and 8(2)(e)(i) ICC Statute the narrower meaning of 'purposefully'.¹⁰⁰

26.4 Concluding Remarks

The regulation of the mental elements in the ICC Statute appears to be consistent with a narrow interpretation of the international humanitarian law cardinal principles of distinction and of proportionality. Articles 8(2)(b)(i) and 8(2)(e)(i) ICC Statute could limit the scope of the war crime of attack against civilians to situations where the agent pursued the causation of harm to civilians as his or her conscious goal. Furthermore, according to Article 8(2)(b)(iv) ICC Statute read together with Article 30 ICC Statute, the war crime of collateral damage would pertain to cases where the person was practically certain that the operation would have brought excessive losses among protected targets. The legal landscape applicable and binding within the jurisdiction of the ICC

⁹⁹ Ohlin (n 3).

¹⁰⁰ In this sense Werle, *Principles of International Criminal Law* (n 14) para. 1178; Porro (n 17) 204.

departs significantly from the broad concept of intent developed in the jurisprudence of the ad hoc Tribunals and applied by the ICTY to the war crime of attack against civilians. The Yugoslavia Tribunal has regularly held that even in scenarios where the actor merely foresaw the possibility of hitting civilians in consequence of a strike directed at military objectives, criminal responsibility for violation of the principle of distinction could be established.

However, the exclusion of *dolus eventualis* from the realm of Article 30 ICC Statute raises some questions. How should the ICC qualify the behaviour of those agents who, without aiming to launch an attack against protected targets nor being aware that this was a virtual certainty as a result of their act, nevertheless perceived the likelihood of it occurring? To take another example, what should the ICC do with those actors who did not want to kill the people they forcibly deported, but knew there was such a risk? What should the ICC do with their claim that they did not want to kill, but merely threaten the victims to leave their municipality? If it cannot be proven that the accused either *intended* to cause the death of the victims or *knew* that death was almost inevitable, there can be no liability for *dolus directus* of the first degree or *dolus directus* of the second degree (Article 30(2)(b) first and second alternative ICC Statute). In such cases, and according to the very strict interpretation of *dolus* by recent decisions and judgments rendered by the ICC, there can be no liability and the perpetrators should be acquitted. Whether the Appeals Chamber of the ICC will extend the meaning of intention under Article 30 ICC Statute to include *dolus eventualis* is still unresolved.

The ICC's First Encounter with the Crime of Genocide

The Case against Al Bashir

*Claus Kress**

27.1 Introduction

On 31 March 2005 the UNSC, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1593 referring the situation in Darfur, Sudan, since 1 July 2002, to the prosecutor of the ICC.¹ After having informed Pre-Trial Chamber I on 1 June 2005 of its decision to initiate an investigation into the Darfur situation, pursuant to Article 53 of the ICC Statute, the prosecution, on 14 July 2008, filed an application under Article 58 of the ICC Statute requesting the issuance of a warrant of arrest against Omar Hassan Ahmad Al Bashir (2008 Application), who, at that time, was (and, at the time of writing, continues to be) the Head of the State of Sudan.²

It is hard to overstate the importance of the situation in Darfur, in general, and that of the case against Al Bashir, in particular, for the ICC.³ The first UNSC referral of a situation in accordance with Article 13(b) of the ICC Statute confronted the Court, which before had largely been dealing with *rebel* leaders at the request of the respective governments, with its core mission being to examine whether *state* leaders had crossed the ultimate red line drawn by international criminal law. And the Court was requested to fulfil its core mission while the underlying conflict was ongoing and the most likely suspects were still in office. Unsurprisingly, the Sudan precedent has brought to light a host of legal and policy issues, which go to the heart of the ICC's work, including, for example, the tension between the new international criminal justice system and the traditional international law immunities, the timing of the issuance of arrest warrants during ongoing conflicts, the (non-)cooperation of states with the Court in high-profile cases, and the proper role of the UNSC subsequent to a referral under Article 13(b) of the ICC Statute, including the (non-)use of its power under Article 16 of the ICC Statute. More generally, it has also revealed the

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¹ UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593, op. para. 1.

² Public Redacted Version of the Prosecutor's Application under Article 58, ICC-02/05-157-AnxA, *Situation in Darfur*, OTP, ICC, 12 September 2008.

³ For a brief summary of the history of the conflict, see M Kelly, 'The Debate over Genocide in Darfur, Sudan' (2011) 18 *University of California Davis Journal of International Law* 205, 206 *et seq.*

possible tension between the burning need, on the one hand, to alleviate human suffering and put an end to a bloody non-international armed conflict and, on the other hand, the global interest in the validation of fundamentally important international law rules through the new international criminal justice system. Fascinating as all these issues are, none of them will be addressed in this chapter.⁴ Instead, the latter's modest ambition is to shed some light on the ICC's first substantial encounter with the crime of genocide.

This encounter was triggered by the prosecution's submission, in the 2008 Application, that Al Bashir bears criminal responsibility for the crime of genocide as a result of the killing of and the causing of serious bodily or mental harm to members of the Fur, Masalit, and Zaghawa ethnic groups, as well as the deliberate infliction on those groups of conditions of life calculated to bring about the groups' physical destruction.⁵ In its 4 March 2009 Decision (2009 Decision), Pre-Trial Chamber I found that the material provided by the prosecution had failed to give reasonable grounds to believe that Al Bashir had committed the crime of genocide.⁶ This finding was reversed by the Appeals Chamber⁷ in its Judgment of 3 February 2010⁸ (2010 Judgment) on the ground that the Pre-Trial Chamber had applied an erroneous standard of proof. In its 12 July 2010 Decision (2010 Decision), Pre-Trial Chamber I,⁹ on the basis of the legal determinations made by the Appeals Chamber, decided to issue a warrant of arrest for genocide as applied for by the prosecution.¹⁰ At the time of writing, Al Bashir remains at large.

27.2 The ICC's *Al Bashir* Case Law on the Crime of Genocide

To date, the 2009 Decision constitutes the most important engagement of an ICC Chamber with the definition of the crime of genocide. The analysis of this decision, therefore, is at the heart of the present chapter while references to the 2010 Judgment and to the 2010 Decision may be kept comparatively short.

⁴ The literature on these issues is vast; for a few studies, see C Krefl, 'The International Criminal Court and Immunities under International Law for States not Party to the Court's Statute' in M Bergsmo and L Yan (eds), *State Sovereignty and International Criminal Law* (Torkel Opsahl Academic EPublisher 2012) 223; S Nouwen, *Complementarity in the Line of Fire. The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press 2013) 244.

⁵ Public Redacted Version of the Prosecutor's Application under Art 58 (n 2) paras 76–209.

⁶ Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-3, PTC I, ICC, 4 March 2009, para. 206.

⁷ The Chamber was composed of Judges Erkki Kourula, Sang-Hyun Song, Ekaterina Trendafilova, Daniel David Ntanda Nsereko, and Joyce Aluoch.

⁸ 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', *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-73 OA, AC, ICC, 3 February 2010, para. 41.

⁹ The Chamber was composed of Judges Sylvia Steiner, Sanji Mmasenono Monageng, and Cuno Tarfusser.

¹⁰ Second Decision on the Prosecution's Application for a Warrant of Arrest, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-94, PTC I, ICC, 12 July 2010, p. 28.

27.2.1 The teleology behind the law against genocide

The 2009 Decision finds that ‘the definition of the crime of genocide aims at protecting the existence of a specific group or people’. It accordingly determines that the fact that three different groups have been targeted must be reflected through the articulation of three distinct counts of genocide.¹¹ While this is not a particularly elaborate statement, it is in line with a consolidated judicial approach starting with the seminal 1998 judgment of the ICTR in the *Akayesu* case.¹²

By endorsing this approach, the 2009 Decision implicitly rejects the more recent suggestion made by Larry May that the prohibition of genocide *exclusively* protects the interests of the *individual* members of the protected group concerned. These individuals, so the argument runs, hold the interest in defining their (social) identity also through the belonging to their group, and the crime of genocide therefore threatens the individual members of the group with the significant harm of losing their group identity.¹³

It constitutes an intriguing question *de lege ferenda* whether the law against genocide should be purely ‘individualistic’ along the lines suggested by May. The *existing* law, however, cannot be convincingly explained in that way. The protective scope of the current legal definition of genocide is confined to four specific categories of groups, and it is hard to explain this limitation if the prohibition of genocide is seen through the lens of the interest of individual human beings to form a group identity. This interest has also not been at the historical roots of the recognition of genocide as a distinct crime under international law. Raphael Lemkin’s seminal book *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*¹⁴ was inspired by Johann Gottfried Herder’s belief that humanity was enriched by the existence of a plurality of national cultures,¹⁵ and it is precisely this idea that the UNGA ceremonially endorsed when it stated in its historic resolution of 11 December 1946 that genocide ‘results in great losses to humanity in the form of cultural and other contributions represented by these human groups’.¹⁶ The *travaux préparatoires* therefore suggest that the law against genocide protects the world’s interest in ‘national cosmopolitanism’.

While this collective interest has rightly been recognized in the 2009 Decision, there is no compelling reason to deny that, *in addition* thereto, the current law against genocide protects those *individual rights* of the targeted group *members*. The fact that

¹¹ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 115.

¹² Judgment, *Akayesu*, ICTR-96-4-T, TC I, ICTR, 2 September 1998, para. 469.

¹³ L May, *Genocide. A Normative Account* (Cambridge: Cambridge University Press 2010) 88 *et seq.*

¹⁴ R Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, D.C.: Carnegie Endowment for International Peace 1944).

¹⁵ For a brilliant analysis of Lemkin’s ‘groupism’ and the significance of thinkers other than Herder for Lemkin’s writings, see A Dirk Moses, ‘Raphael Lemkin, Culture, and the Concept of Genocide’ in D Bloxham and A Dirk Moses (eds), *The Oxford Handbook of Genocide Studies* (Oxford: Oxford University Press 2010) 22 *et seq.*

¹⁶ UNGA Res 96(I) (11 December 1946) UN Doc A/RES/96(I); reprinted in H Abtahi and P Webb (eds), *The Genocide Convention. The Travaux Préparatoires* vol. I (Leiden: Martinus Nijhoff Publishers 2008) 34; as Dirk Moses (n 15) 37, aptly observes: ‘This is pure Lemkin.’

those individuals may not ‘count’ as individuals *for the genocidaires* is utterly irrelevant. It is *the law’s perspective* that matters, and here the individual rights of the targeted group members count a great deal.¹⁷ The 2009 Decision does not touch upon this aspect.

The decision does also not offer reflections about the question whether, and if yes, in what specific sense, genocide is a crime *against international peace and security* as the ILC’s *Draft Code of Crimes against Peace and Security of Mankind*¹⁸ (through its very title) and the Preamble of the ICC Statute (through its third consideration) suggest. While it would have been fascinating to learn the Chamber’s view on this, it is understandable that it has refrained from digging that deep. At this moment in time international legal scholarship continues to struggle with the conceptualization of the UNSC’s more recent practice to apply the concept of ‘threat to *international* peace and security’¹⁹ to serious forms of *internal* violence, and, accordingly, international criminal law scholarship continues to struggle with the conceptualization of the ‘second generation of crimes under international law’,²⁰ including genocide, crimes against humanity, and war crimes committed in a non-international armed conflict, in cases without direct trans-border repercussions.

27.2.2 The basic structure of the crime of genocide

27.2.2.1 *The texts*

Pursuant to Article 7 of the ICC Statute and customary international law, crimes against humanity require the existence (or at least the emergence) of a widespread or systematic attack directed against any civilian population.²¹ It is thus clearly established that crimes against humanity will, except perhaps in the most exceptional circumstances, have a *systemic* character. The customary definition of genocide, as contained in Article II of the 1948 Genocide Convention²² and as reprinted in Article 6 of the ICC Statute, reads conspicuously differently. It neither contains an explicit objective contextual element, nor does its intent requirement explicitly allude to a collective genocidal activity. As a consequence hereof, the crime of genocide, other than crimes against humanity, appears to be drafted from the perspective of the ‘lone individual seeking to destroy the group as such’.²³ Yet, the ICC Elements of Crimes²⁴ on

¹⁷ For a more detailed argument, see C Kreß, ‘§ 6 VStGB’ in W Joecks and K Miebach (eds), *Münchener Kommentar zum Strafgesetzbuch* vol. 8, 2nd edn (München: C H Beck 2013) 1088 (marginal note 2).

¹⁸ 1996 *Yearbook of the International Law Commission* vol. II, part 2, 44.

¹⁹ See e.g. E de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing 2004) 138 *et seq.*

²⁰ For the distinction between a first and a second generation of substantive international criminal law, see C Kreß, ‘The International Criminal Court as a Turning Point in the History of International Criminal Justice’ in A Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press 2009) 146 *et seq.*

²¹ This part of the chapter builds on and updates C Kreß, ‘The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber’s Decision in the *Al Bashir* Case’ (2009) 7 *Journal of International Criminal Justice* 297.

²² Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

²³ Judgment, *Jelisić*, IT-95-10-T, TC I, ICTY, 14 December 1999, para. 100 (*Jelisić Trial Judgment*).

²⁴ Elements of Crimes, ICC/ASP/1/3, 9 September 2002 (First Session of the ASP).

the crime of genocide significantly qualify this first impression conveyed by a first reading of the crime's definition. They stipulate a common Element which reads as follows:

The conduct (killing, causing serious bodily or mental harm etc.) took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

This is complemented by the following explanations in the Introduction of the Elements of Crimes on genocide.

With respect to the last element listed for each crime:

- The term 'in the context of' would include the initial acts in an emerging pattern;
- The term 'manifest' is an objective qualification;
- Notwithstanding the normal requirement for a mental element provided for in article 30 and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.

27.2.2.2 *The 2009 Decision*

In its 2008 Application, the prosecution takes the requirement of a genocidal context for granted and applies the first alternative of the common Element as follows:

The Prosecution must show that, as to each genocidal *actus reus*, the conduct took place in the context of a manifest pattern of similar conduct directed against each target group. The magnitude, consistency and planned nature of the crimes detailed in this Application unequivocally demonstrate that the alleged acts of genocide took place in the context of a manifest pattern of similar conduct, in furtherance of Al Bashir's plan to destroy in substantial part each of the targeted groups.²⁵

The 2009 Decision takes a more scrupulous approach to the matter. It recognizes a possible departure of the common Element from the crime's definition and notes that 'there is certain controversy as to whether this contextual element should be recognised'.²⁶ In the end, however, the Chamber does not find the contextual Element in 'irreconcilable contradiction' to the definition. The Chamber interprets the Element as follows:

In the view of the Majority, according to this contextual element, the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof. In other words, the protection offered by the penal norm defining the crime of genocide—as an *ultima ratio* mechanism

²⁵ Public Redacted Version of the Prosecutor's Application under Art 58 (n 2) para. 209; cf. also para. 76 of the same document.

²⁶ Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 125.

to preserve the highest values of the international community—is only triggered when the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical.²⁷

In the Chamber's view this is not an amendment to the crime's definition but rather the articulation of an implicit element of the latter:

[T]he Majority considers that the definition of the crime of genocide, so as to require for its completion an actual threat to the targeted group, or part thereof, is (i) not *per se* contrary to article 6 of the Statute; (ii) fully respects the requirements of article 22(2) of the Statute that the definition of the crimes ‘shall be strictly construed and shall not be extended by analogy’ and ‘in case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted’; and (iii) is fully consistent with the traditional consideration of the crime of genocide as the ‘crime of crimes’.²⁸

In her Separate and Partly Dissenting Opinion, Judge Ušacka explicitly refrains from deciding on the issue and questions the Majority's reasoning to the extent that it is based on Article 22 of the ICC Statute.²⁹ More specifically, Judge Ušacka disagrees with the Majority's view that a ‘concrete threat’ is required to satisfy the contextual elements.³⁰

27.2.2.3 Analysis

This commentator shares the Chamber's view that the formulation of the last (common) Element does not purport to amend the crime's definition but provides for a welcome clarification of the latter (section 27.2.2.3.1). It is respectfully submitted, though, that the contextual Element should not be seen as an addition to the crime's *actus reus* but as an *objective point of reference* of a *realistic* genocidal *intent* (section 27.2.2.3.2).³¹ Finally, it is thought that the requirement of a ‘concrete threat’ is unfortunately worded because it suggests an unduly stringent threshold (section 27.2.2.3.3).

27.2.2.3.1 The definition of the crime and the common Element of Crimes on genocide

It should be noted at the outset that the Elements of Crimes do not exclude the scenario of the lone *génocidaire* altogether. The second alternative of the common Element explicitly provides for this possibility. It requires, however, that such a lone *génocidaire* must be in possession of the means to effect the destruction of the targeted group in whole or in part.³² Obviously, this latter qualification is of great practical importance.

²⁷ Ibid., para. 124. ²⁸ Ibid., para. 133.

²⁹ Separate and Partly Dissenting Opinion of Judge Anita Ušacka, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) paras 16 and 20.

³⁰ Ibid., para. 19, fn. 26.

³¹ See already C Kreß, ‘The Crime of Genocide under International Law’ (2006) 6 *International Criminal Law Review* 461, 471 *et seq.*

³² R Cryer et al., *An Introduction to International Criminal Law and Procedure* 2nd edn (Cambridge: Cambridge University Press 2010) 218; W Rückert and G Witschel, ‘Genocide and Crimes against

As it is extremely difficult to conceive of a single perpetrator who is in a position to destroy a (substantial part of a) protected group on his own, the first alternative of the common Element will be applicable in practice (as in the *Al Bashir* case), except for the most exceptional circumstances, which William A Schabas aptly described as ‘little more than a sophomoric *hypothèse d’école* and a distraction for judicial institutions’.³³ Yet, it is important to fully appreciate what the common Element of the crime of genocide essentially suggests: that this crime presupposes a real danger for the targeted group and that this, for all practical purposes, entails the need for a planned genocidal campaign.

(i) The significance of the principle of strict construction

Judge Ušacka is correct that it would be too easy to simply rely on Article 22(2) of the ICC Statute to resolve our question because the application of this statutory rule of interpretation requires the existence of an ambiguity. At the same time, however, Article 22(2) of the ICC Statute carries its full weight if a reasonably strong case—based on other considerations—can be made in support of the narrow construction of the crime’s definition. As it will now be shown, such considerations can be formulated.

(ii) History and travaux préparatoires

The idea of a genocidal campaign is not a recent arrival. Quite to the contrary, it lies at the heart of the original concept of the crime. In his groundbreaking study on the subject, *Raphael Lemkin* had the following to say:

[Genocide] is intended...to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.³⁴

As is well known, Lemkin’s otherwise rather broad concept of genocide, including several forms of cultural genocide,³⁵ was significantly narrowed as a result of the deliberations in the UNGA’s Sixth Committee. This, in itself, makes it rather unlikely that states, at the same time, decided to fundamentally broaden the crime’s scope of application to cases where no real danger for (part of) a group exists. This is confirmed by a reading of the debates within the Sixth Committee. It must of course be conceded that the drafters did not wish to categorically exclude the scenario of the lone *génocidaire* and rejected suggestions that would have had that effect.³⁶ On the other hand, and crucially, at no place do the *travaux préparatoires* reveal that the drafters seriously contemplated the definition encompassing conduct not posing a real danger to the

Humanity in the Elements of Crime’ in H Fischer et al. (eds), *International and National Prosecution of Crimes Under International Law* (Berlin: Berlin Verlag Arno Spitz 2001) 66.

³³ W Schabas, ‘Darfur and the “Odious Scourge”: The Commission of Inquiry’s Findings on Genocide’ (2005) 18 *Leiden Journal of International Law* 871, 877.

³⁴ Lemkin (n 14) 79.

³⁵ W Schabas, *Genocide in International Law. The Crime of Crimes* 2nd edn (Cambridge: Cambridge University Press 2009) 59 *et seq.*, 82.

³⁶ For such suggestions, see A/C.6/211, 1 October 1948 (France); A/C.6/217, 5 October 1948 (Belgium).

group or a part hereof.³⁷ Historical background and genesis thus both point to a narrow construction of the crime's definition.

(iii) Systematic considerations

While the crime of genocide received a proper definition before crimes against humanity did, the former has grown out of the latter.³⁸ This historic fact cautions against a disconnection of the common roots of both crimes under international law. As was highlighted earlier, there can be no doubt that crimes against humanity imply a real danger for the targeted civilian population because of the requirement of a (emerging) widespread or systematic attack. In light of the historic development, it would be rather odd if the crime of genocide had been given a fundamentally broader scope of application. It was therefore right for the 2009 Decision to emphasize that it would be hard to reconcile such a broad construction with the widely accepted consideration of the crime of genocide as the 'crime of crimes'.³⁹

Construing the crime of genocide without the requirement of a real danger for the targeted group would also place this crime in a peculiar position relative to other crimes under international law. For not only crimes against humanity, but also war crimes and the crime of aggression require a real danger to the internationally protected value. In the case of war crimes, this danger stems from the fact that an armed conflict must exist. Consequently, the commission of any war crime entails the real risk of escalating already existing violence and of posing an obstacle to the conclusion of a genuine peace. Correspondingly, a crime of aggression under customary international law presupposes an actual state of use of force in contravention of the international prohibition on the use of force. This is even more than a real threat to international peace and security. All this demonstrates the need to pass a high threshold to reach the realm of the international community's *jus puniendi*. Indeed, the Chamber formulates a useful word of caution against tendencies to trivialize international criminal law *stricto sensu* when it stresses that this body of law constitutes the '*ultima ratio* mechanism to preserve the highest values of the international community'. From a standpoint of systematic coherency within the existing body of international criminal law *stricto sensu*, it would hardly be convincing to construe the crime of genocide in a manner that would legitimize international intervention through criminal law without the need to pass a similarly high threshold.

(iv) The Elements of Crimes as evidence of the opinio juris of states

According to Article 9 of the ICC Statute, the Elements of Crimes shall assist in the interpretation of Article 6 of the ICC Statute and they shall be consistent with it. While these legal requirements cannot exclude the possibility of an irreconcilable conflict

³⁷ For the same view, see Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 244 *et seq.*

³⁸ Cryer et al. (n 32) 205–6.

³⁹ The problematic consequences of this broad construction of the crime are usefully spelled out in P Mysliwiec, 'Accomplice to Genocide Liability: The Case for a Purpose *Mens Rea* Standard' (2009) 10 *Chicago Journal of International Law* 389, 402 *et seq.* Mysliwiec suggests a stringent standard specifically for 'accomplice liability' for genocide to avoid part of these consequences; this, however, does not strike at the root of the problem.

between an Element and the statutory definition, they nonetheless caution against too hasty an assumption that such a contradiction exists. The Elements of Crimes should first be evaluated as what they are, i.e. the expression of a ‘consensus by the international community’⁴⁰ that a certain crime should be interpreted in a certain way. This must also apply in the case of the last common Element on the crime of genocide. There is no compelling indication that the drafters of the last common Element intended to hereby amend the well-entrenched definition of the crime of genocide. While there were differences as to the precise language and the best analytical way to capture the underlying idea, there was no fundamental disagreement on the substance. As one observer has rightly noted:

Because genocide is universally recognized as an extremely serious crime, it was generally agreed that the context of the crime requires that there be a certain scale or other real threat to a group.⁴¹

The Elements of Crimes thus support the systematic considerations by way of subsequent practice.

(v) *The prior case law*

The formulation of the common Element is not without support within the case law of the ICTY. In fact, it is identical to a statement made by the Trial Chamber of the ICTY in *Krstić*.⁴² The ICTY Appeals Chamber, however, was hostile to the Trial Chamber’s view:

The offence of extermination as a crime against humanity requires proof that the proscribed act formed a part of a widespread or systematic attack on the civilian population, and that the perpetrator knew of this relationship. These two requirements are not present in the legal elements of genocide. While a perpetrator’s knowing participation in an organized and extensive attack on civilians may support a finding of genocidal intent, it remains only the evidentiary basis from which the fact-finder may draw the inference. The offence of genocide, as defined in the Statute and in international customary law, does not require proof that the perpetrator of genocide participated in a widespread and systematic attack against a civilian population. In reasoning otherwise, the Trial Chamber relied on the definition of genocide in the Elements of Crimes adopted by the ICC. This definition, stated the Trial Chamber,

⁴⁰ Cryer et al. (n 32) 219 *et seq.*; see also S Malliaris, ‘Assessing the ICTY Jurisprudence in Defining the Elements of the Crime of Genocide: The Need for a “Plan”’ (2009) 5 *Review of International Law and Politics* 105, 116: ‘Given that the Elements have been adopted by the Assembly of States, it should be inferred that the ICC approach is genuinely representing the existing customary norm’.

⁴¹ V Oosterveld, ‘The Context of Genocide’ in R Lee (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers 2001) 45; for a similar observation, see Rückert and Witschel (n 32) 66.

⁴² Judgment, *Krstić*, IT-98-33-T, TC, ICTY, 2 August 2001, para. 682 (*Krstić* Trial Judgment); cf. also the following wise statement of the ICTY prosecution: ‘[I]n the interests of international justice, genocide should not be diluted or belittled by too broad an interpretation. Indeed, it should be reserved only for acts of exceptional gravity and magnitude which shock the conscience of humankind and which, therefore, justify the appellation of genocide as the “ultimate crime”’ (Transcript of hearing before the Trial Chamber of 27 June 1996, *Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, TC, ICTY, 27 June 1996, 15 *et seq.*).

'indicates clearly that genocide requires that the conduct took place in the context of a manifest pattern of similar conduct'. The Trial Chamber's reliance on the definition of genocide given in the ICC's Elements of Crimes is inapposite. As already explained, the requirement that the prohibited conduct be part of a widespread or systematic attack does not appear in the Genocide Convention and was not mandated by customary international law. Because the definition adopted by the Elements of Crimes did not reflect customary law as it existed at the time Krstić committed his crimes, it cannot be used to support the Trial Chamber's conclusion.⁴³

This is a rather strong judicial pronouncement on an important point of law. Deplorably, the pronouncement is not supported by equally strong reasoning.⁴⁴ The only argument contained in the cited passage is that the Genocide Convention does not contain an explicit contextual element. The further statement that the Elements of Crimes 'did not reflect customary international law' remains a mere assertion. Upon a closer look, it would appear that the drafters of the Elements of Crimes captured the prior case law more accurately than the ICTY Appeals Chamber. This is confirmed by the excellent summary of the prior practice in the leading monograph on the subject by William A Schabas:

Although there have been convictions for crimes against humanity in the absence of a plan or policy, there is nothing similar in the case law concerning genocide. In practice, although the jurisprudence often says that it is inquiring into whether 'the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part of the group as such', judges invariably discuss the existence of the organized plan or policy, and conclude as to the existence of the 'intent' of the accused based on knowledge of the circumstances.⁴⁵

It should also be noted that even the ICTY Appeals Chamber in *Jelisić* has made an important concession to the more narrow construction of the crime because it has held that, 'in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases'.⁴⁶ It was thus correct for the 2009 Decision to attribute more weight to the *opinio juris* that states expressed through the

⁴³ Judgment, *Krstić*, IT-98-33-A, AC, ICTY, 19 April 2004, para. 223 *et seq.* ('Krstić Appeals Judgment').

⁴⁴ For the same view, see Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 245; the same author is also correct in criticizing the Appeals Chamber of the ICTY for a similarly poor reasoning with respect to the plan or policy requirement of crimes against humanity; the ICC Statute's retention of the policy requirement in Art 7(2)(a) is evidence for the fact that the judicial pronouncements of the ICTY advocated for a legal development too far ahead of what states were prepared to accept; see Kreß, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice' (n 20) 148.

⁴⁵ Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 246 *et seq.*; Schabas' assessment is in line with the earlier analysis of the ICTR practice by J Jones, '"Whose Intent is it Anyway?" Genocide and the Intent to Destroy a Group' in L Vohrah et al. (eds), *Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer Law International 2003) 467, 474 *et seq.*

⁴⁶ Judgment, *Jelisić*, IT-95-10-A, AC, ICTY, 5 July 2001, para. 48; in the same case, the Trial Chamber went even further and stated that 'it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or system'; *Jelisić* Trial Judgment (n 23) para. 101.

Elements of Crimes than to the view expressed by the Appeals Chamber of the ICTY in *Krstić* on the state of customary international law.

(vi) *Summary*

Taken together, the foregoing considerations support the view espoused in the 2009 Decision that the common Element of the crime of genocide correctly suggests that this crime presupposes the existence of a real danger for the targeted group and that this, for all practical purposes, entails the need for the existence of a planned genocidal campaign.⁴⁷

27.2.2.3.2 The genocidal campaign and a realistic genocidal intent

Yet, the literal argument remains that the wording of the *objective* elements (the *actus reus*) of the crime in its statutory definition does not provide for a basis to introduce a contextual element.⁴⁸ While this argument is hard to refute, it does not affect the alternative approach to reflect the typical interplay between individual and collective conduct in the crime's definition. The key to reconcile the approach taken in the Elements of Crimes with the definition of the crime lies in the interpretation of the concept of genocidal *intent*. All the considerations listed in section 27.2.2.3.1 support the view that this intent must be realistic and must thus be understood to require more than the vain hope of a single perpetrator of hate crimes to destroy (a part of) the hated group. On the basis of such a realistic concept of intent, which is fully compatible with the wording of the legal term, a coherent explanation of the common Element is possible: the individual perpetrator will act with the realistic intent to destroy (a part of) the targeted group if his conduct is in itself capable to effect this destruction. In almost

⁴⁷ This position remains controversial; for statements, which would appear to be (at least broadly) in agreement with it, see K Ambos, 'What Does "Intent to Destroy" in Genocide Mean?', (2009) 91 *International Review of the Red Cross* 833, 846; P Behrens, 'The Mens Rea of Genocide' in P Behrens and R Henham (eds), *Elements of Genocide* (New York: Routledge 2013) 70, 74–5; L Berster, 'Article II' in C Tams et al. (eds), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Oxford: C H Beck/Hart/Nomos 2014) 141 (marginal note 114); Cryer et al. (n 32) 219; K Goldsmith, 'The Issue of Intent in the Genocide Convention and its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach' (2010) 5 *Genocide Studies and Prevention* 238, 245 *et seq.*; S Kirsch, 'The Social and the Legal Concept of Genocide' in P Behrens and R Henham (eds), *Elements of Genocide* (New York: Routledge 2013) 7, 12 *et seq.*; Malliaris (n 40) 105 *et seq.*; Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 246 *et seq.*; for the contrary view, see D Alonzo-Maizlish, 'In Whole or in Part: Group Rights, the Intent Element of Genocide, and the "Quantitative Criterion"' (2002) 77 *New York University Law Review* 1369, 1380–1; S Clearwater, 'Holding States Accountable for the Crime of Crimes: An Analysis of Direct State Responsibility for Genocide in Light of the IJC's 2007 Decision in *Bosnia v Serbia*' (2009) 15 *Auckland University Law Review* 1, 34 *et seq.*; N Maitra, 'A Perpetual Possibility? The International Criminal Tribunal for Rwanda's Recognition of the Genocide of 1994' (2005) 5 *International Criminal Law Review* 573; Mysliwiec (n 39) 402; C Safferling, 'The Special Intent Requirement in the Crime of Genocide' in C Safferling and E Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (The Hague: TMC Asser Press 2010) 163, 172; G Werle, *Principles of International Criminal Law* 2nd edn (The Hague: TMC Asser Press 2009) 271–2 (paras 743–6); for the—unconvincing—suggestion to distinguish between the different genocidal acts, see A Cassese, 'Is Genocidal Policy a Requirement for the Crime of Genocide?' in P Gaeta (ed.), *The UN Genocide Convention* (Oxford: Oxford University Press 2009) 128, 134–5.

⁴⁸ Second Decision on the Prosecution's Application for a Warrant of Arrest (n 10) para. 6 in conjunction with paras 13–17, the Pre-Trial Chamber explicitly treats the 'contextual element' as a 'material element'.

all cases, however, this will not be the case. Therefore, for all practical purposes, a perpetrator's realistic intent requires that his conduct take place 'in the context of a manifest pattern of similar conduct directed against that group'. Under this approach, the common Element constitutes the objective point of reference of genocidal intent. There is only a fine analytical nuance between this construction of genocidal intent and the widespread judicial practice to regard the genocidal campaign as 'only the evidentiary basis from which the fact-finder may draw the inference'⁴⁹ that a genocidal intent exists.

While it is true that the common Element of Crimes is worded in the form of an objective circumstantial element, it is submitted that the concept of realistic intent constitutes the preferable way to capture the substance of what the drafter's of the Elements had in mind.⁵⁰ First, this concept conforms to the wording of the Genocide Convention. Second, it has the advantage of avoiding the debate about an additional mental requirement. The drafters of the Elements were aware of this problem but were unable to solve it within the short negotiation time given to them. This is readily apparent from the evasive passage in the Introduction to the Elements of Crimes on genocide.⁵¹ If, however, a genocidal campaign is seen as the objective point of reference for a realistic genocidal intent, it is clear that the individual perpetrator must be aware of this campaign to form such an intent.

Very interestingly, when dealing with the intent requirement in its 2009 Decision, the Chamber chose an approach that comes very close to the concept of realistic intent, as outlined earlier. The Chamber draws the following distinction between what it calls the genocidal intent of the Government of Sudan, and Al Bashir's genocidal intent:

The Prosecution highlights that it relies exclusively on proof by inference to substantiate its allegations concerning Omar Al Bashir's alleged responsibility for genocide. In particular, the Prosecution relies on inferences to prove the existence of Omar Al Bashir's *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups.

In this regard, the Majority observes that, according to the Prosecution, Omar Al Bashir was in full control of the 'apparatus' of the State of Sudan....

As a result, the Majority considers that if the materials provided by the Prosecution support the Prosecution's allegations in this regard, the existence of reasonable grounds to believe that Omar Al Bashir had a genocidal intent would automatically lead to the conclusion that there are reasonable grounds to believe that a genocidal campaign against the Fur, Masalit and Zaghawa groups was a core component of the [Government of Sudan (GoS)] counter-insurgency campaign.

However, the situation would be different if the materials provided by the Prosecution show reasonable grounds to believe that Omar Al Bashir shared the control over the 'apparatus' of the State of Sudan with other high-ranking Sudanese political and military leaders. In this situation, the Majority is of the view that the

⁴⁹ *Krstić* Appeals Judgment (n 43) para. 223.

⁵⁰ For the same view, see Ambos (n 47) 845 *et seq.*; Berster (n 47) 138 *et seq.* (marginal note 107 *et seq.*); Jones (n 45) 478 *et seq.*; Kirsch (n 47) 7; May (n 13) 120 *et seq.*

⁵¹ For the citation, see section 27.2.2.1; see the formulation in the third indent.

existence of reasonable grounds to believe that one of the core components of the GoS counter-insurgency campaign was a genocidal campaign against the Fur, Masalit and Zaghawa groups would be dependent upon the showing of reasonable grounds to believe that those who shared the control of the ‘apparatus’ of the State of Sudan with Omar Al Bashir agreed that the GoS counter-insurgency campaign would, *inter alia*, aim at the destruction, in whole or in part, of the Fur, Masalit and Zaghawa groups.

It is for this reason that the Majority refers throughout the rest of the present decision to ‘the GoS’s genocidal intent’ as opposed to ‘Omar Al Bashir’s genocidal intent’.⁵²

While the meaning of these considerations is not entirely clear, one very plausible explanation would be that the Majority holds the view that there is a connection between the required ‘individual’ genocidal intent of Al Bashir and a ‘collective’ genocidal intent. If ‘governmental intent’ is translated into a ‘plan to carry out a genocidal campaign’, it becomes apparent that the Chamber is of the view that the overall genocidal plan amounts to an objective point of reference for Al Bashir’s individual intent which, by virtue of this point of reference, becomes a *realistic* one.⁵³ On the basis of such a concept of genocidal intent, a separate mental requirement concerning an objective contextual element is as superfluous as this objective requirement itself. The 2009 Decision has thus come halfway in adopting the concept of realistic intent as outlined in this contribution and it is suggested that the ICC should fully endorse this idea when the next opportunity arises.

27.2.2.4 No requirement of a concrete threat

In the 2009 Decision, the last common Element is understood to mean that the crime of genocide is only completed when ‘the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical’.⁵⁴ The Chamber’s precise understanding of ‘concrete threat’ is not entirely clear, but the term risks being understood as posing too significant a hurdle to pass. As Judge Ušacka rightly observes in her dissent,⁵⁵ the precondition of a ‘concrete threat’ comes close to a ‘result-based requirement’, i.e. the requirement of a situation where the genocidal campaign has advanced to a point where actual destruction may soon result. None of the above considerations call for the introduction of so stringent a threshold and the same is true for the prior practice. Contrary to what the Chamber appears to hold, the common Element does not require the occurrence of

⁵² Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) paras 147–51.

⁵³ It is worth emphasizing that the concept of realistic intent is not prejudicial to the decision in the debate between a ‘purpose-based’ and a ‘knowledge-based’ approach to the individual intent to which we shall turn our attention in section 27.2.4.3. Analytically, these are two distinct legal issues.

⁵⁴ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 124.

⁵⁵ Separate and Partly Dissenting Opinion of Judge Anita Ušacka, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 19, fn. 26.

*such an advanced threat either.*⁵⁶ Under this Element's second alternative, it is sufficient that the conduct in question *can effect* the destructive result. Accordingly, it must suffice for the first alternative, too, that the genocidal campaign is of a nature *capable of bringing about* the planned destruction.⁵⁷ This interpretation is confirmed by the fact that the Introduction to the Elements of Crimes on Genocide underlines that the 'term "in the context of" would include the initial acts in an emerging pattern'. This means that the crime of genocide is completed with the initial act of a genocidal campaign. It follows that, for the typical case of genocide, no more should be required as the objective point of reference for the perpetrator's intent than the existence of a realistic collective goal to destroy the target group in whole or in part. Interestingly, the 2010 Decision does not contain any reference to the requirement of '*concrete threat*'.⁵⁸ It would be good if the point were fully clarified on the next occasion.

27.2.3 The material elements

The following analysis does not offer a comprehensive commentary on the material elements, and is by and large confined to those legal questions addressed by the 2009 Decision.⁵⁹

27.2.3.1 *On the concept of 'protected group' in general and that of 'ethnical group' in particular*

It was only at an advanced stage of the negotiations that, following a suggestion made by Sweden,⁶⁰ the *ethnical group* was included in the list of protected groups. In light of this, it may be considered as somewhat of a historical irony that the concept of ethnical group has quickly gained particular prominence. The ICC's early case law confirms this point. The 2009 Decision sheds further light on this concept and also on the more general one of 'protected group'. The pertinent passage reads as follows:

[T]he Majority is of the view that the targeted group must have particular positive characteristics (national, ethnic, racial or religious), and not a lack thereof.... The Majority considers that there are no reasonable grounds to believe that nationality, race and/or religion are a distinctive feature of any of the three different groups—the Fur, the Masalit and the Zaghawa—that, according to the Prosecution, have been targeted....

⁵⁶ For the same view, Berster (n 47) 138 (marginal note 107 together with fn. 453); R Cryer, 'The Definitions of International Crimes in the *Al Bashir* Arrest Warrant Decision' (2009) 7 *Journal of International Criminal Justice* 283, 290–1; Cryer et al. (n 32) 219, fn. 93; Werle (n 47) 272–3 (marginal note 746).

⁵⁷ For the same view, see Berster (n 47) 141 (marginal note 114).

⁵⁸ For the relevant passages, see Second Decision on the Prosecution's Application for a Warrant of Arrest (n 10) para. 6 in conjunction with paras 13–17.

⁵⁹ For the attempt of a comprehensive commentary, see Kreß, '§ 6 VStGB' (n 17) 1099–111 (marginal notes 30–69).

⁶⁰ UNGAOR, 3rd Session, 6th Committee, 115.

As a result, the question arises as to whether any of the three groups is a distinct ethnic group. In this regard, the Majority finds that there are reasonable grounds to believe that this question must be answered in the affirmative as there are reasonable grounds to believe that each of the groups...has its own language, its own tribal customs and its own traditional links to its lands.⁶¹

These paragraphs contain four elements which partly consolidate and otherwise usefully complement the prior international case law in point. First of all, the Chamber considers the list of protected groups to be *exhaustive*. Hereby, it implicitly rejects the idea of recognizing *other* protected groups than those explicitly listed, provided such groups are comparably *stable*. This idea had been considered by the ICTR in its *Akayesu* judgment,⁶² but without any positive echo in the subsequent case law. The implicit rejection in the 2009 Decision of the suggestion made in *Akayesu* is all the more important, as both Chambers faced a not altogether dissimilar difficulty to bring the targeted human group(s) in question within the confines of the genocide definition. In light of the text of the definition and of its history, the position adopted in the 2009 Decision is correct⁶³ and, with this judicial pronouncement, the international case law on the point in question appears to be settled.

Second, the 2009 Decision makes the attempt to *distinguish* between the *four* groups listed in the definition of the crime. This contrasts with the 'holistic' approach as developed by William A Schabas⁶⁴ and occasionally accepted by the ICTY.⁶⁵ Although the approach chosen in the 2009 Decision is more cumbersome, it must be commended because it is loyal to the text of the definition.⁶⁶ It would seem premature, though, to treat the international case law on this point as consolidated.

Third, the 2009 Decision explicitly rejects the idea that a protected group in general and an ethnical group in particular could be defined 'by negation'. Such an approach had been favourably considered by the ICTY Trial Chamber in *Jelisić*,⁶⁷ but was then rejected by this Tribunal's Appeals Chamber in *Stakić*.⁶⁸ In its 2007 Judgment in the 'Genocide Case', the ICJ⁶⁹ had endorsed the ICTY Appeals Chamber's view, and the 2009 Decision joins this line of international case law in the following words:

[I]t is important to highlight that the drafters of the 1948 Genocide Convention gave 'close attention to the positive identification of groups with specific distinguishing

⁶¹ Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) paras 135–7.

⁶² *Akayesu* (n 12) para. 701.

⁶³ A very broad majority of writers concurs; see, for example, F Martin, 'The Notion of "Protected Group" in the Genocide Convention and its Application' in P Gaeta (ed.), *The UN Genocide Convention* (Oxford: Oxford University Press 2009) 112, 119 *et seq.*; Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 152.

⁶⁴ Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 129 *et seq.*

⁶⁵ The most important judgment in point is *Krstić* Trial Judgment (n 42) para. 556.

⁶⁶ Concurring Berster (n 47) 102–3 (marginal note 36); Martin (n 63) 112, 122.

⁶⁷ *Jelisić* Trial Judgment (n 23) para. 71.

⁶⁸ Judgment, *Stakić*, IT-97-24-A, AC, ICTY, 22 March 2006, paras 20–1.

⁶⁹ Judgment, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* 26 February 2007, ICI Reports 2007, 43 (paras 193–6).

well established, some said immutable, characteristics'. It is, therefore, a matter of who the targeted people are, not who they are not. (footnotes omitted)⁷⁰

This is correct and may now also be considered as settled international case law.

Fourth, and most importantly, the cited passage from the 2009 Decision, by highlighting each of the groups' 'own language', 'own tribal customs', and 'own traditional links to its lands', encapsulates an essentially *objective* starting point to the definition of the concepts 'protected group' and 'ethnical group'.⁷¹ This contrasts with a number of statements in the prior international case law⁷² and in the literature⁷³ which indicate a preference to define the concept of ethnical group *subjectively* and more specifically from the *perpetrator's* perspective. Yet, as Rebecca Young has usefully demonstrated,⁷⁴ the international case law prior to the 2009 Decision had never articulated an absolute departure from an objective approach and a good part of the international criminal law scholarship had, in varying nuances, moved towards a mixed 'subjective–objective' approach,⁷⁵ which seems broadly in line with the test favoured by the ICJ in its 2007 'Genocide Judgment'.⁷⁶

While the *International Commission of Inquiry on Darfur* (Darfur Commission) went so far as to opine that some form of a subjective–objective approach had 'become part and parcel of international customary law'⁷⁷, it must be welcomed that the 2009 Decision insists on the *objective* starting point to the definition of the concepts of 'protected group' and 'ethnical group'. This is so even though the subjective approach has 'a strong initial appeal, since it is ultimately the *genocidaire's* view of the group's features which decides on whether an individual will be victimized as a group-member',⁷⁸ a fact famously alluded to in Jean-Paul Sartre's

⁷⁰ Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 135.

⁷¹ This is true albeit that the Chamber states in passing that it does not wish to express a view on the matter, *ibid.*, para. 137 (fn. 152).

⁷² Judgment, *Kayishema and Ruzindana*, ICTR-95-1-T, TC II, ICTR, 21 May 1999, para. 98; *Jelisić Trial Judgment* (n 23) para. 70; *Krstić Trial Judgment* (n 42) para. 557; on this tendency towards a *subjective* definition, see G Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals' (2000) 49 *International & Comparative Law Quarterly* 578, 589.

⁷³ For a particularly clear pronouncement to that effect, see R Maison, 'Le crime de génocide dans les premiers jugements du tribunal pénal international pour le Rwanda' (1999) 103 *Révue Générale de Droit International Public* 129, 137; for a more recent statement pointing in the same direction, see R Young, 'How Do We Know Them When We See Them? The Subjective Evolution in the Identification of Victim Groups for the Purposes of Genocide' (2010) 10 *International Criminal Law Review* 1, 21.

⁷⁴ Young (n 73) 10 *et seq.*

⁷⁵ For a few examples, see D Demko, 'Die von der Genozidkonvention geschützten "Gruppen" als Regelungsgegenstand des "Specific Intent"' (2009) *Schweizerische Zeitschrift für internationales und europäisches Recht* 223, 232 *et seq.*; Martin (n 63) 112, 126; D Nersessian, *Genocide and Political Groups* (Oxford: Oxford University Press 2010) 31; Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 128; Werle (n 47) 260 (marginal note 715).

⁷⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 69) para. 191; for a comment, see C Kreß, 'The International Court of Justice and the Elements of the Crime of Genocide' (2007) 18 *European Journal of International Law* 619, 623–4.

⁷⁷ Report of the International Commission of Inquiry on Darfur to the Secretary-General. Pursuant to Security Council Resolution 1564 of 18 September 2004, UN Doc S/2005/60 (1 February 2005) para. 501.

⁷⁸ Berster (n 47) 104 (marginal note 40).

aphorism: ‘...c'est l'antisémite, qui fait le juif’⁷⁹. On a closer inspection, though, a number of—ultimately prevailing—considerations in support of an *objective* starting point come to light. The three most important considerations are as follows.⁸⁰ First, the teleology behind the law against genocide (section 27.2.1), i.e. to prevent conduct that ‘results in great losses to humanity in the form of cultural and other contributions represented by these human groups’,⁸¹ precludes the possibility that the existence of a protected group might result from a construction in the *perpetrator’s* mind. Allowing for such a possibility would, second, also be incompatible with the drafters’ decision for an *exhaustive* list of protected groups. Third, only an objective starting point guards against the transformation of the crime of genocide into an unspecific crime of group destruction based on a discriminatory motive which could be distinguished from *persecution* as a crime against humanity only through the more limited list of *individual* rights at stake.⁸² It should be stressed that an objective starting point to the definition of the concepts ‘protected group’ and ‘ethnical group’, as chosen in the 2009 Decision, leaves due room for considering (collective) perceptions in at least two respects. Elements such as a common culture, history, or language may give rise to a (collective) sense of group identity and this (collective) perception of *the members of the group concerned* is, of course, a relevant factor in establishing the existence of an ethnical group within the meaning of the genocide definition. Furthermore, the (collective) perception of *the perpetrators* may play a limited role when it comes to the delineation of the protected group’s outer fringes.⁸³

Despite these considerations and the fact that a number of commentators have recently expressed weighty words of caution against an essentially subjective approach under the *lex lata*,⁸⁴ the controversy is likely to receive further attention at the ICC. Judge Ušacka has challenged the 2009 Decision’s objective starting point in her Separate and Partly Dissenting Opinion,⁸⁵ and the Majority itself has not really argued the point and has reserved its final view on the matter.⁸⁶

⁷⁹ J-P Sartre, *Réflexions sur la question juive* (Paris: Paul Morihien 1946) 89.

⁸⁰ For a number of additional arguments to the same effect, see Berster (n 47) 105 *et seq.* (marginal notes 41–5).

⁸¹ UNGA Res 96(I) (n 16).

⁸² The arguments set out in the text here are submitted on the basis of the *lex lata*; whether or not such a transformation is desirable *de lege ferenda* is a different matter, which cannot be explored in this chapter (for an argument in favour of a subjective approach *de lege ferenda*, see A Paul, *Kritische Analyse und Reformvorschlag zu Art II Genozidkonvention* (Berlin: Springer 2008) 160 *et seq.*)

⁸³ For such a case, see Judgment and Sentence, *Ndindabahizi*, ICTR-07-71, TC I, ICTR, 15 July 2004, para. 68.

⁸⁴ P Akhavan, *Reducing Genocide to Law* (Cambridge: Cambridge University Press 2012) 150; Berster (n 47) 103–7 (paras 37–7); see also D Luban, ‘Calling Genocide by its Rightful Name: Lemkin’s Word, Darfur and the UN Report’ (2006) 7 *Chicago Journal of International Law* 303, 318, who acknowledges that the subjective approach ‘abandons a central idea behind Lemkin’s definition of genocide’ (for Luban’s reform proposal, see *ibid.* 319).

⁸⁵ Decision on the Separate and Partly Dissenting Opinion of Judge Anita Ušacka, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) paras 25–6.

⁸⁶ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 137 (fn. 152).

27.2.3.2 The genocidal acts

In light of its rejection of reasonable grounds to believe that Al Bashir had acted with genocidal intent, the 2009 Decision does not deal with any of the five categories of genocidal acts. The 2010 Decision cannot avoid the matter, however, after having reached a different conclusion regarding the question of genocidal intent. This decision deals with those first three genocidal acts listed in the definition which have also played a dominant role in the prior international case law.⁸⁷

27.2.3.2.1 Killing

The 2010 Decision holds as follows:

According to the Elements of Crimes, the specific material element of the crime of genocide by killing is that the perpetrator killed one or more persons. It is worth noting that the element is common to both the crime of genocide by killing under article 6(a) and the crime against humanity of murder under article 7(1)(a) of the Statute with the exception that the former provides that the acts of killings must be directed against members of a national, ethnical, racial or religious group, while the latter requires that the acts be directed against a civilian population.⁸⁸

This statement confirms, in particular, that despite the plural ‘members’ in the text of the genocide definition, it suffices for the perpetrator to cause the death of *one member* of a protected group. Although this interpretation does not yet go entirely unchallenged in international criminal law scholarship,⁸⁹ it now appears too firmly accepted in practice to be reversed in the future. The same applies, *mutatis mutandis*, to the second, fourth, and fifth genocidal acts listed in the definition.

27.2.3.2.2 Causing serious bodily or mental harm

The 2010 Decision holds as follows:

According to the Elements of Crime the specific material element of this count of genocide is that the perpetrator caused serious bodily or mental harm to one or more persons, which may include acts of torture, rape, sexual violence, or inhuman or degrading treatment....The underlying acts of genocide by inflicting bodily or mental harm...are identical to the underlying acts of the crimes against humanity included in the Prosecution’s Application as Counts 6, 7 and 8 (forcible transfer of population, torture civilians, and rape of civilians).⁹⁰

This is a surprisingly sweeping statement. While the footnote to the relevant Element of Crimes is worded carefully enough to say that acts of torture, rape, sexual violence, or inhuman or degrading treatment *may* amount to the causing of serious

⁸⁷ For a reference to the potential relevance of the fourth genocidal act to explain the genocidal nature of the *Srebrenica* campaign, see Judgment, *Popović et al.*, IT-05-88-T, TC II, ICTY, 10 June 2010, para. 866.

⁸⁸ Second Decision on the Prosecution’s Application for a Warrant of Arrest (n 10) para. 20.

⁸⁹ For a recent argument suggesting that the perpetrator must cause the death of at least two persons, see Berster (n 47) 116 (marginal note 61); the clearly predominant scholarly view is the one espoused in the 2010 Decision; see e.g. Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 179.

⁹⁰ Second Decision on the Prosecution’s Application for a Warrant of Arrest (n 10) paras 26–7.

bodily or mental harm, the cited passage appears to suggest that such acts *invariably* cause such harm. The latter is not the case. The prior international case law has convincingly established that the genocidal act in question requires the causing of ‘a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life’.⁹¹ Whether or not, say, the inhuman or degrading treatment of another person has led to such a result can only be decided *in concreto*.

The sweeping approach chosen in the 2010 Decision is most astonishing with respect to the ‘forcible transfer of population’, which is *not* referred to in the relevant footnote to the Element of Crime. Here again it is *possible* that forcibly transferred members of the targeted group *may* suffer the required ‘grave and long-term-disadvantage’, but the 2010 Decision, contrary to the much more careful approach in the 2008 Application,⁹² appears to take such a result for granted. It is to be doubted whether the Pre-Trial Chamber has given full consideration to the consequences of its sweeping statement. If the forcible transfer of a person amounted to causing serious bodily or mental harm to that person, a campaign of so-called ethnic cleansing would, contrary to the prior international case law, invariably fulfil the *actus reus* of the crime of genocide.

27.2.3.2.3 Deliberately inflicting conditions of life calculated to bring about physical destruction

According to its description in the definition of the crime, the third genocidal act requires the infliction of certain conditions of life ‘on the group’. In light of the fact that the genocidal conduct in question must be calculated to bring about the group’s physical destruction ‘in whole or *in part*’, the words ‘on the group’ should be read so as to include the case in which the relevant conditions have been inflicted ‘*on a part of the group*'.⁹³ The wording of the definition, however, excludes the idea that the infliction of certain conditions of life upon *one member* of the group suffices.⁹⁴ For most practical purposes, the material genocidal act in question, therefore, and contrary to the four other cases, already implies action *within a genocidal context*. The first Element of Crime on ‘Genocide by Deliberately Inflicting Conditions of Life Calculated to Bring About Physical Destruction’ ignores this fact and instead redefines this genocidal act in structural conformity with the other four categories. The *Element of the Crime* ‘translates’ the ‘infliction of certain conditions of life ‘*on (part of) the group*’, as required in the crime’s *definition*, into the ‘infliction of certain conditions of life *upon one or more persons*’. In doing so the Element of Crimes oversteps the confines of interpretation. The 2010 Decision does not address this question directly and instead—somewhat opaquely—holds as follows:

Unlike for the previous counts of genocide—and similar to what is required for some of the acts underlying the crime against humanity of extermination—the Elements of

⁹¹ See e.g. *Krstić* Trial Judgment (n 42) paras 510 and 513; concurring F Jessberger, ‘The Definition and the Elements of the Crime of Genocide’ in P Gaeta (ed.), *The UN Genocide Convention* (Oxford: Oxford University Press 2009) 87, 99.

⁹² Public Redacted Version of the Prosecutor’s Application under Art 58 (n 2) paras 119–71.

⁹³ Berster (n 47) 121–2 (marginal note 74); Jessberger (n 91) 101.

⁹⁴ Concurring Jessberger, *ibid.*, 100 (fn. 81).

Crimes include an additional element for this particular offense and require that the infliction of certain conditions of life upon one or more persons 'should be calculated to bring about the physical destruction of that group, in whole or in part'.⁹⁵

Because of the definition's explicit reference to the *physical* destruction and the drafter's decision to exclude most forms of *cultural* genocide,⁹⁶ it is not sufficient for the genocidal act in question to be calculated 'merely' to bring about the *dissolution* of the group. Instead, the infliction of the conditions of life must be capable of (slowly) causing either the death of or serious bodily or mental harm to a number of members of the group sufficient to form a significant part thereof.⁹⁷ In line with this interpretation, the international case law prior to the 2010 Decision had settled with the position that the forcible displacement of (a part of) a(n ethnical) group—the often so-called ethnic cleansing of a territory—cannot *as such* be considered to be 'calculated to bring about the physical destruction of the targeted group in whole or in part'.⁹⁸

In accordance with this case law, the prosecution, in its 2008 Application, refrained from relying on the ill-conceived reference to the 'systematic expulsion from homes' in the footnote to the fourth Element of Crime on 'Genocide by Deliberately Inflicting Conditions of Life Calculated to Bring about Physical Destruction' and instead recalled that '[d]eliberations preceding adoption of the Genocide Convention concluded that "[m]ass displacements of populations from one region to another [...] do not constitute genocide [...] unless the operation were attended by such circumstances as to lead to the death of the whole or part of the displaced population".⁹⁹ Therefore, the 2008 Application is careful not to rest its genocide case on the forcible displacement of members of the three protected groups as such, but on the 'systematic displacement from their home *into inhospitable terrain where some died as a result of thirst*,

⁹⁵ Second Decision on the Prosecution's Application for a Warrant of Arrest (n 10) para. 33.

⁹⁶ It is possible to regard the fifth genocidal act as an instance of cultural genocide; Krefß, '§ 6 VStGB' (n 17) 1110 (marginal note 65).

⁹⁷ This is now widely accepted in international criminal law scholarship; see e.g. Jessberger (n 91) 100; Werle (n 47) 267 (marginal note 730); contrary to what is suggested in the text, these three authors appear to confine 'physical destruction' to 'slow death measures'; this is also the starting point adopted by Berster (n 47) 124 (marginal note 78); this commentator then (*ibid.*, marginal note 79) distinguishes between two scenarios; in the first case, so many members of the group are at risk of dying that 'the total number of remaining group members falls below the required minimum to make up a group as such'; in the second case, 'the physical elimination of members may so damage the social bonds between the remaining persons that the minimum social or cultural requirements of national, ethnical, racial or religious groups can no longer be fulfilled'; the need for this distinction is not apparent, though, as in both cases 'slow death measures' are being inflicted on (a substantial) part of a group.

⁹⁸ For the first determination to that effect, see Judgment, *Stakić*, IT-97-24-T, TC II, ICTY, 31 July 2003, para. 519 ('*Stakić* Trial Judgment'); this was confirmed by the ICTY Appeals Chamber in the *Krstić* Appeals Judgment (n 43) para. 33, and by the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 69) para. 190 and in Judgment, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, 3 February 2015, paras 161–3; concurring, for example, Jessberger (n 91) 101; Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 221 *et seq.*

⁹⁹ Public Redacted Version of the Prosecutor's Application under Art 58 (n 2) para. 173; the passage quoted in this paragraph is UN Doc E/447, 24; on the ill-fated Syrian proposal to list the imposition of 'measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment' (UN Doc A/C.6/234), see Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 228.

starvation and disease (emphasis added) and the ‘denial and hindrance of medical and other humanitarian assistance needed to sustain life in IDP camps’.¹⁰⁰

In the quoted passage, the 2010 Decision does not question the prosecution’s interpretation and ‘notes that acts similar to those referred to in the paragraph above are listed in the prosecution’s Application under Count 5 (crimes against humanity of extermination)’.¹⁰¹ The 2010 Decision goes on as follows:

The Chamber is of the view that the acts of contamination of the wells and water pumps and the forcible transfer of hundreds of thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups coupled with the resettlement in those villages and lands they had left by members of other tribes allied with the GoS shall be analysed against the backdrop of the Chamber’s previous findings that (i) thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups were subjected, throughout the Darfur region, to acts of murder by GoS forces, and over a thousand civilians, belonging primarily to the Fur, Masalit and Zaghawa groups were killed in connection with the attack on the town of Kailek on or around 9 March 2004 by GoS forces, and (ii) civilians belonging to the aforementioned groups were subjected to acts of torture by the GoS forces. For these reasons, even though the assessment of the Majority in the First Decision in relation to the conditions within the IDF Camps in Darfur differs in part from what was described by the Prosecution and alleged under Count 3, the Chamber considers that one of the reasonable conclusions that can be drawn is that the acts of contamination of water pumps and forcible transfer coupled with resettlement by members of other tribes, were committed in furtherance of a genocidal policy, and that the conditions inflicted on the Fur, Masalit and Zaghawa groups were calculated to bring about the physical destruction of a part of those ethnic groups.¹⁰²

An important question mark must be placed behind the persuasiveness of the attempt, which is apparent from this passage, to play down the difference between the 2009 Decision and the 2008 Application in the assessment of the conditions within the IDP camps in Darfur. In the 2009 Decision these factual issues are being addressed within the different legal context of Al Bashir’s possible *genocidal intent*. The Majority, after observing that ‘the Prosecution relies heavily on what the Prosecution considers to be a key component of an alleged GoS genocidal campaign: the subjection of a substantial part of the Fur, Masalit and Zaghawa civilian population (up to 2.700.000 individuals) to unbearable conditions of life within IDF Camps’,¹⁰³ remained unconvinced by the materials submitted in the 2008 Application in support of that allegation.¹⁰⁴ If the subjection of a substantial part of the Fur, Masalit, and Zaghawa civilian population to unbearable conditions of life within IDF Camps is indeed a key component of

¹⁰⁰ Public Redacted Version of the Prosecutor’s Application under Art 58 (n 2) para. 172.

¹⁰¹ Second Decision on the Prosecution’s Application for a Warrant of Arrest (n 10) para. 35.

¹⁰² Second Decision on the Prosecution’s Application for a Warrant of Arrest (n 10) paras 37–8.

¹⁰³ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 178.

¹⁰⁴ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) paras 179–89.

the alleged campaign against the Fur, Masalit, and Zaghawa groups, the establishment of the infliction of conditions of life calculated to bring about the physical destruction of a substantial part of these groups *depends on this* conduct. Contrary to what is being suggested in the 2010 Decision, it will not be possible instead to ‘analyse’ the forcible transfer ‘against the backdrop’ of the killings and the acts of torture of other members of the protected groups.

27.2.4 The genocidal intent

As Larry May has aptly observed ‘[t]he *mens rea* element of the crime of genocide is the key to this crime. No other international crime involves such a complex intent element’.¹⁰⁵ The 2009 Decision approaches this key issue from the following, generally shared starting point, that the crime of genocide is comprised of two subjective elements:

- i. a general subjective element that must cover any genocidal act provided for in article 6(a) to (e) of the Statute, and which consists of article 30 intent and knowledge requirement; and
- ii. an additional subjective element, normally referred to as ‘*dolus specialis*’ or specific intent, according to which any genocidal acts must be carried out with the ‘intent to destroy in whole or in part’ the targeted group. (footnote omitted)¹⁰⁶

This chapter will only address the crucial second element and will deal with its three *sub*-elements in turn.

27.2.4.1 The intent to destroy, in whole or in part, a protected group as such

While the narrow interpretation of ‘physical destruction’ within the context of the third genocidal act listed in the definition appears to be widely accepted,¹⁰⁷ the correct interpretation of the word ‘destroy’ within the context of genocidal intent remains a matter of scholarly debate. According to one view, the term includes the destruction of the group as a *social entity*.¹⁰⁸ The international case law prior to the 2009 Decision, however, had favoured the more limited concept of *physical–biological destruction*. This position goes back to the 2001 ICTY’s Trial Chamber’s determination in *Prosecutor v Krstić*,

that...customary international law limits the definition of genocide to those acts seeking the physical and biological destruction of all or part of the group.¹⁰⁹

¹⁰⁵ May (n 13) 130.

¹⁰⁶ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 139.

¹⁰⁷ Cf. section 27.2.3.2.3.

¹⁰⁸ A Ahmed and I Tralmaka, ‘Prosecuting Genocide at the Khmer Rouge Tribunal’ (2009) 1 *City University of Hong Kong Law Review* 105, 111; Berster (n 47) 81 *et seq.* (marginal note 2, 3); Safferling (n 47) 175–6; M Sirkin, ‘Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations’ (2010) 33 *Seattle University Law Review* 489, 512, 525–6; Werle (n 47) 278–9 (marginal note 760).

¹⁰⁹ *Krstić* Trial Judgment (n 42) para. 580; concurring *Krstić* Appeals Judgment (n 43) para. 26; Judgment, *Seromba*, ICTR-2001-66-I, TC, ICTY, 13 December 2006, para. 319; Report of the International

This position enjoys strong support in international criminal law scholarship.¹¹⁰ The predominant view is essentially correct.¹¹¹ The starting point of the more liberal construction of the word 'destroy' is, however, readily understandable. If it is—as we have seen¹¹²—the primary goal of the law against genocide to protect the existence of certain groups in light of their contributions to world civilization, a campaign leading to the *dissolution of the group as a social entity* is directly relevant to that goal. The social concept of the term 'destroy' is thus more in line with the most basic object of the rule against genocide. It may also be wondered whether the social concept of group destruction may be supported by an argument *e contrario* based on the explicit use of the word '*physical*' as an attribute of destruction *only* within the *actus reus* context of *one* of the prohibited acts. Finally, the words 'as such' could be read so as to support the social concept.¹¹³

However, the *social* concept of destruction conflicts with the deliberate decision made by the drafters of the Genocide Convention (for better or worse) *not* to protect the existence of the specified groups *comprehensively* but *only against an exhaustive list of prohibited acts*. Importantly, most forms of *cultural* genocide were deliberately not included in the definition. But if a person kills one member of a protected group or causes serious bodily or mental harm to him or her, thereby furthering an *overall* campaign which, as our perpetrator knows, is directed to the dissolution of the group as such 'merely' through the systematic destruction of the cultural heritage, the perpetrator would have to be convicted of genocide on the basis of the social concept of destruction. This would be contrary to the more modest aspiration which lies at the origin of the international rule against genocide and which has not been superseded by subsequent developments.¹¹⁴

However, the predominant view needs to be clarified in one respect. The meaning of the word 'destroy' cannot be reduced to the physical elimination of the members of the group as they exist at the time of the overall genocidal campaign, but it must extend to all forms of damage to the group which may result from an *overall* campaign which takes the form of a *pattern* of one or more of the prohibited genocidal

Commission of Inquiry on Darfur to the Secretary-General (n 77) paras 515, 517, 518, and 520; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 69) para. 190; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (n 98) para. 136.

¹¹⁰ 1996 *Yearbook of the International Law Commission* (n 18) 46 (para. 12); Behrens (n 47) 70, 82 *et seq.*; Jessberger (n 91) 107–8; Kreß, 'The Crime of Genocide under International Law' (n 31) 486 *et seq.*; Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 221 *et seq.*, 234.

¹¹¹ The following considerations update Kreß, 'The Crime of Genocide under International Law' (n 31) 486 *et seq.*

¹¹² Section 27.2.3.1.

¹¹³ All these arguments are eloquently set out in Berster (n 47) 81–2 (marginal notes 2 and 3).

¹¹⁴ Berster (n 47) 81 *et seq.* (marginal notes 2 and 3) recognizes this consideration as a 'stronger argument', but nevertheless opines as follows: '(T)he penalization of the perpetrator in this scenario appears well justified if viewed in the context of Article III lit. (c)—direct and public incitement to commit genocide, and Article III lit. (d)—attempt to commit genocide. These modes of liability especially highlight the Convention's effort to prevent genocide at a timely stage by averting potential trigger incidents. It stands to reason that, in light of a large scale campaign of "cultural genocide" and collateral hate propaganda, the first physical attacks on members of the group, if they go unpunished, would likely open the floodgates to random atrocities.' This, however, is unconvincing because it broadens the scope of the crime's definition by reference to broad considerations of prevention.

acts. This idea is expressed by the Trial Chamber in *Krstić* by referring to *physical or biological* destruction and the latter term must then be construed so as to also include the *forcible transfer of children* on a mass scale. This careful broadening of the concept of ‘destroy’ beyond physical destruction also allows us to attribute a different meaning to the word ‘destroy’ within the context of genocidal *intent* in comparison with the meaning of ‘physical destruction’ within the context of the third genocidal act. Hence the argument *e contrario* in support of the social concept of the word ‘destroy’ can also be refuted.

The 2009 Decision, without explicitly using the terms ‘physical or biological destruction’, follows the prior international case law and applies it to a campaign of forcible displacement. It endorses, in particular, the statement made by an ICTY Trial Chamber and confirmed by the ICJ that ‘a clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide’.¹¹⁵ The 2010 Decision does not challenge this legal standard.¹¹⁶

While the early practice of the Pre-Trial Chamber has therefore made a contribution to the consolidation of the prevailing position, it would seem premature to consider the latter as fully settled. Following a statement made by Judge Shahabuddeen in *Prosecutor v Krstić*,¹¹⁷ the ICTY Trial Chamber in *Prosecutor v Blagojević* challenged the predominant approach.¹¹⁸ Judge Ušacka adopted this Chamber’s ‘more expansive approach in order to preserve the choice for a later (ICC) Trial Chamber’.¹¹⁹ It is therefore to be expected that the interpretation of the word ‘destroy’ within the context of genocidal intent will be fully debated at the ICC on an appropriate future occasion.

27.2.4.2 The intent to destroy, in whole or in part, a protected group as such

The 2009 Decision does not deal at great length with the meaning of ‘part of a group’. Instead, it refers with approval to the relevant paragraph in the ICJ’s judgment in the Genocide case¹²⁰ in which an attempt is made to summarize the ICTY and ICTR case law in point. The Pre-Trial Chamber hereby lends its support to the by now generally accepted requirement that the relevant part must be *substantive* and joins its voice to the understanding that such ‘substantiality’ may be determined in a *quantitative* or *qualitative* way.¹²¹

¹¹⁵ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 144.

¹¹⁶ Cf. Second Decision on the Prosecution’s Application for a Warrant of Arrest (n 10) para. 4.

¹¹⁷ Partial Dissenting Opinion of Judge Shahabuddeen, *Krstić* Appeals Judgment (n 43) para. 48 in conjunction with 55.

¹¹⁸ Judgment *Blagojević and Jokić*, IT-02-60-T, TC I, ICTY, 17 January 2005, para. 666; for a critical commentary, see Kreß, ‘The Crime of Genocide under International Law’ (n 31) 488–9.

¹¹⁹ Separate and Partly Dissenting Opinion of Judge Anita Ušacka, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 62.

¹²⁰ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 146.

¹²¹ For a detailed explanation, see Kreß, ‘§ 6 VStGB’ (n 17) 1111–16 (marginal notes 73–7).

The 2009 Decision's reference to the ICJ judgment includes the passage in which that Court observed that the ICTY Trial Chamber in *Prosecutor v Stakić* indicated the need for caution not to distort the definition of genocide by too generously accepting geographically defined parts of the protected group in accordance with the *opportunity available to the alleged perpetrator*.¹²² While this call for caution is to be commended,¹²³ it is suggested to go one step further and to completely abandon the criterion of the *individual perpetrator's destructive opportunities*. This criterion lends itself to a dilution of genocide if applied to lower-level perpetrators and it is at odds with that crime's typical form of participation in *collective action*.

It is interesting to note that neither the 2009 Decision nor the 2010 Decision considers the 'at least 35,000 civilians' allegedly (directly) killed by 'Al Bashir's forces and agents'¹²⁴ as constituting per se substantial parts of the three protected groups in question. Instead, both decisions appear to (implicitly) accept the approach chosen in the 2008 Application to recognize only those individuals as forming substantial parts of the groups concerned 'upon whom conditions of life calculated to bring about their physical destruction' were allegedly imposed in the wake of their forcible displacement.¹²⁵ David Luban has drawn an enlightening comparison between the corresponding approach followed in the 2005 Darfur Commission Report, on the one hand, and the ICTY case law starting with *Prosecutor v Krstić* to consider the approximately 40,000 Bosnian Muslims in Srebrenica to constitute a substantial part of the group of the Bosnian Muslims. Luban questions the possibility to convincingly explain the different treatment and suggests that the more restrictive application of the concept of 'part of the protected group' in the Darfur case is 'more faithful to Lemkin's uncompromised conception of genocide'.¹²⁶ While the latter suggestion is certainly correct, it is possible to defend the seemingly more liberal approach in the case of Srebrenica in light of the strategic importance of this safe area under the circumstances prevailing at the relevant time.¹²⁷

27.2.4.3 *The intent to destroy, in whole or in part, a protected group* as such

The proper interpretation of the word 'intent' is often seen as the most important legal question regarding the definition of the crime of genocide. In light of the far-reaching practical consequences of the meaning given to the words 'destroy' and 'part', as discussed, this is a questionable assessment. Yet, the fact remains that the concept of genocidal 'intent' continues to be surrounded by an important controversy, and it is to this controversy that we shall now turn our attention.

¹²² *Stakić* Trial Judgment (n 98) para. 523.

¹²³ Concurring Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide' (n 33) 874.

¹²⁴ Public Redacted Version of the Prosecutor's Application under Art 58 (n 2) para. 36.

¹²⁵ Public Redacted Version of the Prosecutor's Application under Art 58 (n 2) para. 46.

¹²⁶ Luban (n 84) 312 *et seq.*, 316. ¹²⁷ *Krstić* Appeals Judgment (n 43) para. 23.

27.2.4.3.1 The predominant view: the *purpose-based approach*

As early as in its seminal judgment in *Prosecutor v Akayesu*, the ICTR decided to interpret the concept of genocidal *intent* in line with what has come to be referred to as the *purpose-based approach*. According to this approach, the *individual* perpetrator of the crime must act with the *goal* or *desire* to contribute to the (partial) destruction of the targeted group. The pertinent passage reads as follows:

Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator *clearly seeks* to produce the act charged. Thus, the special intent in the crime of genocide lies in ‘the intent to destroy, in whole or in part’, a national, ethnical, racial or religious group, as such.¹²⁸

The Chamber adduces one single consideration in support of this interpretation:

‘Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator.’¹²⁹

When the ICTY addressed the matter for the first time in *Prosecutor v Krstić*, it embraced the *purpose-based approach*, but with a different reasoning and with a brief reference to the possibility of a different construction of the term:

The preparatory work of the Genocide Convention clearly shows that the drafters envisaged genocide as an enterprise whose goal, or objective, was to destroy a human group, in whole or in part.... Some legal commentators further contend that genocide embraces those acts whose foreseeable or probable consequence is the total destruction or partial destruction of the group without any necessity of showing that the destruction was the goal of the act. Whether this interpretation can be viewed as reflecting the status of customary international law at the time of the acts involved is not clear. For the purpose of this case, the Chamber will therefore adhere to the characterisation of genocide which encompasses only acts committed with the *goal* of destroying all or part of the group. (footnote omitted)¹³⁰

To the best of this writer’s knowledge, at no time in the subsequent case law has the *purpose-based approach* received closer attention or been debated in full consideration of the arguments advanced against it. Nevertheless, at least *in the abstract*¹³¹ the

¹²⁸ *Akayesu* (n 12) para. 498; cf., however, the different formulation in para. 520 of the same judgment.

¹²⁹ *Akayesu* (n 12) para. 518.

¹³⁰ *Krstić* Trial Judgment (n 42) para. 571.

¹³¹ Whether the latter standard has been *consistently applied to the facts* is far less clear, however; A Greenawalt, ‘Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation’ (1999) 99 *Columbia Law Review* 2259, 2281; Greenawalt had soon identified the judicial temptation to ‘squeeze ambiguous fact patterns into the specific intent paradigm’.

international case law has ever since adhered to this legal standard. The latter is also shared by many commentators.¹³²

The purpose-based approach has also been followed in the 2005 Darfur Commission Report, but with a noteworthy addition:

...the intent to destroy, in whole or in part, the group as such. This...element is an aggravated criminal intent, or *dolus specialis*; it implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, *and knew that his acts would destroy, in whole or in part, the group as such* (emphasis added).¹³³

The highlighted last part of this passage adds an element of *foresight* to the purpose-requirement which, as we shall see, paves the way to the recognition of a concept of *realistic* intent as suggested in this chapter. This addition has been welcomed in recent international criminal law scholarship.¹³⁴

27.2.4.3.2 The knowledge-based approach

Only one year after the ICTR's judgment in the *Akayesu* case, the predominant position was challenged in Alexander K A Greenawalt's voluminous and thorough article 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation'.¹³⁵ Greenawalt summarized his approach as follows:

In cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part.¹³⁶

In the same year, the Spanish author Alicia Gil Gil came up with a very similar solution¹³⁷ which made it clear that the controversy between the purpose- and knowledge-based approach is not a 'legal family affair'. In the years thereafter quite a considerable number of commentators endorsed the knowledge-based approach,¹³⁸ and since William A Schabas' adoption of this interpretation in the second edition

¹³² Akhavan (n 84) 44; D Amann, 'Group Mentality, Expressivism, and Genocide' (2002) 2 *International Criminal Law Review* 93, 132; Cryer et al. (n 32) 227–8; Jessberger (n 91) 106; B Lüders, *Die Strafbarkeit von Völkermord nach dem Römischen Statut für den Internationalen Strafgerichtshof* (Berlin: Berliner Wissenschaftsverlag 2004) 125; Mysliwiec (n 39) 401–2; D Nersessian, 'The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals' (2002) 37 *Texas International Law Journal* 231, 265; Safferling (n 47) 172; Werle (n 47) 274–6 (marginal notes 754–5).

¹³³ Report of the International Commission of Inquiry on Darfur to the Secretary-General (n 77) para. 491.

¹³⁴ Berster (n 47) 137 *et seq.* (marginal notes 106 *et seq.*).

¹³⁵ Greenawalt (n 131).

¹³⁶ Greenawalt (n 131) 2288.

¹³⁷ A Gil Gil, *Derecho Penal Internacional: Especial Consideración del delito de genocidio* (Editorial Tecnos 1999) 259 *et seq.*

¹³⁸ Ambos (n 47) 842 *et seq.*; C Bassiouni and P Manikas, *The Law of the International Criminal Tribunal for the former Yugoslavia* (Ardsley: Transnational Publishers 1996) 527; Goldsmith (n 47) 245 *et seq.*; Jones (n 45) 478 *et seq.*; H van der Wilt, 'Genocide, Complicity in Genocide and International v Domestic Jurisdiction' (2006) 4 *Journal of International Criminal Justice* 239, 241 *et seq.*; H Vest, *Genozid durch organisatorische Machtapparate* (Baden-Baden: Nomos Verlagsgesellschaft 2002) 107 *et seq.*; in a similar direction May (n 13) 115 *et seq.*

of his leading monograph¹³⁹ it has become doubtful to characterize this position as a *minority* position in international criminal law *scholarship*.

The scholarly articulations of the knowledge-based approach differ in three respects. In its original version, as formulated by Greenawalt, there need not even be a destructive goal at the *collective* level, but just the knowledge of a campaign whose *manifest effect* is the (partial) destruction of the group.¹⁴⁰ Most adherents of the knowledge-based approach, however, require the existence of a *collective* destructive *goal*. Among the latter group some argue that those *at the leadership level* must *individually share* this collective *goal*,¹⁴¹ while others are of the view that it is sufficient that a *collective goal effectively exists*.¹⁴² Finally, some commentators require *dolus eventualis*¹⁴³ or *foresight as a practical certainty*¹⁴⁴ in respect of the occurrence of the (partial) destruction, while others¹⁴⁵ hold that no such additional requirement is needed if the point of reference of the perpetrator's knowledge is a *realistic* collective genocidal goal.

27.2.4.3.3 The 2009 Decision

This was the rather complex picture of the debate when the Pre-Trial Chamber had its first encounter with the crime of genocide. The 2009 Decision's attempt to reflect the state of the discussion reads as follows:

A number of authors have put forward in the recent years an innovative approach to the subjective elements of the crime, known as the 'knowledge-based approach'. See also Kress, C., '*The Darfur Report and Genocidal Intent*', *J Int Criminal Justice*, pp. 562–578, Oxford University Press, March 2005, see in particular pp. 562–572. See also Schabas, W.A., *Genocide in International Law The Crime of Crimes*, 2nd edition, Galway, Cambridge University Press. 2009, pp. 241–264. According to this approach, direct perpetrators and mid-level commanders can be held responsible as principals to the crime of genocide even if they act without the *dolus specialis*/ specific intent to destroy in whole or in part the targeted group. According to these authors, as long as those senior political and/or military leaders who planned and set into motion a genocidal campaign act with the requisite *dolus specialis*/ulterior intent, those others below them, who pass on instructions and/or physically implement such a genocidal campaign, will commit genocide as long as they are aware that the ultimate purpose of such a campaign is to destroy in whole or in part the targeted group. The 'knowledge-based approach' does not differ from the traditional approach in relation to those senior political/military leaders who planned and set into motion a genocidal campaign: they must act with the intent to destroy in whole or in part the targeted group because, otherwise, it would be possible to qualify a campaign of violence against the members of a given group as a genocidal campaign. Moreover, when, as in the present case, those who allegedly planned and

¹³⁹ Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 242–3.

¹⁴⁰ Greenawalt (n 131) 2288. ¹⁴¹ Ambos (n 47) 848–9; Van der Wilt (n 138) 243–4.

¹⁴² H. Vest, 'Humanitätsverbrechen—Herausforderung für das Individualstrafrecht?' (2001) 113 *Zeitschrift für die gesamte Strafrechtswissenschaft* 457, 486.

¹⁴³ Gil Gil (n 137) 259 *et seq.*

¹⁴⁴ Vest, *Genozid durch organisatorische Machtapparate* (n 138) 107 *et seq.*

¹⁴⁵ Jones (n 45) 479.

set into motion a genocidal campaign are prosecuted pursuant to article 25(3)(a) of the Statute as indirect (co) perpetrators, the mental element of the direct perpetrators becomes irrelevant. As explained in the Decision on the Confirmation of the Charges in the case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, the reason being that, according to article 25(3)(a) of the Statute, such senior political and military leaders can be held liable as principals of the crime of genocide regardless of whether the persons through which the genocidal campaign is carried out are criminally liable (ICC-01/04-01/07-717, paras. 571–572, 573–576, 579–580). As a result, the ‘knowledge-based approach’ would only differ from the traditional approach to the subjective elements of the crime of genocide in those cases in which mid-level superiors and low-level perpetrators are subject to prosecution before this Court. In this regard, the literal interpretation of the definition of the crime of genocide in article 6 of the Statute and in the Elements of Crimes makes it clear that only those who act with the requisite genocidal intent can be principals to such a crime pursuant to article 25(3)(a) of the Statute. Those others, who are only aware of the genocidal nature of the campaign, but do not share the genocidal intent, can only be held liable as accessories pursuant to articles 25(3)(b) and (d) and 28 of the Statute.¹⁴⁶

This is a problematic judicial pronouncement in two respects. First (and of lesser importance), the passage falls short of an accurate and comprehensive presentation of the ‘knowledge-based approach’. Only one articulation of this approach is set out,¹⁴⁷ and it is slightly misleading to portray an approach, which, as we have seen, has existed almost as long as the *Akayesu* judgment, as ‘innovative’ in comparison with a ‘traditional’ approach, as espoused by the international case law. Second (and of crucial importance), the knowledge-based approach, which has been explained in the form of detailed legal arguments since Greenawalt’s groundbreaking 1999 study,¹⁴⁸ which, over the past 15 years has been gaining a steadily growing number of adherents and which has never been fully debated in the international case law, is discarded in one single sentence and by way of an unexplained reference to ‘the literal interpretation’.

27.2.4.3.4 The argument in support of a *knowledge-based* approach embodying the concept of *realistic* genocidal intent

The approach chosen in the 2009 Decision is regrettable and it is to be hoped that Trial Chambers and, most importantly, the Appeals Chamber will not treat the Pre-Trial Chamber’s superficial footnote as the ICC’s last word on the difficult controversy between the *purpose-* and *knowledge-based* approaches. The following argument is made in support of a knowledge-based approach which embodies the concept of *realistic* genocidal intent.¹⁴⁹ It is respectfully submitted with a view to help in preparing

¹⁴⁶ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 139 (fn. 154).

¹⁴⁷ It follows from the information given in section 27.2.4.3.2 that other authors than the two cited in the 2009 Decision should have been mentioned as representatives of this articulation.

¹⁴⁸ Greenawalt (n 131).

¹⁴⁹ The argument builds on and updates C Kreß, ‘The Darfur Report and Genocidal Intent’ (2005) 3 *Journal of International Criminal Justice* 562, 565–77; and Kreß, ‘The Crime of Genocide under International Law’ (n 31) 492–8; for a somewhat more detailed exposition of the same argument, see Kreß, ‘§ 6 VStGB’ (n 17) 1116–120 (marginal notes 78–88).

a fully informed judicial consideration of the proper construction of the concept of genocidal intent on an appropriate future occasion.

The argument is exclusively concerned with the genocide scenario that matters for all practical purposes, i.e. the commission of the crime *as part of collective action*. It is argued that, in such a context, a perpetrator—whatever his or her hierarchical level—acts with genocidal *intent* if he or she is *aware* that his or her conduct forms part of a *realistic collective campaign directed* towards the destruction of a protected group, in whole or in part. This complex legal standard requires some commentary.

As was explained earlier¹⁵⁰ in some detail, the existence of a *realistic* collective campaign as the necessary *point of reference* for the *individual* genocidal *intent* incorporates the ‘genocidal context’ and avoids the need to introduce an unwritten contextual element as part of the crime’s *actus reus*. As was also seen earlier, the 2009 Decision makes an implicit step towards the recognition of such a requirement by acknowledging the need to determine the intent of ‘the Government of Sudan’ in case the latter was not, at the material time, simply identical to the individual intent of Al Bashir.

It is not sufficient for the collective campaign to have the (partial) destruction of the protected group as its *manifest effect*. The campaign must rather *target* the members of the group *as such*, i.e. because of this membership, and it must pursue the *goal* to (partially) destroy the group concerned. This collective goal does *not* have to take the form of a *highly sophisticated plan*, but a genocidal campaign may also receive its *collective direction from an effective public incitement* to that effect.¹⁵¹

With the *awareness* of such a genocidal campaign, the perpetrator knows of the *real possibility that the (partial) destruction of the protected group may occur* as a result of the collective action to which he or she chooses to contribute. This is sufficient. A *probability* standard would be impracticable, and to require that the perpetrator *foresee* the (partial) destruction of the group *as a practical certainty* would render the definition of the crime virtually inapplicable in practice.¹⁵²

In the following, the considerations in support of this construction will be set out. Along the way, special regard will be given to the recent commentary by Lars Berster because this study presents the rare example of a sophisticated argument in support of the *purpose-based approach*.

(i) The ‘ordinary’ meaning of the term ‘intent’

Contrary to what the *Akayesu* judgment and the 2009 Decision suggest, the ‘literal interpretation’ does not yield an unambiguous result. The genocidal intent to destroy complements the general intent and goes beyond the material elements of the crime. While often referred to as a *specific* intent requirement, it is more helpful to speak of an *ulterior* intent.¹⁵³ A study of comparative criminal law, as it has been conducted most thoroughly by Kai Ambos, reveals that the words ‘intent’, ‘intention’, and ‘intención’, particularly if used to denote an ‘ulterior intent’, are not invariably understood

¹⁵⁰ Cf. section 27.2.2.3.2.

¹⁵¹ May (n 13) 121 *et seq.*; 209 *et seq.*

¹⁵² For the same ‘cognitive standard’ (though according to him on top of a purpose-requirement) Berster (n 47) 140–1 (marginal notes 113–14).

¹⁵³ Ambos (n 47) 835.

exclusively to mean ‘purposely’, but may take a more cognitive meaning according to their specific legal context.¹⁵⁴ As far as the French concept of ‘*dol spécial*’ is concerned, to which the *Akayesu* judgment referred, it does also not unambiguously refer to the *intensity*, but rather to the *object* of the intent.¹⁵⁵ Recently, Lars Berster has introduced a new element to the debate by suggesting that the Russian and the Chinese versions of the definition support the exclusive interpretation as ‘purpose’. But also Berster accepts that this ‘discovery’ does not lead to a *conclusive* result of the literal interpretation in light of the discrepancies between the different language versions.¹⁵⁶ It has accordingly been acknowledged also by adherents of the *purpose-based* approach that the latter is not required as a matter of *literal interpretation*.¹⁵⁷

It must be conceded, though, that if one reads the word ‘intent’ in the definition of genocide together with the words ‘as such’, which imply the need for a *targeting of group members because of their membership*,¹⁵⁸ more points in the direction of the requirement of a *goal or purpose* to destroy. Yet, the scope of possible meanings of the word ‘intent’ allows for an interpretation that locates such *goal or purpose* at the *collective* level and *connects* the *individual* perpetrator’s mental state with this goal through his or her *knowledge* of the latter’s existence. Such an interpretation recognizes the fact that the definition must, for all practical purposes, capture *individual conduct within a context of collective action*.

(ii) The travaux préparatoires and the customary law argument

Lars Berster suggests that the *travaux* clearly support the interpretation of the word ‘intent’ as ‘purpose’. He points out that the 1947 Secretariat Draft used the words ‘with the *purpose* of destroying’ (emphasis added)¹⁵⁹ and that the subsequent replacement of these words by ‘intent to destroy’ was not accompanied by a wish to alter the meaning, as numerous statements of delegates both in the Ad Hoc Committee and in the Sixth Committee confirm.¹⁶⁰

While Berster’s analysis is a careful one, his firm conclusion is to be doubted for three reasons. First, Greenawalt’s similarly thorough perusal of the same materials 15 years ago led this author to draw the opposite conclusion that ‘an investigation of the origins and drafting of the Genocide Convention only reinforces the ambiguity of the treaty’s intent provision’.¹⁶¹ This contradictory reading of the same materials by two learned observers in itself suggests applying a degree of caution with a view to the interpretation of the statements made by delegates in the course of the historic deliberations.

¹⁵⁴ Ambos (n 47) 842–5; the same is true for the concept of ‘*dol special*’, see Kreß, ‘The Darfur Report and Genocidal Intent’ (n 149) 567–8.

¹⁵⁵ Kreß, ‘The Darfur Report and Genocidal Intent’ (n 149) 567–8 (with reference to French scholarship in fns 24–5).

¹⁵⁶ Berster (n 47) 142–143 (marginal notes 119–121).

¹⁵⁷ Jessberger (n 91) 106.

¹⁵⁸ Kreß, ‘§ 6 VStGB’ (n 17) 1120–21 (marginal notes 89–90).

¹⁵⁹ Secretariat Draft. First Draft of the Genocide Convention, prepared by the UN Secretariat (May 1947) UN Doc E/447, 26.6; reprinted in Abtahi and Webb (n 16) 209, 214.

¹⁶⁰ Berster (n 47) 93–6 (marginal notes 20–3).

¹⁶¹ Greenawalt (n 131) 2270; it is difficult, for example, to disagree with Greenawalt that the statements, which he cites *ibid.* 2277, are ambiguous at best; see also Goldsmith (n 47) 249–50.

This impression is re-enforced by the fact that the debate about the intent-requirement was at times confusingly entangled with that about a motive-requirement.

Second, Lemkin had already proposed to cover not only those persons as *génocidaires* who *order* genocide practices, but also those who *execute* such orders.¹⁶² Those belonging to the latter category, however, will often not be imbued with the personal desire that the group be (partially) destroyed. The *travaux préparatoires* do not reveal a clear drafter's decision to depart from Lemkin's idea. To the contrary, the debate in the Sixth Committee on how to treat those persons who act upon superior orders must be considered as inconclusive.¹⁶³

This uncertainty confirms, third, the important general observation made by John R W D Jones, that

[u]nlike the circumstances surrounding the adoption of the Rome Statute for an International Criminal Court, where criminal lawyers of all shades were at hand to draft precise definitions of the offences, accompanied subsequently by even more detailed 'Elements of the offences', the Genocide Convention was adopted in many ways as a political manifesto against a certain form of massive criminality and was not intended as a criminal code.¹⁶⁴

While this may be a slight exaggeration in both directions, a close reading of the historic deliberations gives the reader a clear sense of the fact that the delegates in the Sixth Committee did not fully appreciate the complexity of translating a macro-criminal phenomenon with its interplay between individual and collective action into easily applicable criminal law terms. It is therefore perfectly possible—and perhaps even likely—that many of the drafters ultimately had the collective level in mind when they used words such as 'aim', 'goal', or 'purpose'. Therefore, even if the ICTY Trial Chamber's assessment in *Prosecutor v Krstić* is taken for granted, that '[t]he preparatory work of the Genocide Convention clearly shows that the drafters envisaged genocide as an *enterprise* whose goal, or objective, was to destroy a human group, in whole or in part' (emphasis added),¹⁶⁵ this would not be conclusive with respect to the requisite mental state of the *individual* perpetrator, as the genocidal 'enterprise' might have always been understood as the collective genocidal campaign.¹⁶⁶

This analysis of the *travaux préparatoires* casts a heavy shadow of doubt about the customary law argument advanced by the ICTY Trial Chamber in *Prosecutor v Krstić*¹⁶⁷ and it should be recalled that this argument was formulated in a strikingly tentative manner. There are also serious methodological problems with this argument. It is impossible to pinpoint a consistent state practice, beginning with the Genocide Convention's entry into force, reflecting a corresponding *opinio iuris* in support of the

¹⁶² Lemkin (n 14) 93; this is rightly recalled by Goldsmith (n 47) 250–1.

¹⁶³ Cf. the statements by the delegates of the Soviet Union, France, Greece, and the USA in UNGAOR, 3rd session, 6th Committee, 96, 97, 306, 307, and 310.

¹⁶⁴ Jones (n 45) 478.

¹⁶⁵ *Krstić* Trial Judgment (n 42) para. 571.

¹⁶⁶ Interestingly, the pertinent paragraph in the commentary of the ILC (1996 *Yearbook of the International Law Commission* (n 18) 45, para. 10) clearly points in that direction so that it is incorrect to list the ILC among the adherents of the purpose-based approach (as was done in the *Krstić* Trial Judgment (n 42) para. 571); for a more accurate reading of the ILC's position, see Goldsmith (n 47) 251–2.

¹⁶⁷ *Krstić* Trial Judgment (n 42) para. 571.

purpose-based approach. This is unsurprising given that the controversy between this and the *knowledge-based* approach concerns a rather *fine* point of the crime's construction which primarily concerns the *internal* delineation between *primary* and *secondary* individual criminal responsibility, rather than the *external* delineation of the international criminal responsibility for genocide as such.

(iii) *The particular seriousness of genocide*

Robert Cryer, Håkan Friman, Darryl Robinson, and Elisabeth Wilmshurst argue that the *purpose-based* approach 'may be seen as correctly reflecting the need to reserve genocide convictions only for those who have the highest degree of criminal intent'.¹⁶⁸ This is an important consideration, but it is to be questioned whether it is indeed the *desire, goal, or purpose* of the *individual* perpetrator that characterizes the particular seriousness of the crime of genocide. In the typical genocide case, it is the formation of the *realistic collective goal* to (partially) destroy a protected group which poses the *danger* to the latter's survival. A person who *knowingly* contributes to the realization of such a destructive goal makes himself or herself a part of this dangerous enterprise, the occurrence of which the law against genocide is intended to prevent. Against this background, it is of secondary importance at best whether or not the person concerned *wishes* the group's (partial) destruction.

The historic *Eichmann* case is a paradigm example used to illustrate this point. Eichmann's conduct was so seriously dangerous because he knowingly contributed to the realization of the Nazis' horrible destructive goal. Therefore, the answer to the question asked by the District Court of Jerusalem whether Eichmann 'was personally imbued with this (collective) intention' does not affect the seriousness of Eichmann's¹⁶⁹ conduct at its core. Here lies the reason for the temptation that is almost inherent in the purpose-based approach to apply the knowledge-based approach through the 'evidentiary backdoor', by inferring the individual perpetrator's purpose from the 'fact patterns' surrounding his conduct. To conclude, Cryer's, Friman's, Robinson's, and Wilmshurst's concern not to see the definition of the crime of genocide becoming diluted is more safely and convincingly served by the requirement of a *realistic* genocidal campaign and by an appropriately narrow interpretation of the words 'destroy' and 'in part'.

(iv) *Genocide and crimes against humanity*

The interpretation of genocidal intent as suggested in this text brings the crime of genocide in structural conformity with crimes against humanity. This congruity makes sense historically, as genocide is rooted in the older concept of crimes against humanity,¹⁷⁰ and systematically, as both crimes capture the individual participation in collective action.¹⁷¹ At the same time, the specificity of the crime of genocide vis-à vis crimes

¹⁶⁸ Cryer et al. (n 32) 227.

¹⁶⁹ Judgment of 12 December 1961, *Attorney-General of the Government of Israel v Eichmann* (1968) 36 *International Law Reports* 18, 134 (para. 194).

¹⁷⁰ Kreß, '§ 6 VStGB' (n 17) 1096 (marginal note 22).

¹⁷¹ For the same view, see Jones (n 45) 479.

against humanity remains completely safeguarded. The latter does not lie in a requirement that the individual perpetrator must act purposely, but in the nature of the campaign in which this individual takes part. While an attack against any civilian population, which may take different forms of violent action, suffices in the case of crimes against humanity, the genocidal campaign must be directed towards the destruction of a specifically protected group.

(v) *Questions of consistency*

As in the case of crimes against humanity, the *actus reus* of the crime of genocide is formulated from the perspective of the subordinate actor rather than from the leadership level.¹⁷² The purpose-based approach combines this *actus reus* with what typically is a leadership *mens rea* standard. This in itself is not a very plausible construction; in addition, it gives rise to technical problems in a number of cases. Imagine that perpetrator A physically exterminates a pre-selected member of the targeted group with knowledge of thereby contributing to a genocidal campaign, but without any desire to help bring about the targeted group's (partial) destruction. Under the purpose-based approach, A has not committed the crime of genocide as a perpetrator for lack of genocidal intent. It is also difficult to see how A could have *otherwise* participated in the crime of genocide through his conduct. While A has certainly *aided and abetted* the *collective genocidal campaign*, this campaign *as such* does not constitute the crime's *actus reus*.¹⁷³ Lars Berster, who is to be commended for having turned his mind to this and similar problems¹⁷⁴ as a supporter of the purpose-based approach, opines that 'such lacunae should not be feared' as 'on-site executors' such as A 'would still be punishable for crimes against humanity'.¹⁷⁵ Quite apart from the fact that domestic criminal codes do not invariably include crimes against humanity, the resort to crimes against humanity cannot dispel the strong feeling that a convincingly construed definition of the crime should allow to hold somebody like A responsible for participation in the crime of *genocide* in one form or the other. The solution put forward in this text offers such a construction.

27.2.4.4 The destiny of the genocide charge in the case against Al Bashir

Whatever decision the ICC will eventually make as regards the controversy between the purpose- and knowledge-based approaches, the prospects for success of the genocide charge against Al Bashir at the trial stage must be considered as fragile at best if the Court maintains the 2009 Decision's strict line to the interpretation of the other two sub-elements of genocidal intent, 'destroy' and 'in part'. It is of course true that the 2010 Decision has found reasonable grounds to believe that Al Bashir acted with genocidal intent. However, it has not adduced any reasoning which would make it appear

¹⁷² For the same point, see Goldsmith (n 47) 252.

¹⁷³ With the exception of the third genocidal act, on the latter's particular structure see section 27.2.3.2.3.

¹⁷⁴ See Kreß, 'The Darfur Report and Genocidal Intent' (n 149) 574–5.

¹⁷⁵ Berster (n 47) 146 (marginal note 127).

likely that, despite the doubts voiced in the 2009 Decision, it could be proven beyond reasonable doubt that the Government of Sudan (be it through Al Bashir's will alone or in the form of concerted decision-making) had formed the goal not only to forcibly displace substantial parts of the three targeted groups, but to ultimately eliminate the human beings concerned or at least to cause them serious bodily or mental harm. The two brief passages in the 2010 Decision, which directly deal with Al Bashir's possible genocidal intent, are completely devoid of substance,¹⁷⁶ and, as we have seen,¹⁷⁷ the related considerations on the third genocidal act are not particularly impressive in their effort to play down the difference between the 2009 Decision and the 2008 Application in the assessment of the conditions within the IDP camps in Darfur.

27.3 An Acquittal *in re Genocide*—A Failure? On the Rhetorics of Genocide

If Al Bashir eventually stands trial, the genocide charge against him is rather unlikely to succeed. Would that mean that the case against Al Bashir has failed? Unhesitatingly, the answer must be negative.¹⁷⁸

At this point in the development of international law, the characterization of conduct as *genocidal* retains considerable practical importance at the inter-state level, as the case of *Bosnia and Herzegovina v Serbia and Montenegro* has brought to light.¹⁷⁹ Within the realm of international criminal law, however, the crime of genocide has lost much of its earlier importance because of the consolidation of crimes against humanity as a distinct crime under international law in times of armed conflict and peace. As the early years of the ICC make abundantly clear, crimes against humanity and not genocide dominate the practice of international criminal justice.¹⁸⁰

The firm establishment of the law against crimes against humanity has led Alexander R J Murray to argue that 'the crime of genocide is now a redundant crime'.¹⁸¹ This is not the position of states, which have until now treated the historical definition of genocide almost as a sacred text and have, to the best of this writer's knowledge, never seriously considered not to include the crime of genocide in a list of crimes

¹⁷⁶ Cf. Second Decision on the Prosecution's Application for a Warrant of Arrest (n 10) paras 4 and 5.

¹⁷⁷ Section 27.2.3.2.3.

¹⁷⁸ For a similar statement with respect to the case of 'Cambodia and the Khmer Rouge', see R Park, 'Proving Genocidal Intent: International Precedent and ECCC Case 002' (2010) 63 *Rutgers Law Review* 129, 187–8.

¹⁷⁹ J Quigley, 'International Court of Justice as a Forum for Genocide Cases' (2007) 40 *Case Western Reserve Journal of International Law* 243, 257; fortunately, however, the characterization of a campaign as *genocidal* is not decisive for the application of Chapter VII of the UN Charter or for the Responsibility to Protect; see, in particular, 2005 World Summit Outcome (15 September 2005) UN Doc A/60/L.1, paras 138–9; and W Schabas, 'Genocide in International Law and International Relations Prior to 1948' in C Safferling and E Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (The Hague: TMC Asser Press 2010) 19, 33–4; in the ICJ case of *Croatia v Serbia* again the characterization of conduct as genocidal was decisive, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (n 98) para. 85.

¹⁸⁰ L Sadat, 'Crimes against Humanity in the Modern Age' (2013) 107 *American Journal of International Law* 334.

¹⁸¹ A Murray, 'Does International Criminal Law Still Require a "Crime of Crimes"? A Comparative Review of Genocide and Crimes against Humanity' (2011) 3 *Göttingen Journal of International Law* 590.

under international law as the basis for international criminal jurisdiction. As of yet, there appears to be the widespread belief within the international community that, where the conditions of that crime's definition are met, it may be useful to single out a campaign and the individual participation therein as *genocidal*. Whether this belief is justified, despite the powerful criticisms that have recently been formulated against the teleology behind the existing definition of genocide¹⁸² and the latter's internal coherency,¹⁸³ is not a matter to be discussed in this contribution.

In any event, the significance of a genocide charge must never be exaggerated in a manner that entails an inappropriate downgrading of any concurrent charge of crimes against humanity. This is precisely what happened when the 2005 Darfur Commission Report's conclusion that 'the Government of Sudan has not pursued a policy of genocide'¹⁸⁴ absorbed virtually all of the world public's attention.¹⁸⁵ Perhaps the ICTR and the ICTY have inadvertently contributed to the perception that a conviction for genocide greatly outweighs all other possible convictions by calling genocide the 'crime of crimes'¹⁸⁶ and by emphasizing the special stigma attached to a conviction for genocide in the pathetic terms that, 'among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium'.¹⁸⁷ Should judgment be rendered one day against Al Bashir, the ICC should avail itself of the opportunity to 'demystify' the crime of genocide and to hereby clear the way for according crimes against humanity their proper place in contemporary international criminal law.

¹⁸² Cf. May (n 13) 23–94 and section 27.2.1.

¹⁸³ The most enlightening recent critical contribution is that by Luban (n 84); in essence, there are three problems with the definition *in light of its teleology to preserve 'national cosmopolitanism'*: first, it is not without difficulties to justify the present list of protected groups; second, the restriction of genocidal acts to 'physical' and 'biological' assaults on group members (together with the borderline case of the transfer of children) is hard to explain; and third, through the inclusion of the words 'in part', the definition loses 'its mooring in the group-pluralist theory of value' (Luban (n 84) 313).

¹⁸⁴ Report of the International Commission of Inquiry on Darfur to the Secretary-General (n 77) para. 518.

¹⁸⁵ Kelly (n 3) 212: 'That finding—removing the label "genocide"—seriously undermined efforts to marshal international action to stop the atrocities in Darfur'; P Bechky, 'Lemkin's Situation. Toward a Rhetorical Understanding of Genocide' (2012) 77 *Brooklyn Law Review* 551, 553.

¹⁸⁶ Judgment and Sentence, *Kambanda*, ICTR-97-23-S, TC, ICTR, 4 September 1998, para. 16.

¹⁸⁷ *Krstić* Appeals Judgment (n 43) para. 36.

Crimes against Humanity

A Better Policy on ‘Policy’

*Darryl Robinson**

28.1 Introduction

The most interesting and controversial ICC jurisprudence on crimes against humanity revolves around the interpretation of the ‘policy element’. Most of the literature has focused on the controversy over whether the organization behind a policy must be ‘state-like’. This chapter will focus instead on broader problematic trends in the early jurisprudence of the ICC, as typified particularly by decisions in the *Gbagbo* and *Mbarushimana* cases.¹ Some early ICC decisions have, in an apparently inadvertent manner, elevated the policy element and infused it with exceedingly formalized requirements. As a result, some cases have already faltered despite a relative wealth of evidence. If the ICC is to be a viable forum for crimes against humanity prosecutions, it is vitally important to correct this trend.

Other jurisdictions follow one of two major approaches to the policy element. One approach rejects the policy element outright. The other approach recognizes the policy element, but regards it as a quite modest threshold. Namely, the policy element simply screens out ‘ordinary’ unconnected crimes of individuals acting on their own unprompted initiatives, and thus requires some link to a state or organization. A policy need not be explicit or formalized; it is satisfied by showing the improbability that the crimes were coincidental individual acts.

Unfortunately, early ICC jurisprudence shows a tendency towards a unique third path: creatively imbuing the policy element with formidable new requirements. For example, in the *Gbagbo* adjournment decision, a Pre-Trial Chamber majority requested direct proof of formal ‘adoption’ of the policy, which is precisely what past authorities have repeatedly emphasized is not required. In the *Mbarushimana* case, a Pre-Trial Chamber majority indicated that FDLR-organized atrocities did not satisfy the policy element because their purpose was vengeance or intimidation. This

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¹ Decision adjourning the hearing on the confirmation of charges pursuant to Art 61(7)(c)(i) of the Rome Statute, *Gbagbo, Situation in Côte d’Ivoire*, ICC-02/11-01/11-432, PTC I, ICC, 3 June 2013 (‘*Gbagbo* Adjournment Decision’); Decision on the confirmation of charges, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-465-Red, PTC I, ICC, 16 December 2011 (‘*Mbarushimana* Confirmation Decision’).

conclusion is perplexing, because those ulterior purposes do not undermine the fact that the FDLR had a policy to attack civilians. Several decisions conflate ‘policy’ with the ‘systematic’ test, which not only raises the bar but also creates an unnecessary contradiction within Article 7 of the ICC Statute.

In this chapter I am not presenting an expansionist, ‘push the envelope’ approach to the policy element. On the contrary, I am mindful of the theory of the policy element. I am arguing that ICC chambers should take deeper cognizance of (1) the purpose of the policy element, (2) the structure of Article 7, and (3) the national and international authorities on the element.

International and national courts have had little difficulty inferring policy from circumstances; it would be most unfortunate if the ICC were the anomaly. Your first reaction to the negative judicial determinations discussed here may be to assume that the problem must lie with the OTP, i.e. that it brought inadequate evidence. However, as we will see, the evidence brought in the cases was equal to or greater than the evidence from which other courts and tribunals have inferred policy.

The policy element is very controversial, and thus it will help if I state my background premises. First, I think that the policy element, or something similar, is conceptually valuable, for reasons I will explain in section 28.2. Second, I happen to think there is ample customary law authority for a policy element, if it is understood as a modest threshold. However, *even if you disagree with me on these points*, it will not detract from the thesis presented in this chapter. If you believe that a policy element is not required in customary law, then you are likely to agree all the more heartily that the ICC should not elevate the element beyond what the limited available authorities indicate, as doing so would bring the ICC even further away from customary law and further away from effectiveness.

The important premise for this chapter is that the policy element is a quite basic threshold that is fairly easy to satisfy. Many people, arguing against recognition of the element, have voiced perfectly cogent concerns, e.g. that it might be (mis)interpreted to require proof of secret plans or to contradict the disjunctive test.² My response to those understandable concerns has been that the policy element need not have these deleterious effects, provided it is interpreted in accordance with the relevant authorities. Unfortunately, however, early ICC cases are often *not* interpreting the element in accordance with the relevant authorities. They also seem to be disregarding the significant literature, from both supporters and opponents of the element, on the dangers of misinterpreting and overstating the policy element. They are thereby ushering in the very problems that neither supporters nor opponents of the element wanted. I will argue that correction is needed, either by the judges, or, if necessary, by an amendment to the Elements of Crimes. As I note in the conclusion, more recent trends, after the drafting of this chapter, are very encouraging. The recent *Katanga* trial Decision

² See e.g. M deGuzman, ‘The Road From Rome: The Developing Law of Crimes against Humanity’ (2000) 22 *Human Rights Quarterly* 335; P Hwang, ‘Defining Crimes against Humanity in the Rome Statute of the International Criminal Court’ (1998) 22 *Fordham International Law Journal* 457; G Mettraux, ‘Crimes against Humanity and the Question of a “Policy” Element’ in L Sadat (ed.), *Forging A Convention for Crimes against Humanity* (Cambridge: Cambridge University Press 2011) 142.

and the later *Gbagbo* Confirmation Decision signal a very welcome move towards a more grounded and effective jurisprudence.

28.2 The Theory Behind the Policy Element

28.2.1 Why a 'policy element' (or something similar) is needed

First, I would like to show, particularly for those readers who may be sceptical of the policy element, why a policy element or something like it is conceptually valuable and indeed necessary. The argument involves two steps. Step one: the concept of crimes against humanity does not include 'ordinary' patterns of crime—the random, unconnected acts of individuals carrying out their own criminal designs.³ Step two: the policy element, or something like it, is needed to actually deliver on this assurance.

It is the second step that is most controversial. It is frequently asserted that the 'widespread or systematic' test is by itself sufficient to exclude random, isolated crime.⁴ Thus, it is argued, the policy element is not needed to exclude normal random crime: it is a redundant safeguard.⁵ If I can demonstrate that this is not correct, that alone would be a valuable contribution to the debate.

The 'systematic' branch certainly succeeds in excluding random criminal activity, because it requires that the crimes be 'organized'.⁶ However, the other disjunctive alternative, 'widespread', simply requires scale. Serious crimes (e.g. murder) in a city or region may be 'widespread' without the crimes being connected. Thus, the 'widespread or systematic' test patently does not succeed in excluding random, unconnected crimes. Recall that an individual need only commit a *single crime* within the requisite context to be liable for a crime against humanity. Thus, without some additional legal filter, every serious crime committed in a context of 'widespread' crime would be a crime against humanity.

An example will illustrate the problem. Assume a state with high crime, such as South Africa today, which faces thousands of murders each year. Assume that no state or organization is actively or passively encouraging such crimes; it is simply a situation

³ The proposition that isolated or random acts of individuals do not constitute a crime against humanity is so frequently noted that it hardly needs a citation, but a few examples include: ILC, 'Draft Code of Crimes against the Peace and Security of Mankind with commentaries', 1996 *Yearbook of the International Law Commission*, vol. II, Part Two, 47 ('ILC draft Code'); Judgment, *Kunarac* et al., IT-96-23-T & IT-96-23/1-T, TC, ICTY, 22 February 2001 ('Kunarac Trial Judgment'); Judgment, *Tadić*, IT-94-1-T, TC, ICTY, 7 May 1997, para. 648 ('Tadić Trial Judgment'). The proposition is acknowledged by opponents of the policy element; see e.g. Mettraux, 'Crimes against Humanity and the Question of a "Policy" Element' (n 2) 153–5, 160, 163.

⁴ See e.g. Judgment, *Bagilishema*, ICTR-95-1A-T, TC I, ICTR, 7 June 2001, para. 78; Judgment, *Kayishema and Ruzidana*, ICTR-95-1-T, TC II, ICTR, 21 May 1999, para. 123 ('Kayishema and Ruzidana'); Mettraux, 'Crimes Against Humanity and the Question of a "Policy" Element' (n 2) 153–5; M Halling, 'Push the Envelope—Watch It Bend: Removing the Policy Element and Extending Crimes against Humanity' (2010) 23 *Leiden Journal of International Law* 827, 840–1; M Boot et al., 'Article 7' in O Triffterer, *Commentary on the Rome Statute of the International Criminal Court* 2nd edn (München: H Beck 2008) 159, 179–80.

⁵ Halling (n 4) 841 ('redundant check'), Mettraux, 'Crimes against Humanity and the Question of a "Policy" Element' (n 2) 153 ('redundant and unnecessary'); Boot et al. (n 4) at 179 ('superfluous').

⁶ See *infra*, section 28.3.1.

of elevated domestic crime. Thousands of murders easily qualifies as ‘widespread’. The crimes are committed against civilians. The perpetrators are aware of the surrounding context (i.e. widespread crime against civilians). Thus, if we do not have a policy element or some equivalent, and we mechanistically apply the remaining elements of a crime against humanity, we will find that all elements are met. Each serious crime committed in a context of rampant serious crime would constitute a crime against humanity.⁷ The test fails to delineate crimes against humanity from ordinary crimes and fails to delineate the scope of international jurisdiction.

Most jurists will agree that the ‘high crime rate’ scenario is not a crime against humanity. The most typical rejoinder to this example would be that unconnected crimes are not an ‘attack directed against the civilian population’. That reaction is completely correct. But then the next question is, ‘Can you articulate the specific requirement within your definition of “attack” that excludes those unconnected acts?’ The answer to that question is the first key to the riddle of crimes against humanity. We need some legal element to actually deliver on the promise that unconnected ordinary crime is excluded. The ‘widespread or systematic’ test by itself does not suffice.

28.2.2 What the policy element means

Different deliberative bodies have noticed over the years that the ‘widespread or systematic’ test does not suffice to exclude rampant ordinary crime. At the Rome Conference, a significant number of states, including the P-5 and many Asian and Arab states, raised precisely this concern about the disjunctive ‘widespread or systematic’ test.⁸ Like-minded delegations responded that an aggregate of truly random, unconnected crimes would not qualify as an ‘attack’. The cautious delegations indicated their readiness to accept the disjunctive ‘widespread or systematic’ test, provided that the assurance about random crime was included in the definition of ‘attack’.

The Rome Conference was not the first time that the over-inclusiveness problem had been noticed. Both the *Tadić* Decision of the ICTY and the 1996 ILC draft Code of Crimes suggested a solution. The *Tadić* Decision employed the term ‘policy’ to explain the idea that an attack is not composed of ‘isolated, random acts of individuals’,⁹ and ‘cannot be the work of isolated individuals alone’.¹⁰ The *Tadić* Decision equated the ‘policy’ element with the requirement recognized by the ILC in the 1996 draft Code of Crimes, that an attack must be ‘instigated or directed by a Government or by any organization or group’.¹¹ Both *Tadić* and the ILC draft Code described this requirement as additional to the ‘widespread or systematic’ test. At the Rome Conference, a Canadian compromise proposal advanced Article 7(2)(a), explicitly based on and

⁷ There are solutions other than a policy element. For example, one could require that the population be targeted on prohibited grounds, which would exclude most random ‘ordinary’ crimes; however, the re-introduction of specific grounds, motives, or special intents raises difficulties; see *infra*, section 28.3.2.

⁸ See e.g. H von Hebel and D Robinson, ‘Crimes within the Jurisdiction of the Court’ in R Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International 1999) 79, 92–8.

⁹ *Tadić* Trial Judgment (n 3) para. 653.

¹⁰ Ibid., para. 655.

¹¹ Ibid., para. 655; ILC draft Code (n 3) 47 (Art 18).

footnoting to these passages in *Tadić* and the ILC draft Code.¹² Thus, the purpose of the policy element in the Rome Statute, in the *Tadić* Decision, and in the ILC draft Code, was simply to exclude 'ordinary' crime, i.e. crime occurring without coordination or encouragement.

This modest purpose is reinforced by four important features of the policy element, which have been consistently emphasized in the jurisprudence (as will be elaborated in section 28.4). First, the term 'policy' is not used in a bureaucratic sense: a policy may be *implicit*, need not be formalized, need not be stated expressly, and need not be defined precisely.¹³ Second, the requisite attributability to a state or organization is intermediate between two extremes: on the one hand, a policy *need not implicate the highest levels* of a state or organization, and on the other hand, the crimes cannot merely be the product of a few isolated members acting on their own.¹⁴ Third, a policy does not require active orchestration; it can be realized by *deliberate inaction* to encourage crimes where a state or organization has a duty to intervene.¹⁵ Fourth, and most importantly, a policy *may be inferred* from the manner in which the acts occur; in particular, by showing the improbability that the acts occurred randomly.¹⁶ These four features are mutually connected and consistent with the purpose of the element. Numerous scholars have noted these features of the policy element.¹⁷ Some of the jurisprudence will be reviewed later.

¹² D Robinson, 'Defining Crimes against Humanity at the Rome Conference' (1999) 93 *American Journal of International Law* 43.

¹³ See *infra*, section 28.4 for authorities.

¹⁴ See e.g. Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, *Nikolić*, IT-94-2-R61, TC, ICTY, 20 October 1995, para. 26; Judgment, *Blaškić*, IT-95-14-T, TC, ICTY, 3 March 2000, para. 205 ('*Blaškić*').

¹⁵ See e.g. ICC Elements of Crimes, ICC-ASP/1/3(part II-B), 3–10 September 2002 (First Session of the Assembly of States Parties), fn. 6 (the Elements, reflecting their tortuous drafting, twice declare a general need for 'action' before acknowledging the important exception of policy by inaction); Judgment, *Kupreškić*, IT-95-16, TC, ICTY, 14 January 2001, paras 554–5 (reviewing case law on policies of inaction) ('*Kupreškić*'); Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674 (27 May 1994), para. 85 (unwillingness to respond may be indicative of policy); K Ambos and S Wirth, 'The Current Law of Crimes against Humanity' (2002) 13 *Criminal Law Forum* 1, 31–4 (logical interpretation of Art 7 requires that policy can be satisfied by inaction, which is consistent with *Kupreškić* and the Elements of Crimes).

¹⁶ See *infra*, section 28.4.1 for authorities.

¹⁷ Boot et al. (n 4) 236 ('policy need not be formalised, and can be deduced from the manner in which the acts occur.... In essence, the policy element only requires that the acts of individuals alone, which are isolated, uncoordinated, and haphazard, be excluded'); K Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press 2002) 97–8 (excludes individuals acting on own initiative without direction or encouragement from a state or organization, not formal, not express, not highest level, infer from circumstances); R Cryer et al., *An Introduction to International Criminal Law and Procedure* 2nd edn (Oxford: Oxford University Press 2010) 237–40 (exclude random criminality of individuals, infer from manner); Ambos and Wirth (n 15) 30–4 (policy excludes ordinary crimes, may be implicit, and may be passive); L Sadat, 'Crimes against Humanity in the Modern Age' (2013) 107 *American Journal of International Law* 334, 354 and 372 (exclude uncoordinated, haphazard, random acts); S Chesterman, 'An Altogether Different Order: Defining the Elements of Crimes against Humanity' (2000) 10 *Duke Journal of Comparative & International Law* 307, 316 ('policy requirement reiterates the position that isolated and random acts cannot amount to crimes against humanity'); Y Dinstein, 'Crimes against Humanity after Tadic' (2000) 13 *Leiden Journal of International Law* 373, 389 (need policy element to exclude spontaneous, fortuitous crimes).

Accordingly, I submit to you that the policy element is simply the logical corollary of the proposition that an ‘attack’ cannot consist of random acts of individuals acting on their own criminal initiatives. If we take that proposition, which is worded negatively (what an attack is *not*), and express its positive corollary (what an attack *is*), then we get something like: ‘to be an “attack”, the acts must be directed, instigated, or encouraged by some source *other than individuals* acting independently’. Given that the first proposition is not controversial, its logical corollary ought to be accepted as well.

Many scholars and jurists accept the need for the ‘widespread or systematic’ test, but seem relatively uninterested in the over-inclusiveness problem. Perhaps this is because of a sanguine reliance on prosecutorial discretion. But the law of crimes against humanity may be applied by any state; thus it is desirable to delineate it sensibly. Moreover, the states creating the ICC were certainly not sanguine about the ‘unconnected crimes’ problem; thus the policy element was included in the Statute and must be understood and interpreted. Understanding the purpose of the element also helps us not to elevate it *beyond* its purpose.

The policy element reflects part of the essence of a crime against humanity: its ‘associative’ dimension. As David Luban has observed, crimes against humanity concern our human nature as social and political animals. We live socially and we form organizations. Crimes against humanity are when our organizational nature turns against us and people work together to commit atrocities; they are ‘politics gone cancerous’.¹⁸ Whereas genocide focuses on the group nature of the victims, the law of crimes against humanity is engaged by the group nature of the perpetrators. The link to a state or organization reflects the minimum requisite ‘associative’ dimension.

28.2.3 What the policy element does not mean

In retrospect, the word ‘policy’, adopted from *Tadić* and earlier sources, is an unfortunate label for this term of art. To many ears, the word ‘policy’ connotes something highly formal and official, and adopted at the highest levels. On this connotation, the word implies something more than mere orders: it suggests something more special, momentous, deliberate, and sanctified, more akin to a manifesto, programme, or platform.

This popular connotation makes more understandable the early ICC decisions that assume a fairly elevated, official concept of policy (see sections 28.4 and 28.5). However, *Tadić* and other authorities emphasize that the term does not carry these formalized connotations, and that it is simply synonymous with the requirement of direction, instigation, or encouragement from a state or organization. While the ICC judges must have latitude to fashion their own path, the deviations from the authorities, drafting history, and purpose of the element seem to be both inadvertent and undesirable.

¹⁸ D Luban, ‘A Theory of Crimes against Humanity’ (2004) 29 *Yale Journal of International Law* 85.

The discrepancy between the term's juridical meaning and one of its popular meanings has also aggravated the current controversy. Many scholars who oppose the policy element understand it in a restrictive manner. I agree with them on the substance: a special, deliberately adopted programme is not required by the precedents, nor is it required by any available theory of crimes against humanity. Such a requirement would be normatively undesirable, as it would frustrate many proper prosecutions. If, however, the policy element is understood as a juridical concept and interpreted in accordance with the authorities (including the four features noted), it will fulfil its simple purpose without undermining meritorious prosecutions.

28.2.4 The resulting concept of crime against humanity

The foregoing generates a concept of a crime against humanity. The hallmarks are *atrocenity* (the prohibited acts), *scale*, and *associativity*.¹⁹ But the interplay of the last two hallmarks, which undergird the contextual elements, is more complex than most jurists realize. The obvious level is that there must be a high degree of *either* scale ('widespread') *or* associativity ('systematic'). The more subtle, less appreciated, level is that, for the law of crimes against humanity to make sense,²⁰ there must also be some minimal degree of *both* scale *and* associativity to constitute an 'attack' on a civilian population.

Why must there be a minimal degree of *both* scale *and* associativity? Where there is *insignificant scale*, the crimes cannot be crimes against humanity, even if there is a high degree of associative coordination. For example, a governmentally orchestrated but isolated murder of one dissident is a crime and a human rights violation, but it is not a crime against humanity. Conversely, where there is *no associativity*, the crimes cannot be crimes against humanity even if there is a high degree of scale (i.e. 'widespread'). Unprompted, unconnected acts of individuals are simply 'a high crime rate' and not a crime against humanity.

The task of Article 7(2)(a) is to fulfil this less obvious, less recognized, yet still important function. It is an *in limine* test, screening out contexts that lack the minimum necessary scale or associativity. It avoids the absurdities of a purely disjunctive approach to scale and associativity. The 'multiple acts' requirement screens out crime that has no scale. The 'policy' requirement screens out crime that has no associativity. Once these minimal standards are both met, the prosecutor must then prove a *high degree of either* scale (widespread) *or* associativity (systematic).

¹⁹ I use 'associativity' not in the mathematical sense but as a short form for the requisite associative aspect. The minimal requirement is reflected in the policy element, requiring at least some sort of active or passive encouragement from an organization of human beings. The more stringent version, 'systematic', requires more active planning and coordination, and I believe it may also require an entity with some authority or power. On the conceptual importance of this collective or 'associative' element, see Luban (n 18); K Fisher, *Moral Accountability and International Criminal Law* (Abingdon: Routledge 2012) 22–5; R Vernon, 'Crimes against Humanity: A Defence of the Subsidiarity View' (2013) 26 *Canadian Journal of Law & Jurisprudence* 229.

²⁰ In referring to 'making sense' I am not advancing a *lex ferenda* argument. Coherence is an aspiration of law itself and is a legitimate interpretational consideration. I am aiming to reveal the theory underlying the law.

28.2.5 A word on the approach of the Tribunals

For the purpose of this chapter, it does not matter whether the policy element is or is not recognized in customary law. Great arguments have been advanced on each side of the debate.²¹ My own view is that there is no conclusive argument for either side on the ‘ascending’ analysis (induction from sources); it is therefore the ‘descending’ analysis (deduction from principles) that convinces me.²² But such questions do not affect the thesis of this chapter. If the element is customary law, the ICC should take into account the relevant authorities.²³ If the element is not customary law, and instead is a legislative imposition under Article 7, the Court should still consider as guidance the authorities as to what the policy element requires.

I should also touch briefly upon the *Kunarac* case. In *Kunarac*, the ICTY Appeals Chamber declared rather sweepingly that there is ‘nothing’ in customary law that requires a policy element and an ‘overwhelming’ case against it.²⁴ For many scholars and jurists, this assertion seems to be dispositive of the customary law question. I agree that an assertion by the ICTY Appeals Chamber is entitled to great weight. I would, however, make three quick points. One, this particular assertion, which appeared in a thinly reasoned footnote, should be taken with a pinch of salt; as many scholars have noted, the authorities it cited are actually either silent on or even contrary to the Chamber’s assertion, and many other authorities are simply ignored.²⁵ Two, the Tribunal’s earlier jurisprudence on the policy element remains a helpful guide for the ICC and other jurisdictions that recognize the element.²⁶ Three, the gulf between the

²¹ Against the element, see Mettraux, ‘Crimes against Humanity and the Question of a “Policy” Element’ (n 2) and Halling (n 4). In favour, see C Kreß, ‘On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision’ (2010) 23 *Leiden Journal of International Law* 855; W Schabas, ‘State Policy as an Element of International Crimes’ (2008) 98 *Journal of Criminal Law and Criminology* 953; C Bassiouni, ‘Revisiting the Architecture of Crimes against Humanity: Almost a Century in the Making, with Gaps and Ambiguities Remaining—the Need for a Specialized Convention’ in L Sadat (ed.), *Forging a Crime against Humanity* (Cambridge: Cambridge University Press 2011) 43. I also review some of the often-overlooked authorities in D Robinson, ‘Crimes against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience’ in F Lattanzi and W Schabas (eds), *Essays on the Rome Statute of the International Criminal Court*, vol. I (Ripa di Fagnano Alto: il Sirente, 1999) 139, 152–64.

²² Contrary to occasional claims that there is no support at all for a policy element, there are in fact plenty of authorities (some of which will be discussed in section 28.4). However, the authorities are far from conclusive. Thus, a good lawyer can minimize the pro-policy authorities or alternatively emphasize them. In my view, it is the strength of the ‘descending’ argument, deduced from principles, i.e. avoiding absurdity and reflecting the nature of the crime, which tilts the balance. See *supra*, section 28.2.1. This leads me to foreground rather than background the authorities in support of the element.

²³ Art 21(1)(b) Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (‘ICC Statute’); Art 31(3)(c) VCLT (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

²⁴ Judgment, *Kunarac et al.*, IT-96-23 & IT-96-23/1-A, AC, ICTY, 12 June 2002, para. 98 (emphasis added) (‘*Kunarac Appeal Judgment*’). The reasoning of the Chamber is almost identical to that in G Mettraux, ‘Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda’ (2002) 43 *Harvard International Law Journal* 237, 270–82.

²⁵ For commentary critical of the Chamber’s claims, see Kreß (n 21) 870–1; Schabas (n 21); Bassiouni (n 21); C Jalloh, ‘What Makes a Crime against Humanity a Crime against Humanity?’ (2013) 28 *American University International Law Review* 381, 397–40; Halling (n 4) 829–31.

²⁶ As was correctly noted in Decision Pursuant to Art 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*,

Tribunal approach and the ICC approach may not be as vast as it seems. In its actual analyses of borderline cases, ICTY cases have re-injected requirements that are functionally similar to the policy element,²⁷ in order to avoid absurdity. Thus, the ICTY approach is arguably one of 'crypto-policy': declaring that there is no such element but then reintroducing comparable requirements *sotto voce*.

28.3 Concerns about ICC Jurisprudence

The remainder of this chapter explores problematic trends in early ICC jurisprudence. Section 28.3 discusses general trends, and sections 28.4 and 28.5 will look more closely at two decisions as exemplars: *Gbagbo* and *Mbarushimana*.

28.3.1 Equating 'policy' with 'systematic'

A recurring problem in early ICC jurisprudence is to describe the policy element in the same terms as the 'systematic' threshold.²⁸ For example, a pre-trial decision in the *Katanga* case states that the policy element requires the attack to be 'thoroughly organized', follow a regular pattern, and involve public or private resources.²⁹ But that standard is actually the 'systematic' test from Tribunal jurisprudence.³⁰ Not only is it the test for a different concept, but it is also a somewhat outdated test from early jurisprudence. Nonetheless, other ICC decisions have repeated the 'thoroughly organized' standard.³¹

The confusion is somewhat understandable. Article 7 is complex, referring both to 'policy' and to 'systematic'. The concepts sound similar, and both deal with associativity. But there are two problems with equating the terms.

First, it violates contextual interpretation, because it unnecessarily creates a contradiction within Article 7. The interpretation requires 'systematic' in all cases, contradicting the disjunctive test in Article 7(1). Of course, one might simply shrug and assert that there *is* a contradiction in Article 7. In support of this view, one could cite a passage in the ILC commentary that equated 'policy' with 'systematic'.³² If that passage is

ICC-01/09-19-Corr, PTC II, ICC, 31 March 2010, para. 86. See also Sadat (n 17) 372–3. The early ICTY jurisprudence on policy was a helpful summation of other national and international jurisprudence.

²⁷ I will not develop the argument in this chapter but rather in a later work; for now I will simply gesture to Judgment, *Haradinaj*, IT-04-84, TC, ICTY, 3 April 2008 (events not an 'attack' due to insufficient scale, frequency, structure, organization, or targeting).

²⁸ This problem has already been noticed by other scholars, such as Leila Sadat; see Sadat (n 17).

²⁹ Decision on the Confirmation of Charges, *Katanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-717, PTC I, ICC, 30 September 2008, para. 396 ('Katanga Confirmation Decision').

³⁰ See e.g. Judgment, *Akayesu*, ICTR-96-4-T, TC I, ICTR, 2 September 1998, para. 580 ('Akayesu').

³¹ Decision Pursuant to Art 15 of the Rome Statute of the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14-Corr, PTC I, ICC, 3 October 2011, para. 43; Decision on the Prosecutor's Application Pursuant to Art 58 for a Warrant of Arrest against Laurent Koudou Gbagbo (Public redacted version), *Gbagbo*, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-9-Red, 30 November 2011, para. 37 ('Gbagbo Arrest Warrant Decision').

³² The ILC draft Code refers to 'systematic' as referring to a 'preconceived plan or policy'. ILC draft Code (n 3) 47. That understanding has been echoed in some cases; see e.g. *Kayishema and Ruzidana* (n 4) para. 123.

correct, then there is indeed a contradiction within Article 7.³³ However, the sanguine assumption that Article 7 is contradictory gives up on coherent interpretation far too easily. After all, the very same authorities that introduced the now-hallowed ‘wide-spread or systematic’ test also expressly coupled it with a policy element;³⁴ we should make the intellectual effort to interpret them coherently. Furthermore, as a matter of statutory construction, an interpretation leading to contradiction is to be avoided.

The second reason not to conflate the terms is to conform to past authorities and understandings. Indeed, the most natural and obvious way to avoid internal contradiction is simply to interpret the terms in accordance with the bulk of the authorities. ‘Policy’ can be inferred where the manner of commission shows some sufficient link to a state or organization (including deliberate inaction to encourage crimes).³⁵ ‘Systematic’ entails a higher threshold of associative activity and effort to coordinate crimes.³⁶ In numerous articles, many scholars—whether supportive or critical of the policy element—have warned that ‘policy’ must be a lower threshold than ‘systematic’, (1) in order to follow the authorities, (2) in order not to negate the disjunctive test, and (3) in order not to negate the position of the vast majority of delegations, who wanted a disjunctive test and accepted only a moderate limitation.³⁷ Early ICC decisions have given inadequate consideration to the structure of Article 7 and to the significant literature warning of this issue.

To conform to past authority, the structure of Article 7, and the drafting history, ‘systematic’ must be a stringent test, requiring a high degree of coordination and organizational activity, whereas ‘policy’ must be a more moderate test, satisfied by a more general link to a state or organization. That link may be demonstrated by the improbability that the crimes are coincidental unprompted acts.

³³ Because Art 7(1) would make ‘systematic’ a disjunctive alternative, whereas Art 7(2)(a) would effectively make it a requirement.

³⁴ See for example, *Tadić* and the ILC draft Code, discussed in section 28.2.2.

³⁵ See *supra* (n 15) and accompanying text.

³⁶ More recent Tribunal cases are settling on the test of the ‘organized nature of the acts of violence and the improbability of their random occurrence’. See e.g. Judgment and Sentence, *Nahimana*, ICTR-99-52-A, AC, ICTR, 28 November 2008, para. 920; *Kunarac* Trial Judgment (n 3) para. 429. As I argue here, ‘improbability of random occurrence’ must be not merely part of ‘systematic’, but part of all crimes against humanity, since truly randomly occurring crime is not a crime against humanity. It may also be that the ‘systematic’ test requires a ‘state-like’ entity, with some power or authority; this argument will be developed elsewhere.

³⁷ Ambos and Wirth (n 15) 28 and 31–4 (policy must be less than ‘systematic’, can be passive); Hwang (n 2) 503 (need for future ICC judges to recall ‘policy’ is not ‘systematic’, but merely requires state or organizational involvement; not formal and can be inferred); DeGuzman, ‘The Road from Rome’ (n 2) 372–4 (interpreting ‘policy’ as ‘systematic’ contradicts Art 7 and erases the position of the vast majority of states); T McCormack, ‘Crimes against Humanity’ in D McGoldrick et al. (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart Publishing 2004) 186–9; D Donat-Cattin, ‘A General Definition of Crimes against Humanity under International Law: The Contribution of the Rome Statute’ (1999) 8 *Revue de Droit Pénal et des Droits de l’Homme* 83; W Rückert and G Witschel, ‘Genocide and Crimes against Humanity in the Elements of Crimes’ in H Fischer et al. (eds), *International and National Prosecution of Crimes under International Law* (Berlin: Berlin Verlag Arno Spitz 2000) 71; Sadat (n 17) 359.

28.3.2 Re-introducing 'grounds' of targeting

Second, some early ICC decisions have adopted a proposition that a 'civilian population' should not be a 'limited and randomly selected group of individuals'.³⁸ That proposition originated in ICTY jurisprudence.³⁹ Such a requirement has some value in those jurisdictions that have rejected the policy element, because it helps provide some filter to exclude ordinary random criminal activity.

Nonetheless, it is both unnecessary and undesirable to import this requirement into ICC jurisprudence. It is *unnecessary* because the policy element in Article 7(2)(a) already excludes crimes that are 'random' in the sense of being unprompted, unconnected ordinary crimes.⁴⁰ It is *undesirable* because requiring that a population not be 'randomly selected' re-introduces disputes over *why* particular civilians were targeted. It is a road that eventually leads to concepts of discriminatory grounds, special intent, or specific purpose.⁴¹ These are not appropriate in crimes against humanity.⁴² When a state or organization attacks civilians, it can be a crime against humanity even if the victims are selected randomly. For example, a state or organization might have a policy of attacking civilian victims at random in order to inflict maximal terror; this is still a crime against humanity. Or consider slavery, the earliest crime against humanity.⁴³ If a slavery ring starts to enslave human beings, capturing whomever it can, the victims may be 'randomly selected', but this does not and should not prevent it from constituting a crime against humanity under the ICC Statute.

Of course, victims will often be an identifiable group in some way, and this can be a factor that can help prove a policy to attack a civilian population. But, apart from the crime of persecution, it is not a requirement that the victim population share characteristics. The essence of a crime against humanity lies in the scale and associative dimension of the attack, not the identity of the victims.⁴⁴ This differing focus distinguishes crimes against humanity from genocide.

³⁸ See e.g. Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, ICC, 15 June 2009, paras 76–7 (distinguishing features, not randomly selected) ('Bemba Confirmation Decision'); Decision Pursuant to Art 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya (n 26) para. 81 (must be distinguished by nationality, ethnicity, or other distinguishing features).

³⁹ See e.g. *Kunarac* Appeal Judgment (n 24) para. 90; Judgment, *Martić*, IT-95-11-T, TC I, ICTY, 12 June 2007, para. 49; Judgment, *Milutinović* et al., IT-05-87-T, TC, ICTY, 26 February 2009, para. 145.

⁴⁰ Art 7(2)(a) does include the word 'population', which connotes an idea of scale. However, courts have already deduced the 'widespread or systematic' test as well as the 'policy' requirement from 'population'; thus there is no need to read still more into it. (See e.g. *Tadić* Trial Judgment (n 3) paras 644–6, 648, and 653.)

⁴¹ To see where such an approach eventually leads, see the *Bowoto* case, discussed in section 28.5.3.

⁴² A requirement of discriminatory grounds was considered and rejected in the drafting of Art 7: see e.g. Von Hébel and Robinson (n 8) 93–4; Boot et al. (n 4) 174; McCormack (n 37) 186–8. It is also rejected by the ICTY Appeals Chamber in Judgment, *Tadić*, IT-94-1-A, AC, ICTY, 15 July 1999, paras 282–305.

⁴³ R Clark, 'History of Efforts to Codify Crimes against Humanity' in Sadat (ed.), *Forging a Convention* (n 2) 10.

⁴⁴ Luban (n 18).

28.4 The *Gbagbo* Adjournment Decision: Direct Proof of Formal Adoption?

The case against Laurent Gbagbo, the former President of the Côte d'Ivoire, concerns large-scale killings, assaults, and rapes committed by pro-Gbagbo state forces and youth militia against civilians who were perceived to support the rival candidate to Gbagbo.⁴⁵ The case presented by the prosecutor focused on 4 incidents, involving over 294 crimes against civilians, and also referred to 41 other incidents. In June 2013 a majority of Pre-Trial Chamber I found the evidence inadequate and adjourned the confirmation hearing to allow the prosecutor to collect and present additional evidence.⁴⁶ The decision raises many important issues; this chapter concerns only the crimes against humanity analysis. Some of the types of evidence requested by the majority are cause for concern, as they are not required for a crime against humanity prosecution.

To establish the policy element, the prosecutor offered a significant amount of direct evidence (witnesses, police records, photographs, videos) as well as indirect evidence. The evidence attested to repeated attacks by pro-Gbagbo forces against civilians supportive of his political opponent; the failure of police to intervene; the participation of police in crimes; preparation for atrocities, such as policemen bringing condoms to the site where they raped female protestors; measures to identify supporters of the opposition; public statements of leaders of the pro-Gbagbo inner circle; internal instructions; prior warnings that unarmed demonstrators would be killed; and witness reports that perpetrators indicated that they were targeting victims because of their opposition to Gbagbo.⁴⁷

Nonetheless, the majority was not satisfied of a policy based on this evidence. The majority requested additional evidence about specific meetings at which the policy was adopted and its internal promulgation; for example:

How, when and by whom the alleged policy/plan to attack the ‘pro-Outtara civilian population’ was adopted, including specific information about meetings at which this policy/plan was allegedly adopted, as well as how the existence and content of this policy/plan was communicated or made known to members of the ‘pro-Gbagbo forces’ once it was adopted.⁴⁸

The decision also requested additional evidence about the coordination, structure, and operating methods of the ‘inner circle’ of the pro-Gbagbo forces.⁴⁹

⁴⁵ See Document amendé de notification des charges, *Gbagbo, Situation in Côte d'Ivoire*, ICC-02/11-01/11-184-Anx1-Red (available in French only), OTP, ICC, 13 July 2012 ('*Gbagbo DCC*'). The attacks overall involved over 1,300 victims; the 4 charged incidents involved over 294 crimes against civilians.

⁴⁶ See *Gbagbo* Adjournment Decision (n 1).

⁴⁷ See e.g. *Gbagbo DCC* (n 45) paras 21, 37, 40, 44, 50, and 81–4.

⁴⁸ *Gbagbo* Adjournment Decision (n 1) para. 44.

⁴⁹ Ibid. For the evidence that was provided on the pro-Gbagbo forces, the inner circle, its membership, its control, and its meetings, see *Gbagbo DCC* (n 45) paras 59–86.

In defence of the decision, it can be said that these were merely 'requests'. Nonetheless, by requesting such specific evidence, after declaring the proffered evidence to be inadequate, and not indicating any alternative way to satisfy it, the majority appears to have in mind heightened legal and evidentiary requirements for the policy element.

One problem with the majority's approach is that it reflects a formalized, bureaucratic conception of the policy element: the requests relate to specific meetings at which a policy was 'adopted', dates of such meetings,⁵⁰ inner workings, and internal transmission of the policy to the rank and file. That conception is somewhat understandable, given that one common sense definition of the word 'policy' does indeed connote something official and formally adopted, perhaps by a Cabinet or board of directors, and then promulgated to the levels below. Nonetheless, as will be explained, this is not and has never been the meaning of the term of art 'policy' in crimes against humanity authorities. Nor does the *theory* of crimes against humanity require a restriction to crimes that were bureaucratically endorsed at the highest level. Indeed, such a conception would not reflect the diverse types of organizations that may orchestrate crimes.

A second, related problem with the majority's approach is that it is epistemologically over-cautious and rarified. The majority indicated its reservations about the inferences it was asked to draw,⁵¹ and requested direct evidence of formal adoption. However, the crucially important point is that a policy will almost always be a matter of inference. The request for direct evidence of formal adoption of a policy is contrary to past jurisprudence, which consistently emphasizes that a policy need not be formally adopted and can be inferred from the manner in which the acts occur. It is understandable for a diligent judge to ask, 'How can I be sure there is a state or organizational policy unless I have proof of the adoption of the policy?' The answer is that we don't need the 'smoking gun'. We can prove '*P*' (policy) by proving the implausibility of 'not-*P*'. In other words, we can infer the policy element from the sheer absurdity of the rival hypothesis, which is that these hundreds of crimes, committed by pro-Gbagbo forces against anti-Gbagbo forces, while making statements indicative of coordination, were actually just a coincidence. It is implausible that this was a simple 'crime wave' of individual acts occurring without any state or organizational coordination.

My legal analysis will proceed in two steps. First, I will start with the authorities on the policy element, because many of them (especially domestic jurisprudence) will be unfamiliar to most readers. It will be useful to show that my claim, that the policy element is a simple threshold, is not an invention or strained reading but rather a well-established feature. Second, I will then look more methodically at the applicable law under the ICC Statute.

28.4.1 The general authorities on the policy element

The purpose of the policy element has been well explained by the Supreme Court of Peru in the *Fujimori* case. The policy element

requires only that *the casual acts of individuals acting on their own, in isolation, and with no one coordinating them, be excluded ... Such common crimes, even when committed*

⁵⁰ *Gbagbo* Adjournment Decision (n 1) para. 44.

⁵¹ *Ibid.*, para. 36.

on a widespread scale, do not constitute crimes against humanity, unless they are at least connected in one way or another to a particular State or organizational authority: they must at least be tolerated by the latter.⁵²

This corresponds perfectly to the purpose of the element in the Rome Statute, in the *Tadić* Decision, and in the ILC draft Code, as noted in section 28.2.

Several features of the policy element reinforce and serve this modest purpose, and are consistently emphasized in the jurisprudence. I will review here the two features most pertinent to the *Gbagbo* Decision: one, policy need not be formalized, need not be stated expressly, and need not be defined precisely, and two, a policy may be inferred from the manner in which the acts occur.

Early ICTY decisions (prior to the subsequent rejection of the policy element in *Kunarac*⁵³) provide helpful guidance on the element and affirm these features. The seminal *Tadić* Decision, on which Article 7(2)(a) was based, emphasized that the ‘policy need not be formalized and can be deduced from the way in which the acts occur’.⁵⁴ Other cases affirm that the ‘policy need not be explicitly formulated’⁵⁵ and that it need not be conceived at the highest levels.⁵⁶ The *Blaškić* Decision is particularly instructive. In addition to confirming that ‘[t]his plan...need not necessarily be declared expressly or even stated clearly and precisely’,⁵⁷ the decision provides a valuable list of factors from which one may infer a policy, including, *inter alia*, repetition of the acts, the scale of the acts, and the overall political background.⁵⁸

Other jurisdictions have affirmed these features. Prior to the *Kunarac* Decision, ICTR cases consistently held that a policy need not be adopted formally.⁵⁹ Likewise, the SCSL has had little difficulty inferring a policy from the manner in which acts occur. For example, in the *Fofana (CDF)* case, the SCSL held, ‘[i]n view of these findings of fact, taken as a whole, the Appeals Chamber is of the view that the criminal conduct against those civilians was neither random nor isolated acts but was rather perpetrated pursuant to a common pattern of targeting the civilian population’.⁶⁰

Of course, since the *Kunarac* Decision, these Tribunals now hold that the policy element is not required.⁶¹ Nonetheless, the earlier cases are helpful statements about the features of the policy element and conform with other authorities.⁶²

⁵² *Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases*, Case No. AV 19-2001, Sala Penal Especial de la Corte Suprema, 7 April 2009 (Peru), para. 715 (citing *Kai Ambos*); translation available (2010) 25 *American University International Law Review* 657 (emphasis added).

⁵³ *Kunarac* Appeal Judgment (n 24) para. 98.

⁵⁴ *Tadić* Trial Judgment (n 3) para. 653.

⁵⁵ See e.g. *Kupreškić* (n 15) para. 551; Judgment, *Kordić and Čerkez*, IT-95-14/2-T, TC, ICTY, 26 February 2001, para. 181.

⁵⁶ *Blaškić* (n 14) para. 205.

⁵⁷ *Ibid.*, para. 204.

⁵⁸ *Ibid.*

⁵⁹ See e.g. *Akayesu* (n 30) para. 508; Judgment and Sentence, *Rutaganda*, ICTR-96-3-T, TC I, ICTR, 6 December 1999, para. 68; Judgment and Sentence, *Musema*, ICTR-96-13-T, TC I, ICTR, 27 January 2000, para. 204. *Akayesu* and later cases note that a policy need not be adopted formally by a state. It is now well accepted that a policy may also be that of a non-state organization.

⁶⁰ Judgment, *Fofana and Kondewa*, SCSL-04-14-A, AC, SCSL, 28 May 2008, para. 307 (‘CDF case Appeal Judgment’).

⁶¹ *Kunarac* Appeal Judgment (n 24) para. 98; Judgment and Sentence, *Semanza*, ICTR-97-20-T, TC III, ICTR, 15 May 2003, para. 329 (citing *Kunarac*); Judgment, *Fofana*, SCSL-04-14-T, TC I, SCSL, 2 August 2007 (citing *Kunarac*) para. 113.

⁶² See *supra*, section 28.2.4, and see discussion in Sadat (n 17) 372–3.

Expert bodies have also affirmed that the policy element is not a difficult threshold. For example, the 1994 Commission of Experts on crimes in former Yugoslavia, which recognized the policy element,⁶³ inferred the policy from the circumstances: ‘There is sufficient evidence to conclude that the practices of “ethnic cleansing” were not coincidental, sporadic or carried out by disorganized groups or bands of civilians who could not be controlled by the Bosnian-Serb leadership.’⁶⁴ Even more pertinently and valuably, the Commission noted:

It should not be accepted at face value that the perpetrators are merely uncontrolled elements, especially not if these elements target almost exclusively groups also otherwise discriminated against and persecuted. Unwillingness to manage, prosecute and punish uncontrolled elements may be another indication that these elements are, in reality, but a useful tool for the implementation of a policy of crime against humanity.⁶⁵

National courts have also recognized that a policy may be implicit and can be inferred from circumstances. For example, a court in Bosnia and Herzegovina, applying a provision identical to Article 7(2)(a) in a crime against humanity case, provided a helpful list of factors from which to infer policy:

The following factual factors are considered with regard to establishing the existence of a policy to commit an attack: *concerted action* by members of an organization or State; *distinct but similar acts* by members of an organization or State; *preparatory acts* prior to the commencement of the attack; prepared acts or steps undertaken during or at the conclusion of the attack; the existence of political, economic or other strategic *objectives* of a State or organization furthered by the attack; and in the case of omissions, *knowledge of an attack or attacks and willful failure to act*.⁶⁶

Similarly, in *Sexual Minorities Uganda v Scott Lively*,⁶⁷ a US court held, ‘one ought to look at these atrocities or acts in their context and verify whether they may be regarded as part of an overall policy or a consistent pattern of inhumanity, or whether they instead constitute isolated or sporadic acts of cruelty or wickedness’.⁶⁸ While this was a civil law case, it relied on criminal law authorities, and on this point the court referred to the late Antonio Cassese.

An Argentine court in the famous *Junta* trial demonstrates with admirable clarity how policy is inferred from the improbability of coincidence:

The operative system put in practice... was substantially identical in the whole territory of the Nation and prolonged over time. It having been proved that the acts were

⁶³ Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) (n 15) para. 84.

⁶⁴ Ibid., para. 142. See also para. 313, inferring policy behind ethnic cleansing, rape, and sexual assault, based on frequency of occurrence and the consistent failure to prevent or punish such crimes.

⁶⁵ Ibid., para. 85.

⁶⁶ Verdict of 28 February 2008, *Mitar Rašević and Sava Todović*, Case No. X-KR/06/275, Court of Bosnia and Herzegovina, 28 February 2008, available at <<http://www.legal-tools.org/en/doc/6a28b5/>> accessed 28 April 2014 (emphasis added).

⁶⁷ 2013 US Dist. LEXIS 114754.

⁶⁸ See also *Doe v Alvaro Rafael Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004) para. 260 (same quote).

committed by members of the armed and security forces, vertically and disciplinarily organized, *the hypothesis that this could have occurred without express superior orders is discarded.*⁶⁹

Similarly, a more recent case against Jorge Rafael Videla held:

It having been proved that the events were directly committed by members of the army, the State Intelligence Secretariat, the Buenos Aires Provincial Police...organised vertically and disciplinarily, it does not appear probable—in this stage—that they could have been committed without orders from hierarchical superiors.⁷⁰

The same approach of inferring policy was also taken in the recent Guatemalan case against General Rios Montt.⁷¹

This jurisprudence is crucially important for the viability of ICC prosecutions of crimes against humanity. The policy element does not require proof of internal meetings and communications. It is satisfied when the circumstances render implausible the alternative hypothesis that the crimes against civilians were coincidental, unprompted acts of individuals on their own criminal initiatives. The authorities repeatedly draw the contrast between crimes with state or organizational support or encouragement versus crimes that are ‘haphazard’, ‘coincidental’, ‘random’, ‘sporadic’, and carried out by ‘uncontrolled and uncontrollable elements’.

Some ICC chambers have correctly noted some aspects of this jurisprudential tradition, for example, that a policy need not be formalized and need not be explicitly defined.⁷² Unfortunately, because of the tendency to conflate ‘policy’ with ‘systematic’, ICC chambers have not yet grappled with the differences between the two, these features of the policy element, or the structure of Article 7.

⁶⁹ Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Buenos Aires (C.Fed), 9/12/1985, ‘Causa No. 13/84 (Juicio a las Juntas Militares)’, Sentencia 9 December 1985, Second Part, paragraph 3(c) available at <<http://www.derechos.org/nizkor/arg/causa13/cap20.html>> accessed 28 April 2014 (emphasis added).

⁷⁰ Causa No. 1.285/85, ‘Videla, Jorge Rafael y otros s/presunta infracción a los arts. 146, 293 y 139, inc. 2do. del Código Penal’, Juzgado Federal de San Isidro, 13 July 1998.

⁷¹ ‘[T]he army carried out these massacres using the same pattern of conduct, which is verified by the actions carried out in each of the communities. This circumstance is very important because it is evidence of prior planning and the implementation of that planning. Why do we say this? It is important because, as has been shown, the violent acts against the *Íxil* [people] was not a spontaneous action but the concretization of previously prepared plans which formed part of a state policy towards the elimination of that group.’ *Tribunal de Alto Riesgo A, Sentencia C-01076-2011-00015* (Rios Montt, Rodriguez Sanchez) Of. 2o, of 2 May 2011, Folio 697 available at <<http://paraqueconozca.blogspot.com/>> accessed 28 April 2014; judgment annulled pending appeal against the rejection of a defence motion to recuse two trial judges: Corte de Constitucionalidad, 20 May 2013, decision available at <<http://www.right2info.org/resources/publications/constitutional-court-judgment-5.20.2013>> accessed 28 April 2014.

⁷² Pre-Trial Chamber II held in the *Bemba* confirmation decision that the ‘policy need not be formalised. Indeed, an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion’. *Bemba Confirmation Decision* (n 38) para. 8. Pre-Trial Chamber I made the identical observation in the *Katanga* confirmation decision. *Katanga Confirmation Decision* (n 29) para. 396: ‘The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.’ And Pre-Trial Chamber III held in the *Gbagbo* arrest warrant decision that a policy ‘need not be explicitly defined or formalised’. *Gbagbo Arrest Warrant Decision* (n 31) para. 37.

28.4.2 The policy element under ICC applicable law

The ICC must follow its own applicable law, and thus any consideration of the interpretive tradition of other international tribunals, national courts, and expert bodies must take its proper place within that analysis. Accordingly, we will now look at the applicable law (Article 21 of the ICC Statute), starting with the Statute itself and its text, context, and object and purpose.

First, the 'ordinary meaning' of the term 'policy' does not point one way or the other, because the word itself is amenable to either the formalistic or the non-formalistic understanding. The term 'policy' can certainly be understood as referring to something official and formally adopted. Yet it can also be understood less formalistically as a 'course of action adopted as expedient'.⁷³ As 'policy' is a legal term with a significant interpretive history, its lay meaning will be less instructive, and other interpretive guides, such as past authorities, will be more important.⁷⁴

Second, *contextual* interpretation requires us to consider the structure of Article 7. In order to avoid a contradiction between Article 7(1) and Article 7(2)(a), 'policy' *must* entail a threshold less demanding than 'systematic' (just as 'multiple' must be less demanding than 'widespread'). Otherwise, the disjunctive nature of the widespread or systematic test would be negated and the 'widespread' test would be redundant. Indeed, the problem with the *Gbagbo* Decision is significantly worse than the cases equating 'policy' with 'systematic'.⁷⁵ It is worse because requiring direct proof of formal adoption actually renders 'policy' even *more* demanding than 'systematic'. This not only negates the disjunctive test, but it also completely overthrows the relationship between Articles 7(1) and 7(2)(a). It makes the 'tail' (the minor test) wag the 'dog' (the major test). Instead, the coherence of Article 7 must be preserved, by recognizing the established features of the policy element, including that policy may be implicit and can be inferred from the manner of commission of the crimes.

Third, sound legal interpretation must consider the interpretation in the relevant precedents and authorities. One could try to argue that the Court should not consider other authorities because the Statute provides its own self-contained distinct regime. However, Article 7 refers to general concepts of international criminal law and was intended to reflect customary law.⁷⁶ Thus, it is appropriate to consider other authorities. Two interpretive rules tell us to look at other authorities. First, basic contextual interpretation requires it (see the principle of systemic integration in Article 31(3)(c) of the VCLT, and discussion by the ILC of the need to consider the broader legal

⁷³ *Oxford English Dictionary* Vol. XII 2nd edn (Oxford: Oxford University Press 1989) 27, provides this as the 'chief living sense' of the term. See also DeGuzman, 'The Road from Rome' (n 2) 374, quoting an American dictionary to similar effect.

⁷⁴ As an example of the limits of 'ordinary meaning' for terms that have a jurisprudential history, one might try to argue that the ordinary meaning of 'attack' entails violence, but that argument would be overwhelmed by the long jurisprudential history of including non-violent forms of mistreatment.

⁷⁵ See *supra*, section 28.3.1.

⁷⁶ See e.g. Report of the Preparatory Committee on the Establishment of an International Criminal Court (1996) vol. I, UNGAOR, 51st Session (1996) Supp. No. 22 (A/51/22) paras 51–4; Von Hebel and Robinson (n 8) 91; Sadat (n 17) 372–3.

environment).⁷⁷ Second, Article 21 calls for consideration not only of treaties but also of ‘principles and rules of international law’, i.e. customary law.⁷⁸ As was shown in the previous section (28.4.1), the authorities show that policy may be implicit and can be inferred from the manner of commission of the acts.

Fourth, the object and purpose of the policy element also favours the standard interpretation. As was discussed in section 28.2, the purpose of the policy element is to exclude random, ‘ordinary’ crime, i.e. the crimes of diverse individuals acting on their own unconnected criminal designs. That purpose is fully served by the established features of the policy element. To inject additional requirements is to go beyond the purpose of the limitation and thus to undermine victim protection for no teleological reason. Nor does following the standard interpretation involve any violation of fundamental principles such as the principle of legality or culpability.

Note that I am not adopting a facile approach to teleological interpretation that assumes one single purpose (maximizing protection of victims), and then uses that presumed purpose to overrun every other interpretive guide.⁷⁹ Victim protection is of course a general purpose of the definition of crimes, but I am also grappling specifically with the purpose of the *limitation* (the policy element). Moreover, I am not arguing that the Court should ignore the authorities in order to better protect victims. On the contrary, I am arguing that the Court should *follow* the authorities, and that doing so is also supported by contextual and teleological considerations.

Fifth, the drafting history also supports the standard interpretation; however, it is unnecessary to have recourse to drafters’ intent given the decisiveness of the foregoing considerations. The proposal introducing Article 7(2)(a) was accompanied by express quotes of the passages of *Tadić* and the ILC draft Code that highlighted the non-formality and inferability of the policy element, and the text footnoted directly to relevant paragraphs. At the Rome Conference, the policy element was quite controversial, particularly because of fears that ICC judges might over-interpret it, by equating ‘policy’ with ‘systematic’, by applying a formalistic/bureaucratic concept, or by requiring ‘proof of secret plans’.⁸⁰ Delegations supporting the policy element repeatedly gave the assurance that it was a modest limitation and would not have these deleterious effects.⁸¹ By requesting proof of internal plans, the *Gbagbo* Decision would bring about the scenario that no constituency wanted.

These issues were discussed again in the drafting of the Elements of Crimes. The draft Elements of Crimes at one point included a proviso that a policy may be inferred from the manner in which the acts occur, but this was removed on the grounds that it

⁷⁷ ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission’, UN Doc A/CN.4/L.682 (13 April 2006) paras 410–23, discussing Art 31(3)(c) of the VCLT and its role in reducing fragmentation.

⁷⁸ M deGuzman, ‘Article 21’ in Triferrer, *Commentary* (n 4) 701, 707–8.

⁷⁹ D Robinson, ‘The Identity Crisis of International Criminal Law’ (2008) 21 *Leiden Journal of International Law* 925, 933–6.

⁸⁰ See Hwang (n 2) and DeGuzman, ‘The Road from Rome’ (n 2).

⁸¹ The common ground between these two positions is that requiring proof of internal plans would be undesirable.

was unnecessary.⁸² Similarly, the proposition that a policy need not be formally adopted ‘was considered by the majority [of delegations] to be sufficiently well-established that it did not need to be repeated’.⁸³

Thus, a ‘drafters’ intent’ argument could be advanced to support the same conclusions. However, it is unnecessary to do so. Drafting history is only a subsidiary means of interpretation. In this case the ‘drafters’ intent’ was merely that the ICC judges should follow the relevant authorities. That is already a basic principle of interpretation.

As a final observation, to require direct proof of adoption of a policy is also conceptually and practically undesirable. There is no normative reason to suggest that the law of crimes against humanity should only be concerned with organized atrocities if they are formally approved at the highest levels of an organization. The orderly, clinical vision of a formal policy being ‘adopted’ at specific meetings and then transmitted to implementers will often not correspond to how crimes against humanity are unleashed. When members of an organization start to direct or encourage crimes against a civilian population, they often do so in an organic, implicit, and evolving manner, and often deliberately avoid creating a record. Furthermore, the modern reality of crimes against humanity, which may involve different forms of human organization in different cultural contexts, cannot assume a bureaucratic organizational model.⁸⁴ The established features of the policy element in prior jurisprudence provide the appropriate flexibility.

28.4.3 Lessons from the Gbagbo adjournment Decision

The test for an ‘attack’ is not as difficult as some early ICC cases are making it. International and national courts have had little difficulty inferring policy from the circumstances surrounding crimes.⁸⁵ ICC jurisprudence should take cognizance of the well-established features of the policy element, which will conform to national and international jurisprudence, provide a coherent interpretation of Articles 7(1) and 7(2)(a), and fulfil the purpose of the policy element.

Policy can be inferred from the improbability of the competing hypothesis of coincidence, i.e. that all these crimes, committed by members of pro-Gbagbo forces against Gbagbo opponents, occurred without any state or organizational support or

⁸² R Lee et al. (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers 2001) 77. The provision was based on a proposal by Canada and Germany, which stated: ‘The existence of a policy may be inferred on the basis of the available evidence as to the facts and circumstances. It is not necessary to prove that a policy has been formally adopted’. UN Doc PCNICC/1999/WGEC/DP.36 (23 November 1999).

⁸³ Lee (n 82) 77.

⁸⁴ For similar concerns see T Hansen, ‘The Policy Requirement in Crimes against Humanity: Lessons from and for the Case of Kenya’ (2011) 43 *George Washington International Law Review* 1, esp. 37; Jalloh (n 25).

⁸⁵ For some further illustrations of inference of policy from fact patterns, see Blaškić (n 14) paras 467–8; CDF case Appeal Judgment (n 60) para. 307; Sudrajat, Judgment, No. 11/PID.B/HAM.AD HOC/2002/PN.JKT.PST (HRCI, Dec. 27, 2002) (Indonesia); *B v Refugee Appeals Tribunal & Anor* [2011] IEHC 198 (05 May 2011) (Ireland) paras 29–34; *Attorney General v Tamil X* [2010] NZSC 107; [2011] 1 NZLR 721 (27 August 2010) (New Zealand) para. 49; *SRYY v Minister for Immigration and Multicultural Affairs* [2006] AATA 320 (5 April 2006) (Administrative Appeals Tribunal of Australia) paras 100–7.

encouragement. Evidence of repeated attacks of significant scale by state forces and militia against supporters of a political rival, coupled with evidence of police participation and inaction, preparation for atrocities, public statements, prior warnings, and statements of perpetrators made during attacks, have been emphasized in national and international cases. Once ‘multiple’⁸⁶ crimes have been proven as well as the policy element, the simple threshold for ‘attack’ under Article 7(2)(a) is met. Analysis must then move to the more exacting questions of whether the attack was ‘widespread or systematic’.

28.5 *Mbarushimana*: Distracted by Ulterior Purposes?

Another example of a problematic approach to the policy element appears in the *Mbarushimana* case. Callixte Mbarushimana was a leader within the FDLR, an armed group in the DRC.⁸⁷ A majority of Pre-Trial Chamber I declined to confirm the charges against him.⁸⁸ The decision is best known for its interpretation of principles of liability under Article 25: the majority was not satisfied that the accused bore personal culpability under Article 25 for the war crimes carried out by FDLR troops.⁸⁹ More important for present purposes is the conclusion of the majority (with Presiding Judge Monageng dissenting) that crimes against humanity had not been established.⁹⁰ While the decision was in general well reasoned, I will outline here some problems with the majority’s approach to the policy element.

The crimes against humanity charges were supported by evidence of a series of violent attacks by FDLR troops on villages, involving murder, rape, torture, and persecution of civilians. As in *Gbagbo*, the prosecutor did not merely rely on the manner of commission of the acts (from which other courts have inferred a policy). The prosecutor brought a range of direct and indirect evidence. Thus, evidence of policy included the scale and repetition of attacks on villages by FDLR troops; insider testimony from multiple witnesses attesting to orders to attack civilians; a copy of an alleged written order to attack civilians; a transcript of an alleged radio order; and a report of a Special Rapporteur on the strategy of attacking civilians.⁹¹ The testimony of FDLR members described orders, *inter alia*, ‘to carry out attacks that will make the civilian population suffer’,⁹² ‘to burn houses of civilians’,⁹³ to ‘set fire to houses without regard for the civilians “because the civilians were our enemies as well”’,⁹⁴ ‘to go in there and destroy everything’,⁹⁵ and, that ‘everything that has breath shouldn’t be there at all’, meaning that the place would have to be ‘annihilate[d]’.⁹⁶

⁸⁶ The term ‘multiple’ must be lower than ‘widespread’, not only to follow the ordinary meaning of the terms but also to follow the structure of Art 7. This chapter does not analyse the threshold for ‘multiple’, but an event involving several dozens of atrocities surely qualifies as ‘multiple crimes’.

⁸⁷ *Mbarushimana* Confirmation Decision (n 1) para. 295. ⁸⁸ Ibid.

⁸⁹ An appeal by the OTP, focusing on the assessment and evaluation of evidence, was dismissed by the Appeals Chamber. 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’, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-514 OA 4, AC, ICC, 30 May 2012.

⁹⁰ At the confirmation stage, the requisite standard is ‘substantial grounds to believe’.

⁹¹ *Mbarushimana* Confirmation Decision (n 1) paras 242–67. ⁹² Ibid., para. 248.

⁹³ Ibid., para. 250.

⁹⁴ Ibid., para. 254. ⁹⁵ Ibid., para. 254.

⁹⁶ Ibid., para. 253.

Notwithstanding this evidence, the majority was still not convinced of a policy to attack a civilian population.⁹⁷ As the following discussion will show, the majority had reasons for discounting some pieces of evidence, but nonetheless its approach was inappropriately stringent. First, its conclusions are incongruous with its own factual findings elsewhere in the decision, that the FDLR ordered and directed attacks on civilians. Second, the majority adopted an inexplicably rigorous approach to policy, assessing each piece of evidence of policy in isolation without considering the totality. Third, and most problematically, the majority focused on the ulterior purpose of the policy, and treated evidence that the FDLR deliberately targeted civilians for reasons such as vengeance or retaliation as incompatible with a policy.

28.5.1 Incongruity of legal conclusion and factual findings

The most disconcerting aspect of the decision is the incongruity of the conclusion that there was no ‘attack directed against a civilian population’ with the clear findings of fact made elsewhere in the same decision. For example, on its analysis of war crimes, the majority was satisfied

that the FDLR soldiers were directly ordered to take revenge on both civilians and soldiers, as the name of the operation, i.e. ‘eye for eye’, also suggests. The orders for the attack were clear: ‘everything which has breath shouldn’t be there at all’. Orders were given: ‘destroy everything, because everybody who was considered as [their] enemy’, ‘we don’t want to hear anything, anybody there, anything in Busurungi’, and ‘everything that moves should be killed’. The soldiers were then expected to kill anyone they met because the enemy had not shown any pity on them. They were also ordered to destroy everything in the village, and to ‘annihilate the whole place...as a sign to...Congolese’.⁹⁸

...

[T]he evidence demonstrates that...even after the FARDC and Mai Mai were chased away, civilians were killed by being directly fired upon, cut into pieces with hooks and machetes or burnt alive inside their homes. Witness 561 saw several corpses of civilians, including women and children. Witness 683 saw civilians being slaughtered and about forty dead bodies lying in the village; the burnt bodies were too many to count. Witness 562 saw civilians being killed with machetes or burned in houses after the Congolese soldiers had been chased away from the village... Witness 562...saw around thirty-five or forty corpses of civilians, including women and children, some of which were burnt, cut into pieces or with skulls broken... Witness 650 counted seventy-nine bodies of adults and children who had been burnt alive in their houses, had gunshot wounds or had been cut with machetes.⁹⁹

These findings satisfy every aspect of Article 7(2)(a). As for a ‘course of conduct involving multiple commission of acts referred to in paragraph 1’, the Chamber found in

⁹⁷ Ibid., paras 265–6. The decision is all the more striking given that the standard applicable at the confirmation stage is merely ‘substantial grounds to believe’.

⁹⁸ Ibid., para. 144. ⁹⁹ Ibid., para. 149.

various incidents that members of the FDLR troops carried out numerous acts of murder, rape, mutilation, and cruel treatment, among other crimes. As for a ‘state or organizational policy to commit such attack’, one could infer the policy from the repeated pattern of attacks on villages by FDLR forces, but it is not even necessary to do so, since the Chamber found that *orders* were issued to carry out the killings and attacks on civilians. Indeed, the Chamber specifically ascribed the attacks to the FDLR and held that the attacks were launched by the FDLR with the aim of targeting civilians.¹⁰⁰ A policy cannot be more clear.

The only way to explain this incongruity between the factual findings and the legal conclusion is that the majority must have perceived some unarticulated additional elements. There are two possibilities. One possibility is that the *Mbarushimana* majority was influenced by the popular understanding of ‘policy’ as requiring something more special, more formal, or more momentous than orders or direction, such as formal adoption at a high level (see section 28.2.3). This impression likely underlies the reasoning to some extent, because the Chamber’s findings that the FDLR issued orders to kill civilians ought to have been paradigmatic proof of policy. The ‘formalized policy’ issue is analysed in section 28.4. The impression of policy as something special, formal, and stringent would also explain the majority’s reticent approach and the conflict with its war crimes analysis. This reticence is discussed in the following section. The second possible explanation is the majority’s preoccupation with the *purpose* of the policy. However, as I will argue in section 28.5.3, once it is shown that an organization is deliberately murdering civilians, it does not matter *why* the organization is doing so.

28.5.2 Reticence to find policy

As noted in the previous section, the majority found in its war crimes analysis that the FDLR had issued orders to attack civilians and carry out various atrocities, and that the FDLR directed attacks against a civilian population. Nonetheless, in its crimes against humanity analysis, the majority altered course and became much more reticent to find orders. The majority tended to look at each piece of evidence in isolation, finding each piece inadequate, without looking at all the evidence in its totality.

First, with respect to the insider statements testifying to orders to commit prohibited acts against civilians, the majority found that in many cases the statements only came after prompting from the investigator.¹⁰¹ It is perfectly appropriate for a Pre-Trial Chamber to be vigilant about investigative practices and ‘tunnel vision’ and to discount evidence accordingly.¹⁰² Nonetheless, as Judge Monageng argued in dissent, the witness evidence was still highly probative. The witnesses were not coached; once asked about orders, they freely furnished additional details, and the details were independently

¹⁰⁰ Ibid., para. 151.

¹⁰¹ Ibid., paras 248, 251, 255, and 257.

¹⁰² Of course, investigators must be able to steer discussion towards the presence or absence of particular elements of crime pertinent to a particular case. It seems that the majority was concerned that some investigators were asking questions in an aggressive style that did not reflect the principle of objectivity. Ibid., para. 51, and see also Decision on the ‘Prosecution’s Application for Leave to Appeal the “Decision

corroborating.¹⁰³ Moreover, the majority had already found, in its war crimes analysis, that the FDLR had indeed issued orders to attack civilians and was directing attacks on civilian populations.

Second, a written transcript of orders ‘to attack civilian populations and hospitals’, reported by a member of the UN Group of Experts as read out by the radio operator, was regarded by the majority as indirect and insufficient evidence.¹⁰⁴ Such evidence is indeed indirect, and would be insufficient on its own. However, if assessed along with the totality of the evidence, it was further confirmation that the crimes were not spontaneous criminal initiatives of individuals.

Third, the majority found that a series of incidents and attacks by the FDLR against civilians was not a sufficient pattern to show a policy.¹⁰⁵ The majority was convinced of only 5 of the 25 incidents alleged by OTP, which left it with 5 incidents over a 6-month period. One could quite defensibly argue that five incidents over six months is insufficient to infer a policy, because such a pattern could also be consistent with an organization making diligent efforts to restrain crimes, which might be the spontaneous acts of a few ‘bad apples’. However, such a position becomes unsustainable in the light of the majority’s earlier finding that there were *orders* to commit the crimes.

Fourth, a report by Philip Alston, Special Rapporteur on Extra-Judicial Executions, on FDLR’s strategy of deliberately attacking civilians, was further corroborating evidence. Nonetheless it was also dismissed, because ‘[a]t best, this report stresses that the FDLR campaign was directed towards the intimidation of and exaction of revenge on those civilians accused of supporting [the opposing side].’¹⁰⁶ As will be discussed, this fits within a problematic theme of the decision, of focusing on the *purpose* behind the policy of the killing, and regarding a purpose of intimidation or revenge as negating the policy element.

Fifth, the majority gave great weight to formal instructions within the FDLR not to commit crimes.¹⁰⁷ Such instructions are certainly relevant and should be taken into account. They may indicate an organization making diligent efforts to restrain crime. However, such instructions *per se* are not incompatible with a criminal policy.¹⁰⁸ It is perfectly common for officials and organizations to proclaim a liability-averting policy for purposes of deniability, while actually carrying out a different policy. Other courts have had little difficulty disentangling ostensible policies against crime from the actual, implicit policies to commit crime.¹⁰⁹

on the Confirmation of Charges”, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-487, PTC I, ICC, 1 March 2012, para. 33. The majority is right to be alert to possible ‘tunnel vision’. It could, however, also be said that interviewers are not required to take all statements at face value and must be able to probe witness responses and to test their credibility and testimonial factors, provided it is done in the spirit of objectivity.

¹⁰³ Dissenting opinion of Judge Sanji Mmasenono Monageng, *Mbarushimana* Confirmation Decision (n 1), paras 2–18.

¹⁰⁴ *Mbarushimana* Confirmation Decision (n 1) para. 260. ¹⁰⁵ Ibid., para. 261.

¹⁰⁶ Ibid., para. 262.

¹⁰⁷ Ibid., paras 248, 249, 250, 251, 255, 256, and 258.

¹⁰⁸ On this point see, Dissenting opinion of Judge Sanji Mmasenono Monageng (n 103) paras 11 and 14–16 (such directives ignored and circumvented, absence of enquiries despite notorious crimes).

¹⁰⁹ See e.g. Judgment, *Sesay, Kallon and Gbao* (RUF Case), SCSL-04-15-A, AC, SCSL, 26 October 2009, para. 723, finding declared norms of the Revolutionary United Front (RUF) prohibiting rape,

The accumulation shows an unusual reluctance to declare that there was a policy. In this case, the hypothesis that the FDLR massacres were spontaneous crimes of individual members of the FDLR, acting on their own unprompted initiatives, is utterly implausible. Indeed, the Chamber found that the atrocities were ordered and directed by the FDLR.

28.5.3 The distraction of ulterior purpose

The best explanation for the majority's negative conclusion seems to be its concern with the *ulterior purpose* for the attacks on civilians. In presenting its case, the prosecution said that the policy of attacking civilians aimed to 'create a humanitarian catastrophe'.¹¹⁰ Interestingly, wherever the majority found that the FDLR directed atrocities against civilians for *other purposes*, these were treated as discrepancies undermining the inference of policy. Other FDLR purposes identified by the majority included (1) attacks on civilians for revenge or retaliation, (2) attacks to make the civilian population leave the region, or (3) the legally erroneous position of the FDLR that civilians supportive of the enemy could be targeted.¹¹¹

However, these other purposes do not undermine the policy element. *Why* the FDLR was deliberately murdering civilians is beside the point. When a state or organization orchestrates the mass murder of civilians, whether it be for revenge or intimidation or because they are affiliated with the opposing side, it is still a crime against humanity. On any of those variations, it was not random individual crime but rather atrocities directed or encouraged by an organization, thus satisfying the basic associative element reflected in the policy element. The ulterior purpose of the massacres does not matter; the law of crimes against humanity prohibits the *means* used (e.g. murder, rape, torture of civilians) and not the *ends* pursued. Having found that the FDLR was deliberately directing attacks against the civilian population, the majority had already made the findings needed for policy and for attack.

It is hard to discern why the majority felt that other purposes undermined the policy element. It may be because the prosecution referred to the organization's aim of 'creating a humanitarian catastrophe'. However, the task of the chamber is to assess whether the legal elements (in this case, the policy element) are proved to the requisite standard. It may be because the majority thought there should be a 'pure' purpose: a single unifying aim beneath the policy. However, a diversity of purposes does not undermine the fact that the FDLR had a policy of murdering civilians. It may be that the majority thought that purposes such as revenge or intimidation or the incorrect belief that civilians may be targeted are incompatible with crimes against humanity.¹¹²

unauthorized looting, killings, or molestation to be 'a mere farce intended to camouflage' the planned atrocities. See also *SRYYY v Minister for Immigration and Multicultural Affairs* (n 85) para. 116.

¹¹⁰ *Mbarushimana* Confirmation Decision (n 1) paras 243, 245, and 246.

¹¹¹ Ibid., paras 250–1 and 254. The majority found that crimes against civilians were 'mostly carried out in retaliation' for attacks by the other side or were 'launched with the aim of targeting both military objectives...and the civilian population...who were perceived as supporting the [opposing side]'. Ibid., para. 265.

¹¹² Dissenting opinion of Judge Sanji Mmasenono Monageng (n 103) para. 17 (arguing that the motive of retaliation does not alter the fact that the policy was to attack civilians).

If the judges were thinking the latter, the decision seems to reflect the growing incursion of 'purpose' or 'grounds' of selection of victims into crimes against humanity, which was touched on earlier.¹¹³ Perhaps intellectual contamination from genocide analysis is spilling over into crimes against humanity analysis. In genocide, purpose does matter: there must be a special intent to destroy one of four groups as such. As a result, even where there is deliberate killing of civilians, a dispute can arise whether it flowed from genocidal intent or from some other purpose. It may sometimes be an answer to a genocide charge to say that one was 'merely' murdering political opponents or attacking resistance sympathizers or killing out of vengeance. But such claims are no answer to a crime against humanity charge.

Transplanting the special intent/specific grounds approach of genocide into crimes against humanity produces strange results. For example, *Bowoto v Chevron*, a US case, held that there was no crime against humanity, *inter alia*, since victims were targeted 'because they were oil protestors'¹¹⁴ and not 'simply because they were civilians'.¹¹⁵ But that type of specific intent is neither in law nor in theory a part of crimes against humanity. It would be exceedingly rare for anyone to attack civilians 'because they are civilians'. People coordinate, through states and organizations, to attack civilian populations for a variety of reasons. When they do, the law of crimes against humanity is engaged.

28.5.4 Lessons from *Mbarushimana*

In the *Mbarushimana* case, a range of evidence was offered showing that the FDLR deliberately directed attacks against civilian populations on a significant scale. The majority declined to find a policy element, which is at odds with its own findings that the FDLR ordered repeated atrocities against civilian villages. The majority's reticent approach departed from the authorities that policy can be inferred from the non-random manner in which the acts occur. The majority's conclusion that the massacres were not part of a policy because they were for purposes of revenge or intimidation, or because of the victims' perceived support for the other side, is particularly distressing. Such purposes in no way undermine the FDLR policy to attack civilian populations. The majority's findings easily satisfied the basic requirements of Article 7(2)(a). Analysis should have moved on to the next step, of whether the attack was 'widespread or systematic'.

28.6 Conclusion and Proposal for Reform

Early ICC jurisprudence shows some disturbing tendencies to infuse the policy element with requirements that are not required by the authorities, nor by theory of the crime, nor by fundamental principles of justice, nor by an appropriate delimitation of international jurisdiction. Some decisions draw from stray strands of jurisprudence

¹¹³ *Supra*, section 28.3.2.

¹¹⁴ *Bowoto v Chevron Corporation*, 2007 US Dist. LEXIS 59374 (US District Court, Northern California) 31–2.

¹¹⁵ *Ibid.*, 32.

on slightly different concepts. Some decisions seem to be inadvertently creating new formidable hurdles with a few casual strokes of the pen. Some decisions seem to be assuming and imposing idealized conceptions of the policy element, which will exclude many actual cases of crimes against humanity. Problems include conflating ‘policy’ with ‘systematic’, requiring direct proof of formal adoption and internal meetings, and getting distracted by ulterior purposes.

If these jurisprudential threads go uncorrected, they will make the ICC a uniquely unsuitable forum for crimes against humanity cases. Some chambers have been unable to detect a policy despite being presented with a comparative wealth of evidence. In order to maintain the viability of the ICC as a forum for crimes against humanity cases, its jurisprudence must urgently take deeper cognizance of the authorities on the policy element, the purpose of the element, and the interplay of Article 7(1) (high threshold) and Article 7(2)(a) (moderate threshold).

The optimal solution would be for these matters to be judicially corrected and clarified through the Court’s jurisprudence.¹¹⁶ Recent trends, after the drafting of this chapter and scholarly voices raising concerns,¹¹⁷ are encouraging. The recent decision in *Katanga*, the Court’s second-ever conviction, is a most welcome development. Trial Chamber II set out the distinct steps of a crime against humanity analysis with masterful clarity.¹¹⁸ The *Katanga* Decision rightly distinguishes ‘attack’ from ‘widespread or systematic’, and therefore also distinguishes ‘policy’ from ‘systematic’. The decision notes that policy need not be formalized and can unfold organically, and can be inferred from circumstances. Equally encouragingly, the Pre-Trial Chamber in *Gbagbo* has confirmed the charges and issued new and admirably clear guidance on crimes against humanity.¹¹⁹ The Chamber held that ‘policy’ is a lesser threshold than ‘systematic’, that policy excludes spontaneous or isolated acts, that proof of planning is relevant but not necessary, and that policy need not reflect a unified purpose or motive.¹²⁰ One hopes that these decisions will start to shift away from early idiosyncratic ICC interpretations and towards conformity with global jurisprudence.

An alternative solution would be to amend the Elements of Crimes to expressly affirm the established features of the policy element. Such clarifications were considered during the original drafting of the Elements, and were excluded because they

¹¹⁶ The Appeals Chamber did not address the Art 7 issue in the *Mbarushimana* appeal (n 89), nor in the appeal of the *Gbagbo* decision (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’, *Gbagbo, Situation in Côte d’Ivoire*, ICC-02/11-01/11-572 OA5, AC, ICC, 16 December 2013).

¹¹⁷ See e.g. Sadat (n 17), as well as an amicus brief by this author, Margaret deGuzman, Charles Jalloh, and Robert Cryer: Amicus Curiae Observations of Professors Robinson, deGuzman, Jalloh and Cryer, *Gbagbo, Situation in Côte d’Ivoire*, ICC-02/11-01/11-534, 9 October 2013.

¹¹⁸ Jugement rendu en application de l’article 74 du Statut, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436, TC II, ICC, 7 March 2014, esp. paras 1094–116.

¹¹⁹ Decision on the confirmation of charges against Laurent Gbagbo, *Gbagbo, Situation in Côte d’Ivoire*, ICC-02/11-01/11, PTC-I, 12 June 2014. Judge Kaul joined Judge Fernández de Gurmendi to form the majority.

¹²⁰ Ibid., paras 207–18.

were thought unnecessary.¹²¹ The Elements can provide a valuable opportunity for ‘dialogue’ between the judiciary and the quasi-legislative branch. Of course, the judges have the final say,¹²² but a provision would help rebut arguments based on overestimations of the conservatism of drafters or States Parties. At present, the best solution would be correction within the Court’s jurisprudence, with the newer trends taking root, forming an approach that is well grounded in law and principle, and effective in practice.

¹²¹ Lee (n 82) 77.

¹²² If a provision in the Elements is irreconcilable with their interpretation of the Statute, then the Statute prevails.

Charging War Crimes

Policy and Prognosis from a Military Perspective

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29.1 Introduction

This chapter highlights the import of the war crimes provisions found in Article 8 of the Rome Statute¹ and describes the correlative considerations related to charging practices for the maturing institution. The expansion of the articulated war crimes in the context of both international armed conflicts (Article 8(2)(b)) and armed conflicts not of an international character (Article 8(2)(e)) culminated an evolution in the laws and customs of war. At the same time, the text of Article 8 should not be understood either as a rejection of prior practice or an evisceration of the core precepts that were widely accepted prior to 1998. When properly understood and applied in light of the Elements of Crimes, the Court's charging decisions with respect to the war crimes

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¹ Art 8 Rome Statute of the ICC (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 ('Rome Statute'). The extension of potentially unchecked international prosecutorial and judicial power over sovereign concerns is one of the primary reasons the United States was originally unwilling to go forward with the Rome Statute 'in its present form'. D Scheffer, 'The United States and the International Criminal Court' (1999) 93 *American Journal of International Law* 14, 21. On 31 December 2000, which was the last day permitted by the treaty, Ambassador Scheffer signed the Rome Statute at the direction of President Clinton. See Art 125(1) Rome Statute (stipulating that states may accede to the Statute at a later time, but that signature was permissible only until 31 December 2000). The White House statement clarified that President Clinton ordered the signature because the United States seeks to 'remain engaged in making the ICC an instrument of impartial and effective justice in the years to come', and reaffirmed America's 'strong support for international accountability'. 'Statement on the Rome Treaty on the International Criminal Court (31 December 2000)' (2001) 37 *Weekly Compilation of Presidential Documents* 4, reprinted in S Cummins and D Stewart (eds), *Digest of United States Practice in International Law* (Washington, D.C.: International Law Institute Publishing Office 2000) 272 <<http://www.state.gov/documents/organization/139599.pdf>> accessed 10 June 2014. Nevertheless, the President's statement made clear that he would 'not recommend that my successor submit the treaty to the Senate for ratification until our fundamental concerns are satisfied', *ibid*. In its operative paragraph, President Clinton, wrote that:

In signing, however, we are not abandoning our concerns about significant flaws in the Treaty.

In particular, we are concerned that when the Court comes into existence, it will not only exercise authority over personnel of States that have ratified the treaty, but also claim jurisdiction over personnel of States that have not. With signature, however, we will be in a position to influence the evolution of the Court. Without signature, we will not. Signature will enhance our ability to further protect U.S. officials from unfounded charges and to achieve the human rights and accountability objectives of the ICC. In fact, in negotiations following the Rome Conference, we have worked effectively to develop procedures that limit the likelihood of politicized prosecutions. For example, U.S. civilian and military negotiators helped to ensure greater precision in the definitions of crimes within the Court's jurisdiction.

found in Article 8 ought to reflect the paradox that its operative provisions are at once revolutionary yet broadly reflective of the actual practice of warfare. The text of Article 8 in essence baked in a complex commingling of *lex lata* hard law and established state practice, as informed by the much more diffuse expectations and assessments of expert practitioners. The intentional integration of hard and soft law within the structure of Article 8 is unique and, it must be noted, ubiquitous in its fabric.

The Rome Statute was designed to largely align criminal norms with actual state practice based in the realities of warfare. As the ICC (the Court) enters a second decade of actuality it faces challenges that continue to foster controversy and drive dramatic change associated with its emerging prerogatives and practices. The sustainability and long-term credibility of the Court depends in large measure upon cooperative synergy with domestic jurisdictions, both States Parties and other states. In particular, the relationship to be forged between the Court and military organizations around the world may well be the fulcrum from which its longer-term legitimacy derives. As Albert Einstein observed, '[i]n theory, theory and practice are the same. In practice, they are not'. Even as Article 8 embodied notable new refinements, the Rome Statute made such sweeping legal advances against a backdrop of pragmatic military practice. This chapter will dissect the structure of the Statute to demonstrate this deliberate intention of Article 8. The logical conclusion is that the carefully constructed Statute will have been effectively abandoned if the Court habitually overrides the permissible discretion of domestic officials by displacing the proper authority of responsible military commanders based on its own preferences or the expediency of political considerations. To be more precise, judicially superimposed preferences would effectively amend the Rome Statute contrary to the intentions of the States Parties. Furthermore, imposing judicial or prosecutorial preferences to the detriment of lawful command latitude in the field would undercut the premise of the admissibility concept in practice.

This chapter discusses the subtleties of the Rome Statute structure insofar as they facilitate a harmonious balance between the prerogatives of responsible military commanders and the vitally important role of the Court in prosecuting perpetrators of war crimes. The charging policies of the Court and its role in strengthening compliance with the fabric of the laws and customs of armed conflict must serve this end irrespective of the nature of the conflict or the identities of the warring parties. Article 21 stipulates that the Court 'shall' apply the Elements of Crimes that accompany each and every offence found in Article 8 with the precise evidence that the prosecutor must prove beyond a reasonable doubt in that order—conduct, consequences, circumstances. To be sure, the *lex specialis* of the Elements of Crimes is reflected in Article 9, which states merely that the Elements 'shall assist' the Court. Nevertheless, a holistic understanding of the crimes specified in Article 8 as amplified by the Elements of Crimes is the only pathway towards authoritative implementation of the text. The judges and prosecutor cannot minimize the importance of the Elements of Crimes because they represent the consensus agreements of all nations, both States Parties and non-States Parties, dating to 30 June 2000.

As the pattern of cases develops in the coming years, the Court would be well served to assess the range of potentially chargeable conduct in light of the optimal synergy between reinforcing military professionalism and the punishment of any perpetrator

found to have committed the prohibited *actus reus* when influenced by criminal *mens rea* and under the circumstances prescribed by law. Section 29.2 of this chapter examines the explicitly permissive aspects of the laws and customs of war, while section 29.3 details the conformity of the Rome Statute and its constituent Elements of Crimes within that basic framework. Section 29.4 builds on these foundational principles to identify some of the most important consequences of the design of the Rome Statute. This chapter proffers a series of specific recommendations that should guide prosecutorial discretion in charging decisions as well as the range of judicial decision-making. To wit, section 29.4 of this chapter explains how the Court should 1) recognize the principle of the jurisdictional floor for war crimes charging that is embedded in the Rome Statute, 2) understand the implications of the Status of Forces agreements widely employed in international military operations, and 3) respect and reinforce the rationale behind the principles embedded in Article 28.

29.2 The Underlying Permissiveness of the *jus in bello* Regime

Over time, the laws of warfare have become the lodestone of professionalism and the guiding point for professional military forces the world over. The law of armed conflict (*jus in bello*) is the gold standard separating trained and disciplined professionals from a lawless rabble. It cannot be overemphasized that the laws and customs of warfare balance humanitarian objectives with the perfectly legitimate need to accomplish the mission. The law explicitly embeds the latitude for military commanders and lawyers alike to balance the requirements of the mission against the humanitarian imperative of the law itself. Thus, the *grundnorm* for the entire scope of the ‘laws and customs applicable in armed conflicts’ (to use the language of Article 8) is to build a careful balance between the ability of practitioners to lawfully accomplish the military mission and the need to respect to the greatest degree possible the enduring value of humanitarian considerations. Michael Walzer is entirely correct in the conclusion that belligerent armies are ‘not entitled to do anything that is or seems to them necessary to win wars. They are subject to a set of restrictions that rest in part on the agreements of states but that also have an independent foundation in moral principle’.² Restraint during the conduct of hostilities helps to preserve the humanity of the war-fighter even as it helps to minimize unavoidable civilian suffering and damage. Conversely, compliance with the legal and moral imperatives for waging war determines the dividing line between pride in one’s service and shame that cannot be discarded like a dirty uniform. This subtle need to protect the humanity of the war-fighter was epitomized by a photograph of an American Marine in the middle of the combat zone that appeared during the early phases of the coalition drive to Baghdad in early 2003. The Marine is shown holding up a notarized letter directing him to report at a specific date and time for jury duty, and is grinning at the stark

² M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books 1977) 131.

reality that the grinding normality of life in a combat zone might as well be occurring in a parallel universe from the normality of life at home.

This reality provides one of the most foundational and enduring rationales for the body of *jus in bello* as it has developed over the past 150 years. In his revolutionary code of 1863, Francis Lieber stated this idea as follows: 'Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God'.³ In his classic text *Nuremberg and Vietnam: An American Tragedy*, Telford Taylor observed that participants in armed conflicts must retain a sense of honour in the midst of horrific warfare by retaining 'such respect for the value of life that unnecessary death and destruction will continue to repel them', otherwise 'they may lose the sense for that distinction for the rest of their lives'.⁴ Consequently, every military expert that I know fully supports the early practice of the Court⁵ in charging perpetrators for the war crime of 'conscripting or enlisting children under the age of fifteen years' into armed forces 'or using them to participate actively in hostilities' (Articles 8(2)(b)(xxvi) for international armed conflicts and 8(2)(e)(vii) for non-international conflicts). War-fighters must develop an inculcated climate of discipline to hone combat effectiveness with the result that the force has confidence in the command. The goal is to win the war as quickly as possible with the fewest casualties as possible and the most favourable peace terms that lead to a sustainable peace. This tenet helps explain why the law of occupation has never conveyed a carte blanche authority to an Occupying Power to exercise unlimited discretion over the civilians within the previously hostile territory.⁶ As one distinguished scholar⁷ observed to me in conversation, Hague law begins with the military mission and tempers the unfettered discretion of war-fighters based upon humanitarian considerations, whilst the body of Geneva law begins with humanitarian principles which are constrained due to the necessities of the military mission. Close examination of the Rome Statute and its constituent elements of crimes reveals that the intent of the drafters was to build upon this baseline of *lex lata* rather than obliterate pre-existing legal precepts and to replace them whole cloth with treaty-based constraints.

For our purposes, it is important to realize that each and every specific crime in Article 8 of the Rome Statute (which deals with the range of war crimes committed

³ See F Lieber, *Instructions for the Government of Armies of the United States in the Field* (originally issued as General Orders No. 100, Adjutant General's Office, 1863; Washington, D.C.: Government Printing Office 1898) ('Lieber Code'), reprinted in D Schindler and J Toman (eds) *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents* (Dordrecht: Martinus Nijhoff 1988) 6, Art 15.

⁴ T Taylor, 'War Crimes' in M Wakin (ed.), *War, Morality and the Military Profession* (Boulder: Westview Press 1986) 378.

⁵ ICC website, Situations and Cases, Situation in Uganda <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/Pages/uganda.aspx> accessed 10 June 2014.

⁶ In 2012 the ICRC completed an extensive set of discussions among experts regarding the proper latitude enjoyed by an occupying power during its temporary authority, see ICRC, 'Occupation and Other Forms of Administration of Foreign Territory' (report prepared and edited by Tristan Ferraro, 2012) <http://lgdata.s3-website-us-east-1.amazonaws.com/docs/905/474159/ICRC_expert_meeting_-_occupation.pdf> accessed 10 June 2014.

⁷ Charles Garraway.

both in international and in non-international armed conflicts) requires the prosecutor to prove that the charged act was committed ‘in the context of and associated with’ the armed conflict. This element reflects the moral truism that the *lex lata* application of *jus in bello* norms is independent from the overarching *jus ad bellum* norms. All participants in armed conflict are equal before the law. In this way, even the most unlawful act of aggression that marks the onset of armed conflict operates to convey the entire range of rights, benefits, and obligations drawn from the laws and customs of warfare onto every participant in that conflict. The principled application of *jus in bello* concepts by the Court in all types of armed conflict as envisioned in Article 8 has the broadest support among professional military forces, because the enforcement of the laws and customs of warfare can only enhance a reciprocal recognition of the need for law and its integral relationship to military discipline. The second circumstantial element that is embedded in every Article 8 offence logically follows; the prosecutor need not prove that the perpetrator made any specific legal conclusion about the nature of the conflict. Sufficient evidence of war crimes depends upon showing that ‘the perpetrator was aware of factual circumstances that established the existence of an armed conflict’. In other words, there is a fundamental due process right that convictions only be grounded in the perpetrator’s knowledge that the *jus in bello* is applicable and should provide the signposts for acceptable conduct. The factual awareness of the perpetrators that the laws and customs of warfare apply derives from notions of notice and fundamental fairness.

The vitally important point for jurists and practitioners to grasp is that *jus in bello* is properly understood as being permissive by its express terms insofar as it defines the limits of lawful authority rather than operating as an affirmative grant of authority. The permissive nature of the legal regime applicable during armed conflicts is inextricably woven into the very fabric of such conflicts. Whereas the human rights regime restricts lethal force to those circumstances where such force is absolutely necessary as a last resort in order to protect life, *jus in bello* permits such force whenever it is reasonably related to an acceptable military purpose; in the language of Protocol I, whenever such force is tailored to achieve a ‘concrete and direct military advantage’.⁸ By contrast, lethal force in armed conflicts is presumed to be permissible whenever reasonably necessary to achieve a military objective absent evidence of some prohibited purpose or unlawful tactic.⁹ As early as 1863, this permissiveness was expressed in Article 14 of the Lieber Code as follows: ‘Military necessity, as understood by modern civilized nations, consists of the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war’.¹⁰ The human rights regime requires a statement of affirmative authority while *jus in bello* operates on a permissive basis subject to express limitations. As an

⁸ Arts 51(5)(b) and 57(2)(b) Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (signed 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (‘Protocol I’).

⁹ N Meltzer, ‘Targeted Killing or Less Harmful Means? Israel’s High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity’ (2006) 9 *Yearbook of International Humanitarian Law* 109.

¹⁰ Art 14 Lieber Code (n 3).

additive requirement, lethal force under the human rights paradigm must be proportionate to the immediate context, meaning that the force used is directly proportionate to the risk posed by the individual at the moment force is employed. In the express language of Article 8(2)(b)(iv), *jus in bello* proportionality by definition and accepted state practice will very likely depend upon the broader contextual set of aggregate circumstances, which in turn inform the commander's assessment of the 'overall military advantage anticipated'.

This permissive *jus in bello* framing empowers those in the vortex of battle to balance the legitimate military needs against larger humanitarian imperatives. Thus, 'every single norm' within the laws and customs of armed conflict operates in the memorable framing of Yoram Dinstein as 'a parallelogram of forces; it confronts an inveterate tension between the demands of military necessity and humanitarian considerations, working out a compromise formula'.¹¹ To be clear, *jus in bello* is not designed to be infinitely malleable based on the individualized will of combatants. The actions of all participants in armed conflict are constrained by considerations of lawfulness based on their relation to the conflict. The proper balance is intentionally integrated into the law itself. Individual participants cannot lawfully inject an individualized rationalization for ignoring *jus in bello* because doing so might permit some degree of differentiation that would erode the humanitarian objectives of the law itself. In the context of armed conflicts proportionality operates as a single principle with little variation. Otherwise, proportionality and military necessity would become interlinked and unstoppable considerations that 'would reduce the entire body of the laws of war to a code of military convenience'.¹² Thus, there is no micro-analysis of the particularized circumstances related to the relationship of the relevant actors when applying the *jus in bello* either in the heat of battle or retrospectively in the course of criminal prosecution or disciplinary investigation and/or criminal prosecution. In other words, there can lawfully be no rationalization for failure to comply with the laws and customs of war, hence there is no recognized defence of military necessity unless the act comports with the actor's larger *jus in bello* obligations.

On the other hand, the Court (here I use the collective to refer to jurists, defence counsel, and members of the OTP) cannot forget for one moment that although *jus in bello* contains numerous express prohibitions subject to no caveats, combatants properly exercise what the International Committee of the Red Cross (ICRC) has labelled a 'fairly broad margin of judgment'.¹³ Therein lies the completely appropriate and distinctive permissiveness of the laws and customs of armed conflict. For example, medical care is due to those in military custody only 'to the fullest extent practicable and with the least possible delay'.¹⁴ Other obligations are often couched in aspirational

¹¹ Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 2nd edn (Cambridge: Cambridge University Press 2010) 5.

¹² L Green, *The Contemporary Law of Armed Conflict* 3rd edn (Manchester: Manchester University Press 2008) 353.

¹³ Sandoz et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff 1987) Art 57, para. 2187 ('Commentary on the Additional Protocols to the Geneva Conventions').

¹⁴ Art 10(2) Protocol I (n 8).

terms such as ‘whenever possible’¹⁵ or ‘as widely as possible’.¹⁶ Still more duties are couched in less than strident terms such as ‘shall endeavor’¹⁷ or the duty to ‘take all practical precautions’.¹⁸ There are also numerous express exceptions permitted for reasons of ‘imperative military necessity’.¹⁹ For the purposes of the war crime in Article 8(2)(b)(iv) of intentionally directing an attack in the knowledge that it would likely inflict disproportionate damage, the most relevant permissive duties incumbent on those who order military strikes require them to ‘do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects’²⁰ and ‘take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects’.²¹ Jurists and prosecutors absolutely must realize that the evaluation of the *actus reus* under Article 8(2)(b)(iv) cannot be made in isolation from these collateral duties of the commander, notwithstanding the fact that they are nowhere specifically referenced in the Rome Statute. Even in that evaluation, it is important to note that the benchmark for what is ‘feasible’ is measured from the reasonable war-fighter’s point of view. As a logical extension, ‘effective advance warning shall be given of attacks which may affect the civilian population, *unless circumstances do not permit*’ (emphasis added).²² The vital point is that the parallel duties incumbent on the commander are to be drawn from the larger *jus in bello* and need not be restated within the contours of Article 8 itself. The commander’s actions ‘must be made in good faith and in view of all information that can be said to be reasonably available in the specific situation’ according to the ICRC.²³

As the next section will recount in some detail, the text of the Rome Statute implicitly imports all of these permissive aspects of the *jus in bello* regime, even as it expressly adds some additional charging considerations. Within the realm of charging and prosecuting war crimes, then, modern international criminal law expressly preserves broad discretionary authority. Rather than serving as a necessary basis for a positive articulation of lawful force as an exception to the norm, *jus in bello* delineates the outer boundaries of the commander’s appropriate discretion. Aharon Barak of the Israeli Supreme Court summarized this aspect of the *lex specialis* perfectly with respect to the principle of proportionality as embedded in Article 8(2)(b)(iv); his thoughts provide a perfect segue to the considerations of the structure of the crimes

¹⁵ Art 12(4) Protocol I (n 8).

¹⁶ Art 83(1) Protocol I (n 8).

¹⁷ Art 77(3) Protocol I (n 8).

¹⁸ Art 56(3) Protocol I (n 8).

¹⁹ Art 55(5) Protocol I (n 8).

²⁰ Art 57(2)(a)(i) Protocol I (n 8). The expression ‘feasible’ is variously translated in French as ‘pratique’ (Art 56), ‘pratiquement possible’, or ‘possible dans la pratique’ (Arts 57, 58, 78, and 86) and ‘utile’ (Art 41), which in English also appears as ‘practical’ (Art 56(3)).

²¹ Art 57(2)(a)(ii) Protocol I (n 8). The United Kingdom, for example, declared on signing the Protocol that the word “‘feasible’” means that which is practicable or practically possible, taking into account all circumstances at the time including those relevant to the success of military operations...? In response to ICRC concerns, this was modified to read as follows: ‘The United Kingdom understands the term “feasible” as used in the Protocol to mean that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations’.

²² Art 57(2)(c) Protocol I (n 8).

²³ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* <<http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>> accessed 15 June 2014, at 75.

articulated in Article 8 and their constituent Elements of Crimes to be detailed in the next section of this chapter:

The court will ask itself only if a reasonable military commander could have made the decision that was made. If the answer is yes, the court will not override the military commander's security discretion within the security discretion of the court. Judicial review regarding military measures to be taken is within the regular review of reasonableness. True, 'military discretion' and 'state security' are not magic words that dismiss judicial review. However, the question is not what I would decide under the given circumstances, but rather whether the decision that the military commander made is a decision that a reasonable military commander is permitted to make. In that realm, special weight is to be granted to the military opinion of the official who bear responsibility for security.... Who decides on proportionality? Is it a military decision to be left to the reasonable application of the military, or a legal decision within the purview of the judiciary? Our answer is that the proportionality of military means used to fight terror is a legal question to be left to the judiciary.... Proportionality is not an exact science; at times there are a number of ways to fulfill its conditions so that a zone of proportionality is created; it is the boundaries of that zone that the court guards.²⁴

29.3 Understanding the Underlying Structure of Article 8

29.3.1 The authoritative backdrop of *jus in bello*

The structure of Article 8 and its accompanying Elements of Crimes was intentionally designed to comport with the historical understandings embedded in established *jus in bello*. To this end, practitioners in the Court make charging decisions as informed by three time-tested considerations that mandate the unique nature of the *jus in bello* regime. In the first place, *jus in bello* is only properly applied depending on the larger context of armed conflict. This is at the heart of the ICJ characterization of the laws and customs of warfare as *lex specialis*. In other words, the precepts that flow from the laws and customs of warfare provide the evaluative basis for all actions undertaken when that body of law is applicable. The main question, then, does not deal with the particularities of the relationship between actors, but with the hierarchy of the choice of law rules. That is why it is intellectually indefensible to limit the use of force in a particular combat engagement to the degree of force used by the enemy. Second, *jus in bello* was not designed or intended to generate symmetry between the warring parties, nor to artificially inject equity into the midst of armed conflict. The asymmetric nature of modern conflicts does not require a wholly new *jus in bello* proportionality application because the law itself contemplates a disparity of combat power and in no way mandates some form of equity as in other areas of international law. Finally, as noted previously, the fundamentally permissive nature of *jus in bello* simultaneously

²⁴ Aharon Barak, President (ret'd) Supreme Court of Israel, Address at the Jim Shasha Center of Strategic Studies of the Federmann School for Public Policy and Government of the Hebrew University of Jerusalem (18 December 2007).

empowers and obligates war-fighters to operate within a zone of reasonable discretion in order to achieve the essential purposes of *jus in bello*. The Court does not superimpose its own discretion so much as the judicial process ensures that the zone of authority is enforced appropriately.

This framework of established *jus in bello* drawn from both specific treaty principles and the larger context of state practice is repeatedly referenced in the Rome Statute as ‘the laws and customs of war applicable in armed conflict...within the established framework of international law’. Practitioners must recall that this same breadth of application is specifically made in both ‘international armed conflict’ (Article 8(2)(b)) and ‘armed conflict not of an international character’ (Article 8(2)(e)). Even this framing follows the categorization of conflicts established in the Geneva Conventions of 1949 because it replicates the odd but long-accepted formulation of Common Article 3, which of course is included verbatim in the Rome Statute as Article 8(2)(c). Indeed, it is worth recalling that many of the specific crimes found in Article 8 draw from the text of existing treaties while some are *sui generis*. Thus, Article 21(1)(b) is logically consistent and entirely predictable when it expressly mandates the Court to apply ‘where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict’. When the *lex specialis* law of armed conflict is applicable, as it must of necessity be in the context of any prosecution under Article 8, persons who violate its precepts are individually responsible for each and every violation and accordingly liable for punishment in the appropriate criminal forum. The authority of the Court extends only insofar as its decision-making remains consonant to the larger context of the *lex specialis* because the laws and customs of armed conflict provide the determinative criteria for decision-making.

Furthermore, Article 22(2) mandates that the principle of strict construction is specifically included in the Court’s interpretation of the substantive offences of Article 8. The text reads as follows: ‘The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted’. This subparagraph is notable for its inclusion in the Rome Statute as an innovation over pre-existing tribunal models. This canon of strict construction operates to the benefit of an accused insofar as ambiguity is to be resolved in such a manner as to prevent the imposition of criminal liability where there is doubt about the appropriate meaning of a particular provision of Article 8. The principle of *in dubio pro reo* operates to protect fundamental due process on its face.²⁵ However, for our purposes, it is important because it implicitly draws upon and implements the broader framework of treaty law and state practice with respect to the conduct of hostilities. In fact, the strict constructionist principle of Article 22(2) could be read as one of the most express limitations on the overarching authority of the Court because the body of war crimes law is widely developed both in theory and practice. This requirement is the only concrete attempt

²⁵ W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press 2010) 410.

in the Statute to limit the Court's interpretive authority, and therefore it implicitly incorporates the authoritative backdrop of the agreed-upon principles of the laws and customs of warfare.

Finally, and most subtly, the delegates negotiating the Elements of Crimes expressly sought to preserve the interpretive force for the agreed-upon *jus in bello*. The Elements of Crimes were originally proposed by the United States on the basis that the principle of legality required international agreement over the scope of the substantive crimes described in the Rome Statute. Delegations in Rome initially opposed the proposal on the basis that agreements would be difficult to develop between common- and civil-law understandings of the relevant international law, but also on the basis that the effort to achieve such agreement might well entail delay in the entry into force for the Rome Statute. However, as previously noted, on 30 June 2000 all nations reached consensus on the authoritative elements for every specific crime listed in Articles 6, 7, and 8. This is particularly important in the macro because it included delegations from major non-States Parties to include the United States, China, and Russia. The Elements also provide a vitally important template in the official languages of the United Nations that can readily be exported for adoption and emulation in the domestic systems of any nation. The world may yet see Arabic judges importing the Arabic text of the ICC Elements into a *sui generis* tribunal created to adjudicate the egregious crimes committed in the Syrian civil war, for example.

For the purposes of properly charging offences under Article 8, the full text of the General Introduction to the Elements of Crimes is critically relevant. The General Introduction, known as the chapeau language, was the fulcrum upon which overall consensus emerged. The Elements truly are revolutionary in the sense that all states now share a common touchstone to dissect the *actus reus*, *mens rea*, and requisite circumstances for every offence included in the Rome Statute. For the purposes of charging war crimes, paragraph 6 of the General chapeau is particularly relevant. It reads as follows: 'The requirement of "unlawfulness" found in the Statute or in other parts of international law, *in particular international humanitarian law*, is generally not specified in the elements of crimes' (emphasis added). Read in conjunction with Article 30, this provision means that substantive crimes found in Article 8 can only be established when there is evidence beyond a reasonable doubt that the perpetrator intentionally (Article 30) and unlawfully (Article 8 General Introduction, chapeau language) committed the relevant *actus reus*. Thus, there can be no doubt whatsoever that the provisions of Article 8 build upon the larger context of the established *jus in bello* rather than attempting to replace the welter of laws and customs with an ad hoc system that might be termed 'Frankenlaw'. Article 8 buttressed the established framework of *jus in bello* rather than obliterating its normative force.

29.3.2 Specific textual incorporation into Article 8

Given the truism that the war crimes enunciated in Article 8 largely represent an outgrowth from the pre-existing body of humanitarian law, they are riddled with references to that body of law. In some areas, the relationship is simply that the offences from previous treaty law are included whole cloth. Article 8(2)(a) thus consolidates

the substantive grave breaches drawn from the respective Geneva Conventions.²⁶ The text is logically consistent in that it embeds the established legal principles drawn from the Conventions into the structure of the crimes and elements. For example, victims of any offence under Article 8(2)(a) must be ‘protected persons’ within the meaning of one or more of the Geneva Conventions, though that legal term of art is nowhere explained in the Rome Statute. Article 8(2)(b)(xxii) correspondingly prohibits the use of ‘protected persons as human shields’ to ‘favour (sic) or impede military operations’. Similarly, the grave breach of ‘[e]xtensive destruction and appropriation of property not justified by military necessity and carried out wantonly and unlawfully’ (Article 8(2)(a)(iv)) may only be committed against property protected under one or more of the Geneva Conventions. As noted earlier, the text of Article 8(2)(c) reproduces the language of Article 3 that is replicated in each of the four Geneva Conventions of 1949. All of these criminal provisions draw their lifeblood from the practice of states and the accumulated understandings from established understandings of the 1949 Geneva Conventions, to include the specific understandings of Common Article 3.

In a slightly more tangential reference to underlying *jus in bello* precepts, the fabric of Article 8 offences also contains an abundance of obvious references to the underlying body of humanitarian law. Apart from the textual reference to military necessity in the grave breach provision of Article 8(2)(a)(iv), the concept is repeatedly referenced in elements for other offences committed during both international and non-international armed conflicts. Military necessity, for example, is specifically included in the textual requirements for proving the war crime in Article 8(2)(b)(viii) of displacing the civilian population because the elements require that the perpetrator’s order ‘was not justified by the security of the civilians involved or by military necessity’. Similarly, the Article 8(2)(b)(v) war crime of attacking undefended places cannot be established in the absence of evidence that the ‘towns, villages, dwellings, or buildings did not constitute military objectives’. The legally defined term of art ‘military objective’ is also included in the elements of the war crime of attacking civilian objects in both international (Article 8(2)(b)(ii) and 8(2)(b)(ix)) and non-international armed conflicts (Article 8(2)(e)(iv)). Finally, the *jus in bello* concept of ‘*hors de combat*’ is embedded in all of the offences under Article 8(2)(c) without any additional clarification or explanation. These obvious references to established legal precepts under pre-existing *jus in bello* make reference to that body of law, an essential predicate to any authoritative interpretive decisions with respect to those offences either in charging or judicial decision-making in the Court.

²⁶ See e.g. Art 47 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (replacing previous Geneva Wounded and Sick Conventions of 22 August 1864, 6 July 1906, and 27 July 1929 by virtue of Art 59); Art 48 Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (replacing Hague Convention No. X of 18 October 1907, 36 Stat. 2371); Art 127 Geneva Convention Relative to the Treatment of Prisoners of War (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (replacing the Geneva Convention Relative to the Protection of Prisoners of War of 27 July 1929, 47 Stat. 2021); Art 144 Geneva Convention Relative to the Protection of Civilians in Time of War (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

Even the extensive reliance of legally specific terminology defined outside the boundaries of the Rome Statute does not exhaust the textual basis for reference by jurists and counsel to the underlying body of established *jus in bello*. In addition to the express and obvious references, there is a third layer of Article 8 provisions with oblique reliance on pre-existing legal precepts. Article 51(3) of Additional Protocol I in 1977,²⁷ for example, provides that civilians 'shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities'. The concept of civilians under *jus in bello* stands in contradistinction to the rights and duties that inhere to lawful combatants. The war crime of 'making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as the distinctive emblems of the Red Cross, resulting in death or serious personal injury' (Article 8(2)(b)(vii)) requires proof that the perpetrator 'made such use for combatant purposes in a manner prohibited under the international law of armed conflict'. The elements make clear that the perpetrator 'knew or should have known of the prohibited nature of such use' at the time of the *actus reus*. These offences are not replicated in the Article 8(2)(e) language applicable to non-international armed conflicts because the concept of combatancy is an oxymoron during armed conflicts of a non-international nature. By contrast, the war crimes provisions of the Rome Statute extended the Article 51, Protocol I, baseline protection for civilians to criminalize 'intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities' in the context of all armed conflicts, both international (Article 8(2)(b)(i)) and non-international (Article 8(2)(e)(i)). The legal concept of direct participation is deeply rooted in current international law, yet its scope remains highly controversial. For example, in Part IX of its Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, the ICRC inserted an entire section addressing restraints on the lawful use of lethal force during armed conflicts. The ICRC text postulated that the 'kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances'.²⁸ This is the narrowest reading of the concept of necessity in military operations in the sense that necessity is a literal term drawn in the narrowest tactical terms.

Given the fact that there is no black letter law (*lex lata*) to support that assertion, the ICRC Interpretive Guidance relied on its assertion of moral authority (*lex ferenda*) and indirect application of the protections that are universally accepted as applying to persons who are not clearly combatants, in particular employing an expansive notion of the principle of necessity. According to this view, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force. In such situation, the principles of military necessity and of humanity play an important role in determining the kind and degree of permissible force against legitimate military

²⁷ Art 10(2) Protocol I (n 8).

²⁸ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (n 23) 77.

targets.²⁹ To be clear, prior to the ICRC position in Part IX, there was no affirmative statement of this principle in any authoritative text, and the Interpretive Guidance did not carry with it the force of state consensus at the time of its promulgation. It is therefore *lex ferenda* rather than accepted *lex lata*. Part IX is highly controversial at the time of this writing, particularly insofar as the ICRC sought to cast its position in terms of pre-existing customary international norms.³⁰ Military practitioners have sharply objected to this commingling of the non-derogable right to life derived from human rights norms with the notion of military necessity and lawful targeting inherent in the *jus in bello*. Experienced military practitioners argue that the ICRC created a precept that embeds the right to capture in *jus in bello*, thereby concluding that ‘the ICRC has lost sight of its role as trusted advisor and has assumed the position of international legislator’.³¹ In the words of one expert that participated in several years of meetings that preceded the Interpretive Guidance, ‘[r]ecommendation IX deals with a matter that the experts were not asked to decide, it was raised late in the expert process, was strongly objected to by a substantial number of the experts present, was not fully discussed and so should not, in my opinion, have been included in the document’.³²

For our purposes, the oblique reference to ‘direct participation’ imports a great deal of controversy and international debate into the fabric of the Rome Statute. It stands alongside other oblique references such as Article 8(2)(b)(vi), which rely upon the concept of combatancy and its limitations without explanation or specific reference to a particular provision of law. Similarly, the war crime of treacherously wounding or killing (Article 8(2)(b)(xi)) relies upon the premise that the perpetrator ‘invited the confidence or belief of one or more persons that they were entitled to or were obliged to accord, protection under rules of international law applicable in armed conflict’. As one final example, *inter alia*, of the oblique reliance on established principles, the structure of the war crime of destroying or seizing the enemy’s property (Articles 8(2)(b)(xiii) and 8(2)(e)(xiii)) requires proof that ‘the property was protected from that destruction or seizure under the international law of armed conflict’. Practitioners in the Court must realize that for all its sophistication and for all of its noble intentions, the Rome Statute simply cannot be implemented as a self-standing island of international law principles isolated from the larger definitional underpinnings of *jus in bello*.

²⁹ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (n 23) 82.

³⁰ J Bellinger, III and W Haynes II, ‘A US government response to the International Committee of the Red Cross Study Customary International Humanitarian Law’ (2007) 89 *International Review of the Red Cross* No. 866, 443. J Kleffner, ‘Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The End of *Jus in Bello* Proportionality as We Know It?’ (2012) 45 *Israel Law Review* 35; W Hays Parks, ‘Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect’ (2010) 42 *New York University Journal of International Law and Politics* 769, 828; D Akande, ‘Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities’ (2010) 59 *International and Comparative Law Quarterly* 180, 192.

³¹ R Taylor, ‘The Capture Versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis When Attacking Civilians Who Are Directly Participating in Hostilities?’ (2011) *The Army Lawyer* 103, 104.

³² A P V Rogers, ‘Direct Participation in Hostilities: Some Personal Reflections’ (2009) 48 *Military Law and the Law of War Review* 143, 158.

29.3.3 The consensus compromises negotiated by states

In addition, the express importation of the laws and customs of warfare and the textual reliance on its precepts that is integrated into the Rome Statute, there are a number of areas where delegates exploited common understandings as an essential step to gaining consensus on the crimes and their accompanying elements. For example, Article 23 of the 1899 Hague II Convention stated that it was forbidden '[t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war'.³³ The Rome Statute copied that same language in Article 8(2)(b)(xiii) and 8(2)(e)(xii) (respectively applicable during international and non-international armed conflicts). Based on their belief that the concept of military necessity ought to be an unacceptable component of military decision-making, some civilian delegates sought to introduce a higher subjective threshold by which to second-guess military operations.³⁴ They proposed a verbal formula for the Elements of Crimes that any seizure of civilian property would be valid only if based on 'imperative military necessity'.³⁵ As noted, there is not a shred of evidence in the *traveaux* of the Rome Statute that its drafters intended to alter the pre-existing fabric of the laws and customs of war.³⁶ Introducing a tiered gradation of military necessity as proposed would have built a doubly high wall that would have had a paralysing effect on military operations. A double threshold for the established concept of military necessity would have clouded the decision-making of commanders and soldiers who must balance the legitimate need to accomplish the mission against the mandates of the law.

From the military practitioners' perspective, requiring 'imperative military necessity' as a necessary condition for otherwise permissible actions would have introduced a wholly subjective and unworkable formulation that would foreseeably have exposed military commanders to after the fact personal criminal liability for their good faith judgments. The ultimate formulation in the Elements of Crimes translated the poetic but impractical 1899 phrase into the simple modern formulation 'military necessity' that every commander and military attorney understands. The important point for our purposes is that the twin concepts of military necessity and feasibility preserve *jus in bello* as a practicable body of law that balances humanitarian and military considerations, at least when applied by reasonable, well-intentioned, and well trained forces.³⁷ The delegates leveraged established practice and common military understanding as the cornerstone of diplomatic consensus. In like manner, the war crime of 'transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population

³³ M Newton, 'Modern Military Necessity: The Role and Relevance of Military Lawyers' (2007) 12 *Roger Williams University Law Review* 877, 896.

³⁴ M Newton, 'Humanitarian Protection in Future Wars' in H Langholtz et al. (eds), *International Peacekeeping: The Yearbook of International Peace Operations* vol. 8 (The Hague: Martinus Nijhoff 2004) 349, 358.

³⁵ K Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press 2003) 249.

³⁶ Schabas, *A Commentary* (n 25) 240–1 (noting that the provisions of the Rome Statute referencing military necessity were 'quickly agreed to at the Rome Conference' and that the concept may be invoked only when the laws of armed conflict provide so and only to the extent provided by that body of law).

³⁷ See M Newton, 'The International Criminal Court Preparatory Commission: The Way It Is and the Way Ahead' (2000) 41 *Virginia Journal of International Law* 204, 211–12.

into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within our outside this territory' (Article 8(2)(b)(viii)) presented delegates with a contentious and time-consuming dilemma. The ultimate consensus was built upon what became footnote 44 in the Elements of Crimes. This footnote was more difficult to achieve than perhaps any other single aspect of the elements, yet its formulation is deceptively simplistic. The text of (the famous) footnote 44 provides that '[t]he term "transfer" needs to be interpreted in accordance with the relevant provisions of international humanitarian law'.

In other words, the Court is simply not free to disregard existing interpretations or understandings of the body of law that developed in the implementation of Article 49 of the Fourth Geneva Convention. To be more precise, the Court *could* embark on an exercise of judicial creativity, but that is vastly a different proposition than arguing that it should engage in an ambitious teleology on its own authority. Such efforts, whether centred among jurists or counsel, would depart from the clearly permissible limits of the Rome Statute and its accompanying Elements of Crimes. Indeed, overly teleological experimentation would contravene the mandate of Article 21, which states that the Court 'shall' rely upon the text of the Statute, the constituent Elements as modified 'where appropriate' by 'applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'. Simply put, the Court cannot create norms in its unfettered discretion, nor should it disregard *lex lata* at its convenience.

The interpretive structure of Article 8(2)(b)(iv) deserves special commentary in closing section 29.3 of this chapter because it represents one of the most important aspects of the modernization enshrined in the Rome Statute even as it exemplifies the limits of Court creationism. In his seminal work *War and Law since 1945*, Geoffrey Best pointed out that 'proportionality is certainly an awkward word. It is a pity that such indispensable and noble words as proportionality and humanitarian(ism) are in themselves so lumbering, unattractive and inexpressive'.³⁸ Proportionality has, nevertheless, been a deeply embedded and indispensable aspect of decision-making during war or armed conflict for many decades. Although the textual incarnations of proportionality came after more than a century of development within the field, that gap should not be attributed to unfamiliarity with the basic precepts of the precautions that attackers and defenders alike are expected to take. The developmentally delayed formulation of the treaty language was 'because it was thought to be too slippery and in its potential implications embarrassing to commit to a set form of words'.³⁹ The Rome Statute describes proportionality in a manner consistent with modern state practice following the adoption of Protocol I as:

- [i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term severe damage to the natural environment which would be *clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated. (emphasis added)

³⁸ G Best, *War and Law since 1945* (Oxford: Oxford University Press 1994) 324.

³⁹ Ibid., 323.

In addition, the Elements of Crimes (adopted by consensus as mentioned earlier) included a key footnote that reads as follows:

The expression ‘concrete and direct overall military advantage’ refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.⁴⁰

The inclusion of a proportionality requirement to mark off a specific war crime under the Rome Statute is significant for two reasons. In the first place, delegates omitted the consequence element required for conviction of a grave breach under Protocol I. The criminal act is committed simply by the deliberate initiation of an attack, provided that the prosecutor can produce evidence sufficient for the finder of fact to infer that the perpetrator believed that the attack would cause an anticipated disproportionate result. The *actual* result is not necessarily relevant. Unlike the grave breach formulation found in Protocol I, the criminal offence in the Rome Statute is completed based on the intentional initiation of a disproportionate attack. The highest possible *mens rea* standard implicitly concedes that some foreseeable civilian casualties are lawful. Thus, the Rome Statute standard strongly mitigates against the inference of a criminal intent just based on evidence sufficient to show that the commander might have had knowledge that a particular attack might cause some level of damage to civilians or their property.

In addition, the explicit footnote in the Elements stipulates that the perpetrator’s knowledge of the foreseeably disproportionate effects of an attack requires an explicit value judgment. Nevertheless, the standard for any *post hoc* assessment of the action taken by an alleged perpetrator is clear: ‘An evaluation of that value judgment must be based on the requisite information available to the perpetrator at the time’. In effect, the text of Article 8(2)(b)(iv) (the crime of disproportionate attack) widens the scope of the military advantage that can be considered in the proportionality analysis (through inclusion of the word ‘overall’) and narrows what level of collateral damage is considered excessive (by specifying that the damage needs to be *clearly* excessive to generate criminal liability). These revisions to the treaty terminology employed by the drafters of Protocol I could be discounted as a *sui generis* necessity based on diplomatic convenience. But this assumption would be inaccurate.

In fact, the text of the Rome Statute reflects the broadly accepted view of state practice. To be more precise, the text of the Rome Statute, as understood in light of the Elements footnote adopted by consensus, accurately embodies pre-existing customary international law. This is true in two equally important dimensions. In the first place, the governments of the United Kingdom, the Netherlands, Spain, Italy, Australia,

⁴⁰ Footnote 36 of the Elements of Crimes, ICC-ASP/1/3(part II-B), 9 September 2002 (First Session of the ASP).

Belgium, New Zealand, Germany, and Canada each published a virtually identical reservation with respect to Articles 51 and 57 as they acceded to Protocol I.⁴¹ The overwhelming weight of the reservations made clear that state practice did not intend to put the war-fighter into a straightjacket of rigid orthodoxy. The New Zealand reservation, for example, (virtually identical to those of other states already listed) reads as follows:

In relation to paragraph 5(b) of Article 51 and to paragraph 2(a)(iii) of Article 57, the Government of New Zealand understands that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack and that the term 'military advantage' involves a variety of considerations, including the security of attacking forces. It is further the understanding of the Government of New Zealand that the term 'concrete and direct military advantage anticipated', used in Articles 51 and 57, means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved.

Second, in reaching the legally defensible assessment of proportionality, the perspective of the commander (or war-fighting decision-maker) is entitled to deference based on the subjective perspective reservation prevailing at the time. The Italian declaration with respect to Protocol I states that in 'relation to Articles 51 to 58 inclusive, the Italian Government understands that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time'. This understanding is replicated in a number of other state pronouncements. Another reservation from the government of Austria declares that 'Article 57, paragraph 2, of Protocol I will be applied on the understanding that, with respect to any decision taken by a military commander, the information actually available at the time of the decision is determinative'. The language of the United Kingdom Law of War Manual summarizes the state of the law which was captured in the prohibition of Article 8(2)(b)(iv) as it should be understood in light of the Elements of Crimes:

The military advantage anticipated from the attack refers to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack. The point of this is that an attack may involve a number of co-ordinated actions, some of which might cause more incidental damage than others. In assessing whether the proportionality rule has been violated, the effect of the whole attack must be considered. That does not, however, mean that an entirely gratuitous and unnecessary action within the attack as a whole would be condoned. Generally speaking, when considering the responsibility of a commander at any level, it is necessary to look at the part of the attack for which he was responsible in the context of the attack as a whole and in the light of the circumstances prevailing at the time the decision to attack was made.⁴²

⁴¹ The numerous texts of state declarations expressing similar views using almost identical language is at <<http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P>> accessed 15 June 2014.

⁴² The Joint Doctrine and Concepts Centre, UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2004) para. 5.33.5.

The point of these cumulative examples ought to be clear as this chapter moves into section 29.4. The text and intent of Article 8 can only be appropriately understood and applied against the realism of state practice and the larger intent of states that conduct hostilities. Phrased another way, if the Court of the future seeks to charge war crimes by ignoring the established body of *jus in bello*, that effort would contravene the structure of the Statute, and would predictably lead to a loss of legitimacy for the institution.

29.4 Interrelationship of the Court with Operational Realities

This chapter concludes with three specific recommendations for charging war crimes that must be preserved as the Court enters its second decade of practice. Section 29.4 builds on these foundational principles to identify some of the most important consequences of the design of the Rome Statute. Prosecutorial discretion in charging decisions as well as the range of judicial decision-making should always recognize the principle of the jurisdictional floor for war crimes charging that is embedded in the Rome Statute, understand the implications of the Status of Forces agreements widely employed in international military operations, and reinforce the rationale behind the principles embedded in Article 28.

29.4.1 Preserving the jurisdictional floor of war crimes charging

The lengthy recitation of examples in section 29.3 aptly demonstrates the manner by which the larger *lex lata* of the laws and customs of armed conflict are embedded into the Rome Statute. On one level, this reliance provides firm foundations for establishing liability because perpetrators simply are not at liberty to inject their own subjective preferences or rationalizations for the commission of war crimes into the law. As only one of many possible examples, consider the case of the US Marines that killed 24 unarmed Iraqi civilians in the village of Haditha by entering their homes following the death of one Marine from an improvised explosive device. What should have been a swift arc of investigative efficiency became bogged down with rationalizations and red tape that only shifted after the shock of public revelation and recrimination.

The official investigation documented a command culture that devalued the lives of Iraqi civilians, which both contributed to the incident and made the follow-up a low priority. In the official terminology of investigation conducted by General Bargewell, '[a]ll levels of command tended to view civilian casualties, even in significant numbers, as routine and as a natural and intended result of insurgent tactics'.⁴³ The pervasive

⁴³ US Dep't of the Army, Major General Eldon A Bargewell, Investigation, "Simple Failures" and "Disastrous Results", p. 18 (15 June 2006) 25. The first investigation under US Army Major General Eldon Bargewell was notable for the simple fact that a well-regarded Army General was charged with investigating allegations of Marine misconduct. The official investigation resulted in the removal of Lieutenant Colonel Jeffrey Chessani, the commanding officer, and the company commander, Captain Luke McConnell along with another commander, Captain James Kimber, from their duties, along with a subsequent courts-martial for key Marines. General Bargewell concluded that '[s]tatements made by

attitude that all Iraqis were either the enemy or supporters of the enemy removed the incentive for individual Marines to follow applicable Rules of Engagement that mandate ceaseless efforts to distinguish between combatants and non-combatants. One US Marine, SSgt Frank Wuterich (who entered a plea of guilty at his court-martial but was sentenced to only 90 days' confinement, which was not served pursuant to a pre-trial agreement, reduction to the lowest enlisted rank, and forfeiture of \$984.06 per month for three months), remarked that: 'As for the PID (Positive Identification of civilians versus combatants as required in the Rules of Engagement), we didn't want my Marines to check if they had weapons first. We told them to shoot first and deal with it later'.⁴⁴ His conviction resulted from the issuance of the unlawful order, which violated the Rules of Engagement and in legal terms violated the principle of distinction. In practice, the *lex lata* applicable to armed conflict embeds principles of military necessity, discretion, and concepts of reasonableness liberally at the precise points of friction within the law where they are relevant to the actual conduct of military operations. Thus, perpetrators cannot subjectively inject those concepts at their own convenience because they are already baked into the structure of the laws and customs where relevant.

Conversely, the Court is bound by the same normative structure. In other words, because the laws and customs of armed conflict are deeply suffused into the structure of the Rome Statute, prosecutorial discretion and judicial decision-making must respect those barriers. This truism has profound implications for the future of the Court. The Court should carefully analyse the specific facts and evidence in light of the applicable principles drawn from the larger *lex lata* of armed conflict as an essential part of preliminary investigations *prior* to actual charging decisions. Phrased another way, the *lex lata* of the laws and customs of armed conflict are so deeply integrated into the structure of the actual crimes found in Article 8 and the constituent elements as to provide the jurisdictional floor that ought to guide Court practitioners seeking to apply those precepts in good faith.

The *lex lata* of the laws and customs of armed conflict provides the jurisdictional floor for war crimes charging that is embedded in the very fabric of the Rome Statute. As a result, the obligatory duty to initiate an investigation under Article 53(1) is tempered by the caveat that the prosecutor may decline investigation after 'having evaluated the information made available to him or her' and concluding that there is 'no reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed'. The notion of a jurisdictional floor for Article 8 is a vitally important, but frequently overlooked dimension of its intended functionality. If the established *jus in bello* provides a reasonable basis for inferring that the *actus reus* alleged against a particular perpetrator was permissible (hence lawful under the impetus

the chain of command during interviews for this investigation, taken as a whole, suggest that Iraqi civilian lives are not as important as U.S. lives, their deaths are just the cost of doing business, and that the Marines need to get "the job done" no matter what it takes. These comments had the potential to desensitize the Marines to concern for the Iraqi populace and portray them all as the enemy even if they are non-combatants'. This excerpt is from Army Major General Eldon A Bargewell's report, "Simple Failures" and "Disastrous Results" (*Washington Post*, 21 April 2007).

⁴⁴ Sworn Statement of SSgt Frank D Wuterich (taken 21 February 2001).

of the chapeau language), it cannot have been criminal within the meaning of the Statute. Other variations of this theme that could arise in other cases could centre on the accepted definitions of a military objective, or of the scope of protected persons, or of the concept of direct participation in hostilities, or a host of other principles. In circumstances where the conduct arguably complied with the established *lex lata*, there would accordingly be no reasonable basis for concluding that a crime within the jurisdiction of the Court occurred. It follows that the prosecutor should be extremely conscious of the moral and legal imperative to recognize and respect this jurisdictional floor in advance of charging decisions.

Even if the prosecutor is inclined to ignore established *lex lata* in favour of a firm policy of aggressive charging, there are strong pragmatic reasons for respecting the jurisdictional floor. Article 54(1)(a) requires the prosecutor to ‘extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and in doing so, investigate incriminating and exonerating circumstances equally’. Such exonerating circumstances would have to include the information reasonably available to the perpetrator, the operational context for a particular discretionary decision, and an array of factual considerations that might have affected the operational decisions during a military campaign. Evidence of good faith application of the laws and customs of war or of wholly appropriate exercises of circumstantial discretion permissible under the *lex lata* would fall within this obligatory investigative scope. To reiterate, if the perpetrator indeed committed the *actus reus* of a particular offence, but did so under circumstances authorized by the laws and customs of armed conflict, the jurisdictional floor for charging was not met. Following the investigation required by Article 54, if the prosecutor establishes a factual or legal basis for concluding that the conduct was in fact permissible, then that information ought to promptly be disclosed to the Court and to defence counsel and any pending charges ought to be dismissed. Far better to undertake a careful factual and legal inquiry *prior* to charging in order to preserve Court resources and to enhance overall legitimacy.

Second, faced with evidence of a good faith application of *jus in bello*, the Pre-Trial Chamber would likely decline to issue an arrest warrant under Article 58(1)(a) on the basis of doubt whether there are ‘reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court’. In any event, it is predictable that uncertainty over the actual legality of the *actus reus* would lead the Pre-Trial Chamber to decline confirmation of charges based on the conclusion that there is not ‘sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged’. The hearing envisioned in Article 61 (Confirmation of charges before trial) is adversarial in nature, and the prosecutor should carefully assess the actual charges in the light of all available information and undertake a critical analysis of the evidence in light of the established *lex lata* prior to seeking confirmation of charges. Most military practitioners would strongly support the pursuit of accountability against those whose conduct violated applicable professional norms; they would, nevertheless urge the prosecutor and Pre-Trial Chambers to be extremely diligent in correctly applying the precepts found in *jus in bello* and embedded in the

Statute in order to prevent inappropriate chilling effects on the lawful conduct of hostilities.

29.4.2 Status of forces agreements

In a related jurisdictional consideration, the Court should develop a firm policy with respect to the international agreements that accompany almost any military deployment. Military practitioners around the world would appreciate the predictability in planning and conducting operations that would accompany a stated Court policy vis-à-vis status of forces agreements that are ubiquitous aspects of armed conflicts or peacetime deployments. At the international level, United Nations Security Council Resolution 1973⁴⁵ empowered nation states to ‘use all necessary means’ to protect civilians inside Libya and to enforce the no-fly zone over Libyan territory. This Chapter VII Security Council Decision was implemented in the shadow of its prior grant of jurisdiction to the Court over the situation in Libya by virtue of Resolution 1970. The Security Council followed widespread state practice by specifying a formula for jurisdictional allocation over potential war crimes. Paragraph 6 of Resolution 1970 specified that

nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.

Military prosecutors would vehemently object to any attempt to characterize this provision as a grant of impunity for war crimes, as it merely serves to preserve the full panoply of prosecutorial prerogatives to the sending state.

In light of the fact that the Court’s juridical authority over the situation in Libya originated in the Article 13(b) authority of the Security Council, there was no doubt expressed in international circles that the grant of exclusive jurisdiction to the nationals of non-States Parties violated international law in general or obviated the object and purpose of the Rome Statute in particular. The extension of Court-based jurisdiction operates irrespective of state consent in a particular case or against a particular perpetrator or even an express waiver of jurisdiction by virtue of that state’s prior ratification of the Rome Statute. With respect to the situation in Libya, the jurisdictional allocation is uncontroversial and universally accepted. It must also be clearly understood that the limitation of Court jurisdiction in the Libya situation has no bearing whatsoever on other existing grounds for national jurisdiction derived from other sources, such as universal jurisdiction based on violations of the grave breach provisions of the Geneva Conventions.

⁴⁵ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

However, in the interests of intellectual consistency and operational predictability, the Court should specifically promulgate policy guidance with respect to the treaty-based allocation of jurisdiction that is a normal corollary to military deployments. Even if the *actus reus* of a particular offence might have been committed, the Court must make a legally defensible, completely objective assessment that ‘there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court’ as required by Article 58(1)(a). Under the tenets of Article 12, personal jurisdiction attaches only on the basis of territoriality or nationality; the Court has no treaty basis under the Rome Statute for claiming a universal scope of punitive authority over all potential perpetrators in all circumstances. The nationals of State Parties and non-States Parties are dissimilar in that citizens of states subjected to treaty-based duties to comply with the Rome Statute may be subject to nationality-based jurisdiction in the Court even when the receiving state had no basis for asserting territorial jurisdiction. In the author’s view, any State Party to the treaty may transfer *its own* claim to territorial jurisdiction to the Court, or to any other entity, as a matter of its own sovereign prerogatives. There is nothing in international law that prohibits a sovereign state from transferring its own jurisdictional right to any other entity irrespective of the consent of a third-party state that might have an equally colourable claim to jurisdiction. Any state can transfer rights it possesses to any other entity in the absence of an express prohibition limiting such transfer of rights. Indeed, as a normal operating principle, in such instances where two states exercise concurrent jurisdiction, transfer of authority from the State Party to the Court does not vitiate the jurisdiction of the non-State Party insofar as jurisdiction still exists on the national level; but as a practical matter the concurrent jurisdiction of the non-State Party is displaced by the sovereign act of the State Party. The competing jurisdictional claims would then become a political rather than a legal matter.

Logically, then, the act of transferring territorial jurisdiction over a state that is not party to the Rome Statute can be done perfectly consistently with the VCLT *if the territorial state has a colourable claim to jurisdiction at the time of the alleged war crime*. In this sense, the territorial state would be transferring its own authority in the same manner that the co-owner of a house could choose to sell or to transfer his/her property right without the consent of the other co-owner. On the other hand, if the territorial state did not in fact have a legally cognizable claim (i.e. possessory interest) to territorial jurisdiction at the time of the alleged offence/s, then it had no power to transfer jurisdictional authority that it did not possess. In practice, almost every military operation is accompanied by a specific bilateral treaty, or at the very least by an exchange of diplomatic notes, that limits the exercise of territorial jurisdiction for the purposes of the armed conflict or military deployment. As an example of a frequently encountered provision, Afghanistan relinquished any claim to criminal jurisdiction over the nationals of the United States by accepting that they are ‘accorded status equivalent to that accorded to the administrative and technical staff of the Embassy of the United States of America under the Vienna Convention on Diplomatic Relations of April 18, 1961’. Such status [termed A&T P&I by military practitioners] is just one notch below full diplomatic immunity enjoyed by the Ambassador upon delivery of his full powers instrument to the sovereign government. In other words, the basic law

of the Vienna Convention is absolutely clear that persons enjoying A&T P&I status are fully immune from host nation criminal law for all purposes at all times, and subject to limited civil immunity for acts undertaken in their official capacity. Thus, from 12 December 2002 the United States had exclusive jurisdiction over any US national alleged to have committed any cognizable criminal offence within Afghanistan.

The voluntary surrender of territorial jurisdiction in the context of military operations is distinct from other agreements that purport to limit the transfer of any persons to the Court as envisioned in Article 98(2). A State Party that has no existing basis for exercising territorial jurisdiction simply has no legal basis for undermining the exclusive personal jurisdiction possessed by another nation. In other words, if the State Party had no jurisdiction over crimes committed on its territory by virtue of having ceded such exclusive jurisdiction to another state, there would be no basis under the Rome Statute to transfer jurisdictional authority that it did not possess at the time. Thus, the State Party could not transfer territorial jurisdiction over the class of persons that it had already relinquished by its own sovereign authority despite the language of Article 12 that ostensibly grants such jurisdiction to the Court. In time, the ASP could amend Article 12 to specifically prohibit States Parties from entering into any agreement that curtails territorial jurisdiction that would otherwise be within the Court's purview. One thing is clear: in the absence of a Chapter VII Security Council Resolution that would override the discretion of sovereign states by virtue of Article 12(7) of the UN Charter, the Court has no articulable basis for asserting an independent claim to jurisdiction outside the scope of the Rome Statute. Court authority derives from the consent of sovereign states, and a State Party is not at liberty to disregard its grant of exclusive jurisdiction to another state absent a waiver of jurisdiction by that state. Thus, it follows that for the purposes of military deployments in which states routinely allocate exclusive jurisdiction over criminal acts, the Court cannot unilaterally assert that 'there are reasonable grounds to believe that a person has committed a crime within the jurisdiction of the Court' unless there is in fact a valid basis for such jurisdiction. Clarifying the scope of Court authority in the face of such frequently utilized treaty obligations would certainly enhance the efficiency of investigations and perhaps garner additional investigative support from military authorities, even as it would preserve the Court's overall credibility and legitimacy.

29.4.3 Protecting the precepts of command responsibility

Commanders throughout history have recognized that the humanizing influence of the norms for conducting conflict is a vital dimension of a combat effective unit that should not be ignored or devalued. An effective commander issues plans and guidance prior to the onset of operations, and sets a command climate of professionalism in which he or she empowers subordinates as the conflict unfolds.⁴⁶ The law of armed

⁴⁶ *Commentary on the Additional Protocols to the Geneva Conventions* (n 13) Art 87, para. 3550 <<http://www.icrc.org/ihl.nsf/COM/470-750001?OpenDocument>> accessed 20 June 2014 ('Undoubtedly the development of a battle may not permit a commander to exercise control over his troops all the time; but in this case he must impose discipline to a sufficient degree, to enforce compliance with the rules of the Conventions and the Protocol, even when he may momentarily lose sight of his troops').

conflict developed as a restraining and humanizing necessity to facilitate commanders' ability to accomplish the military mission even in the midst of fear, fatigue, factual uncertainty, moral ambiguity, and horrific violence conducted under the dual impulses of surging adrenaline and inculcated training.⁴⁷ The historical grounding of the laws and customs of war as deriving from the unyielding demands of military discipline under the authority of the commander or king explains why the legal status of lawful combatant was reserved for the armed forces fighting for a state or to paramilitary forces incorporated into those armed forces.⁴⁸ In other words, Cicero was simply incorrect when he postulated that law was silent during war; or in the best possible light, his opinion betrayed an inaccurate appreciation for the dynamics of waging war. In fact, Seneca, also writing in the Roman period, called for significant restraint especially during times of armed conflict in his essays 'On Anger' and 'On Mercy'.⁴⁹

Even in the face of the powerful psychological tendencies that are the *sine qua non* of combat, the principles of the law of armed conflict became an embedded aspect of military professionalism. The *jus in bello* obligates an individualized consideration of the propriety of each and every military action against the backdrop of the established normative framework discussed earlier. Writing in 1625, Hugo Grotius documented the Roman practice that 'it is not right for one who is not a soldier to fight with an enemy' because 'one who had fought an enemy outside the ranks and without the command of the general was understood to have disobeyed orders', which offence 'should be punished with death'.⁵⁰ Grotius explained the necessity for such rigid

⁴⁷ See Schindler and Toman (n 3).

⁴⁸ This statement is true subject to the linguistic oddity introduced by Art 3 of the 1907 Hague Regulations, which makes clear that the armed forces of a state can include both combatants and non-combatants (meaning chaplains and medical personnel), and that both classes of military personnel are entitled to prisoner-of-war status if captured ('[t]he armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war'). The Hague Regulations embodied this legal regime as follows:

Art 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'.

For a side-by-side comparison of the evolution from the 1899 language to the 1907 multilateral text, see J Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907* (New York: Oxford University Press, 1918) 100–27. It should be noted, though, that there is a difference between the way the term 'combatant' was used in the law of the Hague Convention and the way it is used today in the law of Additional Protocol I.

⁴⁹ Seneca, 'On Anger' in J Cooper and J Procope (eds), *Seneca: Moral and Political Essays* (Cambridge: Cambridge University Press 1995) 97–8; and 'On Mercy', *ibid.*, 132–4. Also see N Sherman, *Stoic Warriors: The Ancient Philosophy behind the Military Mind* (New York: Oxford University Press, 2005); J Reynolds, 'Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground' (2005) 56 *The Air Force Law Review* 1, 8.

⁵⁰ H Grotius, *On the Law of War and Peace* (1625) Book III, ch. XVIII, 788–9 (Francis W Kelsey tr., Oxford: Clarendon Press 1925). In this respect, Grotius is consistent with Cicero who conditioned his Just War rationale in part on the identity of the participants by declaring that only the state could properly

discipline as follows: ‘The reason is that, if such disobedience were rashly permitted, either the outposts might be abandoned, or, with the increase of lawlessness, the army or a part of it might even become involved in ill-considered battles, a condition which ought absolutely to be avoided’. Military doctrine admonishes that leaders must focus ‘on the impropriety of the motives of vengeance, cruelty, and hatred’. Once the enemy is viewed as something less than human, atrocities are more likely to occur. A generalized hatred towards the enemy leads too quickly to events like those at Beirut or My Lai. In light of this awareness, General David Petraeus wrote⁵¹ to ‘Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen serving in Multi-National Force-Iraq’:

Our values and the laws governing warfare teach us to respect human dignity, maintain our integrity, and do what is right. Adherence to our values distinguishes us from our enemy. This fight depends on securing the population, which must understand that we—not our enemies—occupy the moral high ground. This strategy has shown results in recent months. Al Qa’ida’s indiscriminate attacks, for example, have finally started to turn a substantial proportion of the Iraqi population against it.

The commander is responsible both for decision-making needed to employ a disciplined force and for the sustained combat readiness and training of those whom he or she is privileged to lead. As famed historian S L A Marshall noted, ‘when an officer winks at any depredation by his men, it is no different than if he had committed the act’.⁵² The implicit permission given by a present authority figure by acquiescence and silent approbation has been labelled ‘atrocity by connivance’.⁵³ This principle extends to command at all levels and in all contexts, and applies without limitation to commanders who assume control of organizations by conventional means or after the death or incapacitation of a previous leader. Each individual military actor remains an autonomous moral figure with personal responsibility. This explains the bright line principle that there is no defence of superior orders in response to allegations of war crimes.⁵⁴ At the same time, commanders have the most at stake in the success of the mission both personally and professionally. ‘To command’ is an active verb. The independent emergence of the principle that the commander’s orders operate with the force of law to limit the application of violence in widely disparate cultures and historical periods suggests that it is more than just a legal technicality, and instead is fundamental to the nature of warfare itself. Of course, the commander does not always speak with the authority of law behind him or her. But the best commanders are those that convey the proper sense of the restraints of established *jus in bello* for all of those who serve under them. The bedrock of military professionalism that is inherent and indistinguishable

conduct warfare and that a ‘soldier not inducted by oath could not legally serve’. R Bainton, *Christian Attitudes towards War and Peace: A Historical Survey and Critical Reexamination* (Nashville: Abingdon Press 1960) 41.

⁵¹ See e.g. Letter from Gen. David H Petraeus, Commanding Officer of Multi-National Force-Iraq, to Multi-National Force-Iraq (10 May 2007) (copy on file with author).

⁵² Gen. S L A Marshall, *The Officer as Leader* (1966) 274.

⁵³ M Osiel, *Obeying Orders* (New Brunswick/London: Transaction Publishers 1999) 189.

⁵⁴ Report of the International Law Commission Covering its Second Session (5 June–29 July 1950), UN Doc A/1316, reprinted in Schindler and Toman (n 3) 1265–6.

from the exercise of effective control over military operations explains the necessity for Article 28 in the Rome Statute.

29.4.3.1 The limits of co-perpetratorship

Despite the sweeping inclusion of groundbreaking provisions related to command and superior responsibility in Article 28 of the Rome Statute, both the prosecutor and Pre-Trial Chambers have displayed a remarkable reticence to charge Article 28 as a mode of liability in early cases. In *Lubanga*, Pre-Trial Chamber I found that there are reasonable grounds to believe that the perpetrator founded the military organization and served as its Commander-in-Chief throughout the relevant time period. Remarkably, the provision of the Rome Statute applying the precepts of command responsibility was avoided both by the prosecution and the Pre-Trial Chamber despite its patent applicability.⁵⁵ In lieu of extending the principles of command accountability onto a non-traditional, non-linear battlefield in which the commanders utilized fluid mechanisms of control in the midst of rapidly evolving operations, the Pre-Trial Chamber resorted to a theory of individual responsibility known as ‘co-perpetratorship’. Similarly, Pre-Trial Chamber I found that as the President and Commander-in Chief Omar Al Bashir ‘played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation’ of the massive campaign of criminality against civilians in Darfur, but issued the warrant only on the basis that he acted as an ‘indirect perpetrator’ (or, in the alternative, an ‘indirect co-perpetrator’) within the meaning of Article 25(3)(a) of the Rome Statute.⁵⁶

In the early cases, the prosecutor and Pre-Trial Chambers strained to avoid invocation of the precepts of command in favour of resuscitating an outmoded and arcane theory. By extrapolating Roxin’s organizational analysis drawn from the 1962 trial of Adolf Eichmann, the ICC generated a wholly new category of individual responsibility in which both superiors and subordinates in military organizations are held responsible as co-perpetrators, acting through an organizational apparatus.⁵⁷ These

⁵⁵ W Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press 2007) 212–13. See also Decision on the Confirmation of Charges, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-717, PTC I, ICC, 30 September 2008, paras 477–518; Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-14-tENG, PTC III, ICC, 10 June 2008, para. 78 (incorporating Claus Roxin’s interpretation of the Eichmann judgment into international jurisprudence and eschewing traditional principles of command responsibility); Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, *Situation in Uganda*, ICC-02/04-01/05-53, PTC II, ICC, 27 September 2005 (adopting the same theory of liability).

⁵⁶ See Warrant of Arrest, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-1, PTC I, ICC, 4 March 2009 (Chamber finds, in the alternative, that there are reasonable grounds to believe (i) that the role of Omar Al Bashir went beyond coordinating the design and implementation of the common plan; (ii) that he was in full control of all branches of the ‘apparatus’ of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the National Intelligence and Security Service, and the Humanitarian Aid Commission; and (iii) that he used such control to secure the implementation of the common plan).

⁵⁷ See Decision on the Confirmation of Charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-803, PTC I, ICC, 29 January 2007, paras 327–67.

developments are even more notable given the rejection of the theory by the Appeals Chamber of the ICTY on the basis that ‘co-perpetratorship’ as promulgated by the ICTY Trial Chamber did ‘not have support in customary international law or in the settled jurisprudence of this Tribunal’.⁵⁸ Moreover, the Roxin theory was built on the assumption of a ‘rigidly formal bureaucracy’ patterned on the model of the Prussian organizational model in which authority is channelled into defined hierarchical structures in which compliance is assured based on uniformity of expectations and goals.⁵⁹

The irony of the ICC approach is that the ICC has grafted Roxin’s theory into a non-linear battlefield in which non-state actors operate in precisely the opposite manner to a Westernized military hierarchy. Second, and perhaps more ominously, the ill-fated marriage may help to ensure acquittal of the perpetrators almost by definition, because defence counsel need only demonstrate a lack of power ‘to replace sullen juniors with more enthusiastic drones’.⁶⁰ The important point is that the ICC is artificially injecting its own view of the law rather than sustaining strict fidelity to the intent of States Parties. Such an approach even in cases where the evidence would otherwise support a finding of effective control is a major shift from the precepts of individual responsibility that embodies a regrettable ‘recollectivation of responsibility’⁶¹ because of the broader conception of the entire military organization as a unified criminal activity.

The current ICC approach is likely to prove irreducibly flawed in the end because any organization united under the authority of a superior will, by definition, exist with a common purpose. That is the very essence of authority and command. Overreliance of co-perpetratorship as the defining form of liability within military and para-military organizations would come dangerously close to strict liability for any perpetrator in a position of effective control, however briefly. In the abstract, the law is clear that superiors cannot be convicted on the basis of strict liability by virtue of their position alone.⁶² The decision to confirm charges against warlords in the DRC on the basis of ‘indirect co-perpetratorship’ appeared to demonstrate a strong disinclination to rely on the core precepts of Article 28.⁶³ The pathway chosen by the ICC endangers the

⁵⁸ Judgment, *Stakić*, IT-97-24-A, AC, ICTY, 22 March 2006, para. 62.

⁵⁹ M Osiel, *Making Sense of Mass Atrocity* (Cambridge: Cambridge University Press 2009) 100.

⁶⁰ *Ibid.*, 101.

⁶¹ See M Sassoli, ‘Transnational Armed Groups and International Humanitarian Law’ (Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper No. 6, 2006) 36 (noting that a policy of imputing criminal responsibility to every member of the organization by virtue of membership in an organization that participates in crimes creates a disincentive to compliance with international humanitarian law that ‘should be avoided’. Sassoli points out that it ‘remains of utmost importance to be able to reward the armed group member who respects IHL in order to increase our ability to encourage compliance with IHL and, thus, protect victims’).

⁶² Judgment and Sentence, *Semanza*, TC, ICTR, ICTR-97-20-T, 15 May 2003, para. 404 (‘Criminal liability based on superior responsibility will not attach on the basis of strict liability simply because an individual is in a chain of command with authority over a given geographic area. While the individual’s position in the command hierarchy is considered a significant indicator that the superior knew or had reason to know about the actions of his subordinates, knowledge will not be presumed from the status alone’).

⁶³ Decision on the Confirmation of Charges, *Katanga and Ngudjolo* (n 55).

foundations of individual responsibility because superimposing an extended version of joint responsibility onto a non-state organizational structure leads inexorably to a system of strict liability.

Though ad hoc readjustments of the theories of individual responsibility may provide a result-oriented mechanism for affixing criminal responsibility, they fail to understand the essence of the criminality at issue for all fighting organizations—that it is the fielding of the fighting organization without the proper safeguards that is the root of the criminal behaviour. International law places a heightened responsibility on commanders who field a fighting organization on the basis of their authoritative control of the application of violence. This principle in turn requires that accountability ensue for commanders who fail to exercise appropriate control over the operations of their subordinates on the basis of their inherent duties as commanders. Any military or para-military organization seeks to use ‘deliberate, controlled, and purposeful acts of force combined and harmonized to attain what are ultimately political objectives’.⁶⁴ Indeed, the ‘first basic need for an insurgent who aims at more than simply making trouble is an attractive cause’ which permits supporters to be recruited and over time gives the insurgent ‘a formidable, if intangible, asset that he can progressively transform into concrete strength’.⁶⁵ Thus, a ‘highly articulated structure of control’ is necessary to prevent purposeless and indiscriminate violence that detracts from the larger purpose of the conflict.⁶⁶

To date, the trajectory of the Court’s practice risks undermining the law of command responsibility based on the predilection of jurists. A commander, by definition, exercises operational control at the risk of personal criminal liability for the actions of subordinates. The precepts of command responsibility embedded in the Rome Statute represent the culmination of a long developmental arc supported by centuries of pragmatic professional military practice. Article 28 cannot be considered as a secondary or subordinate form of liability because its precepts are too central to the foundation of military professionalism. Command responsibility logically would have provided the strongest basis of responsibility for use by an emerging supranational institution focused on fidelity to its constitutive authorities. Though they would certainly support the independence and judicial authority of Court officials, the drafters of the Rome Statute surely did not foresee such an evisceration of the important principles of Article 28. By reducing the utility of the cornerstone concept of command responsibility that developed to constrain the application of violence during conflicts, the Court risks its own effectiveness as an institutional inhibitor of atrocities conducted by the participants in future armed conflicts.

⁶⁴ M Howard, ‘Temperamenta Belli: Can War Be Controlled?’ in M Howard (ed.), *Restraints on War: Studies in the Limitation of Armed Conflict* (Oxford: Oxford University Press 1979) 3.

⁶⁵ D Galula, *Counterinsurgency Warfare: Theory and Practice* (New York: Praeger 2006) 12. The first basic need for an insurgent who aims at more than simply making trouble is an attractive cause, particularly in view of the risks involved and in view of the fact that the early supporters and the active supporters—not necessarily the same—have to be recruited by persuasion. With a cause, the insurgent has a formidable, if intangible, asset that he can progressively transform into concrete strength.

⁶⁶ Ibid.

29.4.3.2 Properly applying the Article 28 standard

Given the historical context and vitally important role of command authority explained earlier, military practitioners would almost certainly be in strong concurrence that the phrase ‘knew or should have known’ is an essential and non-transferrable tenet of command. Any person that claims to be in effective control of a military force of any size in the context of any imaginable combat operations should be subject to the ‘knew or should have known’ standard of established *jus in bello*. The charges against Jean-Pierre Bemba were confirmed by Pre-Trial Chamber II on the basis of actual knowledge that forces under his effective control were committing or about to commit war crimes and crimes against humanity.⁶⁷ After the prosecution closed its case on 20 March 2012 and the defence opened its case in August of that year, the Trial Chamber notified the parties that it reserved the right to amend the characterization of the Article 28 liability to consider whether the perpetrator could also be accountable on the alternative ground that he ‘should have known’ that forces under his effective control were committing or about to commit violations.⁶⁸

In the interest of equality of arms, the Chamber made clear that its right to recharacterize the basis of liability under Court Regulation 55 was contingent upon hearing all of the available evidence and following the submissions of the prosecution and defence. At the time of this writing, the Bemba trial is ongoing and there will likely be no definitive resolution of the basis for individual responsibility or the lack thereof until a trial judgment is issued. Setting aside the arguments postulated by the defence and prosecution teams, and acknowledging the uncertainty of predicting pending litigation, military practitioners would be little troubled to see a conflation of the distinct formulations of *mens rea*. That is one reason the elements for the war crime of conscripting child soldiers contain an express element that the commander either ‘knew or should have known’ the age of the victims. For a responsible military commander there simply is no distinction between a standard requiring actual knowledge and a broader ‘should have known standard’. Regardless of the mode of liability eventually accepted, military professionals would value the reinforcement of the professional ethos of commandership.

29.5 Conclusions

Casual readers of this chapter (and perhaps the editors of this volume) may be surprised at its length, or the breadth of issues related to properly charging crimes within the purview of Article 8. *Jus in bello* norms are best preserved when they are understood to be an integral dimension of the mission. For example, the proportionality principle found in Article 8(2)(b)(iv) becomes an embedded aspect of war-fighting on

⁶⁷ Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, ICC, 15 June 2009.

⁶⁸ Decision giving notice to the parties and participant that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2324, TC III, ICC, 21 September 2012.

both the horizontal level (by linking disparate units and national contingents) and on the vertical level (by binding the strategic, operational, and tactical goals of a military operation). The ICRC categorically maintains that state practice has proven the principle of proportionality to be a norm of customary law applicable in both international and non-international armed conflicts.⁶⁹ This remains true despite the omission of a parallel principle in Article 8(2)(e). Accomplishing the mission is a non-negotiable necessity which in turn breeds a military culture that prizes the selfless pursuit of duty. Correctly applying the precepts of proportionality should seldom if ever force good faith war-fighters into an absolute choice. The Israeli Supreme Court summarized this notion by noting that the authority of military commanders ‘must be properly balanced against the rights, needs, and interests of the local population: the law of war usually creates a delicate balance between two poles: military necessity on one hand, and humanitarian considerations on the other’.⁷⁰

As it expands upon its jurisprudence and practice with respect to the investigation and charging of Article 8 offences, the Court should remain mindful of Shakespeare’s admonition in King Lear that ‘Striving to better, oft we mar what’s well’.⁷¹ The Court would advance the cause of justice and reinforce established professional military ethos by accepting the jurisdictional floor for war crimes charging that is embedded in the Rome Statute, understanding the implications of the Status of Forces agreements widely employed in international military operations and promulgating clear guidance to states and military planners around the world, and by upholding the historic principles embedded in Article 28. Thus, the Court can serve an irreplaceable role in reinforcing the larger *jus in bello* context rather than ravaging the laws and customs of war by creating an artificial set of parallel jurisprudential applications.

⁶⁹ J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* vol. I (Cambridge: Cambridge University Press 2005) Rule 14, 46ff ('Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited').

⁷⁰ *Beit Sourak Village Council v the Government of Israel* [2004] HCJ 2056/04, para. 34 <http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.htm> accessed 20 June 2014 (quoting Y Dinstein, 'Legislative Authority in the Administered Territories' (1973) 2 *Tel Aviv University Law Review* 505, 509).

⁷¹ W Shakespeare, *King Lear*, act 1, sc. 4.

The Characterization of Armed Conflict in the Jurisprudence of the ICC

*Anthony Cullen**

30.1 Introduction

The existence of armed conflict is the most fundamental prerequisite for the exercise of jurisdiction over war crimes. This chapter will probe the characterization of armed conflict in the case law of the ICC and consider the prospects for its future development. It will examine the schema currently employed by the Court for the qualification of armed conflict and issues that impact on the exercise of subject-matter jurisdiction over war crimes. In doing so, it will provide a critique of the approach currently adopted and highlight issues that may, in the longer term, impact on the characterization of armed conflict by the Court.

30.2 The Exercise of Jurisdiction over War Crimes

The basis for the exercise of jurisdiction over war crimes is provided for in Articles 5 and 8 of the Rome Statute.¹ Article 8(1) of the Rome Statute states that '[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'.² This provision must be read in the context of Article 5(1), which places a fundamental, overarching qualification on the Court's jurisdiction: 'The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.' In accordance with this provision, offences that do not qualify as crimes of international concern are excluded from the Court's jurisdiction.

For the purpose of the Rome Statute, 'war crimes' are defined in Article 8(2). This provides four lists of offences that qualify as 'war crimes'. The offences listed in Articles 8(2)(a) and 8(2)(b) apply to situations of international armed conflict, while those contained in Articles 8(2)(c) and 8(2)(e) apply to armed conflict not of an international character. The war crimes enumerated for international armed conflict

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¹ Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute').

² According to Michael Bothe, a consequence of this provision is that 'isolated individual acts of individual members of the armed forces or, as the case may be, of individual civilians should not ordinarily be tried by the Court'. M Bothe, 'War Crimes' in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press 2002) 380–426, 380.

cover '[g]rave breaches of the Geneva Conventions' and '[o]ther serious violations of the laws and customs applicable in international armed conflict'. In the context of armed conflict not of an international character, war crimes are 'serious violations of Article 3 common to the four Geneva Conventions' and '[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character'. The definitions contained in Article 8(2) thus require the Court to qualify situations as international armed conflict or non-international armed conflict for the exercise of its subject-matter jurisdiction. Awareness of the existence of armed conflict is required on the part of the perpetrator, but not of its character as international or non-international.³

In addition, in order for an act or omission to qualify as a war crime, there must be a nexus between the offence and a situation of armed conflict. It is not necessary for the existence of armed conflict to be regarded 'as the ultimate reason for the criminal conduct, nor must the conduct have taken place in the midst of the battle'.⁴ However, the offence in question must have taken place in the context of an armed conflict and must be 'closely related to the hostilities'.⁵ As noted by Professor William Schabas,

Not all crimes committed during armed conflict are war crimes. Ordinary criminal acts—murder, rape, robbery, child and spousal abuse, fraud—continue to be perpetrated, but they do not become war crimes merely because there is a situation of armed conflict. Case law establishes that there must be a link or nexus between the acts of the accused and the armed conflict.⁶

The existence of armed conflict and the required nexus are evidentiary matters to be determined on the basis of case-specific analysis of facts. It is important to bear in mind that there is no definition of armed conflict in the Rome Statute or in the

³ The ICC Elements of Crimes state: (a) There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international; (b) In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international; (c) There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms 'took place in the context of and was associated with'. See Elements of Crimes, Official Records of the ASP to the Rome Statute of the ICC, First Session, New York, 3–10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B. See K Dörmann, 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes' (2003) 7 *Max Planck Yearbook of United Nations Law* 341, 359.

⁴ Decision on the Confirmation of the Charges, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-717, PTC I, ICC, 30 September 2008, para. 380.

⁵ Decision on the Confirmation of the Charges, *Lubanga, Situation in the Democratic Republic of the Congo*, PTC I, ICC, 29 January 2007 ('Lubanga decision on the confirmation of charges'), para. 288. See also Judgment, *Kunarac et al.*, IT-96-23&IT-96-23/1-A, AC, ICTY, 12 June 2002, para. 58: 'What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment—the armed conflict—in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, 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. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.'

⁶ W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press) 207.

Elements of Crimes.⁷ As a consequence, the basis for the qualification of situations is to be located elsewhere. In the absence of a definition, the Court has referred to ‘applicable treaties and principles and rules of international law, including the established principles of international law of armed conflict’ for guidance on the characterization of armed conflict.⁸ In addition, reference has also been made to ‘relevant jurisprudence of other tribunals which echo principles of the international law of armed conflict’.⁹ The section that follows will consider the approach adopted in doing so.

30.3 The Characterization of Armed Conflict under the Rome Statute

The approach employed by the Court in its characterization of armed conflict has been shaped to a considerable extent by the jurisprudence of the ICTY. In the absence of a general definition of armed conflict in the Rome Statute or in the Elements of Crimes, the Court has on a number of occasions derived assistance from the case law of the tribunal. This section will explore the approach employed in doing so. It will examine the basis for relying on the jurisprudence of the tribunal as applicable law and will consider critically how the concept of armed conflict developed by the ICTY has been utilized by the Court.

Before scrutinizing the Court’s jurisprudence on the characterization of armed conflict, it is useful to consider the scope of the applicable law. Article 21 of the Rome Statute states:

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

⁷ This has been noted in a number of decisions of the Court. These include Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, PTC II, ICC, 15 June 2009 ('Bemba decision on the charges'), para. 217; Judgment pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, TC I, ICC, 14 March 2012 ('Lubanga trial judgment'), para. 531; and Jugement Rendu en Application de l'Article 74 du Statut, *Katanga, Situation in the Democratic Republic of the Congo*, TC II, ICC, 7 March 2014 ('Katanga trial judgment'), para. 1172.

⁸ Art 21(1)(b) ICC Statute.

⁹ *Bemba* decision on the charges (n 7) para. 218.

age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

As there is no general definition of armed conflict in the sources referred to in Article 21(1)(a), the Court has considered the matter ‘pursuant to article 21(1)(b) of the Statute, and with due regard to article 21(3) of the Statute’.¹⁰ Although necessary for the qualification of situations, the absence of general definition of armed conflict in the Rome Statute is not unusual. There is no such definition of armed conflict in any treaty of international law, including the Geneva Conventions of 1949 and the Additional Protocols thereto.¹¹ In the Geneva Conventions, the scope of armed conflict is defined by the terms of common Articles 2 and 3 which cover international and non-international armed conflict respectively. Common Article 2 refers to ‘all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties’, while common Article 3 refers to ‘armed conflict not of an international character’. As sources reflecting applicable law, these provisions have been referred to on a number of occasions by the Court in its characterization of armed conflict.

The Additional Protocols of 1977 added two additional categories of armed conflict to the schema of characterization created by the Geneva Conventions. Article 1(4) of Additional Protocol I expanded international armed conflict to include wars of national liberation:

[A]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹²

Article 1(1) of Additional Protocol II created a new category of non-international armed conflict distinct from that of common Article 3. These are conflicts ‘which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol’.¹³ Both Geneva Conventions of 1949 and the Additional Protocols of 1977 created distinctions in international humanitarian law that had not previously existed. These distinctions emerged as a result of negotiations in the drafting of the treaties. The new categories

¹⁰ *Lubanga* decision on the confirmation of charges (n 5) para. 205.

¹¹ Although Additional Protocol I and II contain definitions of international and non-international armed conflict, the terms of the definitions provided are peculiar to the instruments and not helpful for the characterization of situations in the contexts of the Rome Statute.

¹² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (signed 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

¹³ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (signed 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

of armed conflict produced by the distinctions complicate and sometimes frustrate the applicability of the law. It is fortunate, therefore, that only the distinction reproduced in the Rome Statute is that created by the Geneva Conventions between international and non-international armed conflict. The distinctions created by the Additional Protocols do not feature in the Statute.

Although recognized as part of the established framework of the law of armed conflict, the appropriateness of maintaining the distinction between international and non-international armed conflict has been questioned by a number of commentators.¹⁴ Arguments raised in this debate have been alluded to in the case law of the Court. In its Judgment pursuant to Article 74 of the Statute, the Trial Chamber in the *Lubanga* case stated:

It is to be observed at the outset that some academics, practitioners, and a line of jurisprudence from the ad hoc tribunals have questioned the usefulness of the distinction between international and non-international armed conflicts, particularly in light of their changing nature. In the view of the Chamber, for the purposes of the present trial the international/non-international distinction is not only an established part of the international law of armed conflict, but more importantly it is enshrined in the relevant statutory provisions of the Rome Statute framework, which under Article 21 must be applied. The Chamber does not have the power to reformulate the Court's statutory framework.¹⁵

The distinction between international and non-international armed conflict is thus one that will continue to be applied by the Court in the exercise of subject-matter jurisdiction over war crimes. As the alternative would require an amendment of the Rome Statute, it is anticipated that the distinction will be maintained to feature in the case law on characterization of armed conflict for the foreseeable future. The way in which the distinction will be conceptualized, however, is less predictable. This point will be returned to later when considering the test employed for internationalization of internal armed conflict. Before doing so, attention will be turned to the definition that rests at the heart of the Court's jurisprudence on the characterization of armed conflict.

As there is no formula for the characterization of armed conflict in the Statute, and as neither 'international armed conflict' nor 'armed conflict not of an international character' is defined in the sources referred to in Article 21(1)(a), the Court has relied heavily on the case law of the ICTY. In doing so, consonant with 'the established framework of the international law of armed conflict', the Court has referred to the concept of armed conflict that was first pronounced in the *Tadić* case.¹⁶ In its Decision

¹⁴ Examples include the following authors: E Crawford, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts' (2007) 20 *Leiden Journal of International Law* 441; J Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalised Armed Conflict' (2003) 85 *International Review of the Red Cross* 313; G McDonald, 'The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War' (1998) 156 *Military Law Review* 30.

¹⁵ *Lubanga* trial judgment (n 7) para. 539.

¹⁶ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić*, IT-94-1-AR72, AC, ICTY, 2 October 1995 ('*Tadić* jurisdiction decision'), para. 70. It is difficult to overstate the influence of this case on the Statute of the ICC. Delivered on 2 October 1995, the Appeal Chamber's Decision on

on the Defence Motion for Interlocutory Appeal on Jurisdiction (*Tadić* Jurisdiction Decision), the Appeals Chamber stated the following definition of armed conflict as an *obiter dictum*:

[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.¹⁷

This definition, credited to Judge Antonio Cassese,¹⁸ has been incorporated into jurisprudence of the ICC. It represents the most authoritative contemporary standard for determining the existence of armed conflict.¹⁹ International armed conflict is characterized as the ‘resort to armed force between states’, while the existence of non-international armed conflict is defined as ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a state’. This characterization of non-international armed conflict by the ICTY Appeals Chamber expanded significantly the applicability of international humanitarian law. According to Sonja Boelaert-Suominen,

The seemingly innocuous description by the Appeals Chamber of what constitutes an armed conflict was innovative in various respects. First, it covers a variety of hypotheses and caters explicitly for conflicts between non-state entities. Second, whilst it sets a low threshold for the application of humanitarian law in general, it is particularly important for its consequences in relation to internal armed conflicts. The definition of armed conflict suggested by the Appeals Chamber covers not only the classic examples of (a) an armed conflict between two or more states and (b) a civil war between a state on the one hand, and a non-state entity on the other. It clearly encompasses a third situation, (c) an armed conflict in which no government party is involved, because two or more non-state entities are fighting each other.²⁰

the Defence Motion for Interlocutory Appeal on Jurisdiction asserted for the first time the existence of individual criminal responsibility for violations of international humanitarian law in non-international armed conflict; it expanded the norms deemed applicable to non-international armed conflict on the basis of customary international humanitarian law, and provided a definition of armed conflict that has since become the most authoritative point of reference to establish subject-matter jurisdiction for the prosecution of war crimes. See generally, C Greenwood, ‘International Humanitarian Law and the *Tadic* Case’ (1996) 7 *European Journal of International Law* 265; P Rowe, ‘The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the *Tadic* Case’ (1996) 45 *International and Comparative Law Quarterly* 691.

¹⁷ *Tadić* jurisdiction decision (n 16) para. 70.

¹⁸ Rowe (n 16) 697.

¹⁹ See A Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge: Cambridge University Press 2010), 117–58.

²⁰ S Boelaert-Suominen, ‘The Yugoslav Tribunal and the Common Core of Humanitarian Law Applicable to All Armed Conflicts’ (2000) 13 *Leiden Journal of International Law* 619, 632–3.

The significance of the definition for the ICC is evident not only from its application in the case law of the Court, but also from the incorporation of text from *Tadić* into the Rome Statute. Article 8(2)(f) of the Rome Statute characterizes ‘armed conflicts not of an international character’ using similar language: ‘protracted armed conflict between governmental authorities and organized armed groups or between such groups’.²¹ The influence of the definition is also clear from its use in the characterization of various situations, including the DRC,²² the CAR,²³ and Dafur, Sudan.²⁴ However, it is important to note that the Court’s case law has not been entirely consistent: differences of interpretation are evident between decisions of the Pre-Trial and Trial Chambers. With regard to armed conflict not of an international character, the Pre-Trial Chamber in the *Bemba* case, citing the Decision on the Confirmation of Charges issued by the *Lubanga* Pre-Trial Chamber on 29 January 2007,²⁵ interpreted responsible command as a requirement for characterization of non-international armed conflict: “[O]rganized armed groups” must be under responsible command. In this regard, responsible command entails some degree of organization of those armed groups, including the possibility to impose discipline and the ability to plan and carry out military operations.²⁶ The context of this statement by the *Bemba* Pre-Trial was its Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the prosecutor against Jean-Pierre Bemba Gombo, issued on 15 June 2009.²⁷ On 14 March 2012 the *Lubanga* Trial Chamber issued its judgment pursuant to Article 74 of the Statute which contained a different view to that of the Pre-Trial Chambers on the requirement of responsible command. In this judgment, the Trial Chamber stated:

Article 8(2)(f) does not incorporate the requirement that the organised armed groups were ‘under responsible command’, as set out in Article 1(1) of Additional Protocol II. Instead, the ‘organized armed groups’ must have a sufficient degree of organisation, in order to enable them to carry out protracted armed violence.²⁸

The inconsistency between Pre-Trial and Trial Chamber decisions raises important questions concerning the management of judicial practice and the role of Pre-Trial Chambers in the characterization of situations. This was reflected in the first report of the ICC Study Group on Governance, which states: ‘A discussion is needed...to

²¹ Despite use of the word ‘conflict’ instead of ‘violence’ in Art 8(2)(f), there is evidence to suggest a threshold identical to that of *Tadić*. See A Cullen, ‘The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)’ (2008) 12 *Journal of Conflict and Security Law* 419.

²² *Lubanga* decision on the confirmation of charges (n 5) para. 533; *Katanga* trial judgment (n 7) para. 1173.

²³ *Bemba* decision on the charges (n 7) para. 229.

²⁴ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-3, PTC I, ICC, 4 March 2009, para. 59.

²⁵ *Lubanga* decision on the confirmation of charges (n 5) para. 232.

²⁶ *Bemba* decision on the charges (n 7) para. 234.

²⁷ A similar approach to the issue of responsible command was taken by the Pre-Trial Chamber in the *Bashir* case on 4 March 2009: Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-3, PTC I, ICC, 4 March 2009, para. 59.

²⁸ *Lubanga* trial judgment (n 7) para. 536.

address the required extent of the legal interpretation made by the Pre-Trial Chamber as well as the necessary degree of precision of the legal characterization of facts and modes of liability.²⁹ The issue identified by the Study Group on Governance is one that reflects the complexity of the Court as an institution and the issues of interpretation that it is required to resolve. It is foreseeable that such issues will continue to occupy the Working Group on Lessons Learnt as it reviews the working practices of the Court.³⁰ As an evidentiary requirement for the exercise of subject-matter jurisdiction, it is also foreseeable that the judicial practice will evolve as the Rules on Procedure and Evidence are amended, increasing consistency between Pre-Trial and Trial Chambers in the interpretation of armed conflict.

In terms of substantive law, it is clear that the distinction between international and non-international armed conflict will continue to play a fundamental role in the characterization of situations. For non-international armed conflict, the parties engaged in the conflict must possess a minimum level of organization and the hostilities must reach a certain threshold of intensity.³¹ Control over territory is not required. In its Judgment pursuant to Article 74 of the Statute, the *Lubanga* Trial Chamber stated:

Article 8(2)(f) of the Statute only requires the existence of a ‘protracted’ conflict between ‘organised armed groups’. It does not include the requirement in Additional Protocol II that the armed groups need to ‘exercise such control over a part of [the] territory as to enable them to carry out sustained and concerted military operations’. It is therefore unnecessary for the prosecution to establish that the relevant armed groups exercised control over part of the territory of the State.³²

The level of organization required for a group to qualify as an ‘organized armed group’ need not imply the existence of responsible command or control over territory. It must, however, be sufficient for the purposes of engaging in armed violence of a particular intensity. The approach adopted by the Court in its interpretation of this organizational requirement has been a flexible one. The conditions associated with the level of organization required were characterized by the *Lubanga* Trial Chamber as follows:

When deciding if a body was an organised armed group (for the purpose of determining whether an armed conflict was not of an international character), the following non-exhaustive list of factors is potentially relevant: the force or group’s internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group’s ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement. None of these factors are individually determinative. The test, along with these criteria, should be applied flexibly when the Chamber is deciding

²⁹ Study Group on Governance: Lessons Learnt: First Report of the Court to the ASP, IICC-ASP/11/31/Add.1, 23 October 2012 (Eleventh Session of the ASP), 4.

³⁰ Study Group on Governance Working Group on Lessons Learnt: Second Report of the Court to the ASP, IICC-ASP/12/37/Add.1, 31 October 2013 (Twelfth Session of the ASP).

³¹ These two related requirements for the characterization of non-international armed conflict are both derived from the *Tadić* case: Opinion and Judgment, *Tadić*, TC, ICTY, 7 May 1997, para. 561.

³² *Lubanga* trial judgment (n 7) para. 536.

whether a body was an organised armed group, given the limited requirement in Article 8(2)(f) of the Statute that the armed group was ‘organized’.³³

The Court thus explains the organizational requirement in terms of indicative criteria rather than stipulating a definitive threshold of organization. In doing so, it follows the approach employed in the case law of the ICTY and cites with approval tribunal judgments elucidating the level of organization required for the existence of armed conflict: the *Limaj* case, the *Haradinaj* case, and the *Boškoski* case.³⁴ Although the approach employed is balanced on the degree of flexibility it provides to characterize the broadest range of situations, the open-endedness of the requirement in itself does little to illuminate the parameters of non-international armed conflict. It must, therefore, always be considered in conjunction with the requirement of intensity.

The requirement relating to the intensity of hostilities is related to that of organization. According to the terms of Article 8(2)(d) and 8(2)(f), the level of armed violence must rise above that of ‘internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature’. This language is taken from Article 1(2) of Additional Protocol II. According to the ICRC Commentary on Article 1(2),

The concept of internal disturbances and tensions may be illustrated by giving a list of examples of such situations without any attempt to be exhaustive: riots, such as demonstrations without a concerted plan from the outset; isolated and sporadic acts of violence, as opposed to military operations carried out by armed forces or armed groups; other acts of a similar nature, including, in particular, large scale arrests of people for their activities or opinions.³⁵

The exclusion of ‘internal disturbances and tensions’ in the Rome Statute reflects the lower threshold of non-international armed conflict under international humanitarian law.³⁶ This threshold determining the existence of armed conflict is fundamental to the exercise of subject-matter jurisdiction over war crimes. According to the Pre-Trial Chamber in the case of *Gombo*, ‘this is ultimately a limitation on the jurisdiction of the Court itself, since if the required level of intensity is not reached, crimes committed in such a context would not be within the jurisdiction of the Court’.³⁷ In *Lubanga*, the Trial Chamber clarified conditions indicative of the required degree of intensity by reference to the ICTY cases of *Prosecutor v Đorđević* and *Prosecutor v Mrkšić*:

³³ Ibid., para. 537. ³⁴ Id.

³⁵ International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff 1987) 1354, para. 4474.

³⁶ The Pre-Trial Chamber in the case of *Bemba* stated: ‘[I]n interpreting the concept of armed conflict not of an international character under the regime of the Statute, the Chamber concludes that an “armed conflict not of an international character” is characterized by the outbreak of armed hostilities of a certain level of intensity, exceeding that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, and which takes place within the confines of a State territory. The hostilities may break out (i) between government authorities and organized dissident armed groups or (ii) between such groups.’ See *Bemba* decision on the charges (n 7) para. 231.

³⁷ Ibid., para. 225.

The intensity of the conflict is relevant for the purpose of determining whether an armed conflict that is not of an international character existed, because under Article 8(2)(f) the violence must be more than sporadic or isolated. The ICTY has held that the intensity of the conflict should be ‘used solely as a way to distinguish an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.’ In order to assess the intensity of a potential conflict, the ICTY has indicated a Chamber should take into account, *inter alia*, ‘the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, if so, whether any resolutions on the matter have been passed.’ The Chamber is of the view that this is an appropriate approach.³⁸

The approach adopted is again one that mirrors the jurisprudence of the ICTY,³⁹ based on the concept of armed conflict developed from the *Tadić* case. The quotations from the *Dorđević* and *Mrkšić* cases are taken from the paragraphs which refer to the *Tadić* test for determining the existence of an armed conflict.⁴⁰ Both judgments note that the test has been consistently applied in the jurisprudence of the Tribunal and that there are two criteria associated with the test: (i) the intensity of the conflict and (ii) the organization of the parties.⁴¹ According to Sylvain Vité, ‘[t]he ICTY’s case law has not only identified the two constitutive elements of that concept, but has also put forward a wide range of indicative criteria making it possible to verify, on a case-by-case basis, whether each of these components has been achieved’.⁴² Considering the depth of attention that has been given to the concept in the case law of the ICTY, and the authority that is now associated with the *Tadić* definition, it is foreseeable that the jurisprudence of this institution will continue to play a pivotal role in the characterization of situations by the Court.

In addition to clarifying the interpretation of ‘armed conflict not of an international character’, the decision of the Trial Chamber in *Lubanga* also illuminated the distinction between international and non-international armed conflicts.⁴³ In doing so,

³⁸ *Lubanga* trial judgment (n 7) para. 538. This approach has also been followed in *Katanga* trial judgment (n 7) para. 1187.

³⁹ The judgment of the Trial Chamber in *Limaj* et al. states the following the approach employed by the ICTY in assessing intensity for the purposes of a situation as one of armed conflict: ‘[I]n assessing the intensity of a conflict, other Chambers have considered factors such as the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed.’ Judgment, *Limaj* et al., IT-03-66-T, TC II, ICTY, 30 November 2005, para. 90.

⁴⁰ Public Judgment with Confidential Annex—Volume I of II, *Dorđević*, IT-05-87/1-T, TC II, ICTY, 23 February 2011, para. 1522; Judgment, *Mrkšić* et al., IT-95-13/1-T, TC II, ICTY, 27 September 2007, para. 407.

⁴¹ Id.

⁴² S. Vité, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’ (2009) 91 (973) *International Review of the Red Cross* 69, 94.

⁴³ *Lubanga* trial judgment (n 7) paras. 538–42. According to the Pre-Trial Chamber in *Bemba*, ‘an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State’. *Bemba* decision on the charges (n 7) para. 223.

the Trial Chamber confirmed that ‘international and non-international conflicts may coexist’.⁴⁴ Accordingly, the Chamber ‘implicitly recognized that different legal frameworks may apply to the distinct conflicts occurring in such situations. Inter-state confrontations are governed by the law of international armed conflict, whereas other scenarios are subject to the law of non-international armed conflict’.⁴⁵

The *Lubanga* Trial Chamber also confirmed the position adopted by the Pre-Trial Chamber on the conditions required for a change in status from a non-international to an international armed conflict:

The Chamber considers an armed conflict to be international in character if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance. In addition, an internal armed conflict that breaks out on the territory of a State may become international—or, depending upon the circumstances, be international in character alongside an internal armed conflict—if (i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).⁴⁶

In the event of indirect intervention, the test for internationalization is one involving the exercise of ‘overall control’ by a state of an armed group. This test is derived from the *Tadić* Appeals Chamber judgment of 15 July 1999.⁴⁷ It is the standard employed for the qualification of *prima facie* internal armed conflict as either international or non-international, depending on the degree of control exercised by a state external to the armed conflict over the non-State Party to the conflict. The *Lubanga* Trial Chamber explained the basis for internationalization as a result of both direct and indirect intervention as follows:

It is widely accepted that when a State enters into conflict with a nongovernmental armed group located in the territory of a neighbouring State and the armed group is acting under the control of its own State, ‘the fighting falls within the definition of an international armed conflict between the two States’. However, if the armed group is not acting on behalf of a government, in the absence of two States opposing each other, there is no international armed conflict. Pre-Trial Chamber II, when considering this issue, concluded that ‘an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State.’ As regards the necessary degree of control of another State over an armed group acting on its behalf, the Trial Chamber has concluded that the ‘overall control’ test is the correct approach. This will determine whether an armed conflict not of an international character may have become internationalised due to the involvement of armed forces acting on behalf of another State. A State may exercise the required degree of control when it ‘*has a role in organising, coordinating or planning the military actions of the military group*, in addition to financing, training and equipping or providing operational support to that group’.⁴⁸

⁴⁴ *Lubanga* trial judgment (n 7) para. 540.

⁴⁵ S Vité, ‘Between Consolidation and Innovation: The International Criminal Court’s Trial Chamber Judgment in the *Lubanga* Case’ (2012) 15 *Yearbook of International Humanitarian Law* 61, 64.

⁴⁶ *Lubanga* decision on the confirmation of charges (n 5) para. 209.

⁴⁷ Judgment, *Tadić*, IT-94-1-A, AC, ICTY, 15 July 1999, para. 131.

⁴⁸ *Lubanga* trial judgment (n 7) para. 541. Emphasis in original.

This text describing the ‘required degree of control’ is taken from the *Tadić* Appeals Chamber judgment which sets out the test of ‘overall control’. As a standard employed for the internationalization of armed conflict, the test does not require proof of instructions being issued from the authorities of state to an armed group; it is sufficient to show that the group acts as a *de facto* organ or agent of the state and that ‘the group as a whole [is] under the overall control of the State’.⁴⁹

Although the test of ‘overall control’ is employed consistently in the case law of the ICTY, and its incorporation into the jurisprudence of the ICC is unqualified, use of the test as a standard for the internationalization of armed conflict has not been uncontroversial. It has been criticized by a number of scholars for departing from the standard enunciated by the ICJ in the *Nicaragua* case.⁵⁰ Prior to the *Tadić* Appeals Chamber judgment, the test of ‘effective control’ pronounced in *Nicaragua* was applied as the standard for imputing responsibility for the acts of a non-state actor to a state external to an internal armed conflict. Use of the ‘overall control’ test as an alternative to the ‘effective control’ test has generated considerable debate over the applicable standard. As noted by Martti Koskenniemi in his report to the ILC on the Fragmentation of International Law, ‘*Tadic* does not suggest “overall control” to exist alongside “effective control” either as an exception to the general law or as a special (local) regime governing the Yugoslav conflict. It seeks to replace that standard altogether’.⁵¹ Considering that the test of ‘effective control’ has been used consistently in the jurisprudence of the ICJ since *Nicaragua*, the proposition that it should be replaced by a test developed by an ad hoc tribunal has been a source of considerable controversy.⁵² In its judgment in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ stated:

Insofar as the ‘overall control’ test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals

⁴⁹ Judgment, *Tadić*, IT-94-1-A, AC, ICTY, 15 July 1999, para. 120.

⁵⁰ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 4, para. 109

⁵¹ Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc A/CN.4/L.682, 13 April 2006, para. 50. Emphasis in original.

⁵² An example is provided in the commentary of Shane Spelliscy, who regards the approach taken by the Appeals Chamber as a danger to the cohesion of the international legal order: ‘The *Tadić* decision by the ICTY is, perhaps, the most worrying because it involves one relatively subsidiary tribunal expressly breaking ranks with the clear, express and widely-accepted doctrine of the principal judicial arm of the United Nations, the ICJ. Now that the taboo of explicit conflicts has been overcome, the *Tadić* decision may signal the opening of a crack that will develop over the coming years. The *Tadić* decision may have opened the floodgates to explicit conflicts of jurisprudence among international tribunals.’ (‘The Proliferation of International Tribunals: A Chink in the Armor’ (2001) 40 *Columbia Journal of Transnational Law* 143, 169.)

See also P Rao, ‘Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?’ (2004) 25 *Michigan Journal of International Law* 929, 957; A Danner, ‘When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War’ (2006) 59 *Vanderbilt Law Review* 1, 31; A Chase, ‘Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism’ (2004) 45 *Virginia Journal of International Law Association* 41, 112; M Sassoli and L Olson, ‘International Decision: *Prosecutor v Tadić* (Judgment)’ (2000) 94 *American Journal of International Law* 571, 575.

Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the ‘overall control’ test as equally applicable under the law of State responsibility for the purpose of determining—as the Court is required to do in the present case—when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.⁵³

The position expressed by the ICJ in the *Bosnian Genocide* case did little to settle the debate. Given the controversy that continues to surround the test of ‘overall control’, a more substantive elaboration by the ICC on the basis for its usage would be welcomed. Indeed, it is noteworthy that there are different views that exist within the Court concerning the merits of the test as the basis for the internationalization of armed conflict. In her Minority Opinion in the *Katanga* case, Judge Christine Van den Wyngaert dissented on the Trial Chamber’s characterization of the situation in Ituri using the test of ‘overall control’, holding that ‘law is far from settled’.⁵⁴ Given the significance of the test for the characterization of armed conflict, it would be helpful if the Court could provide a more detailed elucidation of the concept and an account of relevant state practice. This would clarify not only the basis for the qualification of armed conflict under the Rome Statute, but also an important aspect of one of the most fundamental distinctions in international humanitarian law: the distinction between international and non-international armed conflict. The section that follows will explore some further issues that may impact on characterization of armed conflict by the Court.

30.4 Issues Impacting on the Characterization of Armed Conflict by the ICC

As new situations continue to come before the Court, so too will challenges concerning characterization. Perhaps one of the most significant of these challenges will be to ensure the integrity of ‘armed conflict’ as a concept of international humanitarian law while at the same time allowing for the possibility of its future development.⁵⁵ In this context, it is instructive to recall how the meaning of the term has developed

⁵³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Merits)* [2007] ICJ Rep 43, para. 210.

⁵⁴ Minority Opinion of Judge Christine Van den Wyngaert, *Jugement Rendu en Application de l’Article 74 du Statut, Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436-AnXI, TC II, ICC, 7 March 2014, para. 276 and note 382.

⁵⁵ The Commentary of the International Committee of the Red Cross states: ‘The substitution of this much more general expression for the word “war” was deliberate. One may argue almost endlessly about the legal definition of “war”. A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression “armed conflict” makes such arguments less easy.’ J Pictet (ed.), *Commentary I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC 1952), 32.

since the drafting of the Geneva Conventions of 1949, in particular in relation to non-international armed conflict. At the time of the drafting of the Geneva Conventions, ‘armed conflict not of an international character’ was understood to refer to ‘civil war’.⁵⁶ Since then, the term has evolved to cover situations that would never have been contemplated by the drafters of the Geneva Conventions. These include situations of guerrilla warfare and hostilities between non-state armed groups. The Geneva Conventions were designed with a view to regulating types of armed conflicts that took place in the decades preceding their adoption in 1949. Non-international armed conflict was regulated only to the extent that it resembled ‘war’ in the existence of ‘belligerency’, a concept that has now largely fallen into disuse. The interpretation of ‘armed conflict’ to include new kinds of situation presents significant challenges to the coherence of the law. As practice evolves, it is foreseeable that the interpretation of armed conflict may change in order to maintain its relevance, as it has done in the past. In order to protect the integrity of the concept, it would be important for such changes to be consistent with the rules of interpretation provided for under customary international law and Article 31 of the VCLT. If such rules are not adhered to, the creditability of characterization itself may be stretched to breaking point.

Another issue that may affect the Court in the exercise of its jurisdiction over war crimes is the over- or under-characterization of situations by involved parties. In the absence of an independent body to decide the applicability of international humanitarian law, questions concerning the characterization of non-international armed conflict are often extremely politicized. As noted by Sylvain Vit  :

The classification of situations of armed violence is also often linked to political considerations, as the parties involved endeavour to interpret the facts in accordance with their interests. On the basis of the margin of discretion allowed by the general terms of the legal categories, it is not unusual, for instance, for States to refuse to admit that they are involved in an armed conflict. They prefer to play down the intensity of the situation by claiming to carry out an operation to maintain public order. In so doing, they deny the applicability of humanitarian law. This tendency is encouraged by the fact that there is no independent international body authorized to decide systematically on cases that are likely to relate to one or other form of armed conflict.⁵⁷

Considering the highly politicized nature of such situations, and the many examples of mischaracterization, it will be important for the Court to be cognizant of the various inconsistencies that exist in state practice and maintain an approach based upon objectively verifiable criteria. The establishment of an international independent body with authority to decide issues of characterization under international humanitarian law would be helpful. Although the decisions issued by such a body would not be binding on the Court, they could potentially serve as useful points of

⁵⁶ The Report of the Joint Committee to the Plenary Assembly of the Diplomatic Conference states that ‘[i]t was clear that this referred to civil war’. ‘Report drawn up by the Joint Committee and presented to the Plenary Assembly’ in *Final Record of the Diplomatic Conference of Geneva of 1949* vol. II-B (Berne: Federal Political Department) 129.

⁵⁷ Vit   (n 42) 94.

reference. Considering the absence of a general definition of armed conflict in the statutory framework of the Court, and that the law employed in characterization includes ‘applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict’, it should be emphasized that an autonomous reading of the Court’s jurisprudence does little to illuminate the approach employed. The context for characterization of situations is not one that is *sui generis*: the concepts applied by the Court are derived from case law of the ad hoc tribunals and shared with other judicial institutions that have been influenced by their jurisprudence.

A final issue that has a bearing on the Court’s approach to the characterization of armed conflict concerns the development of international humanitarian law and the interpretation of ‘armed conflict’ by national courts and tribunals. As noted by Michael Bothe,

Rules concerning the punishment of ‘war crimes’ are secondary rules in relation to the primary rules concerning behaviour which is prohibited in case of an armed conflict. Thus, the concept of war crimes is a dynamic concept, as it is bound to change with the development of the primary or substantive rules relating to that behaviour. But for that very reason, it is in the interest of the certainty of the law, which in criminal law matters is enshrined in the principle of *nulla poena sine lege*, that the acts which may be punished as war crimes are clearly defined. This is necessary because of the vague and general character of some of the primary rules, but also because not every breach of those rules may necessarily be characterized as a war crime.⁵⁸

The tension that underlies the relationship between the war crimes contained in the Rome Statute and the development of international humanitarian law is one that also exists in the conceptualization of armed conflict as a basis for the exercise of subject-matter jurisdiction. The abstract nature of the concept means that each situation must be determined on a case-by-case basis. As such, there will always be a degree of uncertainty regarding the conditions that establish subject-matter jurisdiction and the awareness required on the part of the perpetrator.

The relationship between rules of international criminal law and those of international humanitarian law is complicated further when the role of state practice in the development of customary international humanitarian law is considered. Concepts such as ‘proportionality’, ‘necessity’, and ‘humane treatment’ are not static, but evolve as state practice contributes to the crystallization of customary law. As state practice feeds into the development of custom, the parameters of concepts of international humanitarian law have the potential to change. This has implications for the interpretation of related concepts of international criminal law, including the notion of armed conflict. In this context, it is furthermore important to bear in mind that the practice of states is also influenced by the practice of international organizations, such as the ICC. As the influence of the Court’s jurisprudence becomes evident in more

⁵⁸ Bothe (n 2) 381.

jurisdictions, a study of such dynamics would be a useful area for further research on the characterization of armed conflict.

30.5 Conclusion

The jurisprudence of the ICC on the characterization of armed conflict has developed through the utilization of concepts derived from case law of the ICTY. The most significant of these concerns the conceptualization of non-international armed conflict as ‘protracted armed violence between governmental authorities and organized armed groups or between such groups’ and the test of ‘overall control’ for the internationalization of *prima facie* internal armed conflict. Although the incorporation of such concepts is arguably a positive development, a more detailed explanation of the basis for their use would be helpful. It would be helpful not only in illuminating the approach of the Court, but also for national courts in deciding similar issues of characterization in the domestic proceedings.

Ultimately, the legacy of the Court’s jurisprudence on the characterization of armed conflict will depend on how developments in the conduct of armed conflict are dealt with in establishing subject-matter jurisdiction over war crimes. This will, to a large extent, be decided by the wisdom of the judges in their application of the rules of interpretation provided for under the VCLT and customary international law. In responding to changes in the practice of armed conflict, and the parallel evolution of international humanitarian law, it is foreseeable that the jurisprudence of the Court will influence the development of the concept beyond the sphere of the institution. A question that remains open is how the Court will build on existing jurisprudence to accommodate new kinds of armed conflict while maintaining the integrity of ‘armed conflict’ as a concept of international humanitarian law. This is, perhaps, the greatest challenge in the longer term facing the Court in the characterization of situations for the exercise of subject-matter jurisdiction over war crimes.

31

The Crime of Aggression

Roger S. Clark*

31.1 Introduction

Opening the case for the prosecution on the second day of the Nuremberg proceedings in 1945, Justice Robert Jackson uttered these immortal words about the crime against peace, or aggression:

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.¹

With the trial over, this enthusiasm, perhaps never overwhelming in the capitals of the prosecuting nations, waned. None of the four Powers that undertook the Nuremberg Trial showed any enthusiasm in support of efforts at the United Nations in the immediate post-trial years to create a permanent international criminal court, whose jurisdiction would include the crime of aggression.² Of the four, the Soviet Union alone took action under domestic law to make it possible to penalize the crime of aggression.³ There is no indication, however, that any prosecutions were ever brought concerning the USSR's subsequent foreign adventures. In the revitalized negotiations on the ICC in the 1990s, the Permanent Members of the Security Council were not to be found among the ranks of those pressing for the crime of aggression to be within its jurisdiction.⁴ That was left to a dogged collection of

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¹ Nuremberg Trial Proceedings Vol. II, 21 November 1945.

² The depressing story is exhaustively documented by Nobel Peace Prize Nominee Ben Ferencz: B Ferencz, *Defining International Aggression, The Search for World Peace: A Documentary History* (Dobbs Ferry: Oceana Publications 1975).

³ Of the 19 other Allied States adhering to the Nuremberg Charter, only Poland and Yugoslavia ultimately adopted domestic law on the crime of aggression. See numbers in A Reisinger Coracini, 'Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute's Complementarity Regime' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff 2009) 725, 734. The vast majority of about 25 domestic examples of legislation criminalizing aggression come from the countries emerging from Yugoslavia and the USSR.

⁴ A nuanced argument against activating the Court's jurisdiction over the crime of aggression is that 'the ICC is not yet adequately experienced and established to effectively deal with the controversial and politically charged [crime of aggression]'. J Williams, 'Biting Off More Than It Can Chew? The International Criminal Court and the Crime of Aggression' (2012) 30 *Australian Yearbook of International Law* 201. Williams has an excellent discussion of the relevant literature. To the extent that there is any force to the argument, which I doubt, I believe that the delay until at least 2017 built into the 2010 amendments will more than compensate for 'inexperience'.

small and medium powers, including members of the Non-Aligned Movement and Germany,⁵ to press the item forward. What this group of countries succeeded in getting into the Rome Statute was a statement that aggression was within the jurisdiction of the Court, but the details of making that promise operational were left to another day.

This chapter tells the story of the next round in the saga, the Amendments made to the Statute in Kampala in 2010 to fulfil the 1998 promise, albeit with some further delay. It also delineates the task of implementing them internationally and domestically. Section 31.2 of the chapter deals with the details of the Kampala Amendments and the efforts to obtain the necessary ratifications. Section 31.3 analyses what the options are for a diligent state that wishes to give practical effect to the Amendments under its domestic law. Section 31.4 draws some brief conclusions.

31.2 The Kampala Amendments on the Crime of Aggression

Activating the Court's jurisdiction over the crime of aggression was the most important piece of unfinished business from the Rome Diplomatic Conference in 1998.⁶ Adding appropriate material to the Statute was the primary task of the First Review Conference on the Court which met in Kampala in June of 2010 and adopted a comprehensive set of amendments⁷ aimed at allowing the Court to exercise its jurisdiction over the crime.

Article 5(1) of the Statute lists 'the crime of aggression' (along with genocide, crimes against humanity, and war crimes) as one of four items within the subject-matter jurisdiction of the Court. However, paragraph 2 of Article 5 adds:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.⁸

Building on Article 5, the Final Act of the Rome Conference instructed the Preparatory Commission for the Court (PrepCom) to 'prepare proposals for a provision on aggression, including the definition and Elements of Crimes of Aggression and conditions under which the International Criminal Court shall exercise its

⁵ Germany had written the following prohibition into its Basic Law in 1949: 'Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offence.' Art 26(1) Basic Law for the Federal Republic of Germany, 1949. Criminal legislation was duly adopted.

⁶ The material in this section is based on and expands the discussion in R Clark, 'Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May–11 June 2010' (2010) 2 *Goettingen Journal of International Law* 689.

⁷ The crime of aggression, ICC Resolution RC/Res.6, 11 June 2010.

⁸ On the ambiguities in the reference to Arts 121 and 123 of the Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute'), see R Clark, 'Ambiguities in Arts 5(2) 121 and 123 of the Rome Statute' (2009) 41 *Case Western Journal of International Law* 413, 421–5.

jurisdiction with regard to this crime'.⁹ 'Definition' here was understood to refer to the relevant substantive criminal law issues; 'conditions' required consideration of whether some organ of the United Nations (in particular the Security Council) could be able—or even required—to participate in the process alongside the Court and perhaps even to make a decision in respect of part of the elements of the crime that would be binding on the Court. The drafting task was not completed by the end of the life of the Preparatory Commission, and the Court's ASP created the Special Working Group on the Crime of Aggression (SWGCA) to carry forward the task. The SWGCA was open to participation by all states, members of the ICC, and non-members alike.¹⁰

The Group's ultimate effort on provisions and conditions was contained in its final Report to the Assembly in February 2009,¹¹ which was in front of the Review Conference. It was accompanied by some later suggestions which had been generated at a subsequent informal meeting of the ASP and by the last Chair of the Working Group, His Royal Highness Prince Zeid Ra'ad Zeid Al-Hussein, former President of the ASP.¹²

The essence of the SWGCA's draft comprised two Articles for addition to the Statute: 'Article 8bis' which contained the definition, and 'Article 15bis' which dealt with the conditions for exercise. Article 8bis did not contain any alternatives, representing a consensus that held in Kampala where this part of the SWGCA's work was adopted verbatim. Article 15bis, on the other hand, had offered many alternatives—notably variations on the theme of involvement *vel non* of the Security Council in the process by which a specific case would come before the Court. This Article was where most of the debate took place in Kampala. That difficult debate resulted in separation of the Working Group's 15bis into two Articles, 15bis and 15ter, covering the matters in the SWGCA's draft, but in a somewhat different manner which incorporated new proposals made in Kampala.¹³

As requested in the Final Act of Rome¹⁴ draft Elements of Crimes had also been produced before Kampala, at the informal inter-sessional meeting of the Assembly held in June 2009.¹⁵ While there was some doubt at the time whether these Elements would

⁹ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I, Resolution F, UN Doc A/CONF.183/10 (17 July 1998), para. 7. The Final Act added the reference to Elements which is not mentioned specifically in Art 5.

¹⁰ Continuity of work on the crime of aggression, ICC-ASP/1/Res.1, 9 September 2002.

¹¹ Report of the SWGCA, ICC-ASP/7/SWGCA/2, 20 February 2009.

¹² Non-paper by the Chairman on the Elements of Crimes, ICC-ASP/INF.2, 28 May 2009, Annex II, Informal inter-sessional meeting on the Crime of Aggression 8–10 June 2009, Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton Club ('Chairman's Non-Paper 2009').

¹³ For good accounts of the negotiations, see J Bertram-Nothnagel, 'A Seed for World Peace Planted in Africa: The Provisions on the Crime of Aggression Adopted at the Kampala Review Conference for the Rome Statute of the International Criminal Court' (2010) *Africa Legal Aid Quarterly* 9; N Blokker and C Kress, 'A Consensus Agreement on the Crime of Aggression: Impressions from Kampala' (2010) 23 *Leiden Journal of International Law* 889; S Barriga and L Grover, 'A Historic Breakthrough on the Crime of Aggression' (2011) 105 *American Journal of International Law* 517; L Grover, 'Taking Traditional Realism Seriously—A Case Study of the Negotiations and Resolution on the Crime of Aggression' (2011) European Society of International Law Conference Paper Series, No. 7/2011; J Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference' (2011) 11 *International Criminal Law Review* 49.

¹⁴ See (n 9).

¹⁵ See (n 12).

be approved formally in Kampala, that was what in fact occurred, with little debate. A set of understandings, the juridical nature and effect of which has been debated,¹⁶ was also adopted.¹⁷

In what follows in this section, I discuss what I believe are the most significant drafting choices that were ultimately made in Kampala in respect of the definition and the conditions for exercise of jurisdiction, as well as the relevant 'Elements of Crimes' for the crime of aggression.

31.2.1 Article 8bis—the definition

A major intellectual and juridical contribution of the Nuremberg and Tokyo trials after the Second World War was to take what in the past had been thought of essentially as a question of state responsibility and add to it an enforcement measure based on individual criminal responsibility. As the Nuremberg Tribunal said in a famous quotation, 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.¹⁸ As the context of the Tribunal's discussion made plain, this is not to deny that there is still state responsibility as well.¹⁹

Article 8bis uses a drafting convention that builds on this combination of state and individual responsibility. It distinguishes between an 'act of aggression' (what a state does) and the 'crime of aggression' (what a leader does). 'Act of aggression' is defined²⁰ as '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'. This language, based on the United Nations Charter, is followed, in the second paragraph of the Article, by a reference to a list of 'acts' that 'shall, in accordance with General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression'. These acts are (paraphrased): invasion, annexation, bombardment, blockade, attack on the armed forces of another state, using forces that are in a state by consent in contravention of the terms of their presence, allowing a state's territory to be used for the purposes of aggression by another, and sending by or on behalf of a state armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another state. Resolution 3314 is the well-known effort of the General Assembly to define aggression so as to assist the Security Council in doing its work for the maintenance of peace and security²¹, although the Security Council has been somewhat churlish in

¹⁶ K Heller, 'The Uncertain Status of the Aggression Understandings' (2012) 10 *Journal of International Criminal Justice* 229.

¹⁷ Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression Annex III ('Understandings') (n 7).

¹⁸ Judicial Decisions, 'International Military Tribunal (Nuremberg), Judgment and Sentences' (1947) 41 *American Journal of International Law* 172, 221.

¹⁹ Art 25(4) ICC Statute confirms this approach: 'No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.'

²⁰ Art 8bis, para. 2, Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Annex I ('Amendments') (n 7).

²¹ UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/9631.

its attitude towards accepting the ‘help’. The resolution deals with state responsibility, but there was considerable support in the SWGCA for using it as the basis for a definition in the present context. Utilizing it was a significant drafting challenge. The ultimate wording of *8bis* is aimed at avoiding the open-ended nature of Resolution 3314 which says, essentially, that the Security Council may decide that something that meets the definition is nonetheless not aggression and, on the other hand, that acts other than those on the list may be regarded by the Security Council as aggression.²² As a political body, the Security Council may act in a completely unprincipled and arbitrary manner. A criminal Court which is constrained by the principle of legality²³ must be under more restraint. So the open textured aspects of 3314 needed some pruning and the Security Council’s determination needed to be removed from the mix. The result is fairly precise. The list of ‘acts’ in Article *8bis*(2), taken verbatim from Resolution 3314, may be open-ended to the extent that it does not say that no *other* acts can amount to aggression. However, any other potential candidates must surely be interpreted narrowly and *ejusdem generis* with the existing list.

So much, then, for the ‘act of aggression’. For the ‘crime of aggression’, Article *8bis* provides:

For the purpose of this Statute, ‘crime of aggression’ means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.²⁴

The crime of aggression is thus a ‘leadership’ crime, a proposition captured by the element that the perpetrator has to be in a position effectively to exercise control over or to direct the political or military action of a state. There was considerable discussion in the SWGCA about how this applies to someone like an industrialist who is closely involved with the organization of the state but not formally part of its structure.²⁵

Some support was shown for clarifying the matter by choosing language closer to that used in the United States Military Tribunals at Nuremberg, namely ‘shape and influence’,²⁶ rather than ‘exercise control over or to direct’, the words in *8bis*.

²² See Arts 2, 3, and 4 of the 1974 definition.

²³ Art 22 ICC Statute.

²⁴ Art *8bis*, para. 1 Amendments (n 20). Out of an abundance of caution, the following, underscoring the leadership quality of the crime, is added to Art 25(3) which deals with modes of criminal responsibility: ‘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.’

²⁵ General Principles of Criminal Law, ICC-ASP/3/SWGCA/INF.1, 13 August 2004, para. 49, Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression 21–3 June 2004, Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University: ‘[I]t was also suggested that all persons in a position to exert decisive influence over the policies of the State should be held criminally responsible, so that political, social, business and spiritual leaders could be included within the leadership group.’ See also K Heller, ‘Retreat from Nuremberg: The Leadership Requirement for the Crime of Aggression’ (2007) 18 *European Journal of International Law* 477.

²⁶ ICC-ASP/6/SWGCA/INF.1, 25 July 2007, para. 12, Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression 11–14 June 2007, Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University. The preparatory work suggests that industrialists are potentially covered by the amendments, although no formal language was added to that effect.

American and French prosecutions at the end the Second World War had made it clear that industrial leaders could potentially be responsible for the crime of aggression, although none was ultimately convicted.²⁷

Note should also be taken at this point of the ‘threshold’ clause at the end of the definition of ‘crime of aggression’, indicating that not every act of aggression is the basis for criminal responsibility. It is only those which by their character, gravity, and scale constitute a ‘manifest’ violation of the Charter.²⁸ The need for such a limitation was strongly debated, but most participants finally accepted that they could live with it in return for removal of any requirements that there be a ‘war of aggression’ or that the list of acts in the definition of ‘act of aggression’ be more limited than the list in General Assembly Resolution 3314. Some speakers thought it might help in analysing a (rare) case of principled humanitarian intervention, or a case more generally in a grey area where the legality of the action was definitely in doubt. In a speech to the Conference on 4 June 2010, the Legal Adviser to the US Department of State insisted, tendentiously, that:

If Article 8bis were to be adopted as a definition, understandings would need to make clear that those who undertake efforts to prevent war crimes, crimes against humanity or genocide—the very crimes the Rome Statute was designed to deter—do not commit ‘manifest’ violations of the U.N. Charter within the meaning of Article 8bis. Regardless of how states may view the legality of such efforts, those who plan them are not committing the ‘crime of aggression’ and should not run the risk of prosecution.²⁹

Two paragraphs of the ‘understandings’ annexed to the Review Conference’s resolution adopting the amendments on the Crime of Aggression³⁰ address these matters, apparently giving comfort to the United States:

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.
7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a ‘manifest’ determination. No one component can be significant enough to satisfy the manifest standard by itself.³¹

With these seemingly harmless comments, the SWGCA’s work on the definition part of Article 8bis was adopted in Kampala.

²⁷ Heller (n 25).

²⁸ See (n 24).

²⁹ Statement by Harold Koh, Legal Adviser to the US Department of State, at the Review Conference on the ICC (4 June 2010).

³⁰ Understandings (n 17).

³¹ Id.

31.2.2 The Elements of Crimes

The Elements of Crimes for the crime of aggression³² do not add anything of substance to the definition,³³ but they clarify the details significantly. They read:

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person³⁴ in a position effectively to exercise control over or to direct the political or military action of the state which committed the act of aggression.
3. The act of aggression—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—was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.³⁵

The Elements were drafted along the lines of the Elements completed in 2000 for the other crimes within the jurisdiction of the Court, genocide, crimes against humanity, and war crimes.³⁶ The drafters of those earlier Elements had concluded that their handiwork needed to use the scheme set forth in Article 30 of the Statute as a structure.³⁷ While it is headed ‘mental element’, the Article also suggests a framework for the ‘material’ or physical elements of the Rome crime also. The mental element, at least in the normal case, is intent and knowledge. This serves as a default rule which does not need to be stated unless something different applies. The material elements are conduct, consequence, and circumstance.³⁸ The Elements had also to take account

³² Amendments (n 20).

³³ Art 9 ICC Statute says that the Elements ‘shall assist the Court in the interpretation and application’ of the substantive crimes in the Statute.

³⁴ Amendments to the Elements of Crimes, Annex II ('Elements') (n 7): ‘With respect to an act of aggression, more than one person may be in a position to meet these criteria.’ (Note 1 in original.)

³⁵ Elements (n 7). ³⁶ Elements of Crimes, ICC-ASP/1/3 (part II-B), 9 September 2002.

³⁷ An important feature of the Rome Statute, not found in previous international criminal instruments, was a comprehensive ‘general part’. See R Clark, ‘Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Court’s First Substantive Law Discussion in the Lubanga Dyilo Confirmation Proceedings’ (2008) 19 *Criminal Law Forum* 519. Making sure that the Kampala Amendments and the Elements of the Crime of Aggression ‘fit’ with the general part was an important part of the work of the SWGCA. For detailed discussion, see R Clark, ‘General Principles of Criminal Law’ in S Barriga and C Kress (eds), *The Crime of Aggression—A Commentary* (Cambridge: Cambridge University Press, forthcoming).

³⁸ See generally, R Lee et al. (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers 2001); R Clark, ‘The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences’ (2001) 12 *Criminal Law Forum* 291.

of Article 32 of the Statute which deals with mistakes of fact and mistakes of law.³⁹ Several comments need to be made about how Articles 30 and 32 of the Statute play out here in dealing with aggression.⁴⁰

In the first place, the default rule derived from Article 30 applies to Element 2—the perpetrator must be shown to know that he or she fitted the relevant category.⁴¹ On the other hand, Element 4 modifies the default rule in such a way as to minimize the possible application of a ‘mistake of law’ defence under Article 32 of the Statute. As the Chairman’s Explanatory Note points out:⁴²

[A] mental element requiring that the perpetrator positively know that the State’s acts were inconsistent with the Charter of the United Nations (effectively requiring knowledge of law) may have unintended consequences. For example, it may encourage a potential perpetrator to be willfully blind as to the legality of his or her actions, or to rely on disreputable advice supporting the legality of State acts, even if that advice is subsequently shown to have been incorrect.⁴³

The Note gives examples of a similar type of finesse of the mistake of law issue concerning other crimes.⁴⁴ It also offers some examples of ‘relevant facts’, knowledge of which by the perpetrator could, in appropriate circumstances, bring him or her within the element: ‘the fact that the use of force was directed against another State, the existence or absence of a Security Council resolution, the content of a Security Council resolution, the existence or absence of a prior or imminent attack by another State.⁴⁵ The Note adds⁴⁶ that, ‘[i]n any event, a perpetrator could still raise a defense of mistake of fact as to this element which, if proven, would result in acquittal’.⁴⁷

³⁹ Art 31 provides: ‘1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime. 2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in Article 33.’ (Art 33 relates to the defence of superior orders.)

⁴⁰ What follows is reflective particularly of the Explanatory Note in Appendix II of the 2009 Chairman’s Non-Paper on the Elements of Crimes (‘Explanatory note’) (n 12).

⁴¹ *Ibid.*, para. 14.

⁴² *Ibid.*, para. 18.

⁴³ *Ibid.*, para. 21, points to a connection between the defence of mistake and the requirement that only ‘manifest’ violations of the Charter are made criminal. Some instances of mistake will be washed out under the manifest requirement.

⁴⁴ *Ibid.*, note 7, which reads: For example, factual circumstances establishing the lawfulness of a person’s presence in an area (Elements of Crimes, article 7(1)(d) crime against humanity of deportation or forcible transfer of population, Elements 2 and 3); the protected status of a person under the Geneva Conventions (see Elements for most of the war crimes, for example Art 8(2)(a)(i) war crime of wilful killing, Elements 2 and 3); or the existence of an armed conflict (see Elements for most of the war crimes, for example Art 8(2)(a)(i) war crime of willful killing, Element 5). On these finesse of mistake of law by re-characterizing the issue as one of fact, see Clark (n 38) 330–1. My guess is that the Court will treat this as a judgment call on the part of the drafters of the Elements which is entitled to deference. If the Court wishes to overturn this approach, it would need to find that this strategy is *ultra vires* the Statute—the Elements are always subservient to the Statute. See Art 9(3) ICC Statute.

⁴⁵ Explanatory note (n 40) para. 20.

⁴⁶ *Id.*

⁴⁷ *Ibid.*, para. 21. ‘Proven’ is an awkward word in this sentence in light of Art 67(1)(i) ICC Statute which says that the accused is entitled ‘[n]ot to have imposed on him any reversal of the burden of proof or any onus of rebuttal’. The accused may have to shoulder the burden of producing evidence on the issue, but not of establishing the matter affirmatively.

In a similar vein, Element 6 governs the mental element required for the circumstance element that the act of aggression must be a ‘manifest’⁴⁸ violation of the Charter. Once again, the emphasis is on awareness of the factual circumstances, not an evaluation of them by the actor. To summarize, as the special Introduction to the Elements of the Crime of Aggression puts it, ‘[a]s a result of Element 4, there is no requirement to prove that the perpetrator has made a legal evaluation as to the inconsistency with the Charter of the use of armed force by the State’. Similarly, ‘[a]s a result of Element 6, there is no requirement to prove that the perpetrator had made a legal evaluation as to the “manifest” nature of the violation’.⁴⁹

31.2.3 Structure of Articles 15bis and 15ter—‘conditions’

The Special Working Group had been less successful in resolving the issue of conditions than that of definition. The second sentence of Article 5, paragraph 2 of the Statute, added without public debate in the last days of the Rome Conference,⁵⁰ states that the provision on aggression ‘shall be consistent with the relevant provisions of the Charter of the United Nations’. By and large, the Permanent Members of the Security Council took the position in the negotiations that Article 39 of the Charter confers on them the ‘exclusive’ power to make determinations of the existence of an act of aggression, and thus a Security Council pre-determination of aggression is an essential precondition to exercise of the ICC’s jurisdiction. Most other states pointed out that Article 24 of the Charter confers ‘primary’ power on the Council in respect of the maintenance of international peace and justice and that ‘primary’ does not mean ‘exclusive’. They added that the General Assembly has made several findings of aggression and that the United States, the United Kingdom, and France were co-sponsors of the 1950 Uniting for Peace Resolution which recognizes the Assembly’s powers,⁵¹ and that all five of the Permanent Members have voted pursuant to that resolution when it suited them. Non-permanent Members tended to add that the ICJ has addressed issues where aggression is in play.⁵² Like the Security Council, however, the ICJ has been leery of actually using the word ‘aggression’. The draft sent to Kampala included the

⁴⁸ ‘Manifest’, according to the special Introduction to the Chairman’s Non-Paper (n 12), ‘is an objective qualification’. In that report, in response to a question about what this entailed, ‘[i]t was suggested that the Court would apply the standard of “reasonable leader”, similar to the standard of the “reasonable soldier” which was embodied in the concept of manifestly unlawful orders in article 33 of the Rome Statute’. See also the two Understandings adopted in Kampala which underscore the objective nature of the requirement that the breach be manifest (nn 30–1). For more on the ‘manifest’ requirement, see J Potter, ‘The Threshold in the Proposed Definition of the Crime of Aggression’ (2008) 6 *New Zealand Yearbook of International Law* 155.

⁴⁹ Chairman’s Non-Paper (n 12) para. 21. ⁵⁰ See Clark (n 8) 424.

⁵¹ UNGA Res 377 (V) A (3 November 1950) UN Doc A/1775. In that resolution, the Assembly ‘[r]esolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force where necessary, to maintain or restore international peace and security’.

⁵² Most recently in *Armed Activities on the Territory of the Congo (DR Congo v Uganda)* [2005] ICJ Rep 168.

General Assembly and the ICJ as alternative ‘filters’ for the crime of aggression in the absence of Security Council action, but these were deleted in Kampala.

The major achievement in this part of the negotiation in the period of the Special Working Group was to de-couple the definition from the conditions. In the version of the definition and conditions for aggression that was on the table at the end of the life of the Preparatory Commission,⁵³ the Security Council (or possibly the General Assembly or the ICJ) would make a definitive decision on the existence of the element of ‘act of aggression’ which was binding on the ICC. Not only would this subvert the power of the Court to decide itself on the existence or otherwise of all the elements of the crime, but it would make it extremely difficult to build a criminal offence around a structure where one of the key elements was decided elsewhere, and potentially on the basis of totally political considerations. In such circumstances, there would probably be unbearable weight placed on the mental element provisions of Article 30 of the Statute,⁵⁴ the mistake provisions of Article 32,⁵⁵ or on the ‘manifest’ threshold.⁵⁶ This was removed in the Special Working Group’s draft⁵⁷ and in the ultimate language adopted in Kampala. Any determination elsewhere is of a preliminary nature, although it may surely have some evidentiary value. This opened the way for focusing on the various options put before the Review Conference of giving the Security Council (or other United Nations organ) a ‘filter’ role, providing either a ‘green light’ (permission to go forward) or a ‘red light’ (denial of right to go forward) to the ICC’s proceedings. There was, however, a solid group of states strongly behind the proposition that the Court should be able to proceed even in the absence of action (positive or negative) by someone else.

The resolution of these divergent positions in Kampala was facilitated by the move to split the SWGCA’s draft Article 15bis into two parts, one dealing with state referrals and referrals made by the prosecutor *proprio motu*, and the other dealing with Security Council referrals.⁵⁸ These became, respectively, Articles 15bis and 15ter. Article 15ter referrals are the most straightforward to describe and it will thus be helpful to discuss them first.

Paragraph 1 of Article 15ter is the basic provision authorizing the Court to exercise its jurisdiction under the Statute in respect of the crime of aggression, when a referral is made by the Security Council. It provides that ‘[t]he Court may exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraph (b), subject to the provisions of this Article’.⁵⁹

Then follow two paragraphs designed to provide a set of conditions and a timeframe for paragraph 1 to come into play. Paragraph 2 says that the Court ‘may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of amendments by thirty States Parties’.⁶⁰ Paragraph 3 says that

⁵³ Discussion Paper Proposed by the Coordinator (11 July 2002) UN Doc PCNICC/2002/WGCA/RT.1 Rev.2.

⁵⁴ See (nn 37–8).

⁵⁵ See (n 39).

⁵⁶ See (nn 28–31).

⁵⁷ See (n 11).

⁵⁸ Under Arts 13 to 15 of the ICC Statute, action may be ‘triggered’ either by a referral from the Security Council acting under Chapter VII of the United Nations Charter, a referral by a State Party, or by the Prosecutor acting *proprio motu*, on her own initiative.

⁵⁹ Art 15ter, para. 1 Amendments (n 20).

⁶⁰ Ibid., para. 2.

the Court ‘shall exercise jurisdiction over the crime of aggression in accordance with this Article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute’.⁶¹ The required majority at this later date is thus two-thirds of all the States Parties at the relevant time.⁶² Accordingly, the earliest date on which these provisions can become operative is the date on which the decision is made by the ASP after 1 January 2017. If the 30 ratifications have been received by then (or at least a year before then, practically speaking by 31 December 2016), all is well; otherwise, there will be a further delay until one year after the 30 ratifications are obtained.

It should be noted that the requirement of 30 ratifications here is a ‘procedural’ hurdle to enabling the Court to exercise its jurisdiction. It does not mean that the Security Council is limited to making aggression referrals only in respect of those states that have ratified the amendment (or the Statute itself, for that matter). The nationals of *any* states may be the subject of a referral once the timing and ratification requirements are met.⁶³

Paragraph 4 adds the important principle that ‘[a] determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute’.⁶⁴ Including this language in the Article dealing with Security Council referrals underscores the way the negotiation developed towards making the Court master of its own decisions in respect of the elements of a particular (alleged) crime of aggression.

So much for Security Council referrals. Article 15bis, as finally adopted, deals with the exercise of jurisdiction over the crime of aggression in the case of state referrals and referrals by the prosecutor *proprio motu*. The Court is authorized to exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraphs (a) and (c), subject to the other provisions of the Article. Once again, there is the requirement of ratification or acceptance by 30 States Parties, the passage of a year after that, and the further vote after 1 January 2017. Then follows a strange ‘opt-out’⁶⁵ provision that reads:

The Court may, in accordance with Article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by

⁶¹ Ibid., para. 3.

⁶² Art 121(3) ICC Statute provides that ‘[t]he adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of the States Parties’. This means all the parties, not just those present and voting. There are currently 123 parties, so that a majority of 82 would be appropriate. More ratifications and accessions of the Rome Statute itself are in the offing, so the numbers will increase by 2017.

⁶³ See Understanding 2 (n 17): ‘It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with Art 13, para. (b), of the Statute irrespective of whether the State concerned has accepted the Court’s jurisdiction in this regard.’

⁶⁴ Art 15ter, para. 4 Amendments (n 20). An identical provision appears also in Art 15bis, para. 9.

⁶⁵ An ‘opt-out’ clause is more likely to result in more parties being bound than is the case with an ‘opt-in’ clause. For an excellent discussion of how variations on treaty architecture affect participation, see J Galbraith, ‘Treaty Options: Towards a Behavioral Understanding of Treaty Design’ (2013) 53 *Virginia Journal of International Law* 309.

lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.⁶⁶

Note, in particular, that this passage addresses the exercise of jurisdiction over a crime of aggression, ‘arising from an act of aggression committed by a State Party’. ‘State Party’ must mean State Party to the Rome Statute. There is no suggestion here that the Court’s jurisdiction is limited to those states that have ratified the amendment. A state which has not done so, can, on the plain language of the amendment, protect its people from the jurisdiction by utilizing the opt-out provision. Indeed, the opt-out language, on its face, seems to be coherent only on the possibility that *any* State Party may want to opt out.

There is a possible counter-argument to this, based on the procedure adopted for bringing the amendments into force. Article 121 of the Rome Statute deals with amendments. After providing that the ‘adoption’ of an amendment requires a two-thirds majority of States Parties,⁶⁷ unless a consensus can be reached, it continues:

4. Except as provided in paragraph 5, an amendment shall enter into force for all States one year after instruments of ratification have been deposited with the Secretary-General of the United Nations by seven-eighths of them.
5. Any amendment to Articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party that has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.⁶⁸

There was considerable debate in the SWGCA about how these two provisions play out in respect of the crime of aggression, and indeed, whether it was sufficient for the amendments to be ‘adopted’ under paragraph 3 of the Article.⁶⁹ A subsidiary argument was the question, if paragraph 5 applies, of how far the second sentence (excepting jurisdiction over the nationals and territory or non-accepting states for new crimes) applies to the ‘special case’ of aggression. After all, aggression is already ‘within the jurisdiction’ of the Court; at issue is the ‘exercise’ of that jurisdiction. The second sentence of paragraph 5 would certainly apply to the introduction of a new offence (say terrorism or large-scale drug trafficking) into the Court’s jurisdiction, but did it have any force with respect to aggression? Some light may be shone on the question by paragraph 1 of the Kampala adopting resolution. The Conference:

[d]ecides to adopt, in accordance with Article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: ‘the Statute’) the amendments to the Statute contained in annex I of the present resolution, *which are subject to ratification or acceptance and shall enter into force in accordance with Article 121, paragraph 5*; and notes that any State Party may lodge a declaration referred to in Article 15bis prior to ratification or acceptance.⁷⁰

⁶⁶ Art 15bis, para. 4 Amendments (n 20).

⁶⁷ Art 121(3) ICC Statute.

⁶⁸ Art 15ter, paras 4 and 5.

⁶⁹ Clark (n 8) 416–17.

⁷⁰ The crime of aggression (n 7) operative para. 1.

Note the italicized clause. Does it mean that the reference to ratification and acceptance and to entry into force merely relates to the need for 30 ratifications or acceptances, and that the reference to Article 121(5) is to the first sentence of that provision and not to the second sentence? This argument emphasizes ‘shall enter into force’—what the first sentence of paragraph 5 is about. Or does it mean that, while the Court cannot exercise its jurisdiction until the 30 ratifications are received⁷¹ and the ASP adopts the necessary resolution, an aggressor state that fails to accept the amendments is never bound by them for events on its territory or the actions of its citizens (unless the Security Council acts)? Recall the language of the second sentence of 121(5): ‘In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party’s nationals or on its territory.’⁷² The argument for applying the second sentence to the Kampala Amendments perhaps relies on the words ‘in accordance with’ before ‘paragraph 5’. ‘In accordance’ possibly emphasizes the whole of the paragraph, including its second sentence. Of course, if that result is what they wanted, the drafters could have clarified matters by avoiding a vague phrase like ‘in accordance with’⁷³ and saying something like ‘subject to all the requirements of Article 121, paragraph 5’.⁷⁴

Indeed, there were drafters present in Kampala who faced the Article 121 (5) issue head-on for amendments to Article 8 of the Statute.⁷⁵ Relevant amendments (adding provisions on proscribed weapons in the material dealing with non-international armed conflict) were deemed amendments within the meaning of Article 121, paragraph 5.⁷⁶ Accordingly, the second preambular paragraph of the Conference’s adopting resolution on weapons provides:

⁷¹ This, combined with Art 15bis, para. 2 and Art 15ter, para. 2, modifies the effect of para. 5 which, in respect of other amendments to which it relates (such as those made to Art 8 of the Statute in Kampala), applies to the first and subsequent ratifiers *seriatim*, one year after each deposits its instrument, with the result also that the Court may exercise jurisdiction over the offence for that State from that time on. However, for aggression, 30 parties are required before the Court exercises its jurisdiction over any of the 30. To take a simple example, Liechtenstein ratified both the aggression and Art 8 amendments on 9 May 2012. The amendments thus entered into force for Liechtenstein a year later, on 9 May 2013. The effect of this is that the Court may now exercise its jurisdiction over the Art 8 offence in respect of Liechtenstein; it may not, however, exercise jurisdiction over the Art 8bis offence until there are 30 acceptances and the ASP adopts the necessary resolution. In short, a classic example of the importance of contextual meaning is in play; ‘in force’ for the Art 8 offence means both that the State is bound by it and that the Court can exercise jurisdiction over breaches for that State; ‘in force’ for the aggression amendments has only a symbolic meaning until the 30 acceptances are reached and the ASP resolves to make the amendments effective.

⁷² See (n 68).

⁷³ Which, after all, helped create some of the problems with Art 5(2) itself.

⁷⁴ Note that the first paragraph of the Kampala Amendments (n 20) asserts: ‘Art 5, paragraph 2, of the Statute is deleted.’ How can that be squared with a literal application of Art 121(5)? How can the paragraph be deleted for some parties, but not all? Moreover, the second sentence of Art 121(5) is redundant in such a situation.

⁷⁵ Amendments of Art 8 of the Rome Statute, ICC Resolution RC/Res.5. On this amendment, see A Alamuddin and P Webb, ‘Expanding Jurisdiction over War Crimes under Art 8 of the ICC Statute’ (2010) 8 *Journal of International Criminal Justice* 1219; Clark (n 6) 707–11.

⁷⁶ It might have been possible to draft the Art 8 amendment in such a manner as to invoke Art 121(4) and thus make the amendment effective on all, once seven-eighths of the parties accepted. This was controversial and was not the path chosen by the drafters, who clearly invoked Art 121(5). See R Clark, ‘Building on Art 8(2)(b)(xx) of the Rome Statute of the International Criminal Court: Weapons and Methods of Warfare’ (2009) 12 *New Criminal Law Review* 366, 385–9.

Noting Article 121, paragraph 5, of the Statute which states that any amendment to Articles 5, 6, 7 and 8 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance and that in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party's nationals or on its territory, and confirming its understanding that in respect to this amendment the same principle applies in respect of a State Party which has not accepted the amendment applies also in respect of States that are not parties to the Statute.⁷⁷

Can any indications be drawn from the obvious differences between the language here, namely the reference to not binding parties to the Statute who do not accept the amendment, and in the aggression provision with its simple reference to 'an act of aggression committed by a State Party'?

Personally, I believe that the plain language of Article 15bis, paragraph 4, and its reference to a 'State Party', coupled with the right to opt out and the differences in the drafting of the Article 8 amendment, override any inferences to be gleaned from the less than clear statement in the adopting resolution. If there is no requirement that a state opt in, why give it a right to opt out?⁷⁸

The effect of the language also seems to be that a State Party may ratify the amendment and constitute one of the 30 states necessary to bring it into force, but block the application of state or *proprio motu* triggers of the jurisdiction with respect to itself. (Like all other states, it apparently cannot protect its nationals from being the subject of a Security Council referral.) As I have suggested elsewhere,⁷⁹ '[i]t would take some nerve to help make up the thirty and then opt out, but one should never underestimate the acrobatic ability of the diplomatic mind in construing the national interest'.

Paragraph 5 addresses the non-State Party problem. It was of particular significance for the three Permanent members of the Security Council who have not become party to the Rome Statute—China, the Russian Federation, and the United States—and for other non-parties who are wont to use force outside their own territories. It provides

⁷⁷ The next preambular paragraph addresses an issue discussed inconclusively in the aggression negotiations but not mentioned ultimately in the aggression amendments: 'Confirming that, in light of the provision of Art 40(5) of the Vienna Convention on the Law of Treaties, States that subsequently become States Parties to the Statute will be allowed to decide whether to accept the amendment contained in this resolution at the time of ratification, acceptance or approval of, or accession to the Statute.' Art 40(5) of the VCLT (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 is a default rule that must be subject to being set aside, expressly and perhaps impliedly. It provides: 'Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State: (a) be considered as a party to the treaty as amended; and (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.' There will no doubt be some debate in the future about whether the aggression amendments, on the other hand, apply to future parties who do not expressly accept them. Reading them as a whole, I think they do, subject to opting out. It is irrelevant whether the new member makes any specific reference to them one way or the other—the important point is to become a State Party.

⁷⁸ See also the concluding words of paragraph 1 of the Kampala adopting resolution (n 70), in which the Conference 'notes that any State Party may lodge a declaration referred to in Art 15 bis prior to ratification or acceptance'. This language makes no sense if ratification or acceptance is required to make the provisions applicable to a State Party.

⁷⁹ Clark (n 6) 704–5.

that ‘[i]n respect of a State that is not a party to this Statute, the Court shall not exercise jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory’.⁸⁰

In the negotiations leading up to Kampala, there was widespread support for the proposition that where an aggression occurs against a State Party to the Statute, the Article 12 precondition of ratification by the state of territoriality should be sufficient for the Court’s jurisdiction. Article 12 requires that either the state of territoriality or the state of nationality be a party. An aggression, so the argument goes, can, as a matter of territoriality, take place both in the state where the aggression is plotted, and in the place where it is executed (the ‘victim state’). This is in accordance with the normal rules on ‘effects’ or ‘objective territorial’ jurisdiction⁸¹ and seems to be the case with genocide, crimes against humanity, and war crimes. Thus, a citizen of a non-State Party who commits genocide, war crimes, or crimes against humanity on the territory (or having effect on the territory) of a State Party is subject to ICC jurisdiction.

The present provision is aimed at upsetting this implication, specifically in respect of aggression, and preventing jurisdiction over aggression in such cases. It is probably a good example of a small but powerful minority protecting its own position in a consensus negotiation.

Paragraphs 6, 7, and 8 of Article 15bis resolve the various Security Council ‘red light’ and ‘green light’ options concerning state and *proprio motu* referrals that had been considered intensively but inconclusively before Kampala. It is important to appreciate that this is now in the context of cases where the Security Council has not made a referral to the Court and may, or may not, have adopted a resolution concerning actions by a state in respect of a situation coming before the Court.

Where the prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, *proprio motu* or following a state referral, he is required to first ascertain whether the Security Council has made a determination of an act of aggression committed by the state concerned. The prosecutor is to notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.⁸² If, in fact, the Security Council has made a determination of an act of aggression, the prosecutor may proceed with the investigation.⁸³ Then comes the crunch issue: what if the Security Council has not acted, and does not now act? The consensus in Kampala represented a

⁸⁰ On the literal language of this paragraph, the reverse situation is also true: consider the situation where a state that is party to the Rome Statute commits an act of aggression on the territory of a non-party. Notwithstanding the normal ‘nationality’ implication of Art 12(2)(b), there is arguably no jurisdiction in the Court in this situation because of the conduct on the territory of a non-party. As far as I have been able to ascertain, none of the legislation so far adopted to give effect to the Kampala amendments makes any such exception to nationality jurisdiction at the domestic level. It is illegal whatever the Rome Statute status of the victim state. A state may, if it wishes, criminalize actions by its nationals who may thus be tried domestically even if not in the ICC.

⁸¹ As in *The Case of the SS Lotus (France v Turkey)* (Merits) [1927] PCIJ Rep Series A No. 10.

⁸² Art 15bis, para. 6 Amendments (n 20).

⁸³ Ibid., para. 7.

strong resolution of an issue that had bedevilled the earlier negotiations. The relevant language reads:

Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in Article 15, and the Security Council has not decided otherwise in accordance with Article 16.⁸⁴

The ‘filter’ in the ordinary case is thus not the Security Council, but the Pre-Trial Division, that is to say, a majority of all six members of that Division sitting together *en banc*. If the Security Council wishes to enter the fray, it must put up its stop-light. Notice that, consistent with the existing Rome compromise, contained in Article 16 of the Statute,⁸⁵ a dissenting member of the Permanent Five in the Security Council cannot simply stop the process by exercising a veto. It is only where the five concur (and obtain the other necessary votes) that proceedings may be stopped in their tracks.

31.3 Implementing the Kampala Amendments Domestically

Twenty-two states had ratified the Kampala amendments by March 2015, in order, Liechtenstein, Samoa, Trinidad and Tobago, Luxembourg, Estonia, Germany, Botswana, Cyprus, Slovenia, Andorra, Uruguay, Belgium, Croatia, Slovakia, Austria, Spain, Latvia, Poland, San Marino, Georgia, Malta, and Costa Rica. Numerous other states are engaged in the process of doing so.⁸⁶ Several states have amended their penal legislation in order to incorporate the crime of aggression.⁸⁷ Some questions that are particularly relevant to states contemplating legislation will be discussed in the section that follows.⁸⁸

⁸⁴ Ibid., para. 8.

⁸⁵ Art 16 ICC Statute provides: ‘No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.’

⁸⁶ The website <<http://www.crimeofaggression.info>> accessed 13 March 2015, which is maintained by the permanent Mission of Lichtenstein to the UN and the Global Institute for the Prevention of Aggression, asserted in 2014: ‘According to the information available, government or parliamentary officials in at least the following 35 States Parties are currently **actively working on the ratification** of the amendments on the crime of aggression: Albania, Argentina, Australia, Austria, Bolivia, Brazil, Bulgaria, Burundi, Chile, Costa Rica, Czech Republic, Dominican Republic, Ecuador, El Salvador, Finland, Greece, Hungary, Iceland, Italy, Lesotho, Lithuania, Macedonia (FYROM), Madagascar, Malta, Mongolia, the Netherlands, New Zealand, Panama, Paraguay, Peru, Portugal, Romania, Senegal, Switzerland and Venezuela. In 9 further States Parties the process is in its **early stages**: Ghana, Guatemala, Ireland, Japan, Mexico, Moldova, Republic of Korea and Tunisia.’ (Austria, Costa Rica, and Malta have since ratified.)

⁸⁷ Copies of legislation adopted in Croatia, Luxembourg, Peru (soon to be a party), Samoa, and Slovenia may be found at the website referenced in the previous note.

⁸⁸ A particularly useful resource in this respect is *Handbook: Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC, Crime of Aggression, War Crimes* (2012), published by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School of Public and International Affairs, Princeton University in conjunction with the organization mentioned in the preceding note (n 86).

31.3.1 Should a ratifying state criminalize aggression domestically?

The Rome Statute is not a ‘suppression convention’ like the terrorism treaties and many others, explicitly requiring states to engage penal law.⁸⁹ But that they should do so is implicit in the Statute and many thoughtful states have done so for the other crimes in the Statute. In terms of criminal law theory, I think the best explanations for so doing come from the possibilities of deterrence and the expressive view of the law—emphatically spelling out for a domestic audience the illegality of aggression and the other crimes within the jurisdiction of the Court. Relevant also is preambular paragraph 5 of the Rome Statute.⁹⁰ ‘Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’. This obligation, representing what the drafters must have regarded as a customary law norm, is read by some as contemplating universal jurisdiction,⁹¹ at the very least a responsible state must assume territorial or nationality jurisdiction—unless there is something different about aggression from the other three Rome crimes.

Then there is Article 17 on admissibility/complementarity. The SWGCA saw no reason why the general rules on complementarity should not apply equally to aggression.⁹² The Court is to defer to a state which ‘has jurisdiction’ over the crimes in the Statute. Obviously a state cannot ‘have’ jurisdiction without legislation (or some other constitutional mechanism that gives its courts competence). Complementarity is surely an invitation, an incentive even, to legislate. I believe that complementarity applies potentially regardless of the jurisdictional theory asserted by the state—including universal jurisdiction.⁹³ Does the general law, however, suggest some limitations on appropriate legislation, for example, on applicable jurisdictional theories?

31.3.2 Jurisdiction under international law

There is the threshold question here, the debate between the majority and dissent in the *Lotus* case⁹⁴ about whether it is necessary to look for a rule that says you can or one that says you cannot. I will take the majority’s ‘no-rule-against-it’ approach here, relying particularly on the Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal in *DR Congo v Belgium*,⁹⁵ who assert that while this approach has ‘clear

⁸⁹ On ‘suppression conventions’, see E Podgor and R Clark, *Understanding International Criminal Law* 3rd edn (Newark: LexisNexis 2013), para. 1.02[D].

⁹⁰ Preamble ICC Statute, para. 5

⁹¹ See R Clark, ‘Complementarity and the Crime of Aggression’ in C Stahn and M El Zeidy (eds), *The International Criminal Court and Complementarity* vol. 2 (Cambridge: Cambridge University Press 2011) 721, 731. See also (n 30).

⁹² *Ne bis in idem* with regard to the crime of aggression, ICC-ASP/3/SWGCA/INF.1, 13 August 2004, paras 28–34, Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression 21–23 June 2004, Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University.

⁹³ Clark (n 91) 728–30.

⁹⁴ See *Lotus* case (n 81).

⁹⁵ Joint Separate Opinion of Judges Rosalyn Higgins, Pieter Kooijmans, and Thomas Buergenthal in *Case Concerning the Arrest Warrant of 11 April 2000 (DR Congo v Belgium)* [2002] ICJ Rep 3.

attendant dangers in some fields', it 'represents a continuing potential in the context of jurisdiction over international crimes'.⁹⁶

I have seen no serious suggestion that it is improper for a state to exercise jurisdiction over what its own leadership does. The ILC, however, recommended against universal or victim state jurisdiction for aggression in its scheme for Crimes against the Peace and Security of Mankind.⁹⁷ There is some debate about whether aggression, or Nuremberg's 'crime against peace', gives rise to universal jurisdiction in any state, although it was adjudicated in international forums in Nuremberg and Tokyo.⁹⁸ My impression was that many members of the SWGCA were comfortable with victim state ('effects' or 'objective territorial' jurisdiction). In terms of state practice, what must have been victim state jurisdiction was exercised by the Republic of China in Nanking against Japanese generals in at least three cases, notably that of *Takashi Sakai*.⁹⁹ Poland exercised what was either victim state or universal jurisdiction in the *Greiser* case.¹⁰⁰ The USSR convicted numerous German generals for illegal activity that included crimes against peace.¹⁰¹ But practice has been somewhat thin since then, aside from some legislative assertions of power.¹⁰² Legislative assertions of universal jurisdiction over crimes against humanity, and even genocide, were also relatively sparse until they received some impetus from the Rome Statute, so the practice may not mean much.

⁹⁶ Ibid., para. 50. The 'field' they obviously had in mind from the context was the argument from some of the nuclear powers that, since there was no clear rule against the use of nuclear weapons, they were free to use them. There is a big difference between the power to exercise criminal jurisdiction and that to wreak havoc with a weapon of mass destruction.

⁹⁷ Art 8 of the Draft Code of Crime against the Peace and Security of Mankind with commentaries, forty-eighth session, ILC (1996), 30, para. 14: 'An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question whether another State has committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security.'

⁹⁸ See Clark (n 91) 730–5 (expressing some doubts about universal jurisdiction); M Scharf, 'Universal Jurisdiction and the Crime of Aggression' (2012) 53 *Harvard International Law Journal* 358 (emphatic that there is universal jurisdiction over aggression, relying primarily on the precedent of Nuremberg). It is probably the case that just because something may be tried in an international tribunal does not automatically mean that it can be tried in a domestic court on a universal jurisdiction theory, but it must surely be a strong indication.

⁹⁹ See R Clark, 'The Crime of Aggression: From the Trial of Takashi Sakai, August 1946, to the Kampla Review Conference on the ICC in 2010' in G Simpson and K Heller (eds), *Untold Stories: Hidden Histories of War Crimes Trials* (Oxford: Oxford University Press 2013).

¹⁰⁰ Mark Drumbl, 'The Greiser Case', ibid.

¹⁰¹ For pioneering archival research on those trials, see I Bezborodova, *Generaly Vermakhta v plenu (Generals of the Wehrmacht in Captivity)* (Moscow: Rossiiskii gos. gumanitarnyi universitet 1998), carefully reviewed in G Ginsburgs, 'Light Shed on the Story of Wehrmacht Generals in Soviet Captivity' (2000) 11 *Criminal Law Forum* 101.

¹⁰² A Reisinger Coracini (n 3) found 25 States with domestic aggression provisions, many of which emerged from the former USSR and the former Yugoslavia. The jurisdictional provisions in them do not always appear to have been obvious.

Note also the impact of Kampala Understandings 4 and 5 (if any).¹⁰³ Are they just neutral on what the general law is, or do they discourage universal or victim state (or even aggressor state) jurisdiction? Again, note that the general law, reflected emphatically in the Rome preamble, may recognize a right and even an obligation to exercise jurisdiction.

31.3.3 Immunities

Notwithstanding Article 27¹⁰⁴ of the Rome Statute concerning cases before the ICC itself, there may be some possibilities for immunity under international (and domestic) law in domestic courts for leaders, in light of the majority decision in *DRC v Belgium*.¹⁰⁵ I doubt that in the context of aggression it proceeds further than heads of state, heads of government, foreign ministers, and defence ministers, although this is a significant hole in those potentially amenable to prosecution for the crime of aggression. There is probably no immunity for generals or industrialists who fit the leadership criteria of Article 8bis.¹⁰⁶ There is also the question of immunity of former officials. The decision of the House of Lords in the *Pinochet* case¹⁰⁷ suggests that immunity of an official for international crimes may be less absolute after that person leaves office and that there may be no immunity for at least some international crimes (torture in that instance) committed in office. On the other hand, the ICJ seemed to be more restrictive in the *Arrest Warrant* case.¹⁰⁸ Criminal immunity of officials is a work

¹⁰³ These Understandings provide: '4. It is understood that the amendments that address the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with Article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing rules of international law for purposes other than this Statute. 5. It is understood that the amendments 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.' Professor Van Schaak describes these provisions as expressing a 'subtle preference that the states parties do not incorporate the crime into their domestic codes'. B Van Schaak, '*Par in Parem Imperium Non Habet*: Complementarity and the Crime of Aggression' (2012) 10 *Journal of International Criminal Justice* 133 (abstract). She makes a policy argument that: 'The one circumstance on which such prosecutions might be appropriate is when a state prosecutes its own citizen(s) for launching an act of aggression pursuant to the active nationality principle of jurisdiction. For both legal and policy reasons, states other than the nationality state—including victim states, other implicated states, and third party states exercising extraordinary bases of jurisdiction—should in general refrain from such prosecutions so that cases involving the crime of aggression proceed almost exclusively before the ICC.' Ibid., 136. See also J Trahan, 'Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression? Considering the Problem of "Overzealous" National Court Prosecutions' (2012) 45 *Cornell International Law Journal* 569.

¹⁰⁴ Art 27 provides: '1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. 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.'

¹⁰⁵ See *Arrest Warrant* case (n 95) (holding Foreign Minister of DRC immune from arrest at behest of Belgium on charges of grave breaches of the Geneva Conventions and crimes against humanity).

¹⁰⁶ See (n 24).

¹⁰⁷ *R v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte* (No. 3), [2000] 1 App. Cas. 147.

¹⁰⁸ At para. 61 of its Judgment in the *Arrest Warrant* case (n 95), the Court remarks that: '[A]fter a person ceases to hold the office of Minister of Foreign Affairs, he or she will no longer enjoy all of the

in progress in the case law and statutes, and at the ILC,¹⁰⁹ and it is not clear where the field is heading. Most jurisdictions probably have rules applying generally rather than something ICC-specific. A state exercising aggressor state jurisdiction will no doubt want to lift potential immunity of its own officials,¹¹⁰ or the exercise will be pointless. What it does in respect of officials from other countries will have significant implications for whether a case against such officials may be brought in a state other than their state of nationality or only in the ICC itself.

31.3.4 *Par in parem non habet imperium/act of state*

In arguing against universal or victim state jurisdiction, the ILC commented: ‘The determination by a national court of one state of the question of whether another state had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*.’¹¹¹ I have serious doubts about how ‘fundamental’ the maxim is. The principle that states do not judge the acts of other states certainly has some force—it undergirds the rule about state immunity in English and American law. The ‘act of state’ version of the principle is, at least in the common law, a fuzzy rule of comity and not one the courts regard as required by international law.¹¹² But the main impact seems to be in respect of what states do on their own territory—and aggression is ultimately executed elsewhere. The variant on ‘act of state’ that shields individuals who operate on behalf of a state was emphatically denied at Nuremberg.¹¹³ States seem to have no qualms about judging the ‘state policy’ aspects of other *jus cogens* offences like crimes against humanity¹¹⁴ or genocide¹¹⁵ (and, I suspect, the ‘plan or policy’ aspect of Article 8 (2) of the Rome Statute).¹¹⁶ Is aggression different? Or does Nuremberg settle the act of state question? If *par in parem imperium non habet* is really ‘fundamental’, one might expect substantial chapters on it in the leading works on international law, or at least an entry in the index. Alas, it does not even make an appearance in the index of most

immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.’ There is not much leeway here for avoiding immunity for a senior official who was involved in an act of aggression.

¹⁰⁹ Preliminary report on the immunity of State officials from foreign criminal jurisdiction, Rapporteur Concepcion Escobar Hernandez, UN Doc A/CN.4/654 (31 May 2012).

¹¹⁰ As states legislating for the other Rome Statute crimes have typically done.

¹¹¹ See above n 97. ¹¹² *Banco Nacional de Cuba v Sabbatino*, 376 US 398 (1964).

¹¹³ Art 7 of the Nuremberg Charter provided: ‘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.’

¹¹⁴ See Art 7(2)(a) ICC Statute which contains an element that a crime against humanity include an attack directed against a civilian population ‘pursuant to or in furtherance of a State or organizational policy to commit such attack’.

¹¹⁵ An element of genocide requires that ‘the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction’. The ‘pattern’ will often, but not invariably, be set by a Government against its perceived enemies.

¹¹⁶ Art 8(1) ICC Statute states that ‘[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’.

of them. One of the few to refer to it, the 1992 edition of *Oppenheim's International Law*,¹¹⁷ uses it as a transition into a lengthy discussion of state immunity, but does not pursue it beyond that.¹¹⁸ A major article by Yoram Dinstein on the maxim¹¹⁹ finds its origin in ecclesiastical law, on the question whether one Pope is bound by the decisions of a previous Pope, and concludes that 'the progressive development of international law will not be furthered by this principle, just as it does not render existing law more comprehensible'.¹²⁰ In short, it is far from clear what impact this doctrine has in respect of the crime of aggression.

31.3.5 Are there any additional considerations that a state contemplating exercising victim state or universal jurisdiction might ponder?

States have considerable discretion here and I raise a number of questions rather than trying to give a definitive answer of any of them.¹²¹

31.3.5.1 The implications of concurrent jurisdiction

This is an area of concurrent jurisdiction where two or more states may have respectable bases of jurisdiction, and there is no clear hierarchy of jurisdictional theories established in international law (the *Lotus* case¹²² again). Should a state whose theory is a universal one get the consent of the aggressor state (or victim state), or even defer to it? There are suggestions that a state contemplating universal jurisdiction over genocide should consider the position of states actually affected.¹²³ Does this make sense here? It does not if the aggressor government is still in power, but might if there has been a change of regime.

31.3.5.2 Action or inaction by the Security Council

How should a state contemplating exercising jurisdiction treat the action or inaction of the Security Council? Should the legislation forbid action unless the Security Council has spoken (and used the word aggression)? What evidentiary weight should it give to a Security Council decision or to prior findings of the ICC? At the very least, substantial but not conclusive deference to findings by either of those two bodies finding

¹¹⁷ Sir R Jennings and Sir A Watts (eds), *Oppenheim's International Law*, Vol. I, *Peace* (Oxford: Oxford University Press 2008).

¹¹⁸ Ibid., at 341–2. Van Schaak (n 103) does not offer any extended discussion of the principle.

¹¹⁹ Y Dinstein, 'Par in Parem Non Habet Imperium' (1966) 1 *Israel Law Review* 407.

¹²⁰ Ibid., 420.

¹²¹ Several of these issues were addressed in an interesting Bill introduced into the New Zealand Parliament by Green Party Member of Parliament (and former Secretary-General of Parliamentarians Global Action), Kennedy Graham, 'The International Non-Aggression and Lawful Use of Force Bill'.

¹²² See *Lotus* case (n 81).

¹²³ See the excellent discussion, especially the examination of relevant Spanish cases, by C Ryngaert, 'Horizontal Complementarity' in C Stahn and M El-Zeid (eds), *The International Criminal Court and Complementarity* vol. II (Cambridge: Cambridge University Press 2011) 855.

a state act of aggression which is arguably relevant to the individual case before the domestic court?

31.3.5.3 Could the Security Council halt the domestic proceedings?

Note the other side of the coin: could the Security Council, acting under Chapter VII of the Charter,¹²⁴ do a kind of ‘Article-16-of-the-Rome-Statute’ to a Member State of the UN instructing it to bring a halt to proceedings, temporarily or permanently? I have in mind the analogy of the PanAm Libya case in the ICJ which seems to suggest that the Council has some ability under its Chapter VII powers to direct which states are to exercise jurisdiction in cases where there is concurrent jurisdiction.¹²⁵

31.3.5.4 Defences/grounds for the exclusion of responsibility

Should specific reference be made to defences? The negotiators on the Kampala Amendments, like their counterparts in drafting the ‘special part’ provisions in Articles 6, 7, and 8 of the Rome Statute and the Elements thereof, did not see fit to include specific defences. That is left to the general law which can be incorporated via Article 31 of the Rome Statute.¹²⁶ Some domestic legislation dealing generally with the Rome Statute already incorporates Article 31 of the Rome Statute and that may be sufficient, as may existing defences in domestic penal law.

31.3.5.5 Should any special consent be required?

Should the consent of some particular domestic official be required? Some common-law legislation on the Rome Statute requires the consent of the Attorney-General for a prosecution involving the Rome crimes to proceed. This may be appropriate where the Attorney-General is acting as a chief prosecutor and bound by the ethics of that position. But it may be entirely inappropriate to a prosecution of domestic leadership. Some comments in the Separate Opinion in *DR Congo v Belgium*, addressed generally to exercises of universal jurisdiction have some resonance here: ‘[s]uch charges may only be laid out by a prosecutor or *juge d'instruction* who acts in full independence, without links to or control by the Government of that State’.¹²⁷ In any event, this is not an area where it would be appropriate to have the executive certify that an ‘act of aggression’ occurred (comparable to a determination of ‘terrorism’ in some US

¹²⁴ And see Art 25 UN Charter: ‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.’

¹²⁵ See *Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* [1998] ICJ Rep 9.

¹²⁶ The draft New Zealand legislation by Kennedy Graham MP (n 121) specifically lists self-defence and authorization of the Security Council as (exclusive) defences. Note also that the requirement in Art 8bis (1) that a violation be ‘manifest’ may functionally provide a ‘defence’ in a ‘grey area’, such as the responsibility to protect or in cases of ‘minor’ incursions.

¹²⁷ See *Arrest Warrant* case (n 95) para. 59. Note the solution in the Graham Bill (n 121) for the appointment of a Special Prosecutor.

legislation).¹²⁸ The ‘act of aggression’ is an element of the crime and must be proved to the judges beyond reasonable doubt.

31.3.5.6 Triggering the prosecutorial function

Who should be able to trigger an exercise of the prosecutor’s function? Again, the Separate Opinion in *DR Congo v Belgium*¹²⁹ suggests some relevant considerations:

Moreover, the desired equilibrium between the battle against impunity and the promotion of good inter-State relations will only be maintained if there are some special circumstances that do require the exercise of an international criminal jurisdiction and if this has been brought to the attention of the prosecutor or *juge d’instruction*. For example, persons related to the victims of the case will have requested the commencement of legal proceedings.¹³⁰

Given the world’s migratory patterns in response to modern strife, countries that receive large numbers of migrants, especially asylum seekers, are likely to be sheltering people who are at best potential citizens but for whom the protective functions of the state of asylum are perfectly reasonable. A state prosecuting in such circumstances on a universal jurisdiction basis is much more than an officious bystander; it may have a genuine link of its own to the imperatives of justice.

31.4 Conclusion

Given the activity going on to foster ratification that has been noted earlier, it seems likely that the 2017 target for 30 ratifications will be met. Ratification alone is not enough; implementation is also necessary. In the author’s view, a state ratifying the Kampala Amendments should domesticate Article 8bis and its Elements as closely as possible by penal legislation. It should avoid moving too far away from the ICC definition for domestic purposes. It should take jurisdiction at least over *what its nationals do*. Bolder states may wish to go further into the areas of victim state or universal jurisdiction. I do not read the Kampala Understandings or customary practice as clearly prohibiting them as a matter of law from such endeavours, although customary law is, at present, murky at best.

¹²⁸ See e.g. 18 United States Code paras 2331 and 2332 which incorporate by reference definitions of homicide and crimes against the person committed against a US national ‘outside the United States’, and then add: ‘No prosecution for any offense described in this section shall be undertaken by the United States except on written certification by the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or civilian population.’ The United States seldom uses passive personality jurisdiction, and this provision is pretty fundamental to the crime. It is hard to see it as anything other than a basic element of the crime and thus ought to be subject to trial by jury, as a matter of fundamental constitutional due process.

¹²⁹ See Joint Separate Opinion of Judges Rosalyn Higgins, Pieter Kooijmans, and Thomas Buergenthal in the *Arrest Warrant* case (n 95) para. 59.

¹³⁰ Ibid., para. 59.

32

La Lutte Continue

Investigating and Prosecuting Sexual Violence at the ICC

*Niamh Hayes**

32.1 Introduction

It is a depressing but consistent fact that every international criminal tribunal has struggled to deal with crimes of sexual violence. The Nuremberg Charter did not even include such crimes within the jurisdiction of the Nuremberg Tribunal.¹ While evidence of sexual violence inevitably emerged in the course of witness testimony, it did not form part of the prosecution's case or the final judgment,² while the underlying facts were frequently glossed over or avoided entirely in the name of propriety.³ Although the Charter of the Tokyo Tribunal also failed to explicitly enumerate rape as a war crime or crime against humanity,⁴ evidence of rape and sexual violence was at least included within the prosecution case, although euphemistically characterized as 'inhuman treatment', 'ill treatment', or 'failure to respect family honour and rights' as war crimes.⁵ Although the

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¹ Charter of the IMT, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Establishing the Charter of the IMT (8 August 1945) 82 UNTS 279. Rape and sexual violence were not explicitly enumerated as either war crimes or crimes against humanity in the Charter, although Cherif Bassiouni has argued that rape could nevertheless have been prosecuted as a crime against humanity under the rubric of 'other inhumane acts' as derived from general principles of law. See C Bassiouni, *Crimes against Humanity in International Criminal Law* (Dordrecht: Martinus Nijhoff 1992) 245–6, 320–1. Kelly Askin has likewise argued that, given the historical prohibition of sexual violence crimes under international humanitarian law, the lack of specific reference to rape or sexual violence crimes in the Charter need not have precluded the leading of evidence or inclusion of relevant facts relating to sexual violence under the heading of other enumerated war crimes such as enslavement. See K Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (The Hague: Kluwer Law International 1997) 138.

² Kelly Askin has pointed out that, although the IMT's transcripts contain references to evidence of rape, sexual torture, forced sterilization, forced abortion, and sexual mutilation, the comprehensive 732-page index to the 42-volume text of proceedings of the Tribunal at Nuremberg does not include either 'rape' or 'crimes against women' as a search term. Askin, *War Crimes against Women* (n 1) 97–8.

³ See e.g. S Brownmiller, *Against our Will: Men, Women and Rape* (New York: Ballantine Books 1975) 56, describing an incident where a French prosecutor at Nuremberg declined to read into evidence the report of a medical examiner who had treated numerous victims of rape in a particular region, 'gallantly' sidestepping the relevant facts by stating '[t]he Tribunal will forgive me if I avoid citing the atrocious details... I will pass on'.

⁴ Charter of the IMT for the Far East (19 January 1946) as amended by General Orders No. 20 (26 April 1946), TIAS 1589.

⁵ Askin, *War Crimes against Women* (n 2) 180. Although rape was expressly charged in the trial, no female victims of sexual violence were called to testify. Many scholars have also highlighted the failure

prohibition of rape was subsequently codified in a number of international legal instruments post-Second World War,⁶ at the time of the establishment of the ICTY in 1994 the status of rape and other forms of sexual violence as international crimes was far from clear.⁷

International outrage at reports of systematic sexual violence committed in the former Yugoslavia had been a significant motivating factor behind the Security Council's decision to establish an international criminal tribunal to investigate violations of international humanitarian law,⁸ and the Tribunal's statute was drafted to explicitly include rape as a crime against humanity.⁹ Despite the apparently marginal position of sexual violence crimes within the Tribunal's legal framework at the outset of its work, the ICTY would go on to create one of the strongest track records of any international criminal tribunal for consciously and comprehensively investigating and prosecuting sexual violence, particularly sexual violence against men, although former staff will readily admit that these achievements were more accidental than intentional in the Tribunal's early years of operation.¹⁰ The ICTR was confronted with an equally

of the Tokyo Tribunal to properly address the issue of hundreds of thousands of 'comfort women' who were forcibly abducted, mainly from the Korean peninsula and other Japanese-occupied territories, and used as sexual slaves by the Japanese military. See further R Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000–1) 46 *McGill Law Journal* 217, 221–3; P Sellers, 'Wartime Female Slavery: Enslavement?' (2011) 44 *Cornell International Law Journal* 115, 117–21; Y Yoshiaki, *Comfort Women: Sexual Slavery in the Japanese Military During World War II* (English translation by S O'Brien, New York: Columbia University Press 2000).

⁶ See Art 27 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287; Arts 76(1) and 85 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3; Art 4(2)(e) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609. See also Art II Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity (20 December 1945), published in Official Gazette of the Control Council for Germany No. 3 (1946) 50, which specifically enumerated rape as a crime against humanity.

⁷ See further T Meron, 'Rape as a Crime under International Humanitarian Law' (1993) 87(3) *American Journal of International Law* 424. Christine Chinkin noted in 1994 that '[t]he substantive law on rape in armed conflict has now become entangled with the question of arenas for its application'; see C Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1994) 5 *European Journal of International Law* 326, 334.

⁸ See e.g. UNSC Res 827 (25 May 1993) UN Doc S/RES/827, which deplored the 'continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia... including reports of... massive, organised and systematic detention and rape of women', and Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc S/25704 (3 May 1993).

⁹ Art 5(g) Statute of the ICTY, UNSC Res 827 (25 May 1993), UN Doc S/RES/827, Annex. Prior to the establishment of the Tribunal, both the ICRC and the US Department of State came out in support of a progressive interpretation of the Geneva Conventions, arguing that rape could also be prosecuted as a grave breach under the rubric of 'wilfully causing great suffering or serious injury to body or health', while Theodor Meron presciently argued that it could also potentially constitute the grave breach of 'torture or inhuman treatment' under certain circumstances. See Meron (n 7) 426–7.

¹⁰ See e.g. K Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288, 318; K Engle, 'Feminism and its (Dis)contents: Criminalising Wartime Rape in Bosnia and Herzegovina' (2005) 99 *American Journal of International Law* 778; K Askin, 'A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003' (2004) 11 *Human Rights Brief* 16; N Hayes, 'Creating a Definition of Rape in International Law: The Contribution of the International Criminal

laconic statute at the time of its establishment,¹¹ tasked with investigating and prosecuting those responsible for the genocidal campaign in which hundreds of thousands of rapes had taken place over a 100-day period.¹² Unfortunately, institutional dysfunction and entrenched problems with investigative and prosecutorial strategy meant that three-quarters of all ICTR charges for sexual violence crimes ultimately resulted in acquittal or were dropped in exchange for a guilty plea.¹³ The SCSL, which began its work at the same time as the ICC, succeeded in leading prosecutions and producing some fascinating jurisprudence on the crime of forced marriage, but was curtailed by the disastrous exclusion of all evidence of sexual violence from one of its four cases on procedural grounds.¹⁴

By the time the ICC Statute was being finalized at the Rome Conference in 1998, the drafting process was already heavily influenced by the impact of both the initial investigations and jurisprudence of the ICTY and ICTR on sexual violence and the advocacy efforts of various feminist lobby groups, such as the Women's Caucus for Gender Justice.¹⁵ Where the ICTY and ICTR Statutes had recognized rape only as a crime against humanity, the Rome Statute contained the broadest enumeration of sexual and gender-based crimes of any international criminal instrument to date, delineating rape, sexual slavery, forced pregnancy, forced sterilization, enforced prostitution, and other forms of sexual violence as both crimes against humanity and war crimes, in both international and non-international armed conflict.¹⁶ A number

Tribunals' in S Darcy and J Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press 2010) 129.

¹¹ Statute of the ICTR, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Annex. Art 3 enumerated rape as a crime against humanity, while Art 4 on grave breaches provided some further scope for the inclusion of evidence of sexual violence under the headings of 'cruel treatment' or 'outrages upon personal dignity' as war crimes.

¹² See e.g. C Bijleveld et al., 'Counting the Countless: Rape Victimization during the Rwandan Genocide' (2009) 19 *International Criminal Justice Review* 208 and B Nowrojee, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (New York/Washington D.C.: Human Rights Watch 1996).

¹³ Rape or other forms of sexual violence were charged against 52 of the ICTR's 93 accused. Of the 43 cases that proceeded to trial, 13 have resulted in a conviction to date (pending some continuing appeals), 23 resulted in an acquittal, 1 accused died at trial, and charges were dropped in the remaining 6 cases. See ICTR, 'Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda' (30 January 2014), which examines some of the strategic and institutional factors behind this extremely disappointing record.

¹⁴ Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, *Fofana* et al., SCSL-04-14-PT, TCI, SCSL, 24 May 2005, Judge Boutet of Canada dissenting; see Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, *Fofana* et al., SCSL-04-14-PT, 24 May 2005. See further S Kendall and M Staggs, 'Silencing Sexual Violence: Recent Developments in the CDF Case at the Special Court for Sierra Leone' (UC Berkeley War Crimes Studies Centre, 2005), and M Staggs Kelsall and S Stepakoff, '"When We Wanted to Talk about Rape": Silencing Sexual Violence at the Special Court for Sierra Leone' (2007) 1 *International Journal of Transitional Justice* 355.

¹⁵ See further Copelon (n 5) 233–9; R Goldstone, 'Prosecuting Rape as a War Crime' (2002) 34 *Case Western Reserve Journal of International Law* 277, 285; J Hall, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' (2008–9) 30 *Michigan Journal of International Law* 1.

¹⁶ Arts 7(1)(g), 8(2)(b)(xxii), and 8(2)(c)(vi) Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 ('ICC Statute'). Art 7(1)(h) also recognizes the crime against humanity of persecution on the grounds of gender, while Art 7(1)(c) recognizes the

of vital procedural and evidentiary safeguards on evidence of prior sexual conduct, inferences of consent, and *in camera* hearings were also introduced into the ICC's Rules of Procedure and Evidence,¹⁷ in recognition of the equivalent measures which had been adopted by the ad hoc Tribunals during their first few years of practice.¹⁸ The Statute also recognized the crucial importance of institutional factors in addressing this category of crime, and therefore imposed a series of strategic, staffing, and policy requirements to prioritize the investigation and prosecution of sexual and gender-based crimes within the work of the Court.¹⁹ In addition to the explicit legal requirement on the Prosecutor to ensure the effective prosecution of sexual violence, the Statute also recognized in general terms the importance of undermining impunity for international crimes,²⁰ which has historically been most pronounced in relation to those who have ordered, permitted, or perpetrated sexual violence.

Unfortunately, despite such auspicious beginnings, the record of the ICC to date in relation to sexual violence has proven to be just as fraught and frustrating as its predecessors. This chapter will critically examine the practice of the OTP over its first decade of operation to assess whether it is in fact living up to its responsibilities to ensure the effective prosecution of such crimes. The chapter will first analyse the OTP's record of charging crimes of sexual and gender-based violence, as well as the outcome

crime against humanity of enslavement provides for the inclusion of evidence of trafficking of persons, particularly women and children. See further C Steain, 'Gender Issues' in R Lee (ed.), *The International Criminal Court—The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International 1999) 357, 389.

¹⁷ Rules 70, 71, and 72 of the ICC Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, 3–10 September 2002 (First Session of the ASP), part II.A (adopted and entered into force 9 September 2002). Rule 70 states that consent cannot be inferred from the words or conduct of a victim in situations where force, threat of force, or a coercive environment has negated their capacity for genuine and voluntary consent or where they are otherwise incapable of consenting, nor can it be inferred from their silence or lack of resistance during the incident. Rules 70(d) and 71 render evidence of the prior or subsequent sexual conduct of a victim or witness inadmissible, and emphasize that no inferences on credibility, character, or 'predisposition to sexual availability' should be drawn from such evidence. Rule 72 provides for *in camera* hearings to assess the appropriateness and admissibility of evidence regarding consent or other issues relating to the words or conduct of a victim or witness of sexual violence. The adoption of these rules was one of the most contentious issues in the negotiations at Rome; see further D Piragoff, 'Evidence in Cases of Sexual Violence' in R Lee et al. (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (New York: Transnational Publishers 2001) 369–91.

¹⁸ See Rule 96 of the ICTY Rules of Procedure and Evidence (adopted 11 February 1994, entered into force 14 March 1994) UN Doc IT/32/Rev.45, as amended on 8 December 2010; Rule 96 of the ICTR Rules of Procedure and Evidence (entered into force 29 June 1995) UN Doc ITR/3/Rev.1, as amended on 1 October 2009; Rule 96 of the SCSL Rules of Procedure and Evidence (adopted on 16 January 2002, entered into force 12 April 2002), as amended on 28 May 2010. The inclusion of these rules at the ICTY and ICTR was intended to facilitate a progressive approach to the adjudication of sexual violence, as well as merely to counteract practical investigatory issues. See further F Ni Aoláin, 'Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War' (1996–7) 60 *Albany Law Review* 883.

¹⁹ For example, Art 42(9) ICC Statute requires the Prosecutor to 'appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children', while Art 54(1)(b) imposes a duty on the Prosecutor to 'take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court...in particular where it involves sexual violence, gender violence or violence against children'.

²⁰ Preamble ICC Statute: 'Affirming 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.'

of those charges. It will then examine issues relating to the conduct of investigations to assess where the problems which have dogged the OTP's evidence and case hypotheses originated. Finally, the chapter will discuss relevant issues of prosecutorial strategy and analyse the potential impact of the OTP's new Policy Paper on Crimes of Sexual and Gender-Based Violence on future prosecutions. Some of the contentious issues are unique to crimes of sexual violence, while some are emblematic of wider strategic or institutional failings. It is to be hoped that all of them, however, can and will be addressed as the ICC continues to evolve, if the Court is ever to reverse the ignominious tradition of ignoring, marginalizing, or mishandling evidence of sexual violence in international criminal prosecutions and live up to its promise to end impunity.

32.2 Charges for Sexual and Gender-Based Crimes: The OTP's Attrition Problem

Before dealing with the detail of how the OTP has characterized and charged crimes of sexual and gender-based violence, a brief word on terminology. The Rome Statute defines gender as follows: '[f]or the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society'.²¹ The term 'sexual violence' is not specifically defined in the Statute, but is described in the Elements of Crimes in the following terms:

The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.²²

Somewhat unhelpfully, this definition hinges on the meaning given to the phrase 'an act of a sexual nature', which is not qualified anywhere in the Statute or the Rules. It would be a mistake, however, to assume that it refers exclusively to acts committed with a sexual motive or for the purposes of gaining sexual gratification. Any act which targets an individual's sexual integrity, sexual function, or sexual organs—such as forcible circumcision, forced castration, mutilation of sexual organs, forced public nudity, or sexualized torture—could be considered 'an act of a sexual nature' for the purposes of the Statute, despite the excessively conservative and regressive approach to the issue taken by Pre-Trial Chamber II.²³

²¹ Art 7(3) ICC Statute. The term 'sex' is not defined.

²² ICC Elements of Crimes, ICC-ASP/1/3(part II-B), 9 September 2002 (First Session of the ASP), Art 7(1)(g)-6, para. 1. The phrase 'acts of a sexual nature' is also used as one of the material elements of the crime of sexual slavery; see ICC Elements of Crimes, Art 7(1)(g)-2.

²³ The judges of Pre-Trial Chamber II (Judge Trendafilova, Judge Tarfusser, and the late Judge Kaul) have made a number of under-reasoned and legally restrictive findings on the issue of sexual violence and which forms of conduct could constitute 'an act of a sexual nature'. In the arrest warrant decision in the *Bemba* case, Pre-Trial Chamber III (comprised of Judge Trendafilova, Judge Kaul, and Judge Dembele-Diarra) refused to include factual allegations of women being forced to undress in public for the purpose of humiliation within the charge of 'other forms of sexual violence'; see Decision

The terms and concepts of ‘sexual violence’ and ‘gender-based violence’ are not mutually exclusive. Whenever someone is targeted for violence on the basis of their gender, or the way in which that gender is understood in that social context, that constitutes a gender-based crime (for example, killing all men of military age as presumed combatants, beating or imprisoning women for working outside the home or becoming politically active).²⁴ Whenever someone is targeted by or forced to engage in an act of a sexual nature without their consent, that constitutes a crime of sexual violence; it may additionally be a gender-based crime if that person was targeted for sexual violence on the basis that they were male or female (for example, ‘corrective’ rape of lesbians or gay men, sexual enslavement of female child soldiers, forcing male prisoners to masturbate or sexually assault another detainee).²⁵ Not every gender-based crime will involve sexual violence, but most crimes of sexual violence will also be gender-based crimes. For example, if a village is attacked, all the men are killed, and all the women are raped, both of those are gender-based crimes; the rape of the women is a sexual *and* gender-based crime. This chapter will refer to both terms where appropriate.

If one were to assess the effectiveness of the OTP on this issue purely in numerical terms, its record of including charges of sexual and gender-based violence in its investigations and cases is impressive, particularly when compared with the glaring absence of such charges in the initial indictments of the ICTY and ICTR. Charges of sexual and gender-based crimes have been brought in six of the eight Situations before the Court

on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-14-tENG, PTC III, ICC, 10 June 2008. In the *Muthaura* case, Pre-Trial Chamber II refused to characterize the forcible circumcision of men of Luo ethnicity—Involving the amateur full or partial amputation of the penis, committed in public with makeshift implements such as broken bottles—as ‘other forms of sexual violence’ on the basis that ‘acts of forcible circumcision cannot be considered acts of a “sexual nature” as required by the Elements of Crimes but are to be more properly qualified as “other inhumane acts” ...in light of the serious injury to body that the forcible circumcision causes’; see Decision on the Prosecutor’s Application for Summons to Appear, *Muthaura, Kenyatta and Ali, Situation in the Republic of Kenya*, ICC-01/09-02/11-01, PTC II, ICC, 8 March 2011, para. 27. The Chamber returned to this issue in the confirmation of charges decision, arguing that ‘not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence’ and that ‘the determination of whether an act is of a sexual nature is inherently a question of fact’. The Chamber came to the remarkable conclusion that ‘the evidence placed before it does not establish the sexual nature of the acts of forcible circumcision and penile amputation visited upon Luo men’; Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Muthaura, Kenyatta and Ali, Situation in the Republic of Kenya*, ICC-01/09-02/11-382-Red, PTC II, ICC, 23 January 2012, paras 265–6. For a critique of these decisions, see N Hayes, ‘Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court’ in N Hayes et al. (eds), *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Aldershot: Ashgate 2013).

²⁴ The OTP’s recently released Policy Paper on Crimes of Sexual and Gender-Based Violence provides the following definition: “‘Gender-based crimes’ are those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender”; see ICC OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014) 3 (‘OTP Policy Paper’).

²⁵ The OTP Policy Paper defines them as follows: “‘Sexual crimes’ that fall under the subject-matter jurisdiction of the ICC are listed under articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Statute, and described in the Elements of Crimes (“Elements”). An act of a sexual nature is not limited to physical violence, and may not involve any physical contact—for example, forced nudity. Sexual crimes, therefore, cover both physical and non-physical acts with a sexual element”; *ibid*.

to date,²⁶ with the exception of Libya and Mali.²⁷ Evidence of crimes of sexual and gender-based violence has been included in 14 of the 20 cases brought by the prosecutor to date, and against 18 of 31 individuals charged (including one female accused, Simone Gbagbo).²⁸ Significantly, allegations of sexual violence against men have been included in three cases to date: Bemba, Ntaganda, and Muthaura.²⁹ Sexual and gender-based violence has been charged as a war crime,³⁰ a crime against humanity,³¹ and an act of genocide,³² although it is significant that the specific charges chosen have largely conformed to those already successfully prosecuted by the ad hoc Tribunals, such as rape, torture, persecution, outrages upon personal dignity, and other inhumane acts.³³ As much as the expanded list of sexual crimes contained in the Rome Statute was hailed at the time of its adoption as both progressive and necessary,³⁴ they have not all been enforced in practice. It is worth noting that the ICC Prosecutor has never sought to bring charges of forced pregnancy, forced sterilization, or enforced prostitution against any defendant to date.

As heartening as the overall statistics on including charges of sexual violence may be, the practice of the ICC has unfortunately confirmed that this category of crime is disproportionately vulnerable to attrition at every stage of proceedings. For example, Women's Initiatives for Gender Justice conducted research on the inclusion of charges sought at the arrest warrant phase of proceedings across nine cases before the ICC,³⁵ and

²⁶ Charges have been included in the cases against Ntaganda, Katanga, Ngudjolo, Mbarushimana, and Mudacumura (*Situation in the Democratic Republic of the Congo*); Bemba (*Situation in the Central African Republic*); Kony et al. (*Situation in Uganda*); Harun and Kushayb, Al Bashir, and Hussein (*Situation in Darfur, Sudan*); Muthaura et al. (*Situation in the Republic of Kenya*); and in the cases against Laurent and Simone Gbagbo and Blé Goude (*Situation in Côte d'Ivoire*).

²⁷ Although Prosecutor Bensouda highlighted preliminary evidence of the commission of rape as a war crime in Mali in her initial report on the Situation under Art 53(1), no arrest warrants or summonses to appear have been issued or made public at the time of writing. See ICC OTP, Situation in Mali Art 53(1) Report (16 January 2013) 25. Likewise, although Prosecutor Ocampo announced his intention to investigate charges for sexual violence in the Gaddafi case, no such charges have been added to date. See e.g. E Pilkington et al., 'Gaddafi Faces New ICC Charges for Using Rape as Weapon in Conflict', *Guardian*, 9 June 2011; Women's Initiatives for Gender Justice, Legal Eye on the ICC (July 2011).

²⁸ See Women's Initiatives for Gender Justice, Gender Report Card on the International Criminal Court 2013, 59–63 for a full overview of all charges of sexual and gender-based violence brought by the ICC to date. These figures do not include cases brought by the Prosecutor for offences against the administration of justice.

²⁹ See further the discussion of male sexual violence in section 32.4.

³⁰ Specifically, the war crimes of rape, sexual slavery, torture, inhuman treatment, outrages upon personal dignity, and mutilation.

³¹ Including rape, sexual slavery, torture, persecution (including persecution based on gender), other forms of sexual violence, and other inhumane acts.

³² The case against Omar Al Bashir includes charges of causing serious bodily or mental harm by means of sexual violence as an act of genocide; see Second Warrant of Arrest for Omar Hassan Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-95, PTC I, ICC, 12 July 2010. The Elements of Crimes specifically acknowledge that the act of genocide of 'causing serious bodily or mental harm' would be satisfied by conduct including, but not limited to, 'acts of torture, rape, sexual violence or inhuman or degrading treatment'; see ICC Elements of Crimes, Art 6(b), para. 1.

³³ The ICC has made good use of some categories of crime which were not available to prosecutors under the Statute of the ICTY or ICTR, such as rape as a war crime or sexual slavery (as distinct from the crime of enslavement) as a war crime or crime against humanity.

³⁴ See e.g. B Bedont and K Hall-Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court' (1999) 6 *Brown Journal of World Affairs* 65, 69.

³⁵ Namely the cases against Bemba, Muthaura and Kenyatta, Harun and Kushayb, Al Bashir, Hussein, Gbagbo, Mbarushimana, Ntaganda, and Mudacumura; see Women's Initiatives for Gender Justice, Gender Report Card on the International Criminal Court 2012, 106.

found that only seven charges out of a total of 204 sought by the prosecutor had not been included in the arrest warrants or summonses to appear, five of which were charges for sexual or gender-based violence.³⁶ The OTP has an indefensibly poor record at the confirmation of charges phase generally,³⁷ with four of the 16 individuals who have appeared before the Court for a confirmation of charges hearing being dismissed without charge and another having all charges against him withdrawn following the confirmation hearing.³⁸ To put that figure in some context, of the 31 individuals indicted by the ICC to date, just under half have never been brought into custody,³⁹ and of those that have made an appearance before the ICC, just over a quarter have had all charges against them dismissed and have been released before trial. However, when one examines the fate of individual charges at the confirmation phase, a distinct pattern emerges where charges of sexual or gender-based violence are overwhelmingly more likely not to be confirmed or to have their legal characterization amended. At the end of Prosecutor Ocampo's term of office, exactly half of all charges of sexual and gender-based violence had been rejected at the confirmation of charges phase;⁴⁰ with

³⁶ The Pre-Trial Chamber in the *Bemba* case declined to include two charges of other forms of sexual violence (based on allegations of forcible public nudity for the purposes of humiliation) in the Arrest Warrant for reasons discussed in fn. 23. In the *Mudacumura* case, the Pre-Trial Chamber refused to include all five charges of crimes against humanity sought by the Prosecutor on the grounds that there was insufficient evidence to establish reasonable grounds to believe that there had been an organizational policy on the part of the FDLR to attack the civilian population. Of those five charges, three (rape, torture, and persecution) related to sexual and gender-based violence and two (murder and other inhumane acts) related to other categories of crime. See Decision on the Prosecutor's Application under Art 58, *Mudacumura, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/12-1-Red, PTC II, ICC, 13 July 2012.

³⁷ See e.g. W Schabas, 'The Banality of International Justice' (2013) 11 *Journal of International Criminal Justice* 545, 546–7, noting that the confirmation of charges statistics, taken together with the acquittal of Ngudjolo and the withdrawal of charges against Muthaura, leave the OTP with 'a batting average of <60% ... [which] compares very poorly with acquittal rates at other international criminal trials, including the International Military Tribunal, that average about 14%'. See further A Smeulers et al., 'Sixty-Five Years of International Criminal Justice: The Facts and Figures' (2013) 13 *International Criminal Law Review* 7.

³⁸ While the cases against Lubanga, Katanga, Ngudjolo, Bemba, Banda, Jerbo, Muthaura, Kenyatta, Ruto, Sang, Laurent Gbagbo, and Ntaganda proceeded to trial, no charges were confirmed against Abu Garda, Mbarushimana, Ali, or Kosgey and they were released. See Decision on the Confirmation of Charges, *Abu Garda, Situation in Darfur, Sudan*, ICC-02/05-02/09-243-Red, PTC I, ICC, 8 February 2010; Decision on the Confirmation of Charges, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-465-Red, PTC I, ICC, 16 December 2011; Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-373, PTC II, ICC, 23 January 2012; Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Muthaura, Kenyatta and Ali, Situation in the Republic of Kenya* (n 23). The charges against Muthaura were withdrawn by Prosecutor Bensouda in March 2013, as various evidentiary problems in the case meant that the OTP no longer believed there to be a reasonable prospect of conviction. Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-687, OTP, ICC, 11 March 2013.

³⁹ Namely Mudacumura, Kony, Otti, Lukwiya, Ongwen, Odhiambo, Harun, Kushayb, Al Bashir, Hussein, Muammar Gaddafi, Saif Gaddafi, Al-Senussi, Simone Gbagbo, and Blé Goude. Of those 15 individuals, 3 are believed to be dead (Vincent Otti, Raska Lukwiya, and Muammar Gaddafi) and 1 case has been deemed inadmissible (Abdullah Al-Senussi), so 11 ICC arrest warrants remain outstanding.

⁴⁰ See Women's Initiatives for Gender Justice, Gender Report Card on the International Criminal Court 2012 (n 35) 106–7. Following the confirmation of charges hearings in the *Mbarushimana* and Kenyan cases, 15 of a total of 30 charges of sexual and gender-based violence across 4 cases (*Bemba, Katanga and Ngudjolo, Mbarushimana*, and *Muthaura et al.*) have not been confirmed for trial. Prior to those decisions, the failure rate of charges for gender-based crimes at the confirmation of charges phase

the successful confirmation hearings against Laurent Gbagbo and Bosco Ntaganda, that figure has improved under Prosecutor Bensouda's tenure, but still represents an attrition rate of over 40%.⁴¹

At the trial phase, there is even less cause for optimism. As the Institute for War and Peace Reporting has pointed out, over a decade after beginning its operation, the ICC has not achieved a single conviction for sexual violence crimes.⁴² Of the three cases to have been the subject of a judgment under Article 74 to date, all have included some evidence of acts of sexual violence, but none has resulted in a conviction for crimes of sexual violence. While the reasons behind this have varied, the determinative issue was not, as some might expect, a failure to prove that the underlying acts of sexual violence had in fact taken place. In the Lubanga case, Prosecutor Ocampo took the infamous decision not to include charges of sexual violence crimes in the first place⁴³ and not to support their inclusion under Regulation 55,⁴⁴ despite the fact that 15 of the first 25 prosecution

was 33%; see Women's Initiatives for Gender Justice, Gender Report Card on the International Criminal Court 2011, 125.

⁴¹ Decision on the Confirmation of Charges Against Laurent Gbagbo, *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-656-Red, PTC I, ICC, 12 June 2014; Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, *Ntaganda, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-309, PTC II, ICC, 9 June 2014. Following the confirmation of charges hearings in the cases against Laurent Gbagbo and Bosco Ntaganda, 22 of a total of 37 charges for sexual and gender-based crimes have successfully been confirmed for trial, which represents a successful confirmation rate of 59.46%. When one takes the withdrawal of charges against Francis Muthaura into consideration, the percentage of charges for sexual and gender-based violence which will proceed to trial drops to 51.35% (19 of 37 charges).

⁴² See B Evans-Pritchard, 'ICC Restates Commitment on Crimes of Sexual Violence' (Institute for War and Peace Reporting, ACR Issue 392, 10 June 2014): 'Ever since the International Criminal Court began bringing suspected war criminals to The Hague, it has been criticised for not taking crimes involving sexual violence seriously enough ... 12 years into its operations, the court is still to convict anyone of rape or other gender-based crimes.'

⁴³ Warrant of Arrest, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2-tEN, PTC I, ICC, 10 February 2006, Prosecutor's Information on Further Investigation, *Prosecutor v Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-170, OTP, ICC, 28 June 2006. See further Women's Initiatives for Gender Justice, Women's Initiatives' Letter to the Prosecutor Stating Concern about the Failure to Investigate and Charge Gender-Based Crimes in the Lubanga Case (2006, Legal Filings Submitted by the Women's Initiatives for Gender Justice to the International Criminal Court); Human Rights Watch, ICC Charges Raise Concern (1 August 2006); S Pritchett, 'Entrenched Hegemony, Efficient Procedure or Selective Justice: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court' (2008) 17 *Transnational Law and Contemporary Problems* 265; Hayes, 'Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court' (n 23).

⁴⁴ See Joint Application of the Legal Representatives of Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1891-tENG, TC I, ICC, 22 May 2009; 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, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2049, TC I, ICC, 14 July 2009; Prosecution's Application for Leave to Appeal the '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', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2074, OTP, ICC, 12 August 2009; 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', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2205, AC, ICC, 8 December 2009.

witnesses testified about sexual and gender-based violence⁴⁵ and the Prosecutor had himself invoked the alleged rape and sexual enslavement of female child soldiers at both the opening and closing of the trial.⁴⁶ This resulted in a deeply unsatisfactory outcome in the trial judgment, where the majority held that, despite the extensive evidence of sexual violence advanced during the trial, ‘given the prosecution’s failure to include allegations of sexual violence in the charges...this evidence is irrelevant for the purposes of the [judgment] save as regards providing context’.⁴⁷

In contrast, both Katanga and Ngudjolo were in fact charged with rape and sexual slavery as war crimes and crimes against humanity.⁴⁸ Following the submission of all evidence at trial and just prior to the expected issuance of a judgment in the case, the Trial Chamber (by majority) issued a controversial decision announcing the severance of the charges between the two defendants and notifying the parties of its intention to amend the legal characterization of the mode of liability against Katanga under Regulation 55.⁴⁹ In its judgment against Ngudjolo, despite concluding that there was ‘a wealth of evidence to show that during and after the 24 February 2003 attack [on Bogoro]...women were raped and some were kept in captivity by the attackers’,⁵⁰ the Chamber nevertheless acquitted Ngudjolo of all charges on the basis that it was not satisfied that his individual criminal responsibility had been proven under the mode of liability alleged by the prosecutor.⁵¹

⁴⁵ For an overview of this testimony, see Women’s Initiatives for Gender Justice, Gender Report Card on the International Criminal Court 2009, 71–85.

⁴⁶ Trial Transcript, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-T-107-ENG ET WT, TC I, ICC, 26 January 2009, 11–13; Trial Transcript, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-T-356-ENG ET WT, TC I, ICC, 25 August 2011, 23–4 and 53–4.

⁴⁷ Judgment Pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012, para. 896 (‘Lubanga Trial Judgment’). The majority reasoned that ‘[r]egardless of whether sexual violence may properly be included within the scope of “using [children under the age of 15] to participate actively in hostilities” as a matter of law, because facts relating to sexual violence were not included in the Decision on the Confirmation of Charges, it would be impermissible for the Chamber to base its [judgment] on the evidence introduced during the trial that is relevant to this issue’; *ibid.*, para. 630. Judge Odio-Benito dissented on this point, arguing that evidence of sexual violence should have been included within the criminal conduct of using children to actively participate in hostilities. See Judgment Pursuant to Art 74 of the Statute—Separate and Dissenting Opinion of Judge Odio-Benito, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2482, TC I, ICC, 14 March 2012.

⁴⁸ Warrant of Arrest for Germain Katanga, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1-US-tENG, PTC I, ICC, 2 July 2007; Warrant of Arrest for Mathieu Ngudjolo Chui, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04/01/07-260-tENG, PTC I, ICC, 6 July 2007; Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-257, PTC I, ICC, 10 March 2008.

⁴⁹ Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3319-tENG/FRA, TC II, ICC, 21 November 2012. See further J Easterday, ‘After Case Closed, Judges Propose Changes to the Charges against Germain Katanga’, *International Justice Monitor*, 26 November 2012; International Bar Association, Fair Trial Digest (IBA ICC Programme, September–November 2012); E Fry, ‘International Criminal Court’ (2013) 31 *Netherlands Quarterly of Human Rights* 217.

⁵⁰ Judgment Pursuant to Art 74 of the Statute, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-3-tENG, TC II, ICC, 18 December 2012, para. 338 (‘Ngudjolo Trial Judgment’).

⁵¹ The prosecution had alleged that Ngudjolo, as the commander of the armed rebel group *Front des Nationalistes et Intégristes* (FNI), was responsible as an indirect co-perpetrator under Art 25(3)(a) for

Bizarrely, the Trial Chamber emphasized that its decision to acquit Ngudjolo should not be taken as a rejection of the allegations against him, stating:

[i]t is the Chamber's position that the fact that an allegation is not, in its view, proven beyond reasonable doubt does not necessarily mean that the Chamber questions the very existence of the alleged fact. It simply means that it considers that there is insufficient reliable evidence to make a finding on the veracity of the alleged fact in light of the standard of proof. Accordingly, finding an accused person not guilty does not necessarily mean that the Chamber considers him or her to be innocent. Such a finding merely demonstrates that the evidence presented in support of the accused's guilt has not satisfied the Chamber 'beyond reasonable doubt'.⁵²

The *Katanga* trial judgment likewise constituted a hugely disappointing outcome for the charges of sexual violence in the case.⁵³ Having recharacterized the mode of liability and essentially '[moved] the factual goalposts of the case in the name of pursuing the truth',⁵⁴ a majority of the Trial Chamber was willing to convict Katanga under Article 25(3)(d)(ii) for his contribution to the attack on Bogoro.⁵⁵ As this was the first case containing charges of sexual and gender-based crimes to reach trial, the judges made some significant legal findings regarding the interpretation of the crimes of rape and sexual slavery under the Statute.⁵⁶ Having reviewed the evidence

seven counts of war crimes and three counts of crimes against humanity allegedly committed by FNI forces during an attack on the village of Bogoro on 24 February 2003. The Trial Chamber found that there was insufficient evidence to conclude beyond a reasonable doubt that Ngudjolo had in fact been the leader of the combatants at the time of the attack on Bogoro, but did not make any findings on the crimes themselves or who may have been responsible for them.

⁵² *Ngudjolo* Trial Judgment (n 50) para. 36.

⁵³ See Women's Initiatives for Gender Justice, Partial Conviction of Katanga by ICC—Acquittals for Sexual Violence and Use of Child Soldiers (7 March 2014).

⁵⁴ Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons, Dissenting Opinion of Judge Christine Van den Wyngaert, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3319-tENG/FRA, TC II, ICC, 21 November 2012, para. 36.

⁵⁵ Jugement Rendu en Application de l'Article 74 du Statut, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436, TC II, ICC, 7 March 2014 ('*Katanga Trial Judgment*'). This judgment was the subject of a blistering minority dissenting opinion from Judge Christine Van den Wyngaert. See Jugement rendu en application de l'article 74 du Statut—Minority Opinion of Judge Christine Van den Wyngaert, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436-AnXI, TC II, ICC, 7 March 2014.

⁵⁶ Ibid., paras 961–84. For example, in dealing with the material elements of sexual slavery, the Chamber held that it is necessary to take a case-by-case approach when analysing the type of acts which would satisfy this element. In relation to deprivation of liberty, the Court noted that facts relating to detention or captivity (including its duration) would be relevant, as would information that relates to efforts to limit freedom of movement or freedom of choice, and information on measures to prevent or discourage attempts to escape. Facts that show the use of threats, force, or other forms of physical or mental coercion are relevant to proving this element, as are facts that show the exercise of psychological pressure, the vulnerability of the victim, or an obligation to engage in forced labour. Significantly, the Court also emphasized that the right of ownership over others does not automatically equate to a commercial transaction—the socio-economic conditions under which the powers of ownership are exercised is a relevant factor, but the fundamental nature of servitude comes down to the inability of the victim to amend or modify his/her situation. This finding implies that a significant enough degree of socio-economic inequality between the victim and perpetrator could potentially satisfy the element of 'exercising powers of ownership'. In relation to the material elements of the crime of rape and the reference to 'force, threat of force or coercion', the Chamber held that proving that any one of these elements was present is sufficient to prove that an act of penetration constituted the crime of rape. It is not necessary to prove the absence of

of the three witnesses who testified about having been the victims of those crimes and found them to be credible,⁵⁷ the Chamber concluded that it had been proven beyond a reasonable doubt that crimes of rape and sexual slavery had been committed during and after the attack on Bogoro.⁵⁸ However, despite finding that the acts of rape and sexual slavery had constituted part of the attack against a civilian population within the meaning of Article 7 and were committed in the context of and associated with an armed conflict within the meaning of Article 8,⁵⁹ the Chamber nonetheless concluded that these acts—and only these acts—did not form part of the common plan to attack the village of Bogoro and therefore declined to convict Katanga even under the alternative form of liability.⁶⁰ Although both the defence and prosecution had initially appealed against the decision,⁶¹ the parties later reached an agreement to discontinue their appeals and so the trial judgment is now final.⁶²

At every stage of proceedings and in relation to every applicable standard of proof, charges of sexual and gender-based violence are demonstrably more likely to be excluded, rejected, or recharacterized, while charges for non-sexual crimes such as murder, persecution, or pillage encounter no such obstacles. Why, then, are crimes of sexual violence so much more vulnerable to attrition than any other category of crime before the Court? If the terminal weakness lay in proving the specific elements of the crimes charged, one might be tempted to attribute the lamentable failure rate to the stereotypical expectation of prohibitive difficulty in eliciting credible, reliable evidence about such intimate details from severely traumatized victims and witnesses.⁶³ However, the experience of the ICC has shown that, in the overwhelming majority

consent by the victim, except in circumstances where the perpetrator committed the act against someone ‘incapable of giving genuine consent’ due to age, incapacity, or other circumstances.

⁵⁷ Ibid., paras 988–1019. For a summary of this testimony, see Women’s Initiatives for Gender Justice, Gender Report Card on the International Criminal Court 2010, 165–76.

⁵⁸ Ibid., paras 999 and 1023. ⁵⁹ Ibid., paras 1167 and 1234.

⁶⁰ Ibid., paras 1663–4. The Chamber inexplicably concluded that ‘although the acts of rape and sexual slavery were an integral part of the project of the militia to attack the mainly Hema civilian population of Bogoro, the Chamber could nevertheless not conclude, on the basis of the evidence before it, that the criminal objective pursued on the 24 February 2003 necessarily included the commission of the specific crimes provided for in Arts 7(1)(g) and 8(2)(e)(vi) of the Statute. Therefore and for all of these reasons, the Chamber cannot hold the rapes and sexual slavery as falling within the common purpose’ (translation author’s own).

⁶¹ Notice of Appeal against the Decision of Conviction ‘Jugement Rendu en Application de l’Article 74 du Statut’ Rendered by Trial Chamber II, 7 March 2014, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3459, Defence, ICC, 9 April 2014; Prosecution’s Appeal against Trial Chamber II’s ‘Jugement Rendu en Application de l’Article 74 du Statut’, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3462, OTP, ICC, 9 April 2014.

⁶² Defence Notice of Discontinuance of Appeal against the ‘Jugement Rendu en Application de l’Article 74 du Statut’ Rendered by Trial Chamber II on 7 April 2014, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3497, Defence, ICC, 25 June 2014; Notice of Discontinuance of the Prosecution’s Appeal against the Art 74 Judgment of Conviction of Trial Chamber II dated 7 March 2014 in Relation to Germain Katanga, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3498, OTP, ICC, 25 June 2014; ‘Defence and Prosecution Discontinue Respective Appeals against Judgment in Katanga Case’, *ICC Press Release*, 25 June 2014.

⁶³ For an example of this kind of reflexive avoidance based on lazy outmoded clichés, see W Wiley, ‘The Difficulties Inherent in the Investigation of Allegations of Rape before International Courts and Tribunals’ in M Bergsmo et al. (eds), *Understanding and Proving International Sex Crimes* (Beijing: Torkel Opsahl Academic EPublisher 2012) 367.

of cases where such charges have been excluded, the Chamber in question have pronounced themselves satisfied that the underlying acts of sexual violence did in fact take place, but have been unwilling to confirm or convict due to insufficiencies in the pleading of the mode of liability or the contextual elements of the crimes.⁶⁴ The problem, therefore, is not with the nature of the crimes themselves but with the manner in which they are understood and presented within the overall case hypothesis, which is not an issue of specialist gender-sensitive intuition but of basic professional competence. While a substantial portion of the responsibility for the Court's abject track record can be attributed to the remarkably unreceptive and conservative attitude of the judges (most particularly, it has to be said, those in Pre-Trial Chamber II),⁶⁵ it is worth examining some of the persistent strategic errors made by the first Prosecutor to understand how the structural weaknesses in ICC cases which have proven so disproportionately injurious to charges of sexual violence came about and were permitted to recur.

32.3 Ocampo and Investigations: The OTP's Evidence Problem

Dianne Luping, who worked as both an investigator and trial lawyer at the ICC, has argued that a focused approach to sexual and gender-based violence must be implemented 'from the outset, during the pre-analysis phase and before any decision is made to initiate an investigation in any country'.⁶⁶ The advantages of this strategy would seem obvious in light of the prosecutor's statutory obligation to prioritize sexual violence, even if the experience of the ad hoc Tribunals had not already provided numerous signal examples of the procedural headaches and evidential consequences resulting from a failure to identify and pursue evidence of sexual violence crimes from the earliest possible stage of proceedings.⁶⁷ However, both the ICTY and ICTR had

⁶⁴ See e.g. the *Katanga* Trial Judgment (n 55), Decision on the Prosecutor's Application under Art 58, *Mudacumura* (n 36), Decision on the Confirmation of Charges, *Mbarushimana* (n 38), Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Ruto, Kosgey and Sang* (n 38) and Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Muthaura, Kenyatta and Ali* (n 23).

⁶⁵ See e.g. the confirmation of charges decision in the *Bemba* case, where the Pre-Trial Chamber chose to recharacterize the facts underlying a charge of torture (relating to the pain and suffering experienced by family members forced to watch the rape of a relative) into a charge of rape (relating to the rape of the relative) on the basis that, in its view, the act of torture was 'fully subsumed by the count of rape'. Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC 01/05-01/08-424, PTC II, ICC, 15 June 2009, paras 204–5. See further the findings on 'other forms of sexual violence' in the *Bemba* arrest warrant decision and *Muthaura* confirmation decision discussed in fn. 23.

⁶⁶ D Luping, 'Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court' (2009) 17 *American University Journal of Gender, Social Policy and Law* 431, 434.

⁶⁷ See e.g. the extraordinary outcome in the *Lukić* case at the ICTY, where the failure of the Prosecution's late application to amend the original indictment against the Lukić brothers to include charges of sexual violence resulted in the truly bizarre situation where testimony from a witness who had been raped by one of the defendants was introduced in court only to undermine his alibi; Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include UN Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as well as on Milan Lukić's Request for Reconsideration on Certification of the Pre-Trial

the relative advantage of a much more focused and defined mandate, particularly in terms of geographic and temporal jurisdiction, whereas for the ICC, as a permanent, treaty-based international criminal tribunal, even the decision to exercise jurisdiction in a particular situation would be viewed as constituting a deliberate strategic choice with both political and resource implications.

The Prosecutor was additionally constrained by emphasis on gravity within the statutory framework of the Court,⁶⁸ which was interpreted by his Office to contain a requirement to focus on ‘those who bear the greatest responsibility for the most serious crimes...[and] those situated at the highest echelons of responsibility, including those who ordered, financed or otherwise organised the alleged crimes’;⁶⁹ as distinct from the freedom to target lower-level direct perpetrators enjoyed by the ad hoc Tribunals in their initial years of operation as part of their pyramidal investigative strategy.⁷⁰ In addition, Regulation 34 of the Regulations of the OTP stipulates that, when developing a case hypothesis, the joint investigation team should aim to select incidents which reflect the most serious crimes and the main types of victimization, specifically sexual and gender-based violence, and violence against children.⁷¹ As a result, Prosecutor Ocampo chose to adopt a policy of ‘focused investigations’, whereby ‘incidents are selected to provide a sample that is reflective of the gravest incidents and the main types of victimisation’,⁷² in an effort to balance the finite resources available to the Court with the obligation to select cases and charges which are most representative of the underlying conflict. In practice, however, this strategy did not result in streamlined, expeditious capsule prosecutions but in insufficient evidence, remotely developed case hypotheses, and a fundamental disconnect from the context in the field.

International criminal investigations are the most critically important component of any international justice project, as the ability to construct a prosecution case or reach a judicial finding as to individual criminal responsibility depends entirely on the sufficiency and quality of the evidence collected. As has been emphasized by the Institute for International Criminal Investigations:

Evidence is the essential work product of any investigation and the raw material that judges will work with in their quest to ascertain the truth. Obtaining the best and most reliable evidence in a balanced and fair manner is the objective of every investigation.... Unless an investigator is able to discover and collect evidence, he or she cannot uncover the truth regarding the event being investigated.... One of the most important principles an investigator must adopt in his or her quest is that there is always evidence in a case. It is impossible to commit wrongdoing and leave no identifiable trace. The task for the investigator is to identify it, document it and collect it. If an investigator fails to turn up evidence in a case, it is not because there was no

Judges Order of 19 June 2008, *Lukić and Lukić*, IT-98-32/1-PT, TC III, ICTY, 8 July 2008; see further S Jennings, ‘Lukic Trial Ruling Provokes Outcry’ (Institute for War and Peace Reporting, 2008).

⁶⁸ See in particular Arts 53 and 54 ICC Statute.

⁶⁹ ICC OTP, Prosecutorial Strategy 2009–12, 5–6.

⁷⁰ ICTY, Investigations <<http://www.icty.org/sid/97>> accessed 1 July 2014.

⁷¹ Regulation 34(2) of the Regulations of the OTP (entered into force 23 April 2009) ICC-BD/05-01-09.

⁷² ICC OTP, Prosecutorial Strategy 2009–2012 (n 69) 6.

evidence; it simply means that the investigator could not find it....An experienced investigator embarks on an unrelenting search for evidence cognisant that evidence must exist and that many different things can have evidential value.⁷³

Given their foundational impact on the success or failure of any subsequent prosecution, the investigation policies and practices of international criminal tribunals have been inexplicably under-analysed within academic discourse.⁷⁴ Within the specific legal framework of the ICC, however, the issue is not just of academic significance; due to the restrictions placed on the permissible timeframe for investigations by the Statute and Appeals Chamber, mistakes or omissions made at the investigation phase may prove to be literally impossible to fix at a later stage of proceedings.⁷⁵ For both legal and practical reasons, investigators must try to get it right on their first try, because they may never get a second opportunity.⁷⁶

The cardinal principle underlying a responsible and professional investigative strategy is that investigations must be *evidence-led*. This is by no means a novel insight; as 'the father of modern scientific crime detection',⁷⁷ Sherlock Holmes, noted in 1891: '[i]t is a capital mistake to theorise before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts'.⁷⁸ Not only does an evidence-led approach lead to a stronger and more logical case hypothesis based on an identified fact pattern, but it also allows investigators and prosecutors to detect and recognize potential weaknesses in their own case at a sufficiently early stage in proceedings to allow for amendment or supplemental investigations.⁷⁹ In addition, the ICC

⁷³ Institute for International Criminal Investigations, *Investigators Manual* 7th edn (The Hague: IICI Foundation 2013, copy on file with author) 86–7.

⁷⁴ Some honourable exceptions include M Marcus, 'Investigation of Sexual and Gender-Based Violence under International Criminal Law' in A de Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Cambridge: Intersentia 2013) and D Groome, *The Handbook of Human Rights Investigation* (Northborough: Human Rights Press 2000).

⁷⁵ See further A Whiting, 'Dynamic Investigative Practice at the International Criminal Court' (2013) 76 *Law and Contemporary Problems* 163; D Groome, 'No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations' (2014) 3 *Penn State Journal of Law and International Affairs* 1.

⁷⁶ There are a number of potential factors which could render subsequent investigations impossible: procedural restrictions on the introduction of new evidence following a confirmation decision or the commencement of a trial; limited resources which cannot be stretched to encompass a follow-up field mission; the danger in an unstable post-conflict environment that physical evidence may degrade or be removed; the death or displacement of victims and witnesses who therefore cannot be traced or re-interviewed; the lack of cooperation of state authorities making official documentary records impossible to access through formal means. A responsible investigator will therefore seek to document or collect all relevant evidence as soon as it is encountered, providing that it is practically feasible for them to do so and will not give rise to an unacceptable risk for the information provider.

⁷⁷ For a fascinating examination of the influential contributions of the Sherlock Holmes stories to the development of modern forensic investigative methods, see S Berg, 'Sherlock Holmes: Father of Scientific Crime and Detection' (1971) 61 *Journal of Criminal Law and Criminology* 446.

⁷⁸ A Conan Doyle, 'A Scandal in Bohemia' in *The Adventures of Sherlock Holmes* (New York: Harper and Brothers 1892) 7; first published in 7 *The Strand Magazine* (1891) 61.

⁷⁹ For example, former practitioners have noted that, while all prosecution activities including investigations should be based on a legal theory oriented to the elements of proof for the case as a whole, '[i]t is also important for the narrative to be allowed to unfold as the investigations develop, rather than being limited to fit a specific legal theory or framework'; R Petit et al. (eds), *Prosecuting Mass Crimes: A Compendium of Lessons Learned and Suggested Practices* (Offices of the Prosecutor of the ICTY, ICTR, SCSL, ECCC, and STL, International Best Practice Project, 2013, copy on file with author) para. 279.

Prosecutor, by way of a provision unique among international tribunals, is under an explicit statutory obligation imposed by Article 54(1)(a) to investigate both incriminating and exonerating circumstances equally ‘in order to establish the truth’,⁸⁰ essentially obliging him or her to act primarily as an organ of the Court rather than as a partial and adversarial litigant.⁸¹

In analysing the practice of the ICC under Prosecutor Ocampo, however, there appears to have been a distinct tendency to identify potential defendants, develop the case hypothesis in the abstract, and then seek evidence which confirmed a preferred theory of liability, rather than to doggedly establish the background fact patterns and context of a situation before pursuing any specific defendant or charges.⁸² The Prosecutor was excoriated for this methodology in the strongest of terms in the *Mbarushimana* confirmation decision:

[T]he Chamber wishes to highlight its concern at the technique followed in several instances by some Prosecution investigators, which seems utterly inappropriate when viewed in light of the objective, set out in article 54(1)(a) of the Statute, to establish the truth by ‘investigating incriminating and exonerating circumstances equally’. The reader of the transcript of interviews is repeatedly left with the impression that the investigator is so attached to his or her theory or assumption that he or she does not refrain from putting questions in leading terms and from showing resentment, impatience or disappointment whenever the witness replies in terms which are not entirely in line with his or her expectations. Suggesting that the witness may not be ‘really remembering exactly what was said’, complaining about having ‘to milk out’ from the witness details which are of relevance to the investigation, lamenting that the witness does not ‘really understand what is important’ to the investigators in the case, or hinting at the fact that the witness may be ‘trying to cover’ for the Suspect, seem hardly reconcilable with a professional and impartial technique of witness questioning. Accordingly, the Chamber cannot refrain from deprecating such

⁸⁰ Art 54(1)(a) states that ‘The Prosecutor shall ... [i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in so doing, investigate incriminating and exonerating circumstances equally’ (emphasis added).

⁸¹ See e.g. International Bar Association, *The ICC under Scrutiny: Assessing Recent Developments at the International Criminal Court* (IBA/ICC Monitoring and Outreach Programme, November 2008), noting that ‘Successful prosecution should not be the ultimate aim of the Prosecutor when investigating—this should be “establishment of truth”’. See further A Cassese, *International Criminal Law* 2nd edn (Oxford: Oxford University Press 2008) 440: ‘[W]ithin the ICC system, the Prosecutor, unlike his counterpart in many national law systems, is not merely a party to a trial’, but instead ‘acts as an “organ of justice”’.

⁸² For example, in the *Lubanga* case, despite uncovering preliminary evidence of a range of crimes, including rape and sexual slavery, prosecution investigators were instructed to concentrate on and pursue evidence relating to the conscription and use of child soldiers only; see K Glassborow, ‘ICC Investigative Strategy Under Fire’ (Institute for War and Peace Reporting, 27 October 2008). The article, based on interviews with multiple OTP staff members including several investigators, identified several examples of ICC prosecutors developing a case hypothesis on the basis of preliminary open-source research, after which ‘investigators are told which alleged perpetrators and particular incidents—such as specific attacks on villages, mass killings or forced transfer of civilians—to focus on’.

techniques and from highlighting that, as a consequence, the probative value of evidence obtained by these means may be significantly weakened.⁸³

In a dissenting opinion to the confirmation of charges in the *Muthaura* case, the late Judge Kaul likewise emphasized the crucial evidentiary and strategic significance of respecting the requirements of Article 54(1)(a), both for the investigation itself and for any subsequent proceedings.⁸⁴ Noting that the Prosecutor was required under Article 61(5) to support each charge at the confirmation hearing with ‘sufficient evidence’ as gathered during the investigation, he stressed that it was ‘an absolute, indispensable necessity that any such investigation must be as comprehensive, professional, expeditious and thereby as effective as possible’.⁸⁵ He warned:

I do not find it difficult to conclude that any investigation which does not meet these standards is not in conformity with the letter and spirit of Article 54(1) of the Statute. Likewise, I do not find it difficult to assume that any investigation meeting these standards only partially and unsatisfactorily will probably lead to problems and difficulties not only for an effective and successful prosecution but also for the work of the Chamber concerned and for the Court in general.⁸⁶

After specifically identifying insufficiency of evidence as a consequence of such a strategy, Judge Kaul implicitly rebuked Prosecutor Ocampo for what he viewed as an irresponsibly risky policy in light of Article 54(1): phased investigations.

Given the staggered procedural phases at the ICC and the gradually increasing standard of proof applied at each stage, an overwhelmed or short-sighted Prosecutor might be tempted to gather only enough evidence to satisfy the most immediate evidentiary requirements in the hope of buttressing the case with additional detail prior to the next phase of proceedings; in other words, to provide enough evidence to establish ‘reasonable grounds to believe’ that crimes had been committed for the purposes of an application to issue an arrest warrant or summons to appear, then find a little more to establish ‘substantial grounds’ in time for the confirmation hearing, then hope that additional investigations will provide credible probative evidence which could establish the crimes ‘beyond a reasonable doubt’ and thereby support a conviction.⁸⁷ In Judge Kaul’s view, not only would this constitute an unsatisfactory investigation under Article 54(1), but:

[s]uch an approach, as tempting as it might be for the Prosecutor, would be risky, if not irresponsible; if after the confirmation of charges it turns out as impossible to

⁸³ Decision on the Confirmation of Charges, *Mbarushimana* (n 38) para. 51. The case against Mbarushimana had contained the broadest range of charges for sexual and gender-based crimes of any case to date—a majority 8 of 13 charges, including rape, torture, mutilation, other inhumane acts, inhuman treatment, and persecution on the basis of gender—but due to fundamental problems with the case theory and a lack of specificity in the presentation of the evidence, all charges against Mbarushimana were dismissed and he was released without charge in December 2011.

⁸⁴ Decision on the Confirmation of Charges—Dissenting Opinion by Judge Hans-Peter Kaul, *Muthaura, Kenyatta and Ali, Situation in the Republic of Kenya*, ICC-01/09-02/11-382-Red, PTC II, ICC, 23 January 2012, paras 46–57.

⁸⁵ Ibid., para. 49.

⁸⁶ Ibid., para. 52.

⁸⁷ The permanent representative to the ICC for the International Federation for Human Rights, Montserrat Carboni, has noted that ‘the OTP had a tendency to gather just enough evidence to secure an arrest warrant. This would then be built on to confirm the charges, and then worked on again in order to clear the next hurdle in the case’. See B Evans-Pritchard, ‘ICC to Unveil New Investigation Strategy’ (Institute for War and Peace Reporting, ACR Issue 367, 21 October 2013).

gather further evidence to attain the decisive threshold of ‘beyond reasonable doubt’, the case in question may become very difficult or may eventually collapse at trial, then with many serious consequences, including for the entire Court and the victims who have placed great hopes in this institution.⁸⁸

Judge Kaul therefore advocated that the Prosecutor should ‘conduct any investigation *ab initio* as effectively as possible with the unequivocal aim to assemble as expeditiously as possible relevant and convincing evidence’ which could support a finding of criminal responsibility beyond reasonable doubt, before such evidence inevitably degrades or becomes more difficult to obtain with the passage of time.⁸⁹ He urged the Prosecutor to have completed the investigation by the time of the confirmation hearing if at all possible,⁹⁰ unless compelling reasons came to light to justify the pursuit of further post-confirmation investigations as envisaged and permitted by the Appeals Chamber.⁹¹

One of the biggest stumbling blocks to the pursuit of evidence-led investigations was the extremely risk-averse strategy employed by the first Prosecutor in relation to the conduct of field investigations.⁹² Prosecutor Ocampo appears to have taken a hard-line cautionary stance in relation to the potential risks to victims, witnesses, and other actors in the field who may have been endangered as a result of their interaction with Court staff.⁹³ Indeed, this attitude was directly responsible for the imposition of the second stay of proceedings in the *Lubanga* case, when the Prosecutor cited what he construed as ‘an independent statutory obligation to protect persons put at risk on account of the Prosecution’s actions’ to justify his repeated refusal to comply with an order for disclosure made in that case, which involved the formal notification to the Defence of the name of a prosecution intermediary which had already inadvertently been revealed in open court.⁹⁴ The Prosecutor had argued that ‘[the OTP] should not comply, or be asked to comply, with an Order that may require it to violate its separate

⁸⁸ Decision on the Confirmation of Charges—Dissenting Opinion by Judge Hans-Peter Kaul, *Muthaura, Kenyatta and Ali* (n 84) para. 52.

⁸⁹ Ibid., para. 53. ⁹⁰ Ibid., para. 57.

⁹¹ Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-568, AC, ICC, 13 October 2006.

⁹² Former ICC prosecutor Andrew Cayley expressed his frustration and disappointment with this strategy, stating, ‘it should be emphasized that the OTP was extremely risk averse when I worked there’; see A Cayley, ‘Discussion’ (2008) 6 *Journal of International Criminal Justice* 763, 779–80. Caroline Buisman, a defence lawyer at the ICC, has likewise argued that the OTP’s assessment of security risks in the field had been ‘an overly cautious approach, resulting in significant gaps in the investigations’; see C Buisman, ‘Delegating Investigations: Lessons to be Learned from the Lubanga Judgment’ (2013) 11 *Northwestern Journal of Human Rights* 30, 63.

⁹³ Art 68(1) ICC Statute obliges the Court to ‘take appropriate protective measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses... [having regard to] all relevant factors, including... where the crime involves sexual or gender violence or violence against children. *The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes*’ (emphasis added); see further *Lubanga* Trial Judgment (n 47) para. 156.

⁹⁴ Prosecution’s Urgent Provision of Further Information Following Consultation with the VWU, to Supplement the Request for Variation of the Time-Limit or Stay, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2516, OTP, ICC, 7 July 2010, para. 6.

statutory obligation by subjecting the person to foreseeable risk', before laying down the astonishing ultimatum that '[t]he Prosecutor accordingly has made a determination that the Prosecution would rather face adverse consequences in its litigation than expose a person to risk on account of prior interaction with this Office'.⁹⁵

Such adverse consequences were only narrowly avoided in that case,⁹⁶ but it seems obvious that such an absolutist stance would ultimately paralyse the Prosecution's investigative activities entirely, as it is simply unrealistic to aspire to the complete avoidance of all risk, however remote, rather than to monitor and manage the risk to both staff and witnesses which is necessarily inherent to this kind of work. Caroline Buisman, who acted as defence counsel in the *Katanga* case and has conducted extensive field investigations in the DRC, has argued that 'investigations in war-torn or violent societies will always involve some level of risk no matter how much one seeks to reduce it: this cannot be allowed to reduce the quality of the investigation to the extent the OTP has done so far'.⁹⁷ Louise Arbour, speaking as a sitting UN High Commissioner for Human Rights and a former Prosecutor of the ICTY, was particularly critical of the Prosecutor's approach in the Darfur Situation, arguing that 'it is possible to conduct serious investigations of human rights violations during an armed conflict in general, and in Darfur in particular, without putting victims at unreasonable risk'.⁹⁸ This issue is of particular relevance to victims of sexual and gender-based crimes, who are frequently additionally vulnerable as a result of the stigma which attaches to such crimes and the heightened risk of family or societal rejection or even reprisals if the existence or content of their cooperation with the Court was to become known. However, I would argue that when a victim or witness is willing to voluntarily assume that risk and make the extremely courageous decision to testify in order to pursue accountability against the perpetrators of such crimes, there is an even more pronounced obligation on the Prosecutor to ensure that the overall case does not ultimately falter because a policy of remote investigations has resulted in clearly insufficient evidence.

⁹⁵ Ibid. The Trial Chamber responded furiously to this line of argument, stating that the Prosecutor had embarked on a 'profound, unacceptable and unjustified intrusion into the role of the judiciary' and concluding that he 'cannot be allowed to continue with this prosecution if he seeks to reserve to himself the right to avoid the Court's orders whenever he decides that they are inconsistent with his interpretation of his other obligations'; Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the VWU, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2517-Red, TC I, ICC, 8 July 2010, paras 27–8.

⁹⁶ The stay of proceedings was ultimately lifted by the Appeals Chamber, which recommended that the Trial Chamber should have instituted proceedings for misconduct against the Prosecutor before resorting to the imposition of a stay. 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 the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the VWU', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2582, AC ICC, 8 October 2010.

⁹⁷ Buisman (n 92) 71.

⁹⁸ Observations of the United Nations High Commissioner for Human Rights Invited in Application of Rule 103 of the Rules of Procedure and Evidence, *Situation in Darfur, Sudan*, ICC-02/05-19, 10 October 2006, para. 64.

While it is undoubtedly challenging to conduct field investigations in situations of ongoing armed conflict or heightened insecurity, it will not be possible to collect the relevant probative evidence necessary to establish individual criminal responsibility for international crimes without conducting at least some enquiries *in situ*. Many of the most fundamental and recurring problems with the Prosecutor's evidence and development of a case theory can be attributed to the failure to establish a permanent (or in some cases any) field presence in the countries under investigation.⁹⁹ Prosecutor Ocampo's decision not to establish a field presence in Darfur was the subject of sharp criticism from those who had worked on the case¹⁰⁰ and those familiar with the investigative conditions within the country.¹⁰¹ Inadequate field investigations will have consequences on the extent to which prosecutors understand the conditions on the ground at the time of the alleged crimes, the identification of relevant fact patterns, cultural contexts, and potential defendants, and the ability to critically assess the credibility and sufficiency of their own evidence. These consequences were highlighted by the Trial Chamber in the *Ngudjolo* case, which deprecated the Prosecution's failure to properly investigate the site of the alleged crimes in question in spite of the acknowledged security risks:

The Chamber is mindful that [the investigations in the cases against Lubanga, and Katanga and Ngudjolo] were conducted in a region still plagued by high levels of insecurity... [and] acknowledges that the Office of the Prosecutor would have encountered difficulties in locating witnesses with sufficiently accurate recollections of the facts and able to testify without fear, as well as in the collection of reliable documentary evidence necessary for determining the truth in the absence of infrastructure, archives and publicly available information.... Yet the collection of testimonies that are as close as possible to the date of the events is particularly important. It is equally desirable, whenever practicable, to make as many factual findings as possible, in particular forensic findings which are often crucial to the identification of victims, expeditiously and in the *loci in quo*.¹⁰²

⁹⁹ See C De Vos, 'Investigating from Afar: The ICC's Evidence Problem' (2013) 26 *Leiden Journal of International Law* (2013) 1009, noting that in the DRC, 'ICC investigators spent only an average of ten days in the field, making it difficult for them to even interview witnesses, much less to develop the sort of long-term connections that a more sustained field presence would enable'; *ibid.*, 1016. This strategy is particularly problematic in relation to the investigators' capacity to establish a rapport and ongoing connection with sexual violence victims and witnesses, which often requires multiple interviews before they will be comfortable or confident enough to speak in detail about their experiences.

¹⁰⁰ Andrew Cayley, who had been the Senior Trial Attorney in the Darfur Situation, insisted that 'it was a mistake that the Court did not establish a presence on the ground in Darfur' in light of the consequences for the evidence in the case; see Cayley (n 92) 779–80.

¹⁰¹ Antonio Cassese had maintained, in an *amicus curiae* brief submitted in his capacity as Chairman of the UN Commission of Inquiry on Darfur, that although some complex investigative activities might not be possible in light of the prevailing security situation and lack of cooperation from state authorities, 'undertaking *targeted and brief interviews* of victims and witnesses... could prove to be safe'; see Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC, *Situation in Darfur, Sudan*, ICC-02/05-14, Antonio Cassese, 25 August 2006, 5 (emphasis in original).

¹⁰² *Ngudjolo* Trial Judgment (n 50) paras 115 and 117.

The Chamber emphasized the importance of on-site investigations for the Prosecution's analysis of its own witness statements, noting:

[I]t would have been beneficial for the Prosecution to visit the localities where the Accused lived and where the preparations of the attack on Bogoro allegedly took place, prior to the substantive hearings. To cite but a few good examples, a good knowledge of Zumbe; the view of Bogoro from Zumbe and Kamburso; the distances between Zumbe and Bogoro as well as between Zumbe, Aveba and Kagaba and the condition of the roads would have been useful in clarifying several witness testimonies, thereby promoting a better understanding *ab ovo* and a more accurate assessment of the various statements.¹⁰³

While acknowledging that it was 'aware of the difficulties encountered by the Prosecution in conducting investigations in a region affected by recurrent conflicts and the fact that it is duty-bound to eschew any action that could result in the identification of witnesses requiring protection',¹⁰⁴ the Chamber advised that it would have benefited the prosecution case to have conducted interviews with certain commanders who had played a key role before and during the attack (as well as Ngudjolo himself) during the investigation phase, to have taken greater efforts to obtain corroborating civil status documents for prosecution witnesses, and to have more thoroughly investigated and understood the socio-cultural framework, local customs, and functioning of family relationships in Ituri.¹⁰⁵

It is difficult to assess from the outside the extent to which such omissions were a deliberate strategy or simply a consequence of the 'efficient' investigation policy (involving short-term field deployments by small teams) pursued by the OTP in light of financial and budgetary constraints.¹⁰⁶ However, it is clear that one of the most significant results of the limited utilization of field investigations was the Prosecutor's debilitating over-reliance on open-source information such as reports of NGOs, media sources, UN documents, and other publicly available material.¹⁰⁷ In the initial years of the OTP's activities, there had been a perilous tendency to heavily rely on evidence obtained from various national and international agencies on foot of confidentiality agreements under Article 54(3)(e),¹⁰⁸ but after the near-fatal rupture to the *Lubanga*

¹⁰³ Ibid., para. 118. The Chamber had themselves conducted a field visit to Bogoro and the surrounding areas in January 2012 and drew on their findings in the trial judgment. Ibid., paras 68–70.

¹⁰⁴ Ibid., para. 121.

¹⁰⁵ Ibid., paras 119–23.

¹⁰⁶ De Vos (n 99) 1014–15, noting that 'in practice, all investigators are Hague-based and travel "on mission", undertaking repeated, short-term trips'.

¹⁰⁷ For example, in the *Ngudjolo* judgment cited here, the Chamber acknowledged that 'in the absence of [evidence collected in the field], it was necessary to rely primarily on witness statements and reports by MONUC investigators or representatives of various NGOs'. *Ngudjolo* Trial Judgment (n 50) para. 117.

¹⁰⁸ For example, more than half the evidence in the *Lubanga* case had been obtained by means of Art 54(3)(e) confidentiality agreements, ultimately resulting in the imposition of a stay of proceedings when some of that evidence was found to be potentially exculpatory but could not be disclosed to the accused. See Trial Transcript, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-T-109-ENG ET WT, TCI, ICC, 27 January 2009 (stating that the prosecution had obtained 55% of its evidence via confidentiality agreements); Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Art 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, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1401, TC I, ICC, 13 June 2008.

case and the resulting damaged relations with information providers, the Prosecutor was forced to rein in his profligate use of the provision.¹⁰⁹ In later investigations, it became inescapably obvious from judicial assessments of the Prosecution's evidence that open-source information was not just being relied on as part of pre-deployment planning and background research or for the purposes of corroboration, but was also being presented in bulk as a substitute for first-hand documentary or testimonial evidence as a consequence of the prosecutor's remote investigative strategy.¹¹⁰

In the *Mbarushimana* case, for example, the Prosecution did not advance a single insider or crime base witness to support over half of their charges, and instead relied entirely on indirect evidence provided by NGOs and other international organizations.¹¹¹ Unsurprisingly, the Pre-Trial Chamber declined to confirm any of the charges, and admonished the Prosecutor for his excessive dependence on such evidence:

As a general principle, the Chamber finds that information based on anonymous hearsay must be given a low probative value in view of the inherent difficulties in ascertaining the truthfulness and authenticity of such information. Accordingly, such information will be used only for the purpose of corroborating other evidence.¹¹²

The Pre-Trial Chamber in the Kenyan confirmation decisions was even more explicit in delimiting the insufficiency of such evidence to support a finding of criminal responsibility:

With respect to indirect evidence, the Chamber is of the view that, as a general rule, such evidence must be accorded a lower probative value than direct evidence. The Chamber highlights that, although indirect evidence is commonly accepted in the jurisprudence of the Court, the decision on the confirmation of charges cannot be based solely on one such piece of evidence.¹¹³

In its application for an arrest warrant in the *Gbagbo* case, the prosecution did not cite a single witness statement, summary, or affidavit to support the charge of rape,

¹⁰⁹ See e.g. K Ambos, 'Confidential Investigations (Article 54(3)(e) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law' (2009) 12 *New Criminal Law Review* 543; H Stuart, 'The ICC in Trouble' (2008) 6 *Journal of International Criminal Justice* 409.

¹¹⁰ The crucial problem is not the fact that open-source information has been used as evidence, but that it has been relied on to replace first-hand investigations despite the very different methodologies pursued by those documenting human rights abuses as opposed to those investigating the individual criminal responsibility of an accused person. There is nothing inherently wrong with using open-source information, particularly for corroboration, but investigators should still make every effort to independently establish its provenance and credibility as evidence.

¹¹¹ Confirmation of Charges Hearing Transcript, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-T-9-ENG CT WT, PTC I, ICC, 21 September 2011, 2–4.

¹¹² Decision on the Confirmation of Charges, *Mbarushimana* (n 38) para. 78.

¹¹³ Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Ruto, Kosgey and Sang* (n 38) para. 74; Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Muthaura, Kenyatta and Ali* (n 23) para. 86 [quote identical in both decisions]. The Pre-Trial Chamber defined 'indirect evidence' as encompassing 'hearsay evidence, reports of international and non-governmental organisations (NGOs) as well as reports from national agencies, domestic intelligence services and the media'; see Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Ruto, Kosgey and Sang* (n 38) para. 69.

only open-source information.¹¹⁴ In the decision postponing the confirmation of charges in that case, the Pre-Trial Chamber was unsparing in its condemnation of the Prosecutor's continuing reliance on indirect evidence:

[T]he Chamber notes with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. Such pieces of evidence 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. Even though NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, 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 charges.¹¹⁵

It seems remarkable that multiple judicial pronouncements on this issue should have been necessary, or that seasoned prosecutors could have been comfortable with presenting an investigative product which read more like a bibliography of Google search results than the outcome of a rigorous fact-finding process conducted by an international court with an obligation to establish the truth.

Of course, while investigations are a foundational component of any international prosecution, there are numerous other elements of prosecutorial strategy which need to be considered and managed carefully in order to avoid the pitfalls of evidentiary incoherence or institutional dysfunction. In this regard, thankfully, there are clear and unambiguous reasons for optimism in relation to the OTP's prospects under the tenure of Prosecutor Bensouda and Deputy Prosecutor James Stewart. As already discussed, it is clear that the first Prosecutor's strategy involved selecting high-profile charges and defendants,¹¹⁶ conducting brief and 'focused' investigations pursuant to an already decided case hypothesis,¹¹⁷ relying heavily on third-party sources and

¹¹⁴ Decision on the Prosecutor's Application Pursuant to Art 58 for a Warrant of Arrest against Laurent Koudou Gbagbo, *L Gbagbo, Situation in Côte d'Ivoire*, ICC-02/11/01/11-9-Red, PTC III, ICC, 30 November 2011.

¹¹⁵ Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Art 61(7)(c)(i) of the Rome Statute, *L Gbagbo, Situation in Côte d'Ivoire*, ICC-02/11/01/11-432, PTC III, ICC, 3 June 2013, para. 35.

¹¹⁶ For example, the decision to publicly announce his intention to seek the arrest of sitting Sudanese President Omar Al Bashir for genocide in Darfur—committed, *inter alia*, by means of widespread acts of rape and sexual violence—in terms which were misleadingly absolute. 'ICC Prosecutor Presents Case against Sudanese President, Hassan Ahmad Al Bashir, for Genocide, Crimes against Humanity and War Crimes in Darfur', *ICC Press Release*, 14 July 2008. Somewhat embarrassingly, the Pre-Trial Chamber subsequently refused to include the charge of genocide in the arrest warrant due to insufficient evidence, although this was later overturned on appeal. See Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-3, PTC I, ICC, 4 March 2009; 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', *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-73, AC, ICC, 3 February 2010.

¹¹⁷ An Institute for War and Peace Reporting article from 2008, based on interviews with several ICC investigators, highlighted the failure to include interviews with sexual violence victims within the investigation plan in the Darfur Situation, the exclusion of evidence relating to sexual violence in the DRC from the prosecution of Thomas Lubanga, the lack of thematic investigation of sexual violence by the LRA in Uganda, and the absence of any charges (at the time) against Bosco Ntaganda for sexual violence in the DRC despite the documentation of extensive lead evidence. One prosecutor, Christine

intermediaries to collect evidence and identify potential witnesses,¹¹⁸ and essentially positioning the role of ICC Prosecutor as a kind of international sheriff, swooping in at times of crisis to swiftly dispense justice and defuse conflict.¹¹⁹ Beatrice le Fraper du Hellen, then Head of the Jurisdiction, Complementarity, and Cooperation Division of the OTP, stated baldly that ‘the Prosecutor’s policy [was] to carry out investigations in a few months, involving as few witnesses and incidents as possible’.¹²⁰ In practice, however, this approach resulted in weak evidence, stagnant proceedings, overstretched staff, insufficient resources, and, most importantly for the purposes of this chapter, the catastrophic outcome for charges of sexual and gender-based violence already described. Any effort to address that specific issue must therefore take as its starting point the underlying strategic assumptions and practices which have proven so woefully ineffective for the successful investigation and prosecution of sexual violence crimes to date.

32.4 Bensouda and the Policy Paper: The OTP’s Future Strategy

The OTP, and specifically Luis Moreno Ocampo as the first Prosecutor of an independent and permanent ICC, was under a huge amount of pressure in the initial years of the Court’s operations to be seen to be active and effective in undermining impunity and providing a degree of accountability (if not deterrence) in conflicts within the Court’s jurisdiction.¹²¹ Prosecutor Ocampo’s strategy in this regard could be criticized for being too media-conscious, too responsive to political pressure, and too willing to opt for the immediate but short-term impact of prematurely announcing an intention to charge before the evidence had been properly analysed and before the foundations

Chung, sought to attribute the problem to the difficulty of establishing linkage evidence for crimes of sexual violence rather than the policy of focused investigations itself, arguing somewhat circularly that ‘[f]inding the victims who can help you link the highest commanders to the rapes and enslavement that happened *at the times and places that are the focus of the investigation* is very difficult’ (emphasis added). See Glassborow (n 82).

¹¹⁸ See further Buisman (n 92), arguing that the OTP had ‘abdicate[d] their responsibility to conduct proper investigations’ by ‘outsourcing … evidence gathering to third-party organisations or intermediaries’ in the *Lubanga* case, and the judges’ finding in that case that ‘the prosecution should not have delegated its investigative responsibilities to the intermediaries in the way set out above, notwithstanding the extensive security difficulties it faced’, *Lubanga* Trial Judgment (n 47) para. 482.

¹¹⁹ For example, in a Wall Street Journal article from 2006, Prosecutor Ocampo was quoted as saying that the ICC would be a ‘sexy court’ which would bring a different case each year with the goal of providing ‘swift justice that is comprehensible to often-uneducated victim populations’; see J Bravin, ‘For Global Court, Uganda Rebels Prove Tough Test’, *Wall Street Journal*, 8 June 2006.

¹²⁰ Glassborow (n 82).

¹²¹ For example, the same Institute for War and Peace Reporting article noted the impact of the pressure to produce tangible results and push for arrest warrants in the Uganda Situation (‘the prosecutor wanted indictments issued within a year’), the Situation in Darfur (‘former court staff say that prosecutors buckled under what was perceived as outside criticism for not moving fast enough’), and the *Lubanga* trial in the DRC Situation (‘the investigation had already taken a long time, and prosecutors wanted something to present at court as soon as possible’). Glassborow (n 82). Even the *Lubanga* Trial Judgment notes that ‘[t]he investigative team was subject to significant pressure, including from within the OTP as well as the Court more generally, because it was felt necessary to make progress’; see *Lubanga* Trial Judgment (n 47) para. 134.

of a winnable case had been constructed.¹²² It is worth remembering that Richard Goldstone was roundly condemned for selecting Duško Tadić as his first defendant, who as a detention camp guard was seen as too low down the pecking order to be worth focusing on when those like Karadžić and Milošević, who were perceived as bearing the greatest responsibility for the conflict, had not yet been publicly indicted. The difference, of course, is that Tadić was exposed in court as an astonishingly sadistic individual and ultimately convicted,¹²³ by which time the ICTY was well on its way to prosecuting more complex cases against higher-profile defendants without the crippling, unrelenting pressure to get off the starting block.

While it is only fair to note that Prosecutor Ocampo would undoubtedly have been slated from some quarters for his perceived inaction had he not pursued proceedings in certain situations in the short term,¹²⁴ particularly at such a formative point in the Court's development as a legal and political force, it should not have been difficult to realize that a record of dropped charges, insufficient evidence, and full or partial acquittals would ultimately be far more damaging to the Court's reputation and capacity for deterrence in the long term. Prosecutor Bensouda, as his successor, is not operating under the same immediate imperative to initiate proceedings in any given Situation, but nevertheless faces an arduous task with two main strands: addressing the impact of the evidentiary and institutional weaknesses that have blighted existing prosecutions, and creating a more efficient and attractive work environment within the OTP, one that emphasizes and prioritizes competence, patience, and exacting professionalism. This is vitally necessary not only to salvage the future prospects of the cases already under investigation or prosecution, but also to protect and build on the perception of the Court as a credible and sustainable actor within the international community. The fundamental job of the ICC prosecutor has evolved, in other words, from simply getting something done to ensuring that it is done right, and nowhere is an understanding of that distinction so badly needed as in relation to sexual and gender-based crimes.

First, one can look at the Prosecutors' public statements and policy announcements in relation to the issue of sexual violence and how they intended to address it. Prosecutor Ocampo asserted on numerous occasions that '[at] the ICC, girls will not

¹²² For example, one commentator noted that 'Moreno Ocampo was criticized by some for seeking too political a role externally, preferring the bright lights of international exposure to the nitty-gritty of investigation and prosecution, but also for micro-managing his division internally, stifling initiative and orderly procedure', B Schiff, 'Managing Multiple Dilemmas: Politics, Justice, Law and Administration at the International Criminal Court' (Paper presented at the 49th Annual Meeting of the International Studies Association, 28 March 2008) 23 <http://citation.allacademic.com/meta/p250992_index.html> accessed 1 September 2014. See further J Flint and A de Waal, 'Case Closed: A Prosecutor without Borders' (2009) *World Affairs*.

¹²³ See Opinion and Judgment, *Tadić*, IT-94-1-T, TC, ICTY, 7 May 1997. Tadić was convicted of persecution, other inhumane acts, and cruel treatment in relation to his role in the rape and sexual violence committed against both male and female detainees in the Omarska, Keraterm, and Trnopolje camps.

¹²⁴ This is particularly true of Situations resulting from a Security Council referral. See e.g. J Hagan and W Rymond-Richmond, *Darfur and the Crime of Genocide* (Cambridge: Cambridge University Press 2009); L Condorelli and A Ciampi, 'Comments on the Security Council Referral of the Situation in Darfur to the ICC' (2005) 3 *Journal of International Criminal Justice* 590.

be invisible'.¹²⁵ However, the fact that this statement appeared to be made by rote and always in the context of defending his Office's 'gendered approach' to a case which famously contained no charges of sexual violence is slightly less reassuring.¹²⁶ It is instructive to compare Prosecutor Ocampo's public statements about his Office's strategy and determination to provide accountability for crimes of sexual violence in the *Lubanga* prosecution with the blistering findings of the Trial Chamber in that case:

The Chamber strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence. He advanced extensive submissions as regards sexual violence in his opening and closing submissions at trial, and in his arguments on sentence he contended that sexual violence is an aggravating factor that should be reflected by the Chamber. However, not only did the former Prosecutor fail to apply or include sexual violence or sexual slavery at any stage during these proceedings, including in the original charges, but he actively opposed taking this step during the trial when he submitted that it would cause unfairness to the accused if he was convicted on this basis. Notwithstanding this stance on his part throughout these proceedings, he suggested that sexual violence ought to be considered for the purposes of sentencing.¹²⁷

Although Prosecutor Ocampo could be relied on to talk a good game about the importance of addressing crimes of sexual violence, he consistently missed opportunities to learn from the fate of unsuccessful charges and to adjust his strategy accordingly.

Since taking office, Prosecutor Bensouda appears to have made a determined effort to restate her Office's commitment to preventing impunity for sexual and gender-based violence, as well as to address the underlying obstacles which have frustrated efforts to address them over the first decade of the Court's operations. Speaking only a couple of months after taking office, she mentioned the issue in general terms, stating

¹²⁵ See e.g. L Moreno-Ocampo, 'The Place of Sexual Violence in the Strategy of the ICC Prosecutor' in A de Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Cambridge: Intersentia 2013) 154; L Moreno-Ocampo, 'Keynote Address—Interdisciplinary Colloquium on Sexual Violence as International Crime: Interdisciplinary Approaches to Evidence' (2010) 35 *Law & Social Inquiry* 839, 846 ('In the International Criminal Court, girls will not be invisible.); Trial Transcript, *Lubanga*, 26 January 2009 (n 46) 13 ('In this International Criminal Court, the girl soldiers will not be invisible.').

¹²⁶ See e.g. L Moreno-Ocampo, 'Keynote Address' (*ibid.*, n 125): 'It is our responsibility to present the gender crimes suffered by the most vulnerable. During the course of the trial, my Office has made it its mission to ensure that Thomas Lubanga Dyilo be held criminally responsible for the atrocities committed against those little girl soldiers'; L Moreno-Ocampo, 'The Place of Sexual Violence in the Strategy of the ICC Prosecutor' (*ibid.*, n 125): 'It is our responsibility to present the gender crimes suffered by the most vulnerable. During the course of the trial, Prosecution has made it its mission to ensure that Mr Lubanga be held criminally responsible for the atrocities committed against little girl soldiers.'; Trial Transcript, *Lubanga*, 26 January 2009 (n 46) 12–13: '[I]t is a responsibility of the Office of the Prosecutor to prove the crimes committed against the most vulnerable, and during the course of the trial my office will make it its mission to ensure that Thomas Lubanga is held criminally responsible for the atrocities committed against those little girl soldiers.'

¹²⁷ Decision on Sentence Pursuant to Art 76 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2901, TC I, ICC, 10 July 2012, para. 60. For a critical overview of Prosecutor Ocampo's strategy in the *Lubanga* case, see further Hayes, 'Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court' (n 23).

that the OTP was ‘responsible for drawing particular attention to sexual and gender-based crimes, in addition to crimes against children. Since its inception, the Office [of the Prosecutor] has sought to file charges accordingly in the great majority of its cases. This will continue to be one of my priorities over the course of my mandate.’¹²⁸ However, in another speech given while still Deputy Prosecutor (as well as the Gender Focal Point within the OTP), she had expressed a degree of frustration at the perception that prosecutions of sexual and gender-based violence were somehow exceptional within the work of the OTP:

Allow me to emphasize this point: gender crimes are prominent in our prosecutions because they are prominent in the contexts being prosecuted. This only becomes remarkable against the backdrop of the prior, and still prevalent, norm of denying their existence, ignoring them, shaming their victims, or defining them in legally improvable ways. In other settings, it was as if there were a tacit agreement to look the other way while women and children were sexually abused—minimizing, trivializing, denigrating and silencing the victims, destroying their credibility, and further violating their dignity, so abusers could continue unimpeded. The body of the ICC’s first cases, however, signals to the world that here, at least, this deal is off.¹²⁹

Unsurprisingly, many of Prosecutor Bensouda’s early public statements on the matter stressed the ICC’s strong record on charging crimes of sexual violence; it took a little longer for the OTP to go on record as acknowledging the problematic outcome for such charges. When it eventually did so, it came at the launch of the OTP’s new comprehensive Policy Paper on Sexual and Gender-Based Crimes.¹³⁰ The Policy Paper was the result of an extensive and in-depth consultation process with interested parties from academia, civil society, states, and international organizations, as well as its own staff,¹³¹ which immediately showed a degree of openness, humility, and receptiveness to criticism which had been strikingly absent from the OTP’s prior interactions. This was a hugely important step in two different planes, both internally and externally. For those within the OTP, it showed that senior management were willing to accept that previous strategies and policies had clearly not succeeded and to change relevant work practices to make them more effective. For those outside the OTP, including this author, who had closely followed the work of the Court on this specific issue and occasionally despaired at its policies and prospects, it represented both a badly needed acknowledgement that mistakes had been made and a cathartic expression of determination to no longer needlessly repeat those mistakes. As Prosecutor Bensouda put it, ‘[w]e have learned the lessons, and we are building on those lessons to make sure that we are more efficient and effective in the investigation and prosecution of these crimes’.¹³²

¹²⁸ F Bensouda, ‘Reflections from the International Criminal Court Prosecutor’ (2012) 45 *Case Western Reserve Journal of International Law* 505, 510.

¹²⁹ F Bensouda, ‘Looking Back, Looking Ahead—Reflections from the Office of the Prosecutor of the ICC’ (2012) 11 *Washington University Global Studies Law Review* 437, 443. See further N Palus, ‘ICC Prosecutor Hails Shift in Fight against Sexual Violence’, *Voice of America*, 13 November 2012.

¹³⁰ See OTP Policy Paper (n 24). ¹³¹ Ibid., para. 13.

¹³² See Evans-Pritchard, ‘ICC Restates Commitment on Crimes of Sexual Violence’ (n 42).

So what specific lessons have been learned, and how are the OTP intending to build on those lessons? If one looks to the Policy Paper itself for answers, the most striking aspect is its unrelenting emphasis on increasing the *effectiveness* of prosecutions for crimes of sexual and gender-based violence.¹³³ In the ICC context, an ‘effective’ prosecution for such crimes would be one where the offences in question are investigated efficiently, characterized appropriately, charged consistently, pleaded under the most suitable mode of liability, successfully confirmed for trial, and ultimately underpinned by sufficient credible evidence to prove the individual criminal responsibility of the accused and support a conviction. In that regard, the very existence of a dedicated Policy Paper on the investigation and prosecution of sexual and gender-based violence as an issue necessitating a specific focus represents a positive evolution in the strategy of the OTP. The very first policy document produced by the OTP in 2003 did not even mention sexual violence as a priority issue, despite the numerous statutory provisions within the Rome Statute imposing a positive duty on the Prosecutor to ensure that it was given due attention.¹³⁴ The first report on the activities of the OTP, covering the formative period from 2003 to 2006, identified several key challenges faced by the Office in its initial operations, none of which concerned the problems of effectively addressing sexual and gender-based violence, although the report did discuss in passing the formulation of several draft in-house guidelines on the investigation of sexual and gender-based crimes and interview practices when dealing with potential witnesses or perpetrators of sexual violence.¹³⁵ The 2006 Report on Prosecutorial Strategy mentioned sexual violence only in the most cursory of terms,¹³⁶ while the Prosecutorial Strategy document for 2009–12 again failed to explicitly prioritize sexual and gender-based crimes within the work of the OTP beyond some perfunctory references under the rubric of ‘continually improving the quality of prosecutions’.¹³⁷

It is telling that the first explicit codification of the OTP’s statutory obligation to prioritize crimes of sexual and gender-based violence did not occur until after Prosecutor Bensouda had taken office. The OTP Strategic Plan for June 2012–15 identified six key strategic goals for the first three years of her tenure as part of a conscious change of overall policy ‘in light of new challenges’, one of which was to ‘enhance the integration of a gender perspective in all areas of our work and continue to pay particular attention to sexual and gender based crimes and crimes against children’.¹³⁸ The document goes into some detail on the reasons for the strategic change, including ‘a serious and systematic under-reporting of sexual and gender-based violence’ and ‘the many challenges that face the Office with regard to the investigation and prosecution of these crimes’,¹³⁹ before setting out specific strategic targets, such as innovations in evidence

¹³³ The word ‘effective’ (and variations thereof) is used 38 times in the Policy Paper, 8 times in the Executive Summary alone.

¹³⁴ See ICC OTP, Paper on Some Policy Issues before the Office of the Prosecutor (September 2003).

¹³⁵ See ICC OTP, Report on the Activities Performed during the First Three Years (June 2003–June 2006) (12 September 2006).

¹³⁶ See ICC OTP, Report on Prosecutorial Strategy (14 September 2006) 7.

¹³⁷ See ICC OTP, Prosecutorial Strategy 2009–12 (n 69) 7–8. There is no reference whatsoever to sexual violence in the discussion of investigations.

¹³⁸ See ICC OTP, Strategic Plan—June 2012–15 (11 October 2013) 4–6 and 27.

¹³⁹ Ibid, paras 58 and 59.

collection, better training for investigators dealing with victims of sexual violence, the implementation of specialist interviewing models for victims of such crimes, the utilization of both same-sex and mixed-sex investigation teams, the finalization of a specific sexual and gender-based violence policy document, the development of guidelines on novel means of proof of large-scale sexual violence, and further specialized training for investigators.¹⁴⁰ Crucially, the Strategic Plan also emphasized the willingness and intention of the Prosecutor not just to learn from the OTP's own experiences, but also 'to draw on the experience of the other tribunals in investigating and prosecuting sexual and gender based violence',¹⁴¹ something which may seem like nothing more than a logical step or even a basic professional courtesy but which had been conspicuously resisted by the OTP up to that point.

The publication of the 2014 Policy Paper on Sexual and Gender-Based Violence was therefore not only a worthwhile achievement in and of itself, but it also represented the fulfilment of one of the specific targets set out in Prosecutor Bensouda's strategic plan. The Policy Paper analyses the OTP's general policy, regulatory framework, preliminary examinations, investigations, and prosecutions, as well as issues relating to cooperation and institutional development, in terms of their impact on the effective investigation and prosecution of sexual and gender-based violence,¹⁴² in addition to restating the OTP's public commitment to 'integrating a gender perspective and analysis into all of its work, being innovative in the investigation and prosecution of these crimes, providing adequate training for staff, adopting a victim-responsive approach in its work, and paying special attention to staff interaction with victims and witnesses, and their families and communities'.¹⁴³ It goes on to deal in great detail with numerous procedural and practical issues requiring unique consideration in relation to sexual and gender-based violence, such as protective measures; reparations; composition of investigation teams; sentencing; pre-deployment planning; understanding of the cultural context of a situation; the use of euphemisms by witnesses; psycho-social assessment procedures for potential victims and witnesses; cooperation with national authorities; the potential for stigmatization, retraumatization, or reprisals against victims and witnesses; staff training; partnerships with NGOs and civil society actors; outreach efforts, and the use of intermediaries. In its structure and content, and by systematically identifying the factors which will require particular attention or a specialized approach at each of the different phases of proceedings in relation to sexual and gender-based violence, the Policy Paper shows the clear influence of similar codification projects at other international criminal tribunals, such as the ICTR's Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes or the Compendium of Lessons Learned produced jointly by the Prosecutors of the ICTY, ICTR, Extraordinary Chambers in the Courts of Cambodia, SCSL, and Special Tribunal for Lebanon as part of the International Best Practices Project.¹⁴⁴ While

¹⁴⁰ Ibid., paras 60–3.

¹⁴¹ Ibid., para. 61.

¹⁴² See OTP Policy Paper (n 24).

¹⁴³ Ibid., para. 5.

¹⁴⁴ See ICTR Best Practices Manual (n 13), Petit (n 79), or the ICTY *Manual on Developed Practices* (ICTY—United Nations Interregional Crime and Justice Research Institute 2009). The Policy Paper states that these documents were taken into account in its drafting; see OTP Policy Paper (n 24) fn. 11.

many of its recommendations are made in general or aspirational terms, it is perhaps best understood (and should be praised) as a declaration of intent.¹⁴⁵ The policy and practices of the OTP in regard to the investigation and prosecution of sexual and gender-based violence are being fundamentally overhauled.

While it is instructive and worthwhile to examine the legal and practical issues which are unique to crimes of sexual and gender-based violence, the examination of the fate of charges for such crimes at the ICC to date has shown that the most common and fatal obstacles to their successful confirmation or prosecution are not exceptional to that category of crime. The charges have foundered not because of a failure to prove the specific material acts of sexual violence, but due to problems with the evidence underlying the generic elements of an international criminal prosecution, such as proving the contextual elements of international crimes or selecting the most appropriate mode of liability. It is undoubtedly true that investigators and prosecutors will face particular challenges when dealing with victims and witnesses of sexual violence,¹⁴⁶ but these can be offset with training, expertise, and dedicated pre-deployment planning. The conclusion of the ICTR Review Committee on sexual violence was that the low conviction rate for sexual violence at the Rwanda Tribunal was ‘not because of the lack of evidence—since the rape victims and witnesses were there—but more because of the lack of understanding, know-how and training to elicit the necessary evidence that would support a conviction’.¹⁴⁷ The experience of all international criminal tribunals has shown time and time again that the fundamental issue is one of *competence*, of knowing how to recognize red flags for sexual violence, how to identify and approach witnesses respectfully and prudently, how to conduct interviews and collect evidence, how to construct a case theory and select the most appropriate mode of liability, and how to present and plead that case to the judges who will ultimately determine criminal responsibility. It is not simply a question of finding the right management policy or drafting the perfect strategy paper, because experience has shown that, unfortunately, no magical combination of standing sub-committees or organizational flowcharts can compensate for the absence of basic bricks-and-mortar professional ability.

Thankfully, this fundamental point appears to have been understood and internalized by the OTP. Some of the most important areas for reform identified in the Policy Paper relate to overall investigative and prosecutorial strategy and have the potential to positively impact the work of the Prosecutor even in cases which do not feature sexual or gender-based crimes. One crucial example is the abandonment of the policy of focused investigations in favour of pursuing ‘more in-depth, open-ended investigations... so that more evidence from diversified sources might

¹⁴⁵ Bizarrely, some commentators appear to have interpreted the release of the Policy Paper as evidence of a degree of activism or exceptionalism on the part of Prosecutor Bensouda. See M Simons, ‘International Criminal Court to Focus on Sex Crimes’, *New York Times*, 5 June 2014.

¹⁴⁶ See e.g. Marcus (n 74); Foreign and Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (June 2014); ICTR Best Practices Manual (n 13).

¹⁴⁷ L Bianchi, ‘The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR’ in A De Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Cambridge: Intersentia 2013) 123, 131.

be collected'.¹⁴⁸ The new investigations policy also seeks to address the problems caused by investigations which are phased or not evidence-led:

Due to the requirement of higher evidentiary standards and the expectation of being trial-ready earlier, the notion of focused investigations is replaced by the principle of in-depth, open-ended investigations while maintaining focus. The Office will expand and diversify its collection of evidence so as to meet the higher evidentiary threshold. The Office will consider multiple case hypotheses throughout the investigation which will further strengthen decision-making in relation to actual prosecutions. It will aim at presenting cases at the confirmation hearing that are as trial-ready as possible. If meeting such a threshold is not possible at the moment of applying for an arrest warrant or a summons to appear, the Office intends to only proceed with the application if there are sufficient prospects to further collect evidence to be trial-ready within a reasonable timeframe.¹⁴⁹

This strategy has already been implemented in the Mali Situation. Although the Government of Mali referred the situation in July 2012, and the OTP announced in January 2013 that it would be opening an investigation on the basis of *prima facie* evidence establishing reasonable grounds to believe that a number of war crimes, including rape, had been committed,¹⁵⁰ the Prosecutor has not yet publicly sought any arrest warrants or summonses to appear. According to the Head of Investigations for the OTP, Michel De Smedt, this was a deliberate decision and 'great care had been taken to make sure that the evidence would stand up to scrutiny by ICC judges before arrest warrants were requested, and before any hearing to have charges confirmed'.¹⁵¹ Likewise, the Office has addressed the problems caused by rigid adherence to a pre-determined case hypothesis, stating that in future, 'the initial case hypothesis and investigation plan will be regularly reviewed, and may be amended on the basis of the additional analysis of evidence collected'.¹⁵²

The increased emphasis on the pursuit of more diverse and novel sources of evidence may be taken as a sign that the OTP is concerned about being too reliant on witness testimony.¹⁵³ Speaking at the launch of the Policy Paper, Prosecutor Bensouda stated that the OTP had 'decided to change that strategy by not only looking at witness statements but also documentary evidence such as hospital records and using forensic investigation strategies as a new way of collecting the evidence that we need'.¹⁵⁴ The Policy Paper itself went into more detail:

The Office is mindful that victims of sexual and gender-based crimes may face the additional risks of discrimination, social stigma, exclusion from their family and community, physical harm, or other reprisals. In order to minimise their exposure and possible retraumatisation, the Office will enhance its efforts to collect other types of evidence, where available, including insider testimony, the statistical or

¹⁴⁸ OTP Policy Paper (n 24) para. 52.

¹⁴⁹ See ICC OTP, Strategic Plan 2012–15 (n 138) 6.

¹⁵⁰ 'ICC Prosecutor Opens Investigation into War Crimes in Mali', *ICC Press Release*, 16 January 2013.

¹⁵¹ See Evans-Pritchard, 'ICC to Unveil New Investigation Strategy' (n 87).

¹⁵² OTP Policy Paper (n 24) para. 64; ICC OTP, Strategic Plan 2012–15 (n 138) 14.

¹⁵³ ICC OTP, Strategic Plan 2012–15 (n 138) para. 44.

¹⁵⁴ Evans-Pritchard, 'ICC Restates Commitment on Crimes of Sexual Violence' (n 42).

pattern-related evidence from relevant experts, medical and pharmaceutical records, empirical research and reports, and other credible data produced by States, organs of the United Nations, intergovernmental and non-governmental organisations, and other reliable sources.¹⁵⁵

On a general analysis, it may be no bad thing for the ICC to reduce the extent of its reliance on witness testimony to prove the various elements of a case, particularly in light of its continuing concern about minimizing risks to victims and witnesses.¹⁵⁶ However, it is also worth noting that the OTP's oppressively risk-averse strategy has resulted in an equally unsustainable reliance on protective measures for victims and witnesses, particularly preventive relocation.¹⁵⁷

Exploring the use of other forms of evidence to prove the contextual or linkage elements of a case which includes charges of sexual or gender-based violence is a worthwhile endeavour if it does in fact lead to a stronger prosecution case, although it remains to be seen how the judges at the ICC would assess such evidence;¹⁵⁸ however, it may not be a suitable replacement for testimonial evidence to prove the specific elements of crimes of sexual violence.¹⁵⁹ Rule 63(4) provides that corroboration is not required to prove crimes of sexual violence,¹⁶⁰ meaning that, in theory at least, all that is needed to prove the underlying acts of sexual violence is the testimony of even one credible, coherent, and reliable witness. In practice, the judges at the ICC have been satisfied with the credibility of the testimony of victims and witnesses of sexual violence to prove these elements to date, but it is by no means clear that they would be equally satisfied that the specific material elements of rape, sexual slavery,

¹⁵⁵ OTP Policy Paper (n 24) para. 65.

¹⁵⁶ The OTP's Strategic Plan for 2012–15 noted that '[a]lthough the Office has not experienced the death of a witness to prevent testimony, there is clearly an increase in attempts to hurt or interfere with persons interacting with the Office or their relatives'; ICC OTP, Strategic Plan 2012–15 (n 138) para. 49. The International Bar Association has welcomed the ICC's move away from the 'unsustainable' reliance on in-court witness testimony and urged that '[c]reative steps need to be taken to utilize other forms of evidence to establish or refute charges in the cases'. See International Bar Association, Witnesses before the ICC (IBA ICC Perspectives, July 2013) 20.

¹⁵⁷ The International Bar Association report notes that, based on figures provided by the VWU, 199 witnesses have provided in-court testimony at the ICC to date across seven trials. However, over 300 witnesses have been relocated under the ICC Protection Programme. See International Bar Association, Witnesses at the ICC (n 156) 14–15 and 35. By comparison, at the ICTY, more than 4,500 witnesses testified between 1996 and 2013, but fewer than 1% were relocated to a third country as a protective measure. See ICTY, Witness Statistics <<http://www.icty.org/sid/10175>> accessed 1 July 2014.

¹⁵⁸ When one considers the degree of caution and frustration shown by ICC judges in relation to the use of open-source evidence (other than as corroboration) at the confirmation of charges phase, it appears that some degree of testimonial or documentary evidence sourced directly by the OTP will be needed to buttress overview or pattern evidence in order to establish the contextual elements of international crimes, particularly if it has been produced by a third party using different evidence-gathering and analysis methodologies. However, for a discussion of the potential of such evidence to establish broader patterns of conduct, see L Lawry et al., 'Evidence-Based Documentation of Gender-Based Violence' in A de Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Cambridge: Intersentia 2013).

¹⁵⁹ The Policy Paper acknowledges this to an extent, stating that '[t]he Office notes that these types of evidence are not legally required as corroboration to prove the crimes. It will, however, endeavor to collect such evidence to strengthen the case, including to prove other aspects of the case, for example, the responsibility of the accused'; OTP Policy Paper (n 24) para. 51 (emphasis added).

¹⁶⁰ Rule 63(4) of the ICC Rules of Procedure and Evidence.

or other sexual violence crimes could be established by the use of quantitative pattern evidence, digital intercepts, or NGO reports.¹⁶¹ The very logic underpinning the inclusion of Rule 63(4) was to ease the crippling practical and logistical challenges obstructing the collection of relevant forensic or documentary evidence months if not years after the commission of crimes, in situations of ongoing conflict or post-conflict dysfunction, challenges which are even more pronounced when it comes to evidence of sexual or gender-based violence.¹⁶² It is to be hoped that Prosecutor Bensouda will not move away from the use of crime-based witness testimony entirely. While there are of course risks, particularly for victims and witnesses of this category of crime, the OTP already provides exceptional support services for vulnerable victims, including mandatory psychosocial screening in advance of any interview by OTP personnel,¹⁶³ and extensive in-court protective measures such as the use of pseudonyms, face and voice distortion, redaction of potentially identifying details, allowing for the presence of a psychologist or support person in court, or permitting testimony from behind a screen, in closed session, or via video-link.¹⁶⁴ The Policy Paper itself recognizes that victims and witnesses of sexual and gender-based crimes ‘may want to testify in support of judicial proceedings, and may regard it as a component of their own recovery process’,¹⁶⁵ as well as acknowledging that ‘victims and witnesses of sexual and gender-based crimes may also be witnesses to other crimes, and vice versa’.¹⁶⁶ The testimony of expert or overview witnesses has also been very valuable.¹⁶⁷

While the OTP did encounter huge difficulties with the intimidation of witnesses (including those testifying about sexual and gender-based crimes) in the Kenya cases,¹⁶⁸ the potential value and impact of victim testimony can be a critical factor in a case. Although the Trial Chamber in *Katanga* did not enter a conviction for the charges of rape or sexual violence, they did make the following remarks about their

¹⁶¹ For an overview of the treatment of evidence of sexual violence at the ad hoc Tribunals, see further D Buss, ‘Prosecuting Mass Rape: *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*’ (2002) 10 *Feminist Legal Studies* 91; Dissenting Opinion of Judge Arlette Ramaroson, *Kajelijeli*, ICTR-98-44A-T, 1 December 2003; A Danner and J Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law’ (2005) 93 *California Law Review* 75.

¹⁶² For an overview of the arguments underpinning the adoption of similar evidentiary concessions at the ICTY, see Ní Aoláin (n 18).

¹⁶³ Regulation 36(3) of the Regulations of the OTP; OTP Policy Paper (n 24) paras 61–3. However, this strategy presupposes that the OTP will be aware in advance when it is dealing with a victim of sexual or gender-based violence and can arrange for the psycho-social assessment, whereas in practice—particularly when dealing with male victims of sexual violence—that relevant fact may not be uncovered by investigators until well into the interview or even afterwards.

¹⁶⁴ OTP Policy Paper (n 24) paras 85–90. For examples of protective measures for victims and witnesses of sexual and gender-based violence from the Court’s practice, see Women’s Initiatives for Gender Justice, Gender Report Card 2010 (n 57) 207–13 and Gender Report Card 2011 (n 40) 314–37.

¹⁶⁵ OTP Policy Paper (n 24) para. 70.

¹⁶⁶ OTP Policy Paper (n 24) para. 66.

¹⁶⁷ For example, three expert witnesses testified in the *Lubanga* case about aspects of sexual and gender-based violence, and two expert psychological witnesses testified about the trauma and impact of sexual violence in the *Bemba* case. A summary of their testimony can be found in Women’s Initiatives for Gender Justice, Gender Report Card on the International Criminal Court 2008, 87–8; Gender Report Card 2009 (n 45) 84–5; and Gender Report Card 2011 (n 40) 252–3.

¹⁶⁸ See e.g. ‘ICC Kenya Probe “Hampered by Intimidation”’ (Institute for War and Peace Reporting, ACR Issue 311, 12 January 2012) and B Evans-Pritchard, ‘Action Urged on ICC Witness Protection’ (Institute for War and Peace Reporting, ACR Issue 385, 28 March 2014).

assessment of the credibility of the victim witnesses in that case, which show a degree of empathy and judicial acknowledgement of the tremendous personal toll involved in testifying about such intimate and traumatic events:

[T]he Chamber considers that the testimony that [Witness] P-132 has provided about these events, although sometimes suffering from a certain lack of consistency due...to the difficulties she encountered in reminding herself of such painful memories, is sufficient to establish that the three people who attacked her in Bogoro intentionally committed the crime of rape....¹⁶⁹ [In relation to alleged contradictions in the testimony of Witness P-249] [t]hese contradictions can be explained by the reluctance she initially felt in revealing personal information....For the Chamber, these differences, [which were] driven mainly by the sense of shame felt by the witness [who was] forced to expose her experiences as well as the desire not to take risks with her security, therefore do not affect her credibility.¹⁷⁰

While no judgment has yet been handed down in the *Bemba* trial, it is also worth highlighting the powerful, courageous, and heart-breaking testimony of a male rape victim in that case who had been targeted by the *Mouvement de libération du Congo* due to his position as a community leader and raped in front of his wife and children.¹⁷¹

You see, somebody like me, a man lying with me, that's why I consider myself to be dead because a man cannot sleep with another man. With what they did to me, I knew that I was dead....¹⁷² They forced me to have anal relations with them. My anus was swollen and I had to get traditional treatment, the kind of treatment that is done on women who have just had a baby, and thanks to God this traditional treatment which I received allowed me—or relieved me; helped me heal somewhat....¹⁷³ [O]nce they had sodomised me, [my second wife] said to me, 'You are no longer a man. You are a woman like myself, so I cannot live with you. I have to leave you.' And that is why she left, until her death....¹⁷⁴ [The members of my community] were aware of what had happened to me. It was serious. It's true that there are some people who would mock me, but others support me and denounce what happened to me, speak out against what happened to me....Now I suffer. Others don't take this into consideration, but there are some who do mock me, but this doesn't matter. We are acting in the national interest....There were many problems in my family. There were people

¹⁶⁹ Katanga Trial Judgment (n 55) para. 992 (translation author's own).

¹⁷⁰ Ibid., para. 994 (translation author's own).

¹⁷¹ See Trial Transcript, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-T-50-Red-ENG CT WT, TC III, ICC, 20 January 2011; Trial Transcript, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-T-51-Red-ENG CT2 WT, TC III, ICC, 21 January 2011; Trial Transcript, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-T-52-Red-ENG CT2 WT, TC III, ICC, 24 January 2011. For an overview of his testimony, see Women's Initiatives for Gender Justice, Gender Report Card 2011 (n 40) 249–50.

¹⁷² Trial Transcript, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-T-51-Red-ENG CT2 WT, TC III, ICC, 21 January 2011, 32. The witness became extremely distressed after this statement and the court adjourned for a brief recess. Afterwards, he apologized for having become emotional and said, 'this event offended me greatly and so I cried earlier'; ibid., 35.

¹⁷³ Ibid., 35.

¹⁷⁴ Ibid., 41–2.

who died. There were cases of separation. Mr Prosecutor, your Honour, I really don't know what else to say.¹⁷⁵

While there are other examples, mainly from the ICTY, of international criminal prosecutions for sexual and gender-based violence where the victims were men rather than women,¹⁷⁶ this is the first occasion where a male rape victim has been called to testify at an international criminal tribunal to support a charge of rape specifically.¹⁷⁷ The parallels between the experience of Witness 23 and the testimony of female rape victims in that and other cases are striking, whether in relation to emotional trauma, societal stigma, rejection by family members, or medical complications caused by the rape, and they underscore the central importance of investigating and prosecuting sexual violence against men and boys, an issue which has been marginalized or ignored entirely to an even greater extent than that of sexual violence against women.¹⁷⁸ The OTP deserves credit for having brought charges for crimes of sexual and gender-based violence committed against men in the *Bemba* case, the *Muthaura* case,¹⁷⁹ and the upcoming *Ntaganda* case,¹⁸⁰ although it represents a missed opportunity that this issue is not specifically addressed in the Policy Paper.¹⁸¹ It is worth remembering the words of Witness 23 towards the end of his testimony, who stated simply '[w]hat I can say is thank you. Thank you. Thank you for calling me to give testimony. Thank you.'¹⁸²

Another cross-cutting issue identified for amendment in the Policy Paper is the OTP's approach to modes of liability. This has often been a decisive factor in the fate of charges for sexual and gender-based violence to date,¹⁸³ and the difficulties of

¹⁷⁵ Trial Transcript, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-T-52-Red-ENG CT2 WT, TC III, ICC, 24 January 2011, 34–5.

¹⁷⁶ For a discussion of this, see e.g. S Sivakumaran, 'Sexual Violence against Men in Armed Conflict' (2007) 18 *European Journal of International Law* 253; P Sellers, 'Sexual Torture as a Crime under International Criminal and Humanitarian Law' (2007–8) 11 *New York City Law Review* 339; E Carlson, 'The Hidden Prevalence of Male Sexual Assault during War: Observations on Blunt Trauma to the Male Genitals' (2006) 46 *British Journal of Criminology* 16.

¹⁷⁷ Although sexual violence against men was charged extensively at the ICTY, particularly in relation to detention camps, it tended to be charged as the war crimes of outrages upon personal dignity, cruel or inhuman treatment, or torture. See further S Sivakumaran, 'Prosecuting Sexual Violence against Men and Boys' in A de Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Cambridge: Intersentia 2013).

¹⁷⁸ For a remarkable overview of the prevalence of sexual violence against men and boys in conflict and the lack of domestic criminal provisions allowing for legal redress, see C Dolan, 'Into the Mainstream: Addressing Sexual Violence against Men and Boys in Conflict' (Briefing Paper for Overseas Development Institute Workshop, 14 May 2014).

¹⁷⁹ The charges against Muthaura and Kenyatta include allegations relating to the forcible circumcision of Luo men, as discussed in greater detail in fn. 23.

¹⁸⁰ The *Ntaganda* confirmation decision refers to allegations regarding both the rape of male detainees by UPC/FLPC soldiers and male detainees who were ordered to rape female detainees. See further Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, *Ntaganda* (n 41) paras 50 and 52.

¹⁸¹ The Policy Paper does acknowledge that both sexual and gender-based violence can be committed against women, girls, men, and boys, see OTP Policy Paper (n 24) 3–4, 7, 12–13, and 42. However, it does not contain any specific recommendations, goals, or best practices for the investigation and prosecution of sexual and gender-based violence against men, an issue which requires careful planning and consideration.

¹⁸² Trial Transcript, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-T-51-Red-ENG CT2 WT, TC III, ICC, 21 January 2011, 50.

¹⁸³ For example, Decision on the Confirmation of Charges, *Mbarushimana* (n 38) paras 339–40.

establishing sufficient linkage evidence to establish the individual criminal responsibility of a remote perpetrator for acts of sexual and gender-based violence have been recognized as a significant obstacle even at the ad hoc Tribunals.¹⁸⁴ The OTP has been criticized for choosing an inappropriate mode of liability in a number of its cases;¹⁸⁵ for example, some observers have argued that Katanga could have been convicted for sexual violence if he had been charged with superior responsibility under Article 28 rather than as a perpetrator under Article 25.¹⁸⁶ However, it is worth noting that the OTP's flexibility in charging multiple modes of liability in the alternate was severely curtailed by the infamous finding of Pre-Trial Chamber II in the *Bemba* case that the practice of cumulative charging was inherently detrimental to the rights of the defence,¹⁸⁷ while its freedom to target lower-level perpetrators had been restricted by Prosecutor Ocampo's interpretation of the statutory requirement of gravity and the need to focus on 'those situated at the highest echelons of responsibility'.¹⁸⁸

The OTP's change of strategy on modes of liability is therefore two-fold. The Prosecutor has announced her intention to shift the initial focus of investigations in order to build up the case from lower-level perpetrators to those most responsible, an approach which was explicitly intended 'to assist in addressing the challenge of establishing the individual criminal responsibility of persons at the highest levels for the commission of sexual and gender-based crimes'.¹⁸⁹ The Strategic Plan clarified the change in scope as follows:

In the light of limitations in investigative possibilities and/or a lack of cooperation and the required evidentiary standards, the Office is re-thinking its approach to proving the criminal responsibility of the most responsible. In such circumstances a strategy of gradually building upwards is needed. The Office would therefore first investigate and prosecute a limited number of mid- and high-level perpetrators in order to ultimately have a reasonable chance to convict the most responsible. The Office will also consider prosecuting lower level perpetrators where their conduct has been particularly grave and has acquired extensive notoriety. Such a strategy will in the end be more cost-effective than having unsuccessful or no prosecutions against the highest placed perpetrators.¹⁹⁰

¹⁸⁴ See further M Jarvis and E Martin Salgado, 'Future Challenges to Prosecuting Sexual Violence under International Law: Insights from ICTY Practice' in A de Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Cambridge: Intersentia 2013); R Haffajee, 'Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory' (2006) 29 *Harvard Journal of Law and Gender* 201; C MacKinnon, 'The ICTR's Legacy on Sexual Violence' (2008) 14 *New England Journal of International and Comparative Law* 101.

¹⁸⁵ See e.g. A de Waal, 'The Public Application by the Chief Prosecutor of the ICC for an Arrest Warrant against Sudanese President Omar al Bashir: A Critique' (Social Science Research Council 2009) 11–13; Women's Initiatives for Gender Justice, Modes of Liability: A Review of the International Criminal Court's Current Jurisprudence and Practice (November 2013).

¹⁸⁶ See Evans-Pritchard, 'ICC Restates Commitment on Crimes of Sexual Violence' (n 42).

¹⁸⁷ See Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba* (n 65) para. 202.

¹⁸⁸ ICC OTP, Prosecutorial Strategy 2009–12 (n 69) 6.

¹⁸⁹ OTP Policy Paper (n 24) para. 52: 'Where necessary, the Office will follow a strategy of gradually building cases up from mid- and high-level perpetrators, and even up from low-level notorious perpetrators, to the most responsible.'

¹⁹⁰ ICC OTP, Strategic Plan 2012–15 (n 138) para. 22.

The Prosecutor has also announced that the OTP will now ‘charge different modes of liability and mental elements in the alternative, where appropriate’.¹⁹¹ In cases of sexual and gender-based crimes, the Office will make more use of provisions for superior responsibility under Article 28 ‘[i]n order to encourage military commanders and non-military superiors to deal effectively with the commission of these crimes by their forces or subordinates’.¹⁹² The OTP will also pay particular attention to the potential use of pattern evidence or evidence of specific notice to establish the accused’s knowledge or awareness of crimes of sexual and gender-based violence under Article 30.¹⁹³

The OTP also intends to make changes in relation to its staff. Under Prosecutor Ocampo, the investigations division of the OTP was under-staffed, with rotating teams of ‘increasingly young personnel’ conducting investigation missions without a dedicated field presence.¹⁹⁴ This pressure, exacerbated by persistent problems with management culture and internal staff satisfaction,¹⁹⁵ unsurprisingly led to the loss of numerous experienced investigators and prosecutors.¹⁹⁶ Prosecutor Bensouda specifically acknowledged that the practice of rotating investigators was now ‘overstretched’ when requesting an increase in the OTP’s operational budget at the ASP in November 2013, and has since managed to secure the additional funding.¹⁹⁷ The Strategic Plan for 2012–15 recognizes the need for increased staffing in the investigations division, as well as greater experience among investigators,¹⁹⁸ stating specifically:

The new approach to investigations requires the Office to assess whether its current mixture of level of experience, types of expertise, language, gender and nationality accords with the new requirements. These requirements can be summarised as the need to have a higher field presence, a stronger embedding of country or regional experts into the investigative teams, increased capability to deal with new forms of evidence and increasing the experience level of staff recruited in order to strengthen the traditional as well as the more specialised investigative capabilities.¹⁹⁹

The Policy Paper likewise emphasizes the need for increased competence and in-house expertise on sexual and gender-based violence, as well as the importance of ongoing specialist training on relevant issues such as the impact of trauma on vulnerable witnesses and methodologies for the collection and analysis of relevant information.²⁰⁰ Prosecutor Bensouda and Deputy Prosecutor James Stewart appear to

¹⁹¹ OTP Policy Paper (n 24) para. 83.

¹⁹² OTP Policy Paper (n 24) para. 78.

¹⁹³ OTP Policy Paper (n 24) paras 81–2.

¹⁹⁴ De Vos (n 99) 1014–17, citing among others a letter from Human Rights Watch to the OTP Executive Committee expressing concern about the high rate of attrition and burnout among investigators and noting that there were ‘simply not enough of them to handle the rigorous demands for conducting investigations’.

¹⁹⁵ See G Townsend, ‘Structure and Management’ in L Reydams et al. (eds), *International Prosecutors* (Oxford: Oxford University Press 2012) 171, 290–3.

¹⁹⁶ See e.g. Flint and De Waal (n 122), who refer to ‘a trickle of resignations [turning into] a haemorrhage’ and specifically cite the senior experienced staff who left the Court under Prosecutor Ocampo’s tenure.

¹⁹⁷ See L Ochieng and S Jennings, ‘ICC Secures Budget Increase’ (Institute for War and Peace Reporting, ACR Issue 376, 20 January 2014).

¹⁹⁸ ICC OTP, Strategic Plan 2012–2015 (n 138) 20–4.

¹⁹⁹ Ibid., para. 47.

²⁰⁰ See e.g. OTP Policy Paper (n 24) paras 15, 21, 28, 37, 57, 114, and 117–19.

be making a concerted effort to make the OTP a more attractive and fulfilling workplace for experienced staff as part of an overall effort to increase professional standards across the board.

One final point relates to the position of the Gender Advisor within the OTP. Although the Statute explicitly requires the appointment of a specialist adviser on sexual and gender-based violence,²⁰¹ Prosecutor Ocampo did not appoint anyone to the position for the first five years of his term, until Catharine MacKinnon was announced as Special Advisor on Gender Crimes in 2008.²⁰² Her appointment was, unfortunately, largely symbolic; as Women's Initiatives for Gender Justice noted at the time, 'as it is a part-time position based outside The Hague, the ability of the post to influence and advise on the day-to-day decisions regarding investigation priorities, the selection of incidents and the construction of an overarching gender strategy will be extremely limited'.²⁰³ In the absence of a dedicated in-house legal adviser on such issues, then-Deputy Prosecutor Bensouda acted as the focal point for sexual and gender-based violence within the OTP.²⁰⁴ Unsurprisingly, she did not wait as long after taking office to appoint specialist advisers. Not only did she appoint Brigid Inder as the Special Gender Advisor within two months of being appointed Prosecutor,²⁰⁵ but also later that same year she appointed Patricia Sellers, who spent 13 years as the Legal Advisor for Gender in the ICTY OTP, as a Special Advisor on International Criminal Law Prosecution Strategies.²⁰⁶ Brigid Inder has made a much stronger contribution in the role than her predecessor, not least in her involvement in the drafting of the Policy Paper, and deserves to be commended. However, she serves in a personal and part-time capacity; as Women's Initiatives have rightly highlighted in the past, this does not allow for full immersion in or the ability to influence the minutiae of cases, charges, and day-to-day legal activities of the OTP. The experience of the ad hoc Tribunals has shown that, in order to be as effective as possible, the Gender Advisor must not only be closely involved in the work of investigation and prosecution teams, but must also be appointed at a sufficiently senior level to be able to affect policy.²⁰⁷ Given that the Policy Paper recognises the need for greater in-house expertise on sexual and gender-based crimes,²⁰⁸ the OTP may want to consider the appointment of an

²⁰¹ Art 42(9) Rome Statute.

²⁰² 'ICC Prosecutor Appoints Prof. Catharine A MacKinnon as Special Adviser on Gender Crimes', *ICC Press Release*, 26 November 2008.

²⁰³ See Women's Initiatives for Gender Justice, *Gender Report Card 2008* (n 167) 21.

²⁰⁴ See Luping (n 66) 435 and 489.

²⁰⁵ 'ICC Prosecutor Fatou Bensouda Appoints Brigid Inder, Executive Director of the Women's Initiatives for Gender Justice, as Special Gender Advisor', *ICC Press Release*, 21 August 2012. Brigid Inder is the Executive Director of Women's Initiatives for Gender Justice. She serves as Special Gender Advisor in a personal capacity and on a part-time *pro bono* basis.

²⁰⁶ 'ICC Prosecutor Fatou Bensouda Appoints Patricia Sellers, Leila Sadat and Diane Marie Amann as Special Advisers', *ICC Press Release*, 12 December 2012.

²⁰⁷ See e.g. P Sellers, 'Gender Strategy is Not a Luxury for International Courts' (2009) 17 *American University Journal of Gender, Social Policy and Law* 301; N Hayes, 'The Impact of Prosecutorial Strategy on the Investigation and Prosecution of Sexual Violence at International Criminal Tribunals' in M Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes* (Oslo: Torkel Opsahl Academic EPublisher 2012) 409.

²⁰⁸ OTP Policy Paper (n 24) para. 115.

internal gender adviser at senior management level—someone who would have the ability and authority to attend the Executive Committee meetings, scrutinize applications for arrest warrants and documents containing the charges to see if they sufficiently reflect the underlying incidents of sexual and gender-based violence, develop progressive charging strategies and generally act as a dedicated internal quality control officer with regard to this category of crime—in addition to the role of Special Gender Advisor.

32.5 Conclusion

The OTP's track record on the investigation and prosecution of sexual and gender-based violence is chequered at best. A strong charging record was undermined by severely deficient evidence and investigation strategies; a Statute containing the broadest range of sexual and gender-based crimes ever enumerated was stymied by recurring difficulties with the mode of liability and extremely conservative interpretations of crimes and legal characterizations by the Pre-Trial Chamber. However, since the appointment of Prosecutor Bensouda, there are clear signs of a change of course. The development and publication of the OTP's Policy Paper on Sexual and Gender-Based Crimes was a very heartening development, and represented a declaration of intent to fundamentally change the underlying investigative and prosecutorial strategies which had proven so harmful to charges for such crimes at the ICC. Of course, it remains to be seen what the impact of the prosecutor's new policies will be in the long term, but there are numerous reasons for optimism when one examines the fate of charges for sexual and gender-based violence under her tenure: the issuance of an arrest warrant against Sylvestre Mudacumura;²⁰⁹ the confirmation of charges against Laurent Gbagbo²¹⁰ and Bosco Ntaganda;²¹¹ even the withdrawal of charges against Francis Kirimi Muthaura showed a degree of prosecutorial responsibility and caution which has previously been notable only by its absence.²¹² One can only hope that her efforts are successful and that the OTP can shake off its initial dysfunction and teething troubles to deal with the obligation imposed on it by the Statute to prioritize and prosecute sexual and gender-based violence as progressively and effectively as possible. The OTP has always had everything it needed to live up to its statutory responsibilities to victims of sexual and gender-based crimes, except for leadership. Let us hope that last missing piece is now, finally, in place.

²⁰⁹ Decision on the Prosecutor's Application under Art 58, *Mudacumura* (n 36). The case against Mudacumura includes charges of rape, torture, and mutilation based on underlying acts of sexual and gender-based violence, but the original application for an arrest warrant, submitted by former Prosecutor Ocampo, was dismissed in its entirety due to a lack of legal specificity. See Decision on the Prosecutor's Application under Art 58, *Mudacumura* (n 36).

²¹⁰ Decision on the Confirmation of Charges against Laurent Gbagbo, *L Gbagbo* (n 41).

²¹¹ Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, *Ntaganda* (n 41).

²¹² Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, *Muthaura and Kenyatta* (n 38).

Cumulative Charges and Cumulative Convictions

*Carl-Friedrich Stuckenberg**

33.1 Introduction

It is typical for cases brought before international criminal tribunals that the defendants are accused and, if found guilty, convicted of the commission not of a single crime, but of multiple crimes under international law, often based on the same conduct. This is due to two factors: the factual characteristics of the criminal behaviour in question (macro-delinquency) and the frequent overlapping of the legal definitions of international crimes, many of which contain compound offences comprising several predicate offences as well as ‘organization crimes’ aimed at complex criminal enterprises. In addition, the offence definitions were not carefully crafted by a sophisticated legislator as parts of a systematically rigorous codification, but grew out of custom and uncoordinated treaties. Although of distinct origin, these crimes have over time ‘grown ever closer¹ without becoming so close that a hierarchy could be established.² For instance, the same act of killing may, in the right circumstances, constitute genocide, murder, or extermination as crimes against humanity, and wilful killing as a war crime.³ The admissibility of cumulative charges and cumulative convictions has been

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¹ G Mettraux, *International Crimes and the Ad Hoc Tribunals* (New York: Oxford University Press 2005) 315.

² The ICTY has always rejected the idea of a ranking of crimes under international law according to their gravity: Judgment in Sentence Appeals, *Tadić*, IT-94-1-A and IT-94-1-Abis, AC, ICTY, 26 January 2000, para. 69; Judgment, *Furundžija*, IT-95-17/1-A, AC, ICTY, 21 July 2000, paras 240–3; Judgment, *Kunarac*, IT-96-23-T and IT-96-23/1-T, TC, ICTY, 22 February 2001, para. 851 (‘*Kunarac Trial Judgment*’); Judgment, *Krstić*, IT-98-33-T, TC, ICTY, 2 August 2001, para. 700; see also Judgment, *Blaškić*, IT-95-14-T, TC, ICTY, 3 March 2000, paras 797–9. Although proposals for a hierarchy have been made, e.g. by M C Bassiouni, ‘International Crimes: The *Ratione Materiae* of International Criminal Law’ in M C Bassiouni (ed.), *International Criminal Law*, vol. I, 3rd edn (Leiden: Martinus Nijhoff 2008) 136–9; A Danner, ‘Constructing a Hierarchy of Crimes in International Criminal Law Sentencing’ (2001) 87 *Virginia Law Review* 415, 453–501; R May and M Wierda, ‘Is There a Hierarchy of Crimes in International Law?’ in L Vohrah et al. (eds), *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer Law International 2003) 529–32; O Olusanya, *Double Jeopardy without Parameters: Re-Characterisation in International Criminal Law* (Antwerp: Intersentia 2004) 178–221; cf. A Bogdan, ‘Cumulative Charges, Convictions and Sentencing at the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda’ (2002) 3 *Melbourne Journal of International Law* 1, 5–9.

³ Appeal Judgment, *Kaing*, 001/18-07-2007-ECCC/SC, ECCC, SCC, 3 February 2012, para. 286, fn. 633 (‘*Kaing Appeals Judgment*’).

an issue in many cases before the ad hoc Tribunals, hybrid tribunals, and, from early on, in the jurisprudence of the ICC.

Cumulative charges and cumulative convictions are, however, only two emanations of the complex legal field, which has been termed *concursum delictorum*,⁴ and deals with all situations in which at least two offences are adjudicated at once, regardless of whether these offences refer to one and the same set of facts or to several distinct sets of facts. These situations exist in every legal order, whether national or international, and all legal systems have developed some kind of solution for it. These solutions are astoundingly similar in substance, although they vary considerably in complexity, terminology, and approach. Civil-law countries usually treat *concursum delictorum* or *concours de qualifications ou d'infractions, concorso di reati, concurso/concurrencia de leyes/delitos*, and *Konkurrenzlehre* as a problem of legal theory or general principles of criminal law, whereas common-law countries discuss equivalent issues in the contexts of pleading (joinder of offences, multiple counts, etc.), of substantive double jeopardy or *ne bis in idem*, and of sentencing.

Everywhere, *concursum delictorum* has two legal dimensions. The substantive dimension concerns the verdict and the sentence. If the defendant is accused of several offences, can a conviction be entered for each of them? That is, are all provisions cumulatively applicable or can the application of one offence bar the application of another, and when? If a cumulative verdict is permissible, shall only one unified sentence covering all offences be passed or a distinct sentence for each offence, and, in any event, how is the total amount of punishment to be determined? The procedural dimension relates to pleading and double jeopardy: are multiple charges always allowed, or only if multiple convictions and multiple sentences are permissible?⁵ In the instance that the same act or transaction violates several offences, can these be dealt with in separate trials or is the prosecutor forced to join all potentially relevant offences? Conversely, when is a subsequent trial barred by a prior acquittal or conviction?⁶ Finally, in both dimensions, two apparently trivial questions have to be solved which may turn out to be the most difficult of all: when are facts the 'same', and when are offences 'different'? All this looks fairly complicated, but *concursum delictorum* is much less of a legal conundrum than it seems because a functional analysis on a comparative law basis reveals that there exist only four types of concurrence situations for

⁴ The Latin term derives from medieval Continental European 'common law' (*ius commune*) and was introduced in international criminal law by the ICTY in Judgment, *Kupreškić*, IT-95-16-T, TC, ICTY, 14 January 2000, paras 637–748 ('Kupreškić Trial Judgment'). The legal problems related to 'concurrence' are known since antiquity, for a historical survey see W Höpfner, *Einheit und Mehrheit der Verbrechen*, vol. I (München: Verlag Franz Vahlen 1901) 7–100.

⁵ The question of multiple charges may be influenced by further aspects unrelated to *concursum delictorum*, as will be seen in section 33.3.1.

⁶ The procedural aspect of *ne bis in idem* will be left out here. For the relationship between *concursum delictorum* and *ne bis in idem* see C-F Stuckenbergs, 'Multiplicity of Offences: Concursus Delictorum' in H Fischer et al. (eds), *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin: Verlag Arno Spitz 2001) 559, 560–1, fn. 4; M Bohlander, 'Ne Bis in Idem', in M C Bassiouni (ed.), *International Criminal Law*, vol. III, 3rd edn (Leiden: Martinus Nijhoff 2008) 541, 543–6; H Friman et al., 'Charges' in G Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press 2013) 436–7.

which legal rules have to be devised and that the number of possible solutions for each situation is extremely limited as well (section 33.2.1).⁷

So far, the development of rules on *concursum delictorum* in international criminal law has not ventured very far beyond the stage of robust yet primitive pragmatism, which still leaves a lot to be desired because many questions are left open or the answers are hidden in the fog of sentencing. At least, it seems to be uncontested that such rules are needed.⁸ Hence, this area of the law presents another challenge for the future jurisprudence of the ICC.

This chapter will summarize and critically assess the current state of the law in customary international criminal law and under the Rome Statute of the ICC, and show perspectives for a principled development of the law of the ICC. The central issue of *concursum delictorum* concerns cumulative convictions and sentencing, and will be discussed first. Then, the admissibility of cumulative charges will be examined because, from a theoretical perspective, this is simply a consequential question.

33.2 Cumulative Convictions

33.2.1 The matrix of substantive *concursum delictorum*

In order to avoid confusion, a brief sketch of the underlying logical and normative structures and a few definitions are useful. As set out in more detail elsewhere,⁹ all problems of *concursum delictorum* involve either the coincidence of several nominally distinct offences¹⁰ or of several units of factual behaviour, or both. There are several possibilities to group these situations; for simplicity's sake, I will use a two-by-two matrix here with the coordinates 'identity of facts' and 'applicability of offences': several nominally distinct offences are either violated by the same set of facts or not (i.e. by several sets of facts); the several offences may all be applicable (i.e. each lead to a conviction) or not—*tertia non dantur*. In this context, the term 'offence' refers exclusively to the *legal definition* of an offence and neither to corresponding facts nor evidence. Thus, the resulting four classes of legal situations are analytically exhaustive; it is not implied, however, that each class exists in any legal order, nor that it should exist everywhere nor that distinct rules for each class are *eo ipso* appropriate. The normative relevance of the classes will be discussed in due course.

33.2.1.1 Identity of facts constituting several offences

If the same set of facts—be it the same act in the sense of a willed bodily movement or a group of acts which might be labelled the same 'transaction', 'conduct', or 'criminal episode'¹¹—violates several provisions of the law, the first question to be answered

⁷ Compare the analytical framework I have tried to sketch in Stuckenberg (n 6) 563–9.

⁸ Cf. Stuckenberg (n 6) 561–3. ⁹ Stuckenberg (n 6).

¹⁰ 'Nominally distinct' means that several of these offences have different statutory or customary definitions although they may be regarded as the same offence 'in reality'.

¹¹ The 'sameness' of facts is anything but trivial, see Stuckenberg (n 6) 564–66.

is whether all these provisions are applicable or not, i.e. whether a conviction may be entered for each offence or not.

33.2.1.1.1 Class 1: non-application of a concurring offence

The simplest example of this type of situation is one act which violates two criminal provisions at once but results in only one conviction. Because only one provision will be applied and not both, this type of legal consequence is known as ‘apparent’ or ‘false concurrence’ (*concours apparent d’infractions; concorso apparente di norme; concurso aparente de leyes; Gesetzeskonkurrenz*) in Continental European doctrine or as the situation that several nominally distinct offences are ‘in reality’ only one and the same offence. The reason for such a rule of non-application ultimately is a generalized assumption of legislative intent, i.e. a rule of interpretation.¹²

(i) The clearest case in this class is the situation of *logical inclusion*: The definition of one offence (e.g. consisting of the elements a+b) is completely contained in or subsumed under the definition of another (e.g. consisting of the elements a+b+c), so that the included offence is a logical subset of the other and both stand in a relationship of *genus ad speciem*. Hence, the violation of the greater offence, or *lex specialis*, necessarily—i.e. without exception—includes the violation of the lesser offence, or *lex generalis*. In domestic law, typical situations are more or less severe variations of a basic crime or compound offences combining several predicate offences. Notwithstanding terminological diversity, national legislations agree widely that only the *lex specialis* or greater offence shall apply ('merger of offences', 'unilateral specialty', *especialidad, specialità, Spezialität, lex specialis derogat legi generali*) and a conviction for the lesser-included offence must not be entered.¹³

(ii) There is considerably less agreement among national laws whether this result is appropriate in other situations as well, e.g. when two offences stand in the logical relationship of interference (or ‘reciprocal specialty’). *Interference* means that two offence definitions overlap either logically (one offence contains the elements a+b, the other the elements b+c) or factually, so that it is not necessary but is possible that the same conduct violates these two offences. If two offences are typically although not necessarily violated at once because they are closely related so as to protect the same or cognate interests, a conviction for only one of the two offences may be considered sufficient to characterize the criminal wrong. The concept is known as ‘consumption’ (*consunción, consunzione, Konsumtion, maius delictum absorbet minus, lex consumens derogat legi consumptae*) in civil-law countries and not unknown to common-law jurisdictions.¹⁴

(iii) A related, not easily distinguished, and therefore controversial subgroup is known in civil-law jurisdictions as ‘subsidiarity’ or ‘subordination’ (*subsidiariedad, sussidiarietà, Subsidiarität, lex primaria derogat legi subsidiariae*). The basic idea here is that one of two interfering offences operates as a residual clause—either by explicit

¹² Stuckenberg (n 6) 587–8. ¹³ For references see Stuckenberg (n 6) 567–8, 586–7.

¹⁴ For references see Stuckenberg (n 6) 591–4.

enactment or by way of construction ('tacit subsidiarity')—in relation to another, usually because one offence describes a less intensive form (e.g. attempt, accomplice liability) of the same type of criminal conduct, and is therefore assumed to apply only if the other offence does not. Obviously, many instances of subsidiarity can also be understood as cases of inclusion (specialty) or consumption.

33.2.1.1.2 Class 2: application of all concurring offences: norm competition

If the two or more offences violated by the same behaviour are not deemed to be the 'same offence', i.e. do not represent a case of 'false concurrence', convictions may be entered for all offences. In the civil-law tradition, this situation of norm competition is traditionally known as 'ideal concurrence' (*concours de qualifications/concours idéal d'infractions, concurso ideal, concorso ideale/formale di reati, Idealkonkurrenz*).

In principle, there is nothing inherently unfair in the pronunciation of multiple convictions for the same conduct as long as the resulting punishment is consistent with the accepted aims of criminal law.¹⁵ Repeatedly, the 'very real risk' of prejudice to the accused (like increased public blame, societal stigma, losing eligibility for early release under the law of the state enforcing the sentence, etc.) has been cited as a reason against allowing cumulative convictions based on the same facts.¹⁶ This argument is correct only if the offences in question are not logically separate because a double conviction for the greater *and* the lesser offence is tautological, and hence unnecessary to fully describe what the accused did.¹⁷ Consequently, the argument is fundamentally flawed if the offences concerned are logically independent. If all statutory provisions are found to be applicable, then the defendant has to be convicted for the violation of all of them. This is not unfair because he gets exactly what his deed deserves: why should he who manages to break two provisions at once be treated the same way as he who breaks only one law? On the contrary, if all provisions are applicable, then cumulative convictions are necessary in order to adequately express what the accused did.¹⁸

It is a separate question how to determine the sentences based on these multiple convictions, especially how to calculate the total amount of punishment. The rules on sentencing in norm competition cases differ in domestic laws in form (multiple sentences which are served either concurrently or consecutively; multiple sentences which are combined in special ways with resulting joint or unitary sentences) and substance (absorption of the lower sentences, aggravation of the severest sentences, or addition of the sentences).¹⁹ The only common maxim appears to be that the violation of several provisions by one factual unit of behaviour ('act', etc.) is regularly punished less severely than the violation of several provisions by unrelated acts.²⁰

¹⁵ But see Olusanya (n 2) 25, 50, 75. There is neither a violation of the principle of legality (*nullum crimen sine lege*) nor of the prohibition of *ne bis in idem*, as Bogdan (n 2) 27, 31, assumes.

¹⁶ Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, Judgment, *Delalić*, IT-96-21-A, AC, ICTY, 20 February 2001, para. 23; Judgment, *Kunarac*, IT-96-23 and IT-96-23/1A, AC, ICTY, 12 June 2002, para. 169 ('*Kunarac Appeals Judgment*').

¹⁷ Stuckenberg (n 6) 589.

¹⁸ Partial Dissenting Opinion of Judge Shahabuddeen, Judgment, *Jelisić*, IT-95-10-A, AC, ICTY, 5 July 2001, para. 34: 'To record the full criminality of his conduct, it may be necessary to convict of all the crimes, overlapping in convictions being adjusted through penalty'.

¹⁹ For references see *Kupreškić Trial Judgment* (n 4) paras 713 ff; Stuckenberg (n 6) 567–9, 596–9.

²⁰ For references see Stuckenberg (n 6) 598–9.

Since crimes under international law do not have divergent sentencing ranges, the need for precise rules on sentencing arithmetic may seem less pressing but, in any event, justice and equal treatment require rules for the determination of the total amount of punishment,²¹ be it by combination of several sentences or otherwise.

33.2.1.2 Non-identity of facts constituting several offences

In addition to situations of logical and factual coincidence, it may be mere procedural coincidence that a court has to adjudicate several offences at once. In other words, several violations, which are not committed through the same acts and may even arise out of totally unrelated incidents, are connected only by the same trial. This group can again be subdivided as before according to the type of legal consequence.

33.2.1.2.1 Class 3: non-application of a concurring offence

Even if separate acts violate separate criminal laws, considerations similar to ‘false concurrence’ situations may apply. Offences which are typically concomitant or ancillary to others, like separately punishable preparatory acts (conspiracy, acquisition of a weapon) or subsequent acts (securing or using stolen goods, concealing the crime, etc.) may be of lesser seriousness than the principal offence and, if no new harm is caused, be deemed irrelevant for sentencing purposes. This class is known in some legal orders as *actos anteriores/posteriores impunes/copenados* or *mitbestrafte Vortat/Nachtat*.

33.2.1.2.2 Class 4: application of all concurring offences: norm competition

If all offences violated by several acts or criminal episodes are deemed applicable, the pronunciation of several convictions seems natural. This class bears the civil-law name of ‘real concurrence’ (*concours réel d’infractions*, *concurso real*, *concorso materiale di reati*, *Realkonkurrenz*) and refers to the corresponding sentencing principles. As with ideal concurrence, national laws differ again in form and substance; often, the total amount of punishment for real concurrence is higher than for ideal concurrence. However, some legal orders do not distinguish between ideal and real concurrence, while others leave the determination of the overall sentence to the discretion of the judge or jury, etc.²²

Again, although crimes under international law lack differentiated sentencing scales, rules on the combination of several sentences are necessary all the same, and these rules should be sound in light of both criminal law theory and the goals of international criminal justice.

33.2.2 Customary law

There were no rules on substantive *concursus delictorum* in customary international criminal law before the establishment of the ad hoc Tribunals.²³ Their statutes as well

²¹ Stuckenberg (n 6) 561–3.

²² For references see Stuckenberg (n 6) 600–2.

²³ See Kupreskić Trial Judgment (n 4) paras 673–7; Kaing Appeals Judgment (n 3) para. 290.

as the statutes of other tribunals are silent on the issue. Cases of multiplicity of offences are addressed only by Rule 87 (and formerly 101),²⁴ identical in its terms of both the Rules of Procedure and Evidence (RPE) of the ICTY²⁵ and the ICTR,²⁶ which reflects traditional²⁷ common-law practice but does not prescribe under which circumstances multiple sentences shall be made concurrent or cumulative.

33.2.2.1 Class 1

The efforts of the ad hoc Tribunals to establish rules on *concurrus delictorum* have been focused almost exclusively on the question of when cumulative convictions are admissible for crimes based on the same facts, i.e. the Class 1 situation. The earlier and more comprehensive approach in *Kupreškić*²⁸ has been subsequently watered down by the ICTY Appeals Chamber in the Čelebići judgment,²⁹ which has become the leading precedent on the issue,³⁰ followed also by the ICTR,³¹ the SCSL,³² and, after close

²⁴ Rule 87(C): ‘If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.’ Former Rule 101(C) in the RPE of the ICTY/ICTR reads: ‘The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.’ Rule 101(C) remains identically retained in the RPE of the SCSL, adopted 16 January 2002, as amended on 31 May 2012.

²⁵ ICTY RPE (adopted 11 February 1994, as amended on 22 May 2013) UN Doc IT/32/Rev.49.

²⁶ ICTR RPE (adopted 29 June 1995, as amended on 13 April 2013).

²⁷ In comparison, the adoption of sentencing guidelines in the United States (United States Sentencing Commission, 2012 Federal Sentencing Guidelines Manual, Ch. 3 Pt. D, Multiple Counts) and England and Wales (pursuant to the Coroners and Justice Act 2009; see Sentencing Council, Definitive Guideline: Offences Taken into Consideration and Totality, 2012, 5ff), even where they are only advisory and not binding, represents a quantum leap in sentencing law by replacing nearly unfettered judicial discretion with complicated sets of detailed rules.

²⁸ *Kupreškić* Trial Judgment (n 4) paras 637–748.

²⁹ Judgment, *Delalić (Čelebići)*, IT-96-21-A, AC, ICTY, 20 February 2001, paras 400–13.

³⁰ Cf. Judgment, *Jelisić*, IT-95-10-A, AC, ICTY, 5 July 2001, para. 82; Appeal Judgment, *Kupreškić*, IT-95-16-A, AC, ICTY, 23 October 2001, para. 387 (*Kupreškić Appeals Judgment*); *Kunarac Appeals Judgment* (n 16) paras 168–74; Judgment, *Kordić*, IT-95-14/2-A, AC, ICTY, 17 December 2004, paras 1032–3 (*Kordić Appeals Judgment*); Judgment, *Stakić*, IT-97-24-A, AC, ICTY, 22 March 2006, para. 356 (*Stakić Appeals Judgment*); Judgment, *Naletilić*, IT-98-34-A, AC, ICTY, 3 May 2006, paras 584–5 (*Naletilić Appeals Judgment*); Judgment, *Galić*, IT-98-29-A, AC, ICTY, 30 November 2006, para. 163; Judgment, *Strugar*, IT-01-42-A, AC, ICTY, 17 July 2008, paras 321–2; Judgment, *Krajišnik*, IT-00-39-A, AC, ICTY, 17 March 2009, para. 386; Judgment, *Milošević*, IT-98-29/1-A, AC, ICTY, 12 November 2009, para. 39; Judgment, *Popović*, IT-05-88-T, TC, ICTY, 10 June 2010, para. 2111; Judgment, *Stanišić*, IT-08-91-T, TC, ICTY, 27 March 2013, vol. 2, para. 905; Judgment, *Prlić*, IT-04-74-T, TC, ICTY, 29 May 2013, vol. 4, para. 1253; *Bogdan* (n 2) 9–30; N Valabhji, ‘Cumulative Convictions Based on the Same Acts Under the Statute of the ICTY’ (2002) 10 *Tulane Journal of International and Comparative Law* 185; H Azari, ‘Le critère Celebici du cumul des déclarations de culpabilité en droit pénal international’ (2007) *Revue de science criminelle et de droit pénal comparé* 1.

³¹ Judgment, *Musema*, ICTR-96-13-A, AC, ICTR, 16 November 2001, paras 358–70 (*Musema Appeals Judgment*); Judgment and Sentence, *Ndindabahizi*, ICTR-2001-71-I, TC, ICTR, 15 July 2004, para. 491 (*Ndindabahizi Trial Judgment*); Judgment, *Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, AC, ICTR, 13 December 2004, para. 542; Judgment, *Nahimana*, ICTR-99-52-A, AC, ICTR, 28 November 2007, para. 1019 (*Nahimana Appeals Judgment*).

³² Judgment, *Fofana*, SCSL-04-14-A, AC, SCSL, 28 May 2008, para. 220; see also Judgment, *Fofana*, SCSL-04-14, TC, SCSL, 2 August 2007, para. 974; Judgment, *Brima* (‘AFRC case’) SCSL-2004-16-A, AC, SCSL, 3 March 2008, para. 202; Judgment, *Sesay*, SCSL-04-15-A, AC, SCSL, 26 October 2009, paras 1190–3.

scrutiny, the ECCC³³. Incompatible earlier approaches have been abandoned since.³⁴ The so-called Čelebić test is a true copy of the American test outlined in *Blockburger v United States*,³⁵ which allows cumulative convictions if the relationship of the offences is not one of logical inclusion:

[M]ultiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.³⁶

This restates the near-universal rule that the *lex specialis* bars the application of the included *lex generalis*. It is a question of law whether the legal definition of one offence is a logical subset of the other's definition,³⁷ including the chapeau elements.³⁸ Therefore, the procedural couching of the test is unnecessary and misleading. In fact, this confusion has, on more than one occasion, led international courts to the erroneous conclusion that cumulative convictions are forbidden if the same evidence is used in the particular case at bar to prove several offences.³⁹ Meanwhile, courts habitually stress that the test relates to the legal elements of the relevant statutory provisions but not to the specific facts of the case.⁴⁰

Though the test seems simple, its application to concrete offences has proven difficult,⁴¹ for example whether cumulative convictions may be entered for persecution

³³ *Kaing* Appeals Judgment (n 3) paras 291–300.

³⁴ Like the test developed in Judgment, *Akayesu*, ICTR-96-4-T, TC, ICTR, 2 September 1998, paras 468–70 (cumulative convictions are acceptable where the offences have different elements, where the provisions creating the offences protect different interests, or where it is necessary to record a conviction for both offences in order fully to describe what the accused did); see also Judgment, *Kayishema*, ICTR-95-1-T, TC, ICTR, 21 May 1999, paras 627 ff; Stuckenberg (n 6) 575–6, 577–8.

³⁵ *Blockburger v United States* (1932) 284 US 299, 304: ‘The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one, is whether each provision requires proof of an additional fact which the other does not.’ Cf. *Morey v Commonwealth* (1871) 108 Mass. 433, 434.

³⁶ Čelebić (n 29) paras 412–13.

³⁷ *Kunarac* Appeals Judgment (n 16) para. 174; *Kordić* Appeals Judgment (n 30) para. 1032; *Krajišnik* (n 30) para. 387; *Strugar* (n 30) para. 322; *Stakić* Appeals Judgment (n 30) para. 356; *Prlić* (n 30) para. 1254; *Nahimana* Appeals Judgment (n 31) para. 1020; *Sesay* (n 32) para. 1191.

³⁸ *Musema* Appeals Judgment (n 31) para. 363; *Nahimana* Appeals Judgment (n 31) para. 1019; *Prlić* (n 30) para. 1254; Partial Dissenting Opinion of Judge Shahabuddeen (n 18) paras 30 ff, 35; contra Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna (n 16) paras 24–33.

³⁹ *Kayishema* (n 34) paras 647–8; Judgment, *Kaing*, 001/18-07-2007/ECCC/TC, TC, ECCC, 26 July 2010, para. 565 (‘*Kaing* Trial Judgment’). The error was also made in *Kupreškić* Trial Judgment (n 4) para. 707.

⁴⁰ *Stakić* Appeals Judgment (n 30) para. 356; *Milošević* (n 30) para. 39; *Kordić* Appeals Judgment (n 30) paras 1033 and 1040; *Naletilić* Appeals Judgment (n 30) para. 589; *Stanišić* (n 30) paras 906 and 909; *Prlić* (n 30) para. 1254 fn. 2340; *Sesay* (n 32) para. 1191; *Kaing* Appeals Judgment (n 3) paras 324–6.

⁴¹ Friman et al. (n 6) 451–2; see e.g. I Hünerbein, *Straftatkonkurrenzen im Völkerstrafrecht: Schuld spruch und Strafe* (Berlin: Duncker & Humblot 2005) 98–179; F Palombino, ‘Should Genocide Subsume Crimes against Humanity? Some Remarks in the Light of the Krstić Appeal Judgment’ (2005) 3 *Journal of*

as a crime against humanity and murder as a crime against humanity,⁴² or not.⁴³ It is a matter of interpretation of the offences concerned whether they are *leges speciales* to others and will therefore not be treated here. It may suffice to say that cases of true logical inclusion are exceedingly rare in international criminal law, in particular, if the context elements of the respective chapeaus are taken into account (and there is no way around this unless a context element is exclusively of a jurisdictional nature⁴⁴). Therefore, other forms of ‘apparent concurrence’ should be given more thought.

But, unfortunately, the usual emphasis on the Čelebići test obscures the fact that there are more situations of *concursum delictorum* to be solved than merely specialty (inclusion). Actually, the test is applied in such a way that multiple convictions are not only permissible but *mandatory* if each statutory provision involved has a materially distinct element not contained in the other, thereby excluding any other form of ‘apparent concurrence’ like consumption and subsidiarity without further reasoning. Attempts to introduce further limitations of cumulative convictions based on considerations of consumption or subsidiarity have been made on occasion,⁴⁵ but without success. In *Stakić*, the Appeals Chamber made it clear that, if the Čelebići test is fulfilled, the Trial Chamber has no discretion to convict cumulatively or not, and therefore no further limitations are permissible.⁴⁶ Deplorably, the Appeals Chamber did not feel the necessity to supply substantive reasons for this view.

In contrast, the SCSL Appeals Chamber refused to enter cumulative convictions for forced marriages in the AFRC case as ‘outrages upon personal dignity’ (as a war crime) and as ‘other inhumane acts’ (as a crime against humanity), although these offences have materially distinct elements and thus:

there is no bar to entering cumulative convictions for both offences on the basis of the same facts. However, in this case the Appeals Chamber is inclined against entering such cumulative convictions. The Appeals Chamber is convinced that society’s disapproval of the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread or systematic attack against the civilian population, is adequately reflected by recognising that such conduct is criminal and that it constitutes an ‘Other Inhumane Act’ capable of incurring individual criminal responsibility in international law.⁴⁷

International Criminal Justice 778, 780–5; C Burchard, ‘Torture in the Jurisprudence of the Ad Hoc Tribunals: A Critical Assessment’ (2008) 6 *Journal of International Criminal Justice* 159, 171ff.

⁴² *Krajišnik* (n 30) paras 388–91; *Kordić* Appeals Judgment (n 30) paras 1040–3; *Naletilić* Appeals Judgment (n 30) paras 587–90; *Stakić* Appeals Judgment (n 30) paras 355 ff, 359; *Kaing* Appeals Judgment (n 3) paras 301 ff, 316–35; see also *Nahimana* Appeals Judgment (n 31) paras 1026–7.

⁴³ Judgment, *Krstić*, IT-98-33-A, AC, ICTY, 19 April 2004, paras 230–3; Judgment, *Vasiljević*, IT-98-32-A, AC, ICTY, 25 February 2004, paras 135, 144–6; Judgment, *Krnojelac*, IT-97-25-A, AC, ICTY, 17 September 2003, para. 188; *Stanišić* (n 30) paras 909–12.

⁴⁴ Cf. Partial Dissenting Opinion of Judge Shahabuddeen (n 18) paras 36–44.

⁴⁵ E.g. Judgment, *Stakić*, IT-97-24-T, TC, ICTY, 31 July 2003, para. 870 (‘*Stakić* Trial Judgment’): ‘The guiding principle in these circumstances would be for the Chamber, in the exercise of its discretion, to convict only in relation to the crime that most closely and most comprehensively reflects the totality of the accused’s criminal conduct’; Palombino (n 41) 786–9; see also *Kupreškić* Trial Judgment (n 4) paras 686–92; Separate and Dissenting Opinion of Judge Dolenc, Judgment and Sentence, *Semanza*, ICTR-97-20-T, TC, ICTR, 15 May 2003, paras 14, 17–19, 22–6.

⁴⁶ *Stakić* Appeals Judgment (n 30) para. 358; *Strugar* (n 30) para. 324.

⁴⁷ AFRC case (n 32) para. 202.

This reasoning appears to be based on considerations similar to consumption and subsidiarity, namely, that it may not be necessary to record a conviction of the residual category ‘other inhumane act’ if the wrong is already sufficiently covered by a more specific offence (albeit a war crime and not *lex specialis* in the technical sense). A conviction for the crime against humanity would have added to the description of what the accused did only in the circumstance where such outrages were committed ‘as part of a widespread or systematic attack’, which here was already evident from the adjacent convictions.

33.2.2.2 Class 2

International criminal tribunals have only rarely spelled out how they mould several sentences into a single sentence or how they determine the length of several concurrent sentences.⁴⁸ The *Kupreškić* Trial Chamber opined that the sentences should be served concurrently and that the sentence for the more serious offence may be aggravated if the less serious offence committed by the same conduct significantly adds to the heinous nature of the prevailing offence.⁴⁹ The Appeals Chamber, however, declined to fix any particular rules and contented itself with a reference to the English ‘totality principle’, stating that:

[T]he overarching goal in sentencing must be to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender. This can be achieved through either the imposition of one sentence in respect of all offences, or several sentences ordered to run concurrently, consecutively or both. The decision as to how this should be achieved lies within the discretion of the Trial Chamber.⁵⁰

Later, one of the ICTY Trial Chambers added that, ‘[t]he prejudice that an offender will or may suffer because of cumulative convictions based on the same conduct has to be taken into account when imposing the sentence’.⁵¹

Although it is not clear how this prejudice can be numbered, there is no doubt that the totality principle is eminently sensible and, thanks to its sweeping generality, capable of universal acceptance. Yet it is regrettable that the Appeals Chamber gave—in contrast, for example, to English law⁵²—no guidance at all on how a Trial Chamber should exercise its broad discretion. Admittedly, the particularities of international criminal law—including the lack of penalty scales and extreme seriousness of the crimes—render it far more difficult to develop appropriate rules than in a domestic law context, but the effort should be made all the same.

⁴⁸ Cf. recently *Prlić* (n 30) paras 1294 ff, where cumulative convictions are discussed without indicating how these affect the total sentence.

⁴⁹ *Kupreškić* Trial Judgment (n 4) para. 718.

⁵⁰ *Čelebići* (n 29) para. 430.

⁵¹ *Kunarac* Trial Judgment (n 2) para. 551; Judgment, *Vasiljević*, IT-98-32-T, TC, ICTY, 29 November 2002, para. 266.

⁵² See the Sentencing Guideline on Totality (n 27).

33.2.2.3 Class 3

Since the Čelebići test focuses on multiple crimes committed by the same acts, the question inherent in the Class 3 situation (whether multiple convictions are always permissible for offences based on distinct acts) is rarely discussed⁵³—and even erroneously answered in the negative⁵⁴—although it occurs regularly, for instance, when several forms of responsibility are affirmed,⁵⁵ for example accomplice liability and liability as a principal, or genocide and complicity in genocide,⁵⁶ conspiracy to commit genocide and genocide, an issue that has led to conflicting judgments.⁵⁷ Occasionally, chambers were even of the opinion that concurrence between modes of liability is not a problem of *concurrētē delictorum*,⁵⁸ although there is in reality no material difference.

In the early case of *Akayesu*, a Trial Chamber of the ICTR stated that a person cannot be guilty of both genocide and complicity to genocide because it thought that both crimes were ‘mutually exclusive’.⁵⁹ Recently, a Trial Chamber of the ICTY held in *Popović* that entering a conviction for the substantive offence of genocide renders redundant a conviction for conspiracy, notably when proof of the substantive offence is the main piece of evidence from which an inference of a prior illegal agreement is drawn and upon which the conspiracy conviction is based,⁶⁰ and founded this result on ‘the fundamental principle animating the concern regarding multiple convictions for the same act’, namely ‘fairness to the accused’, as well as on the ‘unique nature of the offence of conspiracy’.⁶¹ While the impact of ‘fairness’ remains vague, it is sensible not to enter convictions for inchoate crimes and preparatory acts if the defendant later committed the substantive offence as a principal because these are merely different levels of liability for the same wrong, the result being that the fully consummated offence consumes all the others. In the same vein, superior responsibility has been considered subsidiary to other modes of liability,⁶² and ordering a crime has been considered to subsume aiding and abetting;⁶³ commission has been held to exclude

⁵³ *Popović* (n 30) paras 2118–27.

⁵⁴ AFRC case (n 32) para. 212: ‘The problem of impermissibly cumulative or concurrent convictions does not arise when the alleged crimes are not based upon the same criminal conduct’, citing *Galić* (n 30) para. 167.

⁵⁵ See B Burghardt, *Die Vorgesetztenverantwortlichkeit im völkerstrafrechtlichen Strafatsystem* (Berlin: Berliner Wissenschafts-Verlag 2008) 373–81, 423–8.

⁵⁶ *Akayesu* (n 34) para. 468.

⁵⁷ Judgment and Sentence, *Musema*, ICTR-96-13-A, TC, ICTR, 27 January 2000, para. 198, which refused to enter cumulative convictions in contrast to Judgment, *Nahimana*, ICTR-99-52-T, TC, ICTR, 3 December 2003, para. 1043.

⁵⁸ *Kordić* Appeals Judgment (n 30) para. 1030; cf. Judgment, *Orić*, IT-03-68-T, TC, ICTY, 30 June 2006, para. 339.

⁵⁹ *Akayesu* (n 34) paras 532, 700, and 734.

⁶⁰ *Popović* (n 30) paras 2124 and 2126.

⁶¹ *Popović* (n 30) paras 2123–4.

⁶² Judgment, *Blaškić*, IT-95-14/A, AC, ICTY, 29 July 2004, paras 91–2; *Kordić* Appeals Judgment (n 30) paras 34–5; *Orić* (n 58) paras 339–43; Judgment, *Kajelijeli*, ICTR-98-44A-A, AC, ICTR, 23 May 2005, para. 81.

⁶³ Judgment, *Kamuhanda*, ICTR-99-54A-A, AC, ICTR, 19 September 2005, para. 77; cf. the separate opinions of Judge Schomburg, paras 386–9 and Judge Shahabuddeen, paras 401–16; but see the ‘alternative findings’ in *Ndindabahizi* Trial Judgment (n 31) para. 485, understood as cumulative in Judgment, *Ndindabahizi*, ICTR-01-71-A, AC, ICTR, 16 January 2007, paras 122–3.

an additional conviction for planning, although this may be taken into account at the sentencing stage.⁶⁴

33.2.2.4 Class 4

In international criminal cases, it is not easy to ascertain whether cumulative convictions for separate acts have led to stiffer sentences than cumulative convictions for the same acts. It seems that the option, where available, to impose consecutive sentences has never been used.

Although there are some good reasons to establish a sentencing differential between ‘ideal’ and ‘real’ concurrence,⁶⁵ this seems certainly more appropriate in the context of ‘ordinary crimes’ than in relation to massively complex crimes like those typical for international criminal law which are designed to subsume vast clusters of behaviour under one single offence. Nonetheless, there is presumably a comparable difference in blameworthiness between the situation that a crime against humanity and a war crime are committed by the same act and the situation that they are committed in independent criminal episodes. Accordingly, a more principled approach to sentencing multiple offences arising out of various distinct acts seems desirable.

33.2.3 Rome Statute

The Rome Statute, the accompanying RPE, and Regulations of the Court do not address the question of *concursum delictorum*, although the final drafts of the Statute contained rudimentary proposals on that matter.⁶⁶ Article 78(3) of the Rome Statute provides that the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment, when a person has been convicted of more than one crime, and mandates a specified minimum (no less than the highest individual sentence) and maximum level (30 years’ imprisonment or a sentence of life imprisonment). While the technique of concurrent versus consecutive sentences is suppressed, the provision leaves open the preceding questions: in which situations can one speak of ‘more than one’ crime, under which conditions multiple convictions may be entered and how is the amount of the joint sentence to be determined?⁶⁷ Equally, the introduction to the Elements of Crimes merely states that ‘particular conduct may constitute one or more crimes’ without more.⁶⁸

⁶⁴ Judgment, *Kordić*, IT-95-14/2-T, TC, ICTY, 26 February 2001, para. 386; Judgment, *Brđanin*, IT-99-36-T, TC, ICTY, 1 September 2004, para. 268; cf. further *Stakić* Trial Judgment (n 45) paras 443 and 914.

⁶⁵ See Stuckenberg (n 6) 598–602 with further references.

⁶⁶ UN Doc A/51/22, 231–2, Art 47, Applicable penalties; Draft Statute for the ICC, UN Doc A/CONF.183/2/Add.1, 122–23, Art 77(3); cf. Stuckenberg (n 6) 571–2.

⁶⁷ Cf. S Walther, ‘Cumulation of Offences’ in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol. I (Oxford: Oxford University Press 2002) 494.

⁶⁸ Elements of Crimes, ICC-ASP/1/3(part II-B) 3–10 September 2002 (First Session of the ASP), as amended 31 May–11 June 2010 (Review Conference of the Rome Statute of the ICC, Kampala), General Introduction, para. 9.

Thus, it is the task of the ICC to develop the rules on *concursum delictorum* within the framework of Article 78(3) of the Rome Statute in accordance with Article 21. The adoption of the Čelebići test, although reasonable in ‘specialty’ situations, alone will be insufficient because there are more *concursum* problems to be solved, as seen above.

The judgments and corresponding sentencing decisions pronounced so far⁶⁹ did not have to address the issue. Decisions of the Pre-Trial Chambers on the practice of cumulative charging (see section 33.3.3) either expressly referred to the Čelebići test when stating that only distinct crimes may be charged cumulatively in relation to the same conduct, namely that each statutory provision allegedly breached requires at least one additional material element not contained in the other⁷⁰—although the test was arguably misapplied in the *Bemba* case—or tacitly relied on the test when accepting cumulative charges.⁷¹ Though still unclear, it seems equally likely and advisable that the ICC will follow the trodden path and endorse the Čelebići test in order to determine the permissibility of cumulative convictions.

However, the Court should not stop there like the ad hoc Tribunals and *require* cumulative convictions blindly in all cases of ‘reciprocal specialty’ and unrelated acts but give careful consideration to other principles under discussion in this area of law, for example whether it would be wiser to omit convictions for ancillary and residual offences (like ‘other inhumane acts’; cf. the AFRC case) and lesser or residual forms of liability (like conspiracy; cf. the *Popović* case).

33.3 Cumulative Charges

33.3.1 Principle

As a matter of principle, the rules on the cumulation of charges mirror the rules on cumulative convictions: Where cumulative convictions cannot be made, it makes no sense to permit cumulative charges.⁷²

Practical considerations do not alter this principle. In the frequent case of doubt, whether the greater offence or only the lesser offence can be proved beyond reasonable

⁶⁹ Cf. Judgment pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012; Decision on Sentence pursuant to Art 76 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2901, TC I, ICC, 10 July 2012; Jugement rendu en application de l’article 74 du Statut, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436, TC II, ICC, 7 March 2014; Décision relative à la peine (article 76 du Statut), *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3484, TC II, ICC, 23 May 2014.

⁷⁰ Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, ICC, 15 June 2009, para. 202 (‘Bemba Confirmation of Charges Decision’).

⁷¹ Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-373, PTC II, ICC, 23 January 2012, paras 280–1.

⁷² Stuckenberg (n 6) 589; accord *Kupreškić Trial Judgment* (n 4) para. 728; Friman et al. (n 6) 428 fn. 402; K Ambos, ‘Critical Issues in the Bemba Confirmation Decision’ (2009) 22 *Leiden Journal of International Law* 715, 724.

doubt at trial, a charge for the greater offence is sufficient if it permits a conviction for the lesser included crime; otherwise, alternative charges are appropriate.⁷³

The same applies if the law is unclear and the prosecutor cannot predict with sufficient certainty for which crime the court would enter a conviction if the conduct were proven. In jurisdictions where—unlike most international criminal tribunals with the exception of the ICC—the court has the power and the obligation—ICC Regulation 55 leaves this to the discretion of the Chamber—to change the legal qualification of a charge in accordance with the evidence (*iura novit curia*),⁷⁴ even alternative charges are superfluous.

Overcharging in the sense of bringing a cumulative charge, typically a very serious one, for the sole purpose of facilitating a plea agreement on lesser charges with subsequent withdrawal of that serious charge, is an inappropriate practice and should be prohibited.⁷⁵

33.3.2 Customary law

The prosecutors of the ad hoc Tribunals have established a practice of charging all possible crimes and modes of liability that has, not entirely without reason, been criticized as excessive.⁷⁶ This kind of practice has been widely accepted since and, apart from a few equivocal early decisions,⁷⁷ the ad hoc Tribunals⁷⁸ and the SCSL⁷⁹ agree that cumulative charges are always permissible if the Čelebići test is met. The relevant paragraph of the Čelebići Appeals Judgment does not even mention the test:

Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after

⁷³ Stuckenberg (n 6) 589–90 with fn. 132.

⁷⁴ See Friman et al. (n 6) 431–5.

⁷⁵ See the critique in Sentencing Judgment, *Nikolić*, IT-02-60/1-S, TC, ICTY, 2 December 2003, para. 65.

⁷⁶ Mettraux (n 1) 316.

⁷⁷ Decision on Defence Motion on the Form of the Indictment, *Tadić*, IT-94-1-T, TC II, ICTY, 14 November 1995, at 10: ‘In any event, since this is a matter that will only be relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading’; contrary *Kupreškić* Trial Judgment (n 4) para. 727; reversed in *Kupreškić* Appeals Judgment (n 30) paras 325–6; see also Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, *Ayyash*, STL-11-01/I, AC, STL, 16 February 2011, paras 287–90 with further references (‘Ayyash Interlocutory Decision on the Applicable Law’).

⁷⁸ Čelebići (n 29) para. 400; see also *Kupreškić* Appeals Judgment (n 30) para. 385; *Kunarac* Appeals Judgment (n 16) para. 167; *Naletilić* Appeals Judgment (n 30) para. 103; Judgment, *Rutaganda*, ICTR-96-3-T, TC, ICTR, 6 December 1999, paras 115–16; Decision on defence preliminary motion for defects in the form of the indictment, *Kanyabashi*, ICTR-96-15-I, TC II, ICTR, 31 May 2000, paras 5.5–5.7; see also Decision on Vinko Martinović’s Objection to the Amended Indictment and Mladen Naletilić’s Preliminary Motion to the Amended Indictment, *Naletilić*, IT-98-34-PT, TC, ICTY, 14 February 2001, para. B; Friman et al. (n 6) 388–9, 395–7.

⁷⁹ AFRC case (n 32) para. 212 with fn. 327.

the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence.⁸⁰

This seems to insinuate that cumulative charges are admissible even if cumulative convictions were not,⁸¹ and it remains unclear if this distinction was really intended. In any event, there are cases where cumulative charges have been accepted, although the respective crimes did not have at least one materially distinct element not contained in the other.⁸²

The permission of cumulative charges is deemed to include alternative charges *a maiore ad minus*.⁸³ For example, different heads of responsibility may be charged alternatively.⁸⁴

The ECCC⁸⁵ and the Special Tribunal for Lebanon (STL)⁸⁶ likewise permit cumulative charges if the Čelebić test is fulfilled. The STL Appeals Chamber noted that crimes which do not meet the test may be charged in the alternative,⁸⁷ whereas different modes of liability for the same offence should always be charged in the alternative.⁸⁸ It went on to stress that:

[t]he Pre-Trial Judge, in confirming an indictment, should be particularly careful to allow cumulative charging only when separate elements of the charged offences make these offences truly distinct. In particular, when one offence encompasses another, the Judge should always choose the former and reject pleading of the latter. Likewise, if the offences are provided for under a general provision and a special provision, the Judge should always favour the special provisions.⁸⁹

⁸⁰ Čelebić (n 29) para. 400.

⁸¹ Cf. Prosecution's Application for Leave to Appeal the Decision Pursuant to Art 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-427, OTP, ICC, 22 June 2009, para. 16 fn. 11; see also the critical view in Ambos, 'Critical Issues' (n 72) 724, fn. 82.

⁸² E.g. murder and extermination as crimes against humanity, Judgment, *Kamuhanda*, ICTR-95-54A-T, TC, ICTR, 22 January 2004, paras 685–8; Sesay (n 32) para. 1192. For further references see S SáCouto and K Cleary, 'Amicus Curiae Brief on the Practice of Cumulative Charging Before International Criminal Bodies Submitted to the Appeals Chamber of the Special Tribunal for Lebanon Pursuant to Rule 131 of the Rules of Procedure and Evidence' (2011) 22 *Criminal Law Forum* 409, 418–22.

⁸³ Judgment, *Naletilić*, IT-98-34-T, TC, ICTY, 31 March 2003, para. 510; *Naletilić*, Appeals Judgment (n 30) para. 102; see also Decision on Defence Preliminary Motions on the Form of the Indictment, *Kvočka*, IT-98-30/1-PT, TC, ICTY, 12 April 1999, para. 25; Decision on the Defence Preliminary Motion Challenging the Amended Indictment, *Mpambara*, ICTR-2001-65-I, TC, ICTR, 30 May 2005, para. 4.

⁸⁴ Decision on Form of the Indictment, *Mrkšić*, IT-95-13/1-PT, TC, ICTY, 19 June 2003, para. 62; Decision Regarding Defence Preliminary Motion on the Form of the Indictment, *Rašević*, IT-97-25/1-PT, TC, ICTY, 28 April 2004, para. 29.

⁸⁵ Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias 'Duch', *Kaing*, 011/18-07-2007-ECCC/OCIJ (PTC 02), PTC, ECCC, 5 December 2008, paras 85–8; see also *Kaing* Appeals Judgment (n 3) paras 291–300.

⁸⁶ *Ayyash* Interlocutory Decision on the Applicable Law (n 77) paras 265–301; compare Decision Relating to the Examination of the Indictment of 10 June 2011 Issued against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi, and Mr Assad Hassan Sabra, *Ayyash*, STL-11-01/I, PT J, STL, 28 June 2011, paras 89–95; see also M Gillett and A Schuster, 'Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism' (2011) 9 *Journal of International Criminal Justice* 989.

⁸⁷ *Ayyash* Interlocutory Decision on the Applicable Law (n 77) para. 271.

⁸⁸ *Ayyash* Interlocutory Decision on the Applicable Law (n 77) para. 298.

⁸⁹ *Ayyash* Interlocutory Decision on the Applicable Law (n 77) para. 298.

In a laudable call for clearer and shorter indictments, the STL Appeals Chamber added that:

[t]he Pre-Trial Judge should be guided by the goal of providing the greatest clarity possible to the defence.... The Pre-Trial Judge may also request that the Prosecutor reconsider the submission of formally distinct offences which nonetheless do not in practical terms further the achievement of truth and justice through the criminal process. That is, additional charges should be discouraged unless the rules contemplating the offences are aimed at protecting substantially different values.⁹⁰

The last two sentences, however, are surprising because the Appeals Chamber seems to resurrect and even expand—with a ‘values test’—the obsolete view of the *Kupreškić* Trial Chamber.⁹¹ Arguably, this is meant as a non-binding proposal for the exercise of prosecutorial discretion in drafting the indictment and not as a hard rule on the admissibility of charges.

33.3.3 Rome Statute

In the absence of any statutory provisions on the subject of multiple charges, one might have expected the ICC to follow the uniform practice of other international criminal tribunals. When the Pre-Trial Chamber adopted a very restrictive view on cumulative charges in *Bemba*, this caused a considerable stir and the question is still not finally settled.

Initially, the *Bemba* Pre-Trial Chamber appears to have banned cumulative charging altogether in its arrest warrant decision, stating:

[t]he Chamber moreover recalls that in his Application the Prosecutor appears on occasion to have presented the same facts under different legal characterisations. It wishes to make it clear that the Prosecutor should choose the most appropriate characterisation. The Chamber considers that the Prosecutor is risking subjecting the Defence to the burden of responding to multiple charges for the same facts and at the same time delaying the proceedings. It is for the Chamber to characterise the facts put forward by the Prosecutor.⁹²

The subsequent decision on the confirmation of charges explained that the Chamber is of the view that:

[t]he prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence. The Chamber considers that, as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges. This is only possible if each statutory provision allegedly breached in relation

⁹⁰ *Ayyash* Interlocutory Decision on the Applicable Law (n 77) para. 299.

⁹¹ *Kupreškić* Trial Judgment (n 4) para. 727(c), see *Ayyash* Interlocutory Decision on the Applicable Law (n 77).

⁹² Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08, PTC III, ICC, 10 June 2008, para. 25.

to one and the same conduct requires at least one additional material element not contained in the other.⁹³

With the citation of the Čelebići formula the Chamber seems to have returned to the established approach, although it insisted that the ICC legal framework differs from that of the ad hoc Tribunals, since Regulation 55 contains the *iura novit curia* principle and empowers the Trial Chamber to re-characterize a crime to give it the most appropriate legal characterization: ‘Therefore, before the ICC, there is no need for the Prosecutor to adopt a cumulative charging approach and present all possible characterisations in order to ensure that at least one will be retained by the Chamber.’⁹⁴

The Chamber held that rape as a crime against humanity is *lex specialis* to torture, because ‘the evidence...presented reflects the same conduct which underlies the count of rape’, so that, if the acts of rape are the instruments of torture, only rape can be charged,⁹⁵ and that the same applies in relation to rape as war crime and outrages against personal dignity.⁹⁶ The prosecution sought leave to appeal and contested the Chamber’s authority to decline the confirmation of charges because of impermissible multiplicity,⁹⁷ and argued that, in addition, the Chamber had misapplied the Čelebići test because it based its determination on the evidence of the case and not solely on the legal elements of the offences.⁹⁸ The application was rejected and the Chamber restated its understanding of the principle governing cumulative charges as follows:

Based on this understanding, the Chamber ruled in the 15 June 2009 Decision that where the Prosecutor relied on the *same evidence* pertaining to acts of rape to substantiate two or more legal characterisations, the specific elements of the crime of torture and outrages upon personal dignity were congruent with those of the crime of rape and, therefore, fully subsumed by the count of rape. However, the Chamber did not preclude the possibility that charges of rape and torture could be cumulative in the event the Prosecutor presented evidence that pertained to different specific elements not contained in the other.⁹⁹

Obviously, the Chamber deviated from the established understanding of the Čelebići test and adopted a position known as ‘concrete specialty’¹⁰⁰ which is considered erroneous in the jurisprudence of the ad hoc and other Tribunals.¹⁰¹ In substance, this position is utterly defendable under the principle of ‘consumption’,¹⁰² though not of

⁹³ *Bemba* Confirmation of Charges Decision (n 70) para. 202.

⁹⁴ *Bemba* Confirmation of Charges Decision (n 70) para. 203.

⁹⁵ *Bemba* Confirmation of Charges Decision (n 70) paras 199 ff, 205 fn. 282.

⁹⁶ *Bemba* Confirmation of Charges Decision (n 70) paras 301 ff, 312.

⁹⁷ Prosecution’s Application for Leave to Appeal, *Bemba* (n 81) paras 13–15.

⁹⁸ Prosecution’s Application for Leave to Appeal, *Bemba* (n 81) paras 16–18.

⁹⁹ Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo’, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-523, PTC II, ICC, 18 September 2009, para. 54.

¹⁰⁰ E.g. F Antolisei, *Manuale di diritto penale, parte generale*, 14th edn (Milano: Giuffrè 1997) para.

64 (p. 156); G Jakobs, *Strafrecht Allgemeiner Teil*, 2nd edn (Berlin: de Gruyter 1991) ch. 31 paras 13–15.

¹⁰¹ *Kayishema* (n 34) paras 647–8; *Kaing* Trial Judgment (n 39) para. 565. The error was also made in *Kupreškić* Trial Judgment (n 4) para. 707.

¹⁰² In this sense, see K Ambos, ‘Sexuelle Gewalt in bewaffneten Konflikten und Völkerstrafrecht’ (2011) *Zeitschrift für internationale Strafrechtsdogmatik* 287, 296.

'specialty' in the sense of 'logical inclusion'. Yet, the Chamber's reasoning is too imprecise to permit a definitive assessment of whether the decision represents a deliberate departure from the Čelebić rule—like the SCSL Appeals Chamber's in the AFRC case—or rather a misunderstanding of that rule.¹⁰³

The same Pre-Trial Chamber recently allowed cumulative charges of murder, persecution, and deportation or forcible transfer based on the same underlying acts in the *Ruto* case because the respective *offence definitions* contained materially distinct elements not present in the definition of the other offences, citing ICTY cases which expressly rejected an approach that takes into account the actual conduct of the accused as determinative of whether multiple convictions for that conduct are permissible.¹⁰⁴ Likewise, this Pre-Trial Chamber allowed cumulative charges of rape and torture in the subsequent decision on the arrest warrant against *Mudacumura*,¹⁰⁵ so that commentators already felt that it might have given up the *Bemba* approach.¹⁰⁶ In a decision on the arrest warrant in the *Al Bashir* case which was rendered after the *Bemba* arrest warrant ruling, a different Pre-Trial Chamber had accepted cumulative charges of murder and extermination based on the same conduct without comment.¹⁰⁷

So far, there has been no decision by the Appeals Chamber that settles the issue. Nonetheless, it appears unlikely that the ICC wishes to replace the Čelebić test by some other criterion. The Court's discretion to modify the legal qualification of the conduct charged could affect the pleading practice only insofar as cautionary alternative charges may become unnecessary if, in the future,¹⁰⁸ the prosecutor can unfailingly rely upon the Court to exercise its discretion to re-characterize facts in order to correct any legal errors that might be found in the document containing the charges.¹⁰⁹ Otherwise, the authority granted by Regulation 55—which still raises many practical questions¹¹⁰—has

¹⁰³ Cf. Friman et al. (n 6) 434; SáCouto and Cleary (n 82) 428–32.

¹⁰⁴ Decision on the Confirmation of Charges, *Ruto, Kosgey and Sang* (n 71) paras 280–1, quoting *Kordić* Appeals Judgment (n 30) paras 1040–2; Judgment, *Blagojević*, IT-02-60-T, TC, ICTY, 17 January 2005, paras 807–10; *Stakic* Appeals Judgment (n 30) para. 358.

¹⁰⁵ Decision on the Prosecutor's Application under Art 58, *Mudacumura, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/12-1-Red, PTC II, ICC, 13 July 2012, para. 50.

¹⁰⁶ E Chaitidou, 'Recent Developments in the Jurisprudence of the International Criminal Court' (2013) *Zeitschrift für internationale Strafrechtsdogmatik* 130, 142.

¹⁰⁷ Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-3, PTC I, ICC, 4 March 2009, paras 95–6.

¹⁰⁸ More optimistic K Ambos and D Miller, 'Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective' (2007) 7 *International Criminal Law Review* 335, 360; Ambos, 'Critical Issues' (n 72) 724.

¹⁰⁹ Currently, the practice seems to prefer the opposite course of charging a multitude of modes of liability in the alternative, Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, *Ntaganda, Situation in the Democratic Republic of Congo*, ICC-01/04-02/06-309, PTC II, ICC, 9 June 2014, paras 99–100; Decision on the confirmation of charges against Laurent Gbagbo, *Gbagbo, Situation in Côte d'Ivoire*, ICC-02/11-01/11-656-Red, PTC I, ICC, 12 June 2014, paras 227–9; but see Decision on applications for notice of possibility of variation of legal characterization, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1122, TC V, ICC, 12 December 2013, paras 32–44, where notice pursuant to Regulation 55(2) on alternative modes of liability was given even though the Pre-Trial Chamber had dismissed the prosecutor's attempt to bring alternative modes of liability in this case.

¹¹⁰ Compare 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

no bearing on the question of cumulative charges. Furthermore, cumulative charges are always desirable in the interests of fairness to the defendant if cumulative convictions are permissible, so as to inform him as soon as possible about the legal consequences at issue.

Hopefully the ICC will not content itself with the Čelebići rule but will acknowledge the need to develop the law on cumulative charges further by, for example, taking into consideration the slightly more progressive stance of the STL Appeals Chamber set out earlier.

33.4 Conclusion

Fifteen years after the first judicial decisions on the matter of cumulative charges and cumulative convictions, a robust albeit primitive set of judge-made rules has emerged, though many questions remain. The ICTY Appeals Judgment in the Čelebići case seemed to stifle attempts of further elaboration of the law for quite a while, but more recent decisions like those of the SCSL Appeals Chamber in the AFRC case, of the STL Appeals Chamber in Ayyash, and of the ICTY Trial Chamber in Popović demonstrate that there are many more questions in this area of the law to be addressed beyond the ‘logical inclusion’ theory, to which the *Blockburger* and Čelebići tests solely refer. The ICC still has to find its way in the maze of *concursum delictorum* but has the benefit of the views and insights of the other international criminal jurisdictions which should, if appropriate, be carefully revised.

55(2) of the Regulations of the Court’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2205, AC, ICC, 8 December 2009, paras 64–100; see also e.g. Décision relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3319, TC II, ICC, 21 November 2012; 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’, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3363, AC, ICC, 27 March 2013; for the negotiating history see G Bitti, ‘Two Bones of Contention between Civil and Common Law: The Record of the Proceedings and the Treatment of a Concursus Delictorum’ in H Fischer et al. (eds), *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin: Verlag Arno Spitz 2001) 273, 279; cf. also C Stahn, ‘Modification of the Legal Characterisation of Facts in the ICC System: A Portrayal of Regulation 55’ (2005) 16 *Criminal Law Forum* 1.

PART V

FAIRNESS AND EXPEDITIOUSNESS
OF ICC PROCEEDINGS

34

The International Criminal Standard of Proof at the ICC—Beyond Reasonable Doubt or Beyond Reason?

*Simon De Smet**

A judicial proof must be capable of dissection, element by element, so that it becomes completely clear what are the premises, what are the conclusions, why the latter are supposed to follow from the former, and with roughly how much probability they so follow.¹

34.1 Introduction

Standards of proof are a common and essential feature of modern systems of adjudication. Most judicial decisions involving facts can only be made on the basis of a standard of proof in one form or another. Because of the double requirement of diligence and finality, courts cannot postpone judgment indefinitely because they feel dubious about the evidence and want more time to investigate. Nor can they withhold judgment or declare a *non liquet* each time they believe that the available evidence is insufficient to indicate with enough certainty where the truth lies. Standards of proof provide the way out of such situations by telling the court how much uncertainty may remain in its final factual conclusion. If this level is not reached, then the court must deny entering the relevant finding and rule against the party with the burden of proof. In other words, standards of proof allocate the risk of error.

The concept of standards of proof is thus relatively simple and readily understood. What has proved exceedingly difficult and highly controversial, however, is how and where to set the standard of proof. Article 66(3) of the Rome Statute provides that ‘in order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt’. This language is very familiar from the common law standard of proof, which has also been adopted by other international criminal tribunals.² As will be seen, however, the meaning of the beyond reasonable doubt standard is far from clear even in those jurisdictions.³ Moreover, the ICC was intended to be a hybrid legal

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¹ J Cohen, *The Probable and the Provable* (Oxford: Oxford University Press 1977) 285.

² D Jacobs, ‘Standard of Proof and Burden of Proof’ in Sluiter et al. (eds), *International Criminal Procedure—Principles and Rules* (Oxford: Oxford University Press 2013) 1146–7.

³ According to G Boas et al., *International Criminal Law Practitioner Library—Volume III—International Criminal Procedure* (Cambridge: Cambridge University Press 2011) 385: ‘a precise definition...of what constitutes a “reasonable doubt” has proven elusive’.

system, where influences from all legal traditions were intended to play a role. It therefore comes as no surprise that the definition of the criminal standard of proof before the Court has not been a straightforward matter. So far, the jurisprudence of the Trial Chambers has not provided much insight into how the international criminal standard of proof is conceptualized at the ICC. On the contrary, the latest judgment of the Court⁴ shows deep divisions among the judges⁵ on how to interpret the international criminal standard of proof.⁶ In relation to the applicable standard of proof, the Majority declared:

We merely recall that the evidentiary standard based on a proof beyond reasonable doubt cannot imply that judges have reached ‘certainty’. Moreover, the approach whereby the probative value of each piece of evidence is evaluated in a fragmentary manner or one which would lead to the application of the beyond reasonable doubt standard to all the facts in the case, and even to those not indispensable for entering a conviction, would not, in our view, be consistent with the requirements of the Statute.⁷

Without wishing to enter the specific debate between the judges of the Majority and the dissenting judge, it is interesting to note two points: first, despite the fact that there was strong disagreement among the judges of Trial Chamber II as to the definition of the criminal standard of proof, still a verdict beyond reasonable doubt was reached by the Majority. Second, whatever doubts the dissenting judge may have had about the guilt of Germain Katanga were not deemed sufficiently ‘reasonable’ by the Majority to sway their opinion.⁸

⁴ Jugement rendu en application de l’article 74 du Statut, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436, TC II, ICC, 7 March 2014. Full disclosure: the author worked for Trial Chamber II on the *Katanga* case. It would be inappropriate to comment or state any opinion on this specific case. The remainder of this chapter should thus in no way be considered as a commentary on any of the positions expressed by either the majority or the dissenting judge.

⁵ It may be noteworthy that all three judges of Trial Chamber II hailed from the Civil Law tradition.

⁶ See, Minority Opinion of Judge Christine Van den Wyngaert, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436-AnxI, 7 March 2014, para. 172; and especially the Majority’s Concurring opinion of Judges Fatoumata Diarra and Bruno Cotte’, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436-AnxII, 7 March 2014.

⁷ Concurring opinion of Judges Fatoumata Diarra and Bruno Cotte (n 6) para. 4. It is interesting to note that the prosecutor had earlier accused this same Chamber of having misapplied the standard of proof in its judgment in the sister case *Prosecutor v Mathieu Ngudjolo*, where the accused was acquitted of all charges: ‘A number of key findings in the Judgment demonstrate a pattern whereby the Trial Chamber concluded that facts alleged by the Prosecution had not been established beyond reasonable doubt based on a possible alternative or competing inference or on other grounds. But, neither the competing inferences nor the other grounds purportedly establishing a reasonable doubt are based on evidence, logic, reason or common sense. At best, they establish a hypothetical alternative reading of the evidence. This demonstrates that the Trial Chamber, rather than applying the standard of proof beyond reasonable doubt, effectively required proof of the relevant facts to a degree of absolute certainty (i.e. beyond any doubt).’ Prosecution’s Document in Support of Appeal against the ‘Jugement rendu en application de l’article 74 du Statut’, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-39-Red2, OTP, ICC, 3 April 2013, para. 38.

⁸ See, for a general discussion, R Pruitt, ‘Guilt by Majority in the International Criminal Tribunal for the Former Yugoslavia: Does This Meet the Standard of Proof “Beyond Reasonable Doubt”?’, (1997) 10 *Leiden Journal of International Law* 557; and a short response by M Klamberg, *Evidence in International Criminal Trials* (Leiden: Martinus Nijhoff 2013) 130, who concludes that ‘if one judge of a three-judge panel finds that there is reasonable doubt, the minority judge may simply be wrong’. It is not clear

The only indication the Appeals Chamber has given so far, albeit in *dictum*, suggests a very high standard. In the *Al Bashir* case, the Appeals Chamber, in reaction to the definition and application of the standard of proof for issuance of a warrant of arrest by the Pre-Trial Chamber, stated that:

At [the arrest stage] it does not have to be certain that [the suspect] committed the alleged offence. Certainty as to the commission of the crime is required only at the trial stage of the proceedings (see article 66(3) of the Statute) when the Prosecutor has had a chance to submit more evidence.⁹

Considering that the Appeals Chamber was discussing standards of proof and that it made an express reference to Article 66(3) of the Statute, it is unlikely that this was a mere slip of the tongue. At the same time, it is unlikely that the Appeals Chamber literally meant that convictions before the ICC are only possible if the judges are *certain* about the guilt of the accused. Certainty, by definition, does not tolerate any doubt, whether reasonable or not. Yet, as the OTP pointed out in its appeal brief against Trial Chamber II's judgment in the case against Mathieu Ngudjolo:

the ‘beyond reasonable doubt’ standard (a) does not require that guilt be established beyond any conceivable doubt; and (b) only leads to an acquittal if the doubt in question is a truly ‘reasonable’ one that is supported by the trial record and consistent with logic and common sense.¹⁰

Perhaps the Appeals Chamber intended its reference to ‘certainty’ in the same aspirational manner as certain civil-law systems require their adjudicators to establish the ‘truth’.¹¹ Yet, terminologically and substantively, the two concepts are clearly distinct.¹² Whatever the true intention of the Appeals Chamber might have been, it may safely be concluded that the criminal standard of proof before the ICC is still uncertain and it remains to be seen if and when the Appeals Chamber will clarify matters.

In this chapter, attention will be focused on the theoretical choices involved in setting the standard of proof. Any meaningful discussion of standards of proof must involve two different elements: first, it must be determined which model of judicial fact-finding will be adopted in order to determine *how* the standard of proof will be

whether Klamberg is of the view that being ‘wrong’ also automatically means that the judge in question is ‘unreasonable’.

⁹ 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’, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-73, AC, ICC, 3 February 2010, para. 31.

¹⁰ Prosecution’s Document in Support of Appeal against the ‘Jugement rendu en application de l’article 74 du Statut’, *Ngudjolo* (n 7) para. 50. It is hard to disagree with the Prosecutor’s position from a textual or methodological point of view. Unfortunately, however, the Prosecutor did not offer any specific argument about how and where the standard of proof should be set. The addition of the adjective ‘truly’ does not do much to clarify the standard of reasonableness. Indeed, it is unlikely for any adjudicator to qualify his or her doubts as reasonable without considering this to be truly the case. Moreover, what is ‘truly reasonable’ is at least as subjective as what is ‘reasonable’ as such.

¹¹ M Taruffo, ‘Rethinking the Standards of Proof’ (2003) 51 *American Journal of Comparative Law* 667.

¹² ‘Truth’ is an absolute and categorical concept (something either is true or it is not), whereas ‘certainty’ is the highest level on a scale of probability. Significantly, it is possible to establish the truth without being certain of this (or vice versa). See generally, N Lemos, *An Introduction to the Theory of Knowledge* (New York: Cambridge University Press 2007) 14.

defined. Second, one must engage in a complex balancing exercise of all the relevant interests in order to determine *where* to set the applicable standard. In relation to the last point, the question also arises whether the appropriate level of the standard of proof may vary, depending on the nature of the case.

For most legal systems, asking such fundamental questions may appear somewhat artificial, given that they have been in operation for decades if not centuries. However, the ICC is a new jurisdiction, which should be unencumbered by old customs and traditions. On the contrary, despite having been in operation for over a decade now, the ICC still represents an ambitious fresh start and offers an opportunity to address the many theoretical, moral, and policy challenges with a clear and open mind. Indeed, at the time of writing, the ICC's jurisprudence with regard to standards of proof is still in its infancy. This thus seems an opportune moment to take a step back and reflect upon the way ahead.

34.2 Some Theoretical Considerations

It is a truism that judicial fact-finding is imperfect. Despite all best efforts, sooner or later findings will be made that do not correspond with the actual truth. There is nothing shocking about this. Perfect truths only exist in the abstract realm of formal logic. Judicial fact-finding relies on inferential reasoning on the basis of imperfect and incomplete evidence. Uncertainty is thus *inherent* in judicial fact-finding. How to deal with this uncertainty lies at the heart of the concept of standards of proof.

Two general approaches are possible in this regard. First, it may be considered that judicial fact-finders should be unencumbered by philosophical or other considerations. Under this subjective approach, fact-finders are asked to rely on their—presumed—innate ability and common sense to weigh evidence and draw correct inferences from it. Fact-finders are also presumed capable of evaluating the strength of the findings they make without needing any specific criteria. The second approach may be called formal, in the sense that it relies on fully developed models of inductive reasoning, which are thought to offer rational justification for conclusions reached in this manner.¹³ Under this approach, judicial fact-finders are expected to follow more or less strict rules or at least to reason in a particular manner in order to arrive at valid findings.¹⁴

The field which studies the principles and rules of judicial fact-finding, from which the different formal approaches derive, can be loosely referred to as legal epistemology. In essence, this discipline is concerned with applied inductive reasoning in a judicial context. However, as general epistemology offers no clear and unified theory of induction, legal epistemology cannot provide easy solutions to the problem of uncertainty.

¹³ It should be stressed from the outset that the formal approach in no way claims to be objective. Indeed, it is perfectly possible for two individuals to come to different conclusions, even though they have both applied the same formal model. It would lead too far to explain the reasons for this. In essence, the reason is that even under formal models of reasoning, fact-finders still draw heavily on their own background knowledge, which may differ considerably from one individual to another. See, for a discussion of the importance of generalizations based on background knowledge in fact-finding, T Anderson et al., *Analysis of Evidence* 2nd edn (New York: Cambridge University Press 2005) 262.

¹⁴ A distinction should be made between valid findings and true findings. A finding is valid if it is made in accordance with the applicable model of reasoning. However, validity does not guarantee accuracy. Indeed, a finding may be valid but not true, just like a true finding may be invalid.

All that can realistically be expected from legal epistemology is that it gives us a handle on uncertainty in the sense that it allows us to have more clarity about how to reason with and about evidence, and especially how to evaluate the strength of inferences that are based upon it. In other words, legal epistemology may help us to understand how strong or defeasible our findings are. As will be explained, there is no single theory in this regard, but different models about how to reason inferentially about evidence are on offer.

In what follows, a brief overview of the two general approaches will be given. Starting with the subjective approach, a brief discussion of how most domestic systems have dealt with the criminal standard of proof will illustrate how the subjective approach works in practice and what its potential pitfalls are. After that, four different formal approaches towards decision under uncertainty will be highlighted.¹⁵ Under any of these views, the criminal standard is not merely an indicator of a mental state to be reached by the adjudicator, but a reasoning procedure.¹⁶ In other words, whereas the subjective approach is concerned mainly with the mental ‘end-state’,¹⁷ formal approaches also describe the mental process leading there. First, the ‘classic’ probability theory will be presented, which is probably most familiar to many readers, but not always very well understood. Second, an interesting alternative to classic probability theory offered by the late Oxford scholar L Jonathan Cohen will be briefly explained. Third, we will introduce ‘Inference to the Best Explanation’ or ‘IBE’ and what it has to say about standards of proof. Finally, we will introduce interesting developments from argumentation theory and how they may provide a useful theoretical framework for thinking about standards of proof. This chapter will end with a few brief thoughts about where to set the standard of proof. Given that this question involves more political and moral considerations, about which this author has no particular claim of authority, this section will be kept short.

34.3 Subjective Standard of Proof

A standard of proof is said to be subjective when it leaves the adjudicator free to decide where to set the evidentiary threshold or simply describes the state of mind which the adjudicator must attain in order to make a factual finding, without giving a formal definition. Examples of the first kind can be found in Germany¹⁸ and Spain,¹⁹

¹⁵ Given the limitations of this chapter, these introductions will be very succinct. For a more in-depth treatment, see S De Smet, *Rethinking Fact-Finding by International Courts* (forthcoming, Cambridge University Press).

¹⁶ See, P Roberts and A Zuckerman, *Criminal Evidence* (New York: Oxford University Press 2004) 366.

¹⁷ H Ho, *A Philosophy of Evidence Law* (Oxford: Oxford University Press 2008) 174.

¹⁸ Section 261 of the German Strafprozessordnung (i.e. Criminal Procedure Code) reads as follows: ‘Über das Ergebnis der Beweisaufnahme entscheidet das Gericht nach seiner freien, aus dem Inbegriff der Verhandlung geschöpften Überzeugung.’ According to German jurisprudence, the adjudicator must attain ‘subjective certainty’. Although the jurisprudence clearly requires this level of certainty to be based on rational, ‘intersubjectively comprehensible’ considerations, it expressly deems a very high probability estimate as insufficient. See e.g. G Sander, ‘§ 261’ in Löwe-Rosenberg, *Die Strafprozessordnung und das Gerichtsverfassungsgesetz* vol. 6(2), 26th edn (Berlin: De Gruyter 2013) 198; U Eisenberg, *Beweisrecht der StPO—Spezialkommentar* 7th edn (München, C H Beck 2011) 372; L Meyer-Gossner and B Schmitt, *Beckische Kurz-Kommentare, Band 6, Strafprozessordnung* 55th edn (München: C H Beck 2012) 1118.

¹⁹ Art 741 of the Spanish Ley de Enjuicamiento Criminal (i.e. Criminal Procedure Code) reads as follows: ‘El Tribunal, apreciando, según su conciencia las pruebas practicadas en el juicio, las razones

where the law defines no particular criterion but leaves the evaluation of the evidence entirely free. At the same time, these procedural systems proclaim that the goal of criminal proceedings is to establish the truth²⁰ and give courts wide-ranging powers to that end. There is thus no standard of proof in the real sense of the word. Instead, courts have to determine when they have found the truth themselves in each case. As Taruffo points out, however, the conception of truth referred to is not an absolute epistemic truth but rather an idealized or ‘wishful-thinking’ way of defining the desired final outcome of the decision on the facts.²¹ How this idealized state is attained is left open and adjudicators are presumably at liberty to adopt whatever epistemic method they see fit.

In France the situation is similar to the German/Spanish model, although there the *Code de procédure pénale* expressly requires adjudicators to take a purely subjective approach. In particular, Article 353 of the *Code de Procédure Pénale* states that:

la loi...ne...prescrit pas de règles desquelles [les jurés] doivent faire particulièrement dépendre la plénitude et la suffisance d'une preuve; elle leur prescrit de s'interroger eux-mêmes dans le silence et le recueillement et de chercher, dans la sincérité de leur conscience, quelle impression ont faite, sur leur raison, les preuves rapportées contre l'accusé, et les moyens de sa défense. La loi ne leur fait que cette seule question, qui renferme toute la mesure de leurs devoirs: 'Avez-vous une intime conviction?'

For all its poetic elegance, it does not appear that the ‘intime conviction’ standard offers any specific guidance to the adjudicator. It merely describes the reflective, introspective, attitude the fact-finder is required to adopt.²² It is therefore unclear whether, as argued by Spencer and others,²³ the French criminal standard of proof is equal or similar to the beyond reasonable doubt standard. Although it may well be that in practice French courts arrive at similar levels of certainty before reaching a guilty verdict, it is difficult to maintain that the law formulates any specific requirements in this regard.

expuestas por la acusación y la defensa y lo manifestado por los mismos procesados, dictará sentencia dentro del término fijado en esta ley’.

²⁰ Section 244(2) of the German Strafprozessordnung (i.e. Criminal Procedure Code) reads as follows: ‘Das Gericht hat zur Erforschung der Wahrheit die Beweisaufnahme von Amts wegen auf alle Tatsachen und Beweismittel zu erstrecken, die für die Entscheidung von Bedeutung sind.’ Arts 683, 701, 713, and 726 Ley de Enjuicamiento Criminal (i.e. Criminal Procedure Code).

²¹ Taruffo (n 11).

²² This does not mean that French courts can do whatever they like, for they are subject to a duty to motivate their opinions adequately. See e.g. F Desportes and L Lazerges-Cousquer, *Traité de Procédure Pénale* (Paris: Economica, 2009) 424. Nevertheless, the fact remains that the adjudicator in the French system does not have to demonstrate on what basis he or she has concluded that his/her factual conclusions reach a specific level of certainty.

²³ J Spencer, ‘Evidence’ in M Delmas-Marty and J Spencer (eds), *European Criminal Procedures* (Cambridge: Cambridge University Press 2002) 600–2. It has been suggested that the fact that most Continental civil-law systems adhere to the principle of *in dubio pro reo* implies that civil-law judges are not free to do as they please. See e.g. J Jackson and S Summers, *The Internationalisation of Criminal Evidence* (New York: Cambridge University Press 2012) 212. Whilst it is not argued here that the subjective standard means that judges are entitled to convict anyone on a whim, it is hard to see how the rule that the defendant should enjoy the benefit of the doubt clarifies the standard if it does not also explain when a sufficient doubt exists. In other words, unless the legal system gives a more or less precise definition of what constitutes a sufficient doubt to trigger the *in dubio pro reo* principle, adjudicators can easily avoid its application by stating that, according to their subjective definition, the doubt was not sufficiently strong/reasonable, etc.

At a superficial level, then, the situation in most civil-law countries may appear quite different from the common law, where we find the well-known beyond reasonable doubt standard.²⁴ However, when one probes for a definition of the reasonable doubt standard, it transpires that there is very little specific indication as to what level of certainty the adjudicator must attain for conviction. On the contrary, the common-law criminal standard of proof is also rather opaque and leaves considerable freedom of interpretation to the adjudicator. Moreover, different jurisdictions have dealt with the question of whether and how to define the beyond reasonable doubt standard differently.

At one end, there are those jurisdictions which deem it inappropriate to give any definition of the beyond reasonable doubt standard. This is the case, for example, in Australia and the United States' 7th Federal Circuit.²⁵ The reasoning behind this approach seems to be that any attempt at explaining the meaning of beyond reasonable doubt is doomed to fail and can only lead to more confusion.²⁶ Another rationale for not defining the criminal standard of proof is that it is the juries' responsibility to define what constitutes a reasonable doubt in each case, thereby acknowledging the inherent subjectivity of the criminal standard of proof. This attitude is reflected very clearly in the Australian High Court's decision in *Green v The Queen*, where the High Court said:

A reasonable doubt is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances. It is that ability which is attributed to them which is one of the virtues of our

²⁴ For a historical perspective on the beyond reasonable doubt standard, see e.g. B Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* (Berkeley/Los Angeles: University of California Press 1991); B Shapiro, 'Changing Language, Unchanging Standard: From Satisfied Conscience to Moral Certainty and Beyond Reasonable Doubt' (2009) 17 *Cardozo Journal of International and Comparative Law* 511. Shapiro writes: 'Judicial terminology changed over time. The terms, in roughly chronological order, were "a satisfied conscience", "a satisfied understanding", "moral certainty", and finally "beyond reasonable doubt". All were meant to convey the same level of certainty in the minds of the jurors and all expected jurors to exercise their rational faculties.' It is interesting to note, in this regard, that the concept of 'moral certainty'—the immediate precursor of the beyond reasonable doubt standard—was originally used to describe the kind of unshakeable belief (but not physical or mathematical certainty) in the truth of Holy Scripture (Shapiro, 'Changing Language, Unchanging Standard', 268). See also J Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale University Press 2008), who argues that the beyond reasonable doubt standard was originally intended to protect the salvation of the adjudicator (which would be in jeopardy if adjudicators were to have the blood of innocent defendants on their hands); but see B Shapiro, 'The Beyond Reasonable Doubt Doctrine: "Moral Comfort" or Standard of Proof?' (2008) 2 *Law and Humanities* 149.

²⁵ United States, 7th Circuit, *Pattern Criminal Jury Instructions of the Seventh Circuit* 2012 edn, s. 1.04, at 5.

²⁶ See e.g. *United States v Glass* (7th Circuit 1988) 846 F.2d 386, 387: 'This case illustrates all too well that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." *Holland v United States*, 348 U.S. 121, 140 (1954). And that is precisely why this circuit's criminal jury instructions forbid them. See Federal Criminal Instructions of the Seventh Circuit 2.07 (1980). "Reasonable doubt" must speak for itself. Jurors know what is "reasonable" and are quite familiar with the meaning of "doubt." Judges' and lawyers' attempts to inject other amorphous catch-phrases into the "reasonable doubt" standard, such as "matter of the highest importance," only muddy the water.' See also Australian High Court, *Brown v The King* (1913) 17 CLR 570, 584 (Barton ACJ). See also *Dawson v The Queen* (1961) 106 CLR 1, 18 (Dixon CJ).

mode of trial: to their task of deciding facts they bring to bear their experience and judgment. They are both unaccustomed and not required to submit their processes of mind to objective analysis [of the kind proposed in the summing up in that case].²⁷

Other jurisdictions provide some minimal guidance to juries but disfavour elaborate definitions. For example, in England and Wales, the 2010 Bench Book of the Judicial Studies Board recommends judges to direct the jury regarding the criminal standard of proof in the following manner:

The prosecution proves its case if the jury, having considered all the evidence relevant to the charge they are considering, are sure that the defendant is guilty. If the jury are not sure they must find the defendant not guilty.²⁸

This obviously begs the question as to what it means to be ‘sure’. This has proved to present quite a challenge, as was acknowledged in *R v Majid*, where the Court of Appeal stated that:

[a]ny question from the jury dealing with the standard of proof is one that most judges dread. To have to define what is meant by ‘reasonable doubt’ or what is meant by ‘being sure’ requires an answer difficult to articulate and likely to confuse.²⁹

The Judicial Studies Board seems to have taken this concern to heart and now states that ‘[f]urther explanation is unwise’. Interestingly, the standard direction is followed by a rather elliptic note, which ‘clarifies’ that ‘[b]eing sure is the same as entertaining no reasonable doubt’. One may thus wonder what the proposed jury direction adds to the definition of the criminal standard of proof. In fact, the simple abstraction of the Judicial Studies Board jury instruction seems to have been a reaction against previous efforts at defining beyond reasonable doubt. Given the extreme difficulty of providing a definition that is clear and comprehensible for lay jurors, it was thought that it might be better to use an ‘ordinary’ concept that most people are familiar with. What is clear, however, is that appellate courts do not favour attempts at distinguishing between ‘being sure’ and ‘being certain’.³⁰

A third category of jurisdictions takes the position that there is a need to provide juries with some form of definition or explanation of the criminal standard of proof. For example, in the United States, Justice Ginsburg of the US Supreme Court has noted that:

the argument for defining the concept is strong. While judges and lawyers are familiar with the reasonable doubt standard, the words ‘beyond a reasonable doubt’ are not self-defining for jurors. Several studies of jury behavior have concluded that ‘jurors are often confused about the meaning of reasonable doubt,’ when that term is left undefined.³¹

²⁷ *Green v The Queen* (1971) 126 CLR 28, 32–3.

²⁸ England and Wales, Judicial Studies Board, *Crown Court Bench Book—Directing the Jury*, March 2010.

²⁹ Court of Appeal, *R v Majid* [2009] EWCA Crim 2563.

³⁰ See e.g. Court of Appeal, *R v Alan Edwards Stephens* [2002] EWCA Crim 1529; *R v Majid* [2009] EWCA Crim 2563.

³¹ *Victor v Nebraska* (1994) 511 US 1, 26.

Significantly, although the beyond reasonable doubt standard is supposed to have constitutional status,³² there is no single definition that is applied uniformly in all criminal trials. Indeed, although the Supreme Court generally disfavours particular phrases such as ‘moral evidence’ or ‘moral certainty’,³³ or ‘grave uncertainty’,³⁴ its current position is that the Constitution does not mandate any particular form of words.³⁵ Accordingly, we find that even within the Federal system different Circuits use different definitions of beyond reasonable doubt.³⁶ However, the following elements recur frequently.

First, it is often stated that the beyond reasonable doubt standard does not require the prosecution to show guilt ‘beyond all possible doubt’³⁷ or to establish a ‘mathematical certainty’³⁸ or ‘absolute certainty’.³⁹ On the other hand, it is sometimes emphasized that the standard is quite high.⁴⁰ In Canada, for example, the standard direction for the jury states that ‘the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt’ and that ‘[e]ven if you believe that [the accused] is probably guilty or likely guilty, that is not sufficient’.⁴¹ This last point is echoed in New Zealand where it is stated that ‘it is not enough for the Crown to persuade you that the accused is probably guilty or even that he or she is very likely guilty’.⁴²

When it comes to defining the concept of ‘reasonable doubt’ as such, many jurisdictions emphasize that doubts based purely on conjecture or speculation are not reasonable doubts.⁴³ Instead, it is said that a reasonable doubt must be a ‘fair doubt’,⁴⁴ a ‘real doubt’,⁴⁵ a ‘real possibility [that the defendant is not guilty]’ or ‘an honest and

³² *In re Winship* (1970) 397 US 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (The due process clause protects all criminal defendants ‘against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged’).

³³ *Sandoval v California* (1994) 511 US 1101. ³⁴ *Cage v Louisiana* (1990) 498 US 39, 40.

³⁵ In dictum, the Supreme Court has described the state of mind the jurors must reach as ‘a subjective state of near certitude’. *Jackson v Virginia* (1979) 443 US 307, 315. See also *Johnson v Louisiana* (1972) 406 US 356, 360. However, this was not proposed as an instruction to the jury and can therefore not be considered as a definition of the standard of proof.

³⁶ It is noteworthy that the latest edition of the Federal Justice Centre’s model bench book no longer contains a definition of the beyond a reasonable doubt standard. The most recent edition of which this author is aware that contained a definition stated that the criminal standard of proof requires ‘Proof that leaves you firmly convinced’ is [US Federal Justice Centre, 1988].

³⁷ See e.g. United States, 1st Circuit, *Pattern Criminal Jury Instructions for the District Courts of the First Circuit*, 2013, at 61; United States, 3rd Circuit, *Criminal Pattern Jury Instructions*, 2012, s. 1.13; United States, 5th Circuit, *Pattern Jury Instructions (Criminal Cases)*, 2012, s. 1.05, at 12; United States, 6th Circuit, *Pattern Criminal Jury Instructions*, 2013, s. 1.03; the Sixth Circuit explains that ‘Possible doubts or doubts based purely on speculation are not reasonable doubts’; United States, 8th Circuit, *Manual of Model Criminal Jury Instructions*, 2013 Revised Edition, s. 3.11, at 76; United States, 9th Circuit, *Manual of Model Criminal Jury Instructions*, 2010 Edition, s. 3.5, p. 39; United States, 10th Circuit, *Criminal Pattern Jury Instructions*, 2011 Edition, s. 1.05, at 10; United States, 11th Circuit, *Patten Jury Instructions (Criminal Cases)*, 2010.

³⁸ See e.g. United States, 3rd Circuit (n 37).

³⁹ See e.g. New Zealand, *R v Wanhatta* [2006] NZCA 229; [2007] 2 NZLR 573 [49]. This formulation is also adopted in the New Zealand Bench Book, NZ, Institute of Judicial Studies, *Criminal Jury Trials Bench Book* (2006) s. 6.5. Canada, Canadian Judicial Council, *Preliminary Instructions*, June 2012 version, at 41.

⁴⁰ See e.g. United States, 5th Circuit (n 37): ‘the government’s burden of proof is a strict or heavy burden’. *R v Wanhatta* (n 39): ‘beyond reasonable doubt is a very high standard of proof’.

⁴¹ Canadian Judicial Council (n 39).

⁴² *R v Wanhatta* (n 39).

⁴³ See e.g. United States, 3rd Circuit (n 37); United States, 6th Circuit (n 37); United States, 9th Circuit (n 37).

⁴⁴ United States, 3rd Circuit (n 37).

⁴⁵ United States, 11th Circuit (n 37).

reasonable uncertainty left in [the mind of the fact-finder].⁴⁶ Such doubts may be based on reason, logic, common sense, or experience,⁴⁷ after carefully and impartially considering all the evidence (or lack thereof) in the case,⁴⁸ including the nature of the evidence.⁴⁹ This language is also echoed by the Appeals Chamber of the UN ICTR, which ruled that ‘the reasonable doubt standard in criminal law...must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence’.⁵⁰

In terms of the subjective mindset juries are expected to attain before entering a conviction, several jurisdictions state that fact-finders must be ‘sure’ or⁵¹ ‘firmly convinced’.⁵² In a number of United States jurisdictions, reference is also made to a level of certainty that would leave the fact-finder so convinced that he or she would be willing to rely and act on the factual finding ‘without hesitation in the most important of his or her own affairs’.⁵³

It will be clear from this short overview that the criminal standard of proof remains a largely elusive concept in most domestic legal systems. At the very least, it seems correct to say that there is no generally accepted approach towards defining the criminal standard of proof throughout different legal systems. More importantly, all legal systems surveyed here leave a considerable margin of appreciation for the fact-finders and allow them to rely to a large extent on their personal appreciation.

Regardless of whether one thinks that so much faith in the epistemic acumen of the average fact-finder in legal proceedings is justified,⁵⁴ it seems hard to deny that the subjective approach towards defining the criminal standard of proof involves a number of serious problems. First, there is the inevitable uncertainty that it entails.

⁴⁶ *R v Wanhatta* (n 39). This formulation is also adopted in the New Zealand Bench Book, NZ, Institute of Judicial Studies, *Criminal Jury Trials Bench Book* (2006) s. 6.5.

⁴⁷ United States, 3rd Circuit (n 37); United States, 5th Circuit (n 37); United States, 6th Circuit (n 37); United States, 9th Circuit (n 37); United States, 10th Circuit (n 37); United States, 11th Circuit (n 37).

⁴⁸ United States, 5th Circuit (n 37); United States, 9th Circuit (n 37); United States, 11th Circuit (n 37); United States, 10th Circuit (n 37); *R v Wanhatta* (n 39). This formulation is also adopted in the New Zealand Bench Book (n 46).

⁴⁹ United States, 3rd Circuit (n 37); United States, 6th Circuit (n 37).

⁵⁰ Judgment, *Rutaganda*, ICTR-96-3-A, AC, ICTR, 26 May 2003, para. 488. It is probably fair to say that the ad hoc tribunals have by and large followed the common-law approach towards the criminal standard of proof. This is illustrated, *inter alia*, by the fact that the Trial Chamber in *Prosecutor v Delalić* simply adopted Lord Denning’s celebrated formula from *Miller v Minister on Pensions* (1947) 1 All ER 373 (quoted in Judgment, *Delalić*, IT-96-21, TC, ICTY, 16 November 1998, para. 601): ‘It need not reach certainty but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, “of course it is possible, but not in the least probable”, the case is proved beyond a reasonable doubt, but nothing short of that will suffice.’

⁵¹ *R v Wanhatta* (n 39). This formulation is also adopted in the New Zealand Bench Book (n 46). Canadian Judicial Council (n 39). The term ‘sure’ was introduced by the Canadian Supreme Court in 1997 in *R v Lichtfus* [1997] 3 SCR 320, 39.

⁵² United States, 10th Circuit (n 37); United States, 8th Circuit (n 37).

⁵³ See e.g. United States, 1st Circuit (n 37); 3rd Circuit (n 37); 5th Circuit (n 37); 6th Circuit (n 37); 8th Circuit (n 37); or 11th Circuit (n 37).

⁵⁴ It might be objected that the picture painted here is unfair, because most domestic systems surveyed rely (wholly or partially) on lay juries to determine the facts. Accordingly, it might be argued, the legal systems have to ‘dumb it down’ for the benefit of the average juror, who lacks any specific fact-finding

Since each individual will have a different conception of what it means, for example, to be ‘sure’, parties do not know by which standard they will be judged. This is a considerable problem for both prosecuting and defending counsel, who remain oblivious of the expectations of the adjudicator until after the trial has finished and a verdict is returned. Second, a subjective and open-ended standard of proof inevitably leads to inequality among criminal defendants. Indeed, if the precise meaning of the criminal standard of proof varies depending on each individual adjudicator, some criminal defendants may find their cases to be treated more leniently than others. Finally, a standard of proof that is defined in terms of the subjective mindset of the adjudicator, offers very little assurance that the adjudicator will come to his or her conclusion in a fair and objective manner. Indeed, as Larry Laudan has poignantly stated: ‘The firmness of a belief—that is, the depth of one’s conviction in it—does nothing to settle whether the belief is rational or founded on the evidence.⁵⁵

One important corollary of the subjective approach is that it is exceedingly difficult for appeals courts to review whether the standard of proof has been correctly applied.⁵⁶ The subjective approach also explains how it is possible that a chamber can convict someone beyond reasonable doubt by majority without this having to imply that the minority judge is considered unreasonable by the majority. Indeed, if each adjudicator is free to determine in his or her own mind what proof beyond reasonable doubt means, the individual judgment of each adjudicator becomes almost immune to criticism. However, this also implies that it is hard to have any rational discussion about whether or not a particular adjudicator has perhaps misunderstood or misapplied the standard of proof. In particular, parties will find it extremely difficult to challenge the correctness of the application of a subjective standard of proof, because fact-finders do not have to explain how they have interpreted the standard, let alone justify how they arrived at this interpretation. A radical subjective approach may thus end up watering down the concept of a standard of proof as a decisional criterion. What is more, in such a scenario, it will be the adjudicator who decides in each case how to allocate the risk of error between the parties. It is questionable whether in such cases the standard of proof still exerts any regulatory influence as an external benchmark against which the adjudicator must measure her degree of confidence in the accuracy of her findings.⁵⁷

expertise. This argument is based on the assumption that professional judges are experts in fact-finding. However, it is highly questionable that this is actually the case. See e.g. F Schauer, ‘On the Supposed Jury-Dependence of Evidence Law’ (2006) 155 *University of Pennsylvania Law Review* 165; and, especially, B Spellman, ‘On the Supposed Expertise of Judges in Evaluating Evidence’ (2007) 156 *University of Pennsylvania Law Review* 1, who argues that ‘[t]here is no good reason to conclude that, by virtue of qualities, training, or experience, trial judges should be considered experts at weighing evidence or at fact-finding’, id., 6. Whatever the case may be with regard to domestic judges, it suffices to consider the professional background of many international judges, many of whom join the international bench after very distinguished careers in diplomacy or academia, to realize that they have no particular training or experience in fact-finding.

⁵⁵ L Laudan, *Truth, Error, and Criminal Law* (New York: Cambridge University Press 2006) 39.

⁵⁶ See e.g. Judgment, *Furundžija*, IT-95-17/1-A, AC, ICTY, 21 July 2000, para. 37, where the Appeals Chamber remarked that it was perfectly possible for two judges, ‘both acting reasonably, [to] come to different conclusions on the basis of the same evidence’.

⁵⁷ See G Krishnamirthi et al., ‘Bad Romance: The Uncertain Promise of Modeling Legal Standards of Proof with Inference to the Best Explanation’ (2012) 31 *The Review of Litigation* 81 argue that: ‘The linkage of the standards to subjective mental states belies the very purpose of the standards.’ In any event, to

34.4 Formal Standard of Proof

Given the vagueness and ambiguity as well as the serious problems involved in subjective standards of proof, one may wonder whether the ICC should follow the example of most domestic legal systems, or whether it should endeavour to provide the parties appearing before it with something more in terms of guidance and guarantees of objectivity and rationality. The question, then, is how the standard of proof can be defined in a more formal manner.

Fact-finding in the judicial context is a formalized legal process, but the underlying principles are not legal. Indeed, fact-finding in the judicial context is an essentially inductive process. In order to define the standard of proof, it is therefore important to understand the workings and limitations of induction. For this, we need to turn to the field of epistemology. Induction is a notoriously complex matter and there is, as yet, no generally accepted explanation of how induction works. In what follows, four different models will be introduced. Given the limitations of this chapter, these introductions will be necessarily brief. It is thus not possible to do justice to the complexity and sophistica-tion of each of the models which will be presented in a strongly simplified form. It is also important to point out that it is not claimed that these four models are the only available choices or indeed that the correct model is necessarily contained among them. However, it is hoped that what follows can serve as a first step in the reflection about the appropriate approach towards the criminal standard of proof before the ICC.

34.4.1 Quantitative Standard of Proof

Often when people are asked to express how (un)certain they are about something, they do so by giving a percentage. Expressing uncertainty quantitatively has the advantage of great clarity and precision. However, when people are asked to explain how they arrived at the percentage they gave, they are often at pains to do so.

Probability theory offers a sophisticated theoretical framework for assessing uncertainty about factual propositions quantitatively. This field is often referred to as Bayesian epistemology, after the eighteenth-century English Reverend Thomas Bayes, who developed a formula for updating one's probabilistic beliefs in light of (new) evidence.⁵⁸ Space does not permit to give even a basic explanation of how Bayesian epistemology works,⁵⁹ but suffice it to say that it offers the tremendous advantage of clear algorithms and maximum precision. Although the mathematics involved may be

the extent that there is any policy behind a purely subjective standard of proof, it is the personal policy of the adjudicator which may or may not correspond with the preferences of society. Some scholars, like Alex Stein, would argue that this gives adjudicators powers that go far beyond their domain and that the only proper body for making the moral and political choices involved in determining the appropriate distribution of error is the legislator. See A Stein, *Foundations of Evidence Law* (New York: Oxford University Press 2005).

⁵⁸ T Bayes, 'An Essay towards Solving a Problem in the Doctrine of Chances', published (posthumously) originally in (1763) 53 *Philosophical Transactions of the Royal Society of London* 370.

⁵⁹ For a concrete example of a Bayesian analysis of a criminal case, see P Dawid and I Evett, 'Using a Graphical Method to Assist the Evaluation of Complicated Patterns of Evidence' (1997) 42 *Journal of Forensic Sciences* 226.

rather daunting to many lawyers, modern computer programs can offer assistance with this.⁶⁰ Using such programs for real court cases would require a lot of getting used to and would constitute nothing less than a revolution in the way in which most courts actually operate. However, there is no principled reason why courts could not apply Bayesian epistemology if they so wanted. In fact, the great rigour and perfect transparency of the model are two attributes that advocate strongly in its favour.

The main difficulty with this model is where adjudicators are supposed to get their individual probability estimates from. Probability theory is most easily applied when the input data can be measured and quantified. For example, the relative frequency of increased risk of lung cancer in people who have smoked for a certain period can be measured by looking at epidemiological studies. Closer to home, a lot of forensic evidence, including DNA evidence, is also frequentist in nature. Cognitive psychology offers frequentist insights into human behaviour, based on extrapolations from experiments with more or less statistically relevant samples from the population. However, for many relevant facts it is simply impossible to measure frequency because they are unique and happen only once.

These difficulties do not, however, suggest that Bayesian epistemology is therefore doomed as far as judicial fact-finding is concerned. In fact, there are different forms of probability. The type of measurable probability is often referred to as ‘objective’ or ‘frequentist’ probability. Opposed to this are so-called subjective probabilities,⁶¹ which are not based on measurements of the outside world but on the subjective state of belief of the relevant epistemic actor. Being subjective, it is thus perfectly possible that two people estimate the probability of a certain factual proposition differently. For example, A may believe that there is a 60% chance that team X will win a particular game, whereas B may be convinced on the basis of the same information, that the chance is only 20%. Once the initial subjective probabilities have been established, however, the regular rules of probability apply to both of them in relation to how they reason about the proposition in question.

The main challenge with subjective probability is to find ways for how an epistemic agent is supposed to determine his or her state of belief.⁶² Several sophisticated models have been proposed which are designed to allow an individual to quantify his or her beliefs. Many of them are based on imaginary bets or expected utility for the believer.⁶³ Such heuristics are intended to ‘rationalize’ the process as much as possible. Whatever method is applied, however, it will never be possible to *objectively* quantify one’s personal beliefs. Yet, this criticism should not necessarily dissuade anyone from relying on Bayesian epistemology. Although it admittedly has to fall back upon the fact-finder’s personal conception of the world, this is true of any model of inductive reasoning that is not based purely on quantifiable variables. At least Bayesian

⁶⁰ For commercially available software to assist with Bayesian networks, see e.g. <<http://www.hugin.com/>> accessed 22 July 2014.

⁶¹ For a thorough exposition of this stand of probability theory, see R Jeffrey, *Subjective Probability—The Real Thing* (New York: Cambridge University Press 2004).

⁶² Unless one accepts radical subjectivism, in which case anything goes.

⁶³ See, for a general introduction, I Hacking, *An Introduction to Probability and Inductive Logic* (New York: Cambridge University Press 2001) 151.

epistemology has the advantage of offering a rigorous framework within which these intuitions can be processed. Indeed, Bayesian networks have the great merit of exposing every step in the reasoning and are therefore the opposite of the allegorical ‘black box’ that is the human mind when left to its own devices.

Regardless of what one may think about the validity and/or viability of Bayesian epistemology for judicial fact-finding, it has to be admitted that it offers the perfect framework for fine-tuning standards of proof in terms of the appropriate level of risk of error.⁶⁴ Because uncertainty is expressed as a degree of probability, it is possible to be extremely precise when defining the standard of proof. In theory it also allows the appropriate standard to be calculated in light of the different goals and values of the legal system.⁶⁵

34.4.2 Model of Relevant Variables—Inductive Probability

L Jonathan Cohen proposed a different conception of probability, which he called inductive or ‘Baconian’ (as opposed to ‘Pascalian’) probability. Whilst not denying the validity and usefulness of quantitative probability in relation to particular circumstances, Cohen’s point of departure is that Bayesian probability calculus is not suitable for the legal–forensic domain.

According to Cohen’s account of judicial fact-finding,⁶⁶ all factual findings depend on inferences. Inferences, in turn, depend on generalizations and it is finding the correct generalization which lies at the heart of fact-finding and his notion of probability. Under this conception of litigation, parties propose generalizations which, if shown to be correct, would prove their case. They do so by pointing to evidence which supports the generalization and by appealing to general background information about how the world works. However, if they are to have any probative value, the generalizations in question are usually highly specific and involve a complex conjunction of propositions.⁶⁷ For example, in a murder case, the hypothesis that the defendant killed the victim may be supported by the following generalization: ‘Anyone, if s/he was present

⁶⁴ Contra, see e.g. Roberts and Zuckerman (n 16) 365, who argue that: ‘Very precise quantification, seeking to differentiate 90 per cent from 95 per cent certain, for example, is obviously ruled out on pragmatic grounds: such precision could never be achieved in practice, given the inherent subjectivity of individual jurors’ confidence levels.’ Although Bayesians might be willing to admit that the probability estimates are subjective, they would probably dispute that it is not possible to reach such levels of precision. Moreover, it is not entirely clear why subjectivity is a problem when levels of certainty are expressed numerically. Indeed, *all* expressions of confidence levels in the judicial context are, to some extent, based on subjective assessments. Indeed, it would be a fundamental misunderstanding to think that Bayesian epistemologists claim that their method offers absolute, mathematically certain, results. In other words, the proposition ‘I am convinced beyond reasonable doubt that X is guilty’ and the proposition ‘I believe there is a 0.92 probability that X is guilty’ can be equally subjective. The main difference is that the second proposition should be based on Bayesian reasoning if it wants to merit the claim of being rational.

⁶⁵ See, for just one example of an attempt to propose a formula to calculate standards of proof, F Vars, ‘Toward a General Theory of Standards of Proof’ (2010) 60 *Catholic University Law Review* 1.

⁶⁶ What follows is a grossly simplified summary of a highly sophisticated theory developed in Cohen (n 1).

⁶⁷ Cohen (n 1) 207. This issue is familiar in relation to frequentist probability as well, where it is usually referred to as the ‘reference class problem’. For example, the very general generalization ‘smoking kills’ provides virtually no inductive support, because it is clearly not true in all cases. The generalization

at the scene of the crime, *and* conscious, *and* had a motive to kill the victim, *and* carried a gun, *and* fired the gun, *and* aimed the gun in the direction of the victim, *and* the victim was still alive when the shot was fired, *and* the shot hit the victim, *and* no one else fired at the victim, etc., *then* the defendant [almost certainly] killed the victim.⁶⁷ Each of these propositions presents a variable, which may or may not be true. Each variable is a potential *falsifier*, in the sense that it may cast doubt on the applicability of the generalization to the case in question. Some variables will be more important than others.

Although Cohen apparently saw his work more as an extension of the ideas of Francis Bacon and John Stuart Mill, he explicitly modelled his account of inductive probability on the ‘scientific method’,⁶⁸ which is often associated with the work of Karl Popper.⁶⁹ The basic idea behind this method is that the validity of a scientific theory is measured on the basis of experiments that could prove it to be wrong. As long as the experiments continue to confirm the theory, it becomes stronger and stronger. However, if an experiment fails to confirm the predictions of the theory, the theory must either be revised to accommodate the inconsistent data or—if this is not possible—abandoned altogether. The job of scientists is thus to devise more and more specific experiments to test the validity of theories that are more and more refined, until no further experiments can be thought of that could falsify the theory.

Cohen envisages a fairly similar role for adjudicators. When they consider the question of guilt or innocence, it is their responsibility to think of everything that could potentially refute the generalization behind the guilt hypothesis. The prosecutor’s job is thus to defend this generalization by showing that all the evidence confirms the generalization and, crucially, that there is nothing in the case that could falsify it. The accused may decide to limit her defence to simply challenging the validity of the prosecution’s generalization, or she may present an alternative hypothesis of innocence, which will be based on a different generalization. In order to determine which hypothesis has the strongest inductive support, the adjudicator has to evaluate which hypothesis ‘survives’ most potential falsifiers. The assumption is that an untrue hypothesis will sooner or later fail to satisfy a falsifier and will therefore have zero probability.⁷⁰

The beyond reasonable doubt standard is defined by Cohen as ‘inductive probability that amounts to virtual certainty’, which is achieved by eliminating every possible ‘let-out’, either by oral, documentary, or other evidence, or by reference to facts that

⁶⁷ ‘smoking increases the risk for lung cancer in men by 23 times’ is already more specific, but still far from establishing an absolute causal link. Moreover, the applicability of the generalization has been reduced by half, as it only applies to men and not to women (whose risk-increase is only 13 times).

⁶⁸ Cohen (n 1) 126.

⁶⁹ K Popper, *The Logic of Scientific Discovery* (1959, reprinted London: Routledge 2009); *Conjectures and Refutations* (1963, reprinted London: Routledge 2009). However, Cohen does not rely on Popper, presumably because Popper famously denied that induction was possible. Popper also denied that scientific theories could ever be validated, which would be problematic for any theory dealing with legal proof.

⁷⁰ It is to be noted that Cohen’s account differs fundamentally from the quantitative conception of probability, which explicitly posits that the probability of proposition *P* tells us exactly how probable *not-P* is. In the forensic context, if there is an 80% probability that the bullet killed the victim, this implies that there is a 20% probability that the bullet did not kill the victim (i.e. that there is another cause of death).

the defence admits to or the court is prepared to notice.⁷¹ In this conception, reasonable doubts are thus potential falsifiers. Accordingly, as long as there still are variables that could act as potential falsifiers that have not been duly ‘tested’, there is still room for reasonable doubt.⁷²

This raises certain challenges. First, as Cohen notes, ‘[t]he inductive support-function we judge best from an epistemological point of view may nevertheless not be the ontologically correct one... In particular, we may not know all the inductively relevant variables. So what *seems* inductively certain may not *be* inductively certain.’⁷³ In other words, we may be missing certain information without being aware of it. However, Cohen pragmatically points out that criminal courts are only required to exclude reasonable doubt and that ‘reasonableness is to be determined by the best prevailing standards of evidence’.⁷⁴ In other words, we cannot fault our courts for not being omniscient, just like we would not consider scientists were wrong to rely on Isaac Newton’s laws of motion before Albert Einstein proved them wrong. Nevertheless, the difficulty of knowing what *all* the relevant variables are is not to be underestimated, especially in relation to complex fact patterns.

The second serious challenge which follows from Cohen’s account is that in order to satisfy the beyond reasonable doubt standard, the adjudicator must in principle have all the potentially relevant evidence at her disposal. Indeed, as long as not all the evidence is in, the only way in which the proposed generalization can be applied is by *assuming* that for each variable for which we lack information, the variant will be favourable to the generalization.⁷⁵ As long as such assumptions still have to be made—i.e. as long as it is possible to point to variables about which we have no conclusive evidence—this implies that the available evidence is not complete.⁷⁶ This is a key feature of Cohen’s theory: the inductive probability function he proposes incorporates the question of the completeness of the evidential data set. Whereas many other epistemic models allow adjudicators to come to factual conclusions on the basis of the *available* evidence, regardless how incomplete, Cohen’s account requires adjudicators to factor in the *theoretically relevant* evidence⁷⁷ when determining the probability of a particular hypothesis. In other words, whenever there is missing evidence, this will have an immediate impact on the inductive probability of the hypothesis in question.

It is easy to imagine that such a rigorous position may lead to immense practical challenges in terms of gathering all the theoretically relevant evidence. Cohen accepts that having all the theoretically relevant evidence will not always be possible and that, if we ever want to be able to come to any conclusion in the real world, ‘there must be some stage at which we take sufficient evidence to be already available’.⁷⁸ For that reason, Cohen proposes to set a certain inductive probability threshold, above which one is entitled to accept the hypothesis, even without having all the evidence. If this threshold is set sufficiently high, it will presumably guarantee that at least most of the

⁷¹ Cohen (n 1) 249.

⁷² Cohen (n 1) 272.

⁷³ Cohen (n 1) 273.

⁷⁴ Cohen (n 1) 273.

⁷⁵ Cohen (n 1) 212.

⁷⁶ Cohen (n 1) 213.

⁷⁷ Cohen refers to this as ‘the totality of inductively relevant facts’, Cohen (n 1) 320.

⁷⁸ Cohen (n 1) 215.

relevant evidence is available. Unfortunately, Cohen does not say where that probability threshold would have to lie for the beyond reasonable doubt standard, but seems to suggest a variable standard, where the precise level ‘is to be determined in accordance with the nature of the subject-matter and the best available list of relevant variables for tests on generalisations about that subject-matter’.⁷⁹

34.4.3 Inference to the Best Explanation

The basic principle behind ‘Inference to the Best Explanation’ (IBE), or relative plausibility theory as it is also sometimes referred to, is very simple: when confronted with a collection of evidence, which can be reasonably explained by several different hypotheses, the fact-finder is instructed to accept the hypothesis that provides the best explanation of the evidence.⁸⁰ IBE therefore involves two main stages: first, the generation of hypotheses that provide a plausible explanation of as much of the evidence as possible; this is followed by the selection of the best hypothesis by eliminating all others.⁸¹ The essence of IBE is thus a competition of different hypotheses which all claim to offer the best explanation of the evidence.

Whereas the basic principle is generally agreed upon by all those who support IBE, there is no uniformly accepted list of criteria that make one explanation better than another.⁸² Philosophers who discuss IBE more from a scientific standpoint⁸³ seem to put most emphasis on the explanatory value of an explanation. The better explanation is then the one that provides us with the most understanding.⁸⁴ One of the key criteria proposed by Paul Thagard, a leading IBE scholar, is *consilience*. Put simply, consilience is a measure of *how much* of the data a theory explains.⁸⁵ Henderson recently argued that what matters most in simple cases is that the hypothesis makes the data more

⁷⁹ Cohen (n 1) 319.

⁸⁰ P Thagard, ‘The Best Explanation: Criteria for Theory Choice’ (1978) 75 *The Journal of Philosophy* 76, 77. ‘To put it briefly, inference to the best explanation consists in accepting a hypothesis on the grounds that it provides a better explanation of the evidence than is provided by alternative hypotheses.’

⁸¹ IBE is mostly concerned with the second stage of hypothesis selection. Peter Lipton argues that the stage of hypothesis generation is driven by different considerations, which give us a limited list of the most plausible, i.e. the most likely, explanations. P Lipton, *Inference to the Best Explanation* 2nd edn (London and New York: Routledge 2004) 149. To the extent that we make likelihood judgments based on our general background knowledge, there is a real possibility that the hypothesis generation process will be skewed, because we are usually not inclined to come up with explanations which would, if true, require us to reject much of our background beliefs. There is thus no reason to think that the process of generating hypotheses will systematically include the true explanation; Lipton, at 151–2. This is one of the reasons Josephson instructs us to always consider what he calls the NEW hypothesis, which is that we must always seriously consider the possibility that we simply might not have thought of the true explanation, because it is unprecedented or because it does not fit within our existing background knowledge. J Josephson, ‘On the Proof Dynamics of Inference to the Best Explanation’ (2001) 22 *Cardozo Law Review* 1621. As Peter Lipton points out, there is no way of judging how likely it is that we are in fact ignorant about the true explanation; Lipton, at 152.

⁸² Peter Lipton remarks that IBE ‘still remains more of a slogan than an articulated account of induction’; *ibid.*, 57.

⁸³ I.e. they treat IBE as model to infer valid scientific theories.

⁸⁴ Lipton (n 81) 61; ‘the explanation that would, if true, provide the deepest understanding is the explanation that is likeliest to be true’.

⁸⁵ Thagard, ‘The Best Explanation’ (n 80) 79–80; ‘Consilience is intended to serve as a measure of *how much* a theory explains, so that we can use it to tell when one theory explains *more* of the evidence than

expected.⁸⁶ For example, when there is a question about what caused a building to catch fire, and the three competing explanations are: (i) a soldier lit the fire using petrol, (ii) the fire was caused incidentally by using a white phosphorus grenade, or (iii) the fire was caused by a mortar shell, we would probably favour the last explanation if we have evidence of an impact crater, but we would disfavour this as the best explanation if there is no such evidence. One of the difficulties with the consilience criterion is that it is perfectly possible that one explanation will explain one subset of the evidence whereas another explanation will explain a different subset of the evidence. In such cases, one has to make judgments about which facts in evidence are more important, or fall back on other criteria.

A different version of IBE, which has been specifically proposed for judicial fact-finding, is what is sometimes referred to as ‘naturalized epistemology’. This form of IBE is based upon the work of, among others, cognitive psychologists Nancy Pennington and Reid Hastie, who argue that the way in which jurors decide cases is by constructing stories on the basis of the evidence and by selecting the story that best fits within their background knowledge as the most plausible one. Stories in this sense are described as a “causal chain” of events in which events are connected by causal relationships of necessity and sufficiency.⁸⁷ Stories are thus composed of different ‘episodes’ which are all causally linked into a coherent whole. The fact-finder uses his or her knowledge about what makes a story structurally complete to evaluate the comprehensiveness of the evidence and to make the necessary inferences to fill in gaps where the evidence does not cover all the necessary episodes of the story structure.⁸⁸ In order to judge how well the story explains the evidence, fact-finders are said to consider the following criteria. First, fact-finders are said to consider the story’s so-called *coverage* of the evidence, which refers to the extent to which the story accounts for the evidence presented at trial.⁸⁹ Second, the fact-finder will consider the story’s *coherence*, a concept which is divided into three categories: *consistency*, which evaluates whether there are any internal contradictions in the story or with evidence believed to be true; *plausibility*, which measures the extent to which the story corresponds to the fact-finder’s background knowledge; and *completeness*, which measures the extent to which the story is composed of all the necessary episodes, based on the fact-finder’s knowledge of the story structure.⁹⁰ What is important for the purposes of standards of proof is that if more than one story meets all these criteria, belief in any one of them over the others will be less strong.⁹¹ In other words, the level of confidence in the best

another theory....we show one theory to be more consilient than another by pointing to a class or classes of facts which it explains but which another theory does not....it is possible that T_1 explains many more classes of facts than T_2 , but that there are still some facts that only T_2 explains. In cases where these two definitions do not coincide, decisions concerning the best explanation must be made according to what theory explains the most important facts, or on the basis of other criteria.'

⁸⁶ L Henderson, ‘Bayesianism and Inference to the Best Explanation’ (2013) 64 *British Journal for the Philosophy of Science* 1, 14.

⁸⁷ N Pennington and R Hastie, ‘A Cognitive Theory of Juror Decision Making: the Story Model’ (1991) 13 *Cardozo Law Review* 519, 525.

⁸⁸ Ibid., 527.

⁸⁹ Ibid. This seems similar to Paul Thagard’s ‘consilience’ criterion discussed earlier.

⁹⁰ Ibid., 527–8. ⁹¹ Ibid., 528.

explanation will be lower if there is more than one coherent explanation than when there is only one such explanation.

A number of evidence scholars have picked up on this research and have transformed it into a normative account for judicial fact-finding. In particular, Ronald Allen and others have promoted the idea of what they call ‘naturalized epistemology’ in the legal context.⁹² According to this view, trials of fact always come down to a comparison of competing claims⁹³ and fact-finders are supposed to decide cases by determining which of these claims is the best. However, no matter how well this approach may correspond to how people actually think about evidence, it does not sit very easily with the criminal standard of proof. For example, it is not difficult to imagine a case where both the prosecutor and the defence have presented explanations that are reasonably good. According to IBE, the prosecutor should win if her explanation of the evidence is best. However, the best explanation may still not be good enough, because it may still involve an unacceptably high risk of a false conviction.⁹⁴ To get around this problem, a number of additions to IBE have been proposed. Paul Thagard, for example, argued that the beyond reasonable doubt standard requires that the guilt hypothesis must be ‘substantially more plausible’ than the innocence hypothesis.⁹⁵ Ronald Allen has proposed that under IBE the criminal standard would require that the prosecutor must demonstrate a plausible case of guilt and that there may be no plausible case of innocence.⁹⁶ In other words, even if the prosecutor’s explanation of the evidence is the best one on offer, it still cannot lead to a conviction as long as the defence’s explanation is not wholly implausible.⁹⁷ The reasoning behind this approach is that ‘when there is a plausible explanation of the evidence consistent with innocence, then there is a concomitant likelihood that this explanation is correct and thus that the defendant is innocent, which in turn creates a reasonable doubt (and should thus prevent the fact-finder from inferring guilt’.⁹⁸ Pardo and Allen acknowledge that this is quite vague, but argue that this is inherent in the legal standard of proof.⁹⁹ Josephson has tried to be a little more specific and has suggested that an explanation of innocence is plausible if it is ‘internally consistent, consistent with known facts, not highly implausible, and it must represent a “real possibility” rather than a mere logical possibility. A real possibility does not suppose the violation of any known law of nature, nor does it suppose any behaviour that is completely unique and unprecedented, nor any extremely improbable chain of coincidences.’¹⁰⁰ Whether this adds a lot of clarity is

⁹² R Allen and B Leiter, ‘Naturalized Epistemology and the Law of Evidence’ (2001) 87 *Virginia Law Review* 1491; R Allen, ‘The Nature of Juridical Proof’ (2001) 13 *Cardozo Law Review* 373; M Pardo and R Allen, ‘Juridical Proof and the Best Explanation’ (2008) 27 *Law and Philosophy* 223; R Allen and A Stein, ‘Evidence, Probability, and the Burden of Proof’ (2013) 55 *Arizona Law Review* 557.

⁹³ Allen and Leiter (n 92) 1529.

⁹⁴ L Laudan, ‘Strange Bedfellows: Inference to the Best Explanation and the Criminal Standard of Proof’ (2007) 11 *International Journal on Evidence and Proof* 292.

⁹⁵ P Thagard, ‘Why wasn’t O J Convicted? Emotional Coherence in Legal Inference’ (2003) 17 *Cognition and Emotion* 361, 366–7.

⁹⁶ R Allen, ‘Rationality, Algorithms and Juridical Proof: A Preliminary Inquiry’ (1997) 1 *International Journal of Evidence and Proof* 254, 273. For a similar account, see Josephson (n 81) 1642.

⁹⁷ For a criticism of this approach as being in contradiction with the essence of IBE, see Laudan, ‘Strange Bedfellows’ (n 94) 302.

⁹⁸ Pardo and Allen (n 92).

⁹⁹ Pardo and Allen (n 92).

¹⁰⁰ Josephson (n 81) 1642.

open to discussion, but it does confirm that a plausible hypothesis of innocence must also meet some minimum threshold of the standard criteria for IBE.

34.4.4 Qualitative Probability—Argumentation Theory

The last model of inductive fact-finding that will be discussed is based on argumentation theory. Just as with Cohen's relevant variables model and IBE, the qualitative uncertainty model is a response to the concern that quantitative probability theory does not offer a workable model in many situations because human ability to estimate probabilities is thought to be severely limited.¹⁰¹ The idea is to offer a model which allows one to be equally rigorous in one's reasoning about and assessment of uncertain evidence, but without requiring quantification.¹⁰²

The basic idea is that people make decisions on the basis of arguments in favour and arguments against a certain claim or proposition.¹⁰³ The assumption is that it is always possible to determine whether something constitutes an argument for or against a particular proposition, even if it is not possible to indicate how strongly the argument supports or undermines the proposition.¹⁰⁴ In order to know which proposition to believe, one must simply determine which proposition has the most independent lines or arguments in favour and the least against.¹⁰⁵ Significantly, these different lines of argument do not have to be consistent with each other.¹⁰⁶ This is because arguments can be based on different background assumptions.¹⁰⁷

Another key feature of qualitative probability is that it explicitly promotes arguing at different levels. On the one hand, there are arguments that pertain directly to the proposition under investigation. On the other hand, it is possible to argue about these first-level arguments; i.e. to find arguments for a why a particular argument is valid or not.¹⁰⁸ It is by doing the balancing exercise (identifying arguments for and against) at the meta-level that one is able to determine the relative strength of the first-level arguments.¹⁰⁹

It is thus possible to attack a particular claim in two ways: one may try to defeat the argument by attempting to rebut the claim by directly contradicting it with a competing claim (e.g. the raising of an alibi against the allegation that the accused was present at the scene of the crime) or by pointing out weaknesses in the proposition (e.g. internal contradictions); or one may attempt to defeat the argument by challenging some or all of the information used to construct it (e.g. attacking the credibility of the witness who puts the accused at the scene of the crime).¹¹⁰ On this basis it is possible to

¹⁰¹ J Fox et al., 'Quantitative and Qualitative Approaches to Reasoning under Uncertainty in Medical Decision Making' in S Quaglini et al. (eds), *AIME 2001, LNAI 2101* (Berlin: Springer 2001) 272.

¹⁰² J Fox, 'Arguing about the Evidence: a Logical Approach', in P Dawid et al. (eds), *Evidence, Inference and Enquiry* (Oxford: Oxford University Press 2011) 153.

¹⁰³ Fox et al. (n 101) 275.

¹⁰⁴ Fox et al. (n 101) 276.

¹⁰⁵ Fox (n 102) 162.

¹⁰⁶ This is an important point of distinction with IBE, where consistency is a key factor in determining which the best explanation is.

¹⁰⁷ Fox (n 102) 159.

¹⁰⁸ P Krause et al., 'A Logic of Argumentation for Reasoning under Uncertainty' (1995) 11 *Computational Intelligence* 113.

¹⁰⁹ Ibid.

¹¹⁰ Ibid., 126. For example, John Fox lists the following strategies for arguing at the meta-level: 'but-tressing', 'corroboration', 'undermining', 'weakening', and 'equivocation'; Fox (n 102) 174–5.

define so-called acceptability classes, which reflect the extent to which the argument can be challenged.¹¹¹

Open Claim—Referring to any well-formed proposition in the language of the logic.

This is intended to confer a notion of having no information at all, of being completely agnostic.

Supported Claim—Referring to propositions for which an argument can be constructed, although this argument may be based on inconsistent data.

Plausible Claim—Referring to propositions for which a consistent argument can be made, but against which a consistent counterargument can also be constructed on the basis of contradictory information.

Probable Claim—Referring to propositions for which a consistent argument can be made and against which no consistent counterargument can be constructed.

However, one or more steps in the argument can be challenged (i.e. the argument is vulnerable at the meta-level).

Confirmed Claim—Referring to propositions that cannot be consistently attacked at either the first level or the meta-level.

Certain Claim—Referring to propositions that are logically valid and which do not depend on evidence.

These acceptability classes express successively increasing degrees of ‘acceptability’ of the arguments which support the propositions of interest. Each step up represents a decreased level of tension between arguments for and against the proposition in question.¹¹²

However, it should be stressed that, like quantitative probability and IBE (but unlike Cohen’s ‘inductive probability’), the acceptability classes can, in principle, be applied to any evidential dataset no matter how incomplete. Even when a proposition is ‘confirmed’, it is thus still defeasible by new evidence. To account for this, it has been proposed to also adopt a so-called commitment rule, which is intended to express the fact-finder’s confidence that the list of arguments is more or less final and that no further arguments could change the classification of the claim(s). In ideal circumstances, fact-finders should withhold committing to a classification until they are confident that there are no further unknown items of evidence that could generate arguments that might change the classification of the proposition.¹¹³ However, this proposal is somewhat idealistic because (i) often the fact-finder will not have the time or resources to gather all the necessary information to meet the commitment rule and (ii) it is often difficult to know whether information is still missing and, if so, how significant it is. It is thus often difficult to satisfy the commitment rule.¹¹⁴

¹¹¹ M Elvang-Göransson et al., ‘Acceptability of Arguments as “Logical Uncertainty”’, in M Clarke et al. (eds.), *Symbolic and Quantitative Approaches to Reasoning and Uncertainty* (Berlin: Springer 1993) 85–90; Krause et al., ‘A Logic of Argumentation for Reasoning under Uncertainty’ (n 108) 224; Fox (n 102) 177.

¹¹² P Krause et al., ‘Qualitative Risk Assessment Fulfils a Need’ in A Hunter and S Parsons (eds), *Applications of Uncertainty Formalisms* (Berlin: Springer 1998) 144.

¹¹³ Fox (n 102) 178.

¹¹⁴ Fox (n 102) 178–9.

Although I am not aware of any formal proposal to translate acceptability classes into different standards of proof, it is relatively easy to see how this might be done. For example, it is suggested that a finding beyond reasonable doubt would have to correspond to a confirmed claim to which the fact-finder should be able to commit rather firmly.

34.5 Which Model for the ICC?

Choosing the right model for the ICC is not an easy task. Each of the models discussed has advantages and disadvantages. None of them can prove theoretical superiority over the others, and the fact that there are different accounts implies that none of them is universally accepted. It is also not self-evident which of these models is most suitable for judicial fact-finding in the context of international criminal trials.

However, perhaps it is not necessary to make stark choices. Indeed, although each of the accounts purports to offer a sufficient theory of induction, they are not inherently incompatible with each other.¹¹⁵ This is not to suggest that it is possible to spin two or more models together into a coherent hybrid model. However, it may be possible, for practical purposes, to rely on elements from different systems in order to define the international criminal standard of proof. Each of these elements would then have to be assessed in accordance with the methodology of the epistemic model from which it originates.

For example, it might be possible to start with an IBE analysis of which hypothesis offers the best explanation of the available evidence and to ascertain that there is no ‘reasonable’ alternative innocent explanation. Once this hypothesis has been identified, it would then be assessed in terms of quantitative, qualitative, or ‘inductive’ probability in order to ascertain whether the best explanation is indeed good enough. For example, if the best explanation only amounts to a ‘probable claim’ in terms of qualitative probability, it might be held that this is insufficient to meet the beyond reasonable doubt standard.

No specific proposal is made here. The main purpose of this chapter is limited to pointing out that there are a number of viable options to choose from and that the ICC is not bound to blindly follow the subjective approach that is prevalent in most domestic systems. It may be useful to point out, in this regard, that even if the subjective approach is adopted, nothing prevents Trial Chambers from relying on any of the formal models presented here. What is more, without formal guidance from the standard of proof, different judges within the same Chamber may choose to rely on different epistemic models, even in the context of a single case.

34.6 Where to Set the Standard of Proof?

Once it has been determined which model to adopt for the international criminal standard of proof, it becomes possible to start thinking about where to set the threshold. Setting the standard of proof at the appropriate level is a delicate and complex

¹¹⁵ For example, most advocates of IBE, qualitative probability, and the relevant variables theory admit that quantitative probability has a role to play in their model as well. See e.g. Lipton (n 81) 107–17.

task. It is good to remember, in this regard, that standards of proof are primarily tools to distribute the risk of error between the parties. It would be a mistake to think that setting the standard of proof very high will increase the likelihood that the court will establish the truth. Indeed, setting the standard very high does not mean that the court will necessarily make fewer factually wrong decisions. On the contrary, a very high standard may lead to proportionally more factually wrong decisions being made, in the sense that more truly guilty people get acquitted. For example, assuming the standard of proof is set at 90% and the fact-finder comes to the conclusion that the evidence only establishes guilt with 80% certainty, this implies that there is an 80% chance that the court acquits a guilty person and therefore fails to establish the truth.¹¹⁶ In other words, the truth-tropic effect of the criminal standard of proof is asymmetrical.¹¹⁷ It requires high levels of certainty when persons are convicted, but it tolerates severe doubts about the accuracy of the verdict when persons are acquitted.¹¹⁸ In other words, standards of proof are not so much tools to create greater accuracy, but rather mechanisms for minimizing expected losses in case the decision turns out to be wrong.

The main challenge is thus to identify arguments about whether the defendant should run more or less risk of being convicted erroneously. It is often suggested, at least in the common-law tradition, that the criminal standard of proof should reflect the strength of society's aversion against the conviction of innocent persons. The level of risk-aversion is often expressed as a ratio of 1 in 10 or 1 in 100, whereby it is considered acceptable for a judicial system to convict one innocent person once in every 10 or 100 cases.¹¹⁹ However, such considerations quickly lead to very high probability thresholds. The concern about protecting the truly innocent may thus make it exceedingly difficult for the prosecution to obtain convictions against the truly guilty.

This is why more sophisticated models¹²⁰ suggest that the correct threshold can only be determined on the basis of the social cost of convicting the innocent as well as

¹¹⁶ As Lillquist points out, 'guilty defendants are nine times more likely to benefit from an error than an innocent defendant is likely to be harmed by an error'. E Lillquist, 'Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability' (2002) 36 *University of California Davis Law Review* 85, 98.

¹¹⁷ This is true to the extent that we assume there is a roughly equal number of guilty and innocent accused. If most accused are in fact guilty, then a lower standard of proof would not have a particularly detrimental effect on the accuracy of judgments. See Laudan, *Truth, Error, and Criminal Law* (n 55) 66–74. However, as we do not empirically know the relative number of innocent accused, we must base the standard of proof on the—perhaps slightly unrealistic—assumption that the distribution is roughly equal.

¹¹⁸ Perhaps this is what Trial Chamber II had in mind when it stated that an acquittal did not mean that the acquitted person was innocent; *Jugement rendu en application de l'article 74 du Statut, Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-3, TC II, ICC, 18 December 2012, para. 36. To the extent that an acquittal is not an affirmation of actual innocence, but merely a finding that the prosecutor did not meet the standard of proof, this statement is correct.

¹¹⁹ The 'one in ten' ratio is traditionally attributed to Blackstone. However, as Larry Laudan has pointed out, taken literally it makes little sense, as it would condone that in a hundred cases 9 innocent persons are convicted and 90 guilty persons are acquitted, leaving only one case to be decided correctly. See L Laudan, 'The Elementary Epistemic Arithmetic of Criminal Justice' (2008) *Episteme* 282.

¹²⁰ See e.g. L Laudan and H Saunders, 'Re-Thinking the Criminal Standard of Proof: Seeking Consensus about the Utilities of Trial Outcomes' (2009) 7 *International Commentary on Evidence* 1; Laudan, 'The Elementary Epistemic Arithmetic of Criminal Justice' (n 119), in which Laudan argues

acquitting the guilty, on the one hand, whilst also factoring in the utility of convictions. The main factors to determine these costs and utilities are usually said to be the nature of the crime charged and the characteristics of the accused. For example, if the crime charged carries a very heavy sentence, it may be expected that the cost of convicting an innocent person will be considered higher than when only a small fine is in play. Conversely, the utility of convicting a defendant who has openly called for terrorism is said to be higher than locking up a retired grandmother. Other utilities, such as the deterrent effect of the criminal law, the desire to be ‘tough on crime’, or any other rationale one may think of as relevant in the context of international criminal justice,¹²¹ may also play a role.

For example, Nancy Combs, who did much to expose the dismal quality of fact-finding by certain international tribunals, has tried to come up with a rational argument for why the beyond reasonable doubt standard should not be interpreted as strictly at the international level as before domestic courts. The starting point for her analysis is that standards of proof are inherently variable and that the characteristics of the defendant greatly influence how fact-finders understand the beyond reasonable doubt standard.¹²² She argues that, since the former official position or institutional affiliation of international defendants will often suggest that they must have been involved with the commission of *some* crime, international fact-finders are ‘apt to undervalue the harm associated with his wrongful conviction and overvalue the harm associated with his wrongful acquittal’.¹²³ In particular, she suggests that:

[w]e may be justifiably less concerned about preventing the wrongful conviction of a defendant accused of an international crime because the nature of international crimes, their perpetration, and their subsequent investigation are apt to put the defendant’s innocence in a different light from the innocence of a typical domestic defendant.¹²⁴

Apart from invoking inferences from the official position of the accused, Combs identifies four other reasons for why it might be justifiable to convict international defendants despite the fact that the evidence does not show guilt to a high level of certainty.

First, Combs argues that the likelihood that the evidence is insufficient because the investigation was inadequate is greater in international cases than in domestic cases. In other words, the fact that the evidence is insufficient to sustain a finding of guilt

that the relevant ratio is not how many innocent persons are falsely convicted, but rather the relation between the risk that an innocent person runs of being falsely convicted and the risk of being the victim of a crime committed by a person who was falsely acquitted. Given that international criminal justice is—at least in aspiration—exercised globally, it stands to reason that both the risk run by a random person of being falsely convicted of an international crime by the ICC is infinitesimally low. The more interesting question is how likely it is that the average global citizen will become the victim of an international crime committed by someone who has been falsely acquitted by an international court or tribunal. In other words, without information about how often acquitted international defendants go back to commit international crimes, it seems difficult to apply Laudan’s formula in this context.

¹²¹ See e.g. M Damaška, ‘What is the Point of International Criminal Justice?’ (2008) 83 *Chicago-Kent Law Review* 329; Jacobs (n 2) 1146–7.

¹²² N Combs, *Fact-Finding without Facts* (New York: Cambridge University Press 2010) 351.

¹²³ Ibid. ¹²⁴ Ibid., 353.

to a high level of certainty is assumed to be due to the inherent difficulties associated with international investigations and not due to the fact that the evidence simply does not exist.¹²⁵

Second, Combs claims that even if the evidence is insufficient to prove that an international defendant committed a particular crime in the particular way alleged in the indictment, there is greater likelihood that he (as opposed to a domestic defendant) committed the same crime but in a different way.¹²⁶

Third, Combs asserts that even if the international defendant did not commit the international crime he is charged with, there is a greater likelihood than in the domestic context that he committed some other crime.¹²⁷

Fourth, Combs maintains that even if the international defendant did not personally commit a crime, there is still a high likelihood that he may still bear some moral culpability for acquiescing in crimes being committed or by benefiting from them ideologically.¹²⁸

It is unclear what Combs' empirical basis is for making such sweeping claims. Judging by the context in which her study is set, i.e. the Rwandan genocide and events in Sierra Leone and East Timor, it may be asked to what extent the generalizations she proposes (assuming they are valid for these specific contexts) can be extrapolated to all international criminal cases. One may wonder, for example, whether the assumptions underlying her arguments would still be valid in a 'simple' war crimes case involving the prosecution of a British soldier for the mistreatment of prisoners in Iraq. Accordingly, it is probably wise not to take Combs' claim that wrongful *convictions* are always less costly in the international context for granted, let alone as universally applicable to all international cases.

However, apart from these 'substantive' arguments, Combs also offers reasons why wrongful *acquittals* of international defendants are more costly in the international context. Combs raises three arguments to support this claim.

First, she argues that international acquittals are likely to affect victims more profoundly than victims in the domestic context. The purported reason for this is that international victims often view acquittals through an ideological lens. Accordingly, when international defendants are acquitted on the basis of what are perceived as 'technicalities', the victim community is more likely to suspect the international jurisdiction of partiality.¹²⁹

Second, Combs states that the cost of international acquittals is particularly high because it is very difficult to obtain the arrest and surrender of international criminals.¹³⁰

Third, Combs worries that too many acquittals undermine international tribunals' 'very mission'. Accordingly, given the great financial, political, and diplomatic cost of international prosecutions, 'a substantial number of international acquittals—whether rightful or wrongful—could doom international justice entirely'.¹³¹

¹²⁵ Ibid.

¹²⁶ Ibid., 355.

¹²⁷ Ibid.

¹²⁸ Ibid., 353–5.

¹²⁹ Ibid., 358. It is not entirely clear why this argument could not also work in the opposite direction, i.e. it is quite plausible that the supporters of someone who is convicted on the basis of a lowered standard of proof will consider this as proof of partiality on the part of the Court.

¹³⁰ Ibid.

¹³¹ Ibid., 357–8.

Whereas it is easy to see the merit of some of these arguments, one may ask whether they are really so important that they can justify putting potentially innocent defendants at higher risk of being falsely convicted. Conspicuously absent from Combs' argument is any serious consideration of the rights and interests of the accused. This betrays a rather utilitarian or consequentialist conception of criminal proceedings, whereby the interests of individual defendants is subordinated to the presumed greater good of having a 'well-functioning' system of criminal justice.¹³² Indeed, regardless of the validity of Combs' arguments at the institutional level, the individual defendant will always be able to say that they do not concern her and that she should not become a 'martyr' for the institutional problems faced by international courts.¹³³ In the end, the question of how much risk the accused should bear will thus always come down to how much importance is attached to the presumption of innocence, the plight of *individual* innocent defendants and the possibility of a miscarriage of justice. To put matters in simpler terms: where to set the standard of proof reflects how seriously the system takes the individual and her rights and interests.¹³⁴ As H L Ho points out: 'The conviction of an innocent person, however unintentional, whatever the supposed social benefits, is intrinsically unjust. Any argument that ignores this moral fact is dangerously flawed.'¹³⁵

This raises the following question: the Appeals Chamber has repeatedly held that 'ending impunity' is one of the overriding objectives of the ICC,¹³⁶ so if 'impunity' is seen as something to be avoided, it follows that the Appeals Chamber in all likelihood considers that the cost of false acquittals is high; must it therefore be expected that the Appeals Chamber will set the beyond reasonable doubt standard relatively low? After all, from a purely pragmatic point of view, impunity can be more efficiently addressed if it is easier to convict the guilty, even if this means that more innocent accused will be condemned as well.¹³⁷ In any case, it will be interesting to see how the Appeals

¹³² For a discussion and critique of this type of argument, see Roberts and Zuckerman (n 16) 344–60.

¹³³ In the eighteenth century, William Paley famously argued that jurors were too meek in the fight against crime and that 'he who falls by a mistaken sentence, may be considered as falling for his country'. W Paley, *The Principles of Moral and Political Philosophy* (Exshaw et al. 1785) 318, quoted in Ho (n 17) 183. However, as many have since pointed out, the military analogy is deeply flawed, as fallen soldiers are usually honoured for their sacrifice, whereas convicted criminals generally do not enjoy such respect from society.

¹³⁴ See Roberts and Zuckerman (n 16) 345. It also reflects the commitment to the social contract that the public authorities will not condemn and punish someone who has not herself breached the social contract. See Jackson and Summers (n 23) 203.

¹³⁵ Ho (n 17) 184.

¹³⁶ See e.g. 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', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2205, AC, ICC, 8 December 2009, para. 77.

¹³⁷ It can never be said, of course, that the convictions of those who were innocent contributed to the fight against impunity, as, by definition, there must be something punishable before there can be an impunity gap. This shows that arguments invoking the fight against impunity and similar slogans should be used with great caution. As a battle cry for more international justice, in the sense for bigger and stronger institutions, it may be entirely justified. However, justice is done one case at a time and it would be highly perilous if the call for more institutional capacity to tackle international crime were to be translated into a blunt call for more convictions. After all, ending impunity is only a meaningful endeavour if it is done in a just and fair manner.

Chamber will balance its unease about false acquittals against the concern for the plight of individual defendants and how it will fit all this with its earlier dictum that, at trial, ‘certainty’ of guilt is required.¹³⁸

34.7 A Fixed or Variable Standard of Proof?

As the previous section has hopefully made clear, setting the criminal standard of proof at the right level depends on a number of factors, which represent as many variables. When the standard is set at a particular level, this is done on the basis of the typical or average value of these variables across all cases. For example, when determining the cost of false acquittals, a number of scenarios will be considered (e.g. the accused is an active commander in an ongoing conflict versus the accused has been apprehended ten years after the fact and no longer has any meaningful influence). In order to determine how important it is to avoid false acquittals in general, the decision-maker can either decide to rely on what she considers to be the most representative scenario, or she can attempt to define some average value. In any case, it will be clear that these typical/average values may differ considerably from the actual cost of false acquittals in specific cases. When that happens, the standard of proof is not attuned to the real interests of the case and may thus lead to unsatisfactory results. At the same time, it has been famously argued by Lord Denning, albeit in a discussion about the civil standard of proof, that ‘in proportion as the crime is enormous, so ought the proof to be clear’,¹³⁹ indicating that a higher standard of proof is required for more serious allegations. This is, in a nutshell, why it is argued by a number of scholars commenting at the national level¹⁴⁰ that the standard of proof should be variable, depending on the nature of the case or facts to be adjudicated.

Unfortunately, there is not enough space to explore the many empirical and theoretical issues related to this question in any depth. Nevertheless, two general points can be made. First, the wording of the standard of proof provides no indication that beyond reasonable doubt is intended to mean something different depending on the type of case or facts involved.¹⁴¹ Yet, to the extent that the subjective approach is followed, variability of the standard of proof is built in. As adjudicators are free to set the standard of proof at a level which they deem appropriate,¹⁴² they can adjust this in function of the gravity of the charges or the nature of the facts involved. Second, there are indications that other international courts do apply a variable standard of proof. For example, the ICJ has clearly indicated that it will be more demanding when the

¹³⁸ 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’, *Al Bashir* (n 9) para. 31.

¹³⁹ Court of Appeals, *Bater v Bater* [1951] P 35, 37.

¹⁴⁰ See e.g. Lillquist (n 116); Ho (n 17) 213–23.

¹⁴¹ Although Ho notes that ‘the language in which the criminal standard is expressed is open-textured. What standard is imported by the phrase “beyond reasonable doubt” depends on what is meant by reasonable, and it is only rational to determine what is reasonable with reference to the context’; Ho (n 17) 215–16.

¹⁴² Cf. Australian Supreme Court, *Jurymen themselves set the standard of what is reasonable in the circumstances*; *Green v The Queen* (n 27) 32–3.

facts are more serious.¹⁴³ Similarly, the ECtHR has remarked that ‘the level of persuasion necessary for reaching a particular conclusion... [is] intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake’.¹⁴⁴ There are equally indications that before international criminal courts and tribunals the standard of proof is applied differently depending on the nature of the facts concerned. For example, when one analyses the type of evidence which is deemed sufficient to enter findings beyond reasonable doubt concerning facts pertaining to the contextual elements of the crimes charged, it is fairly obvious that a lower standard is applied than for facts pertaining directly to the criminal responsibility of the accused. And although the type of evidence admitted is as such not determinative of the stringency of the standard of proof applied, it is rather suggestive that both the ad hoc tribunals and the ICC significantly relax the requirements for testimonial evidence when the evidence is proffered in relation to facts that do not pertain directly to the acts and conduct of the accused.¹⁴⁵

Assuming for the moment that the law permits the standard of proof to be applied in a flexible manner, the question arises whether there are any limitations in this regard. One important limitation appears to be that of non-discrimination. Indeed, it is one of the most fundamental precepts of procedural justice that like cases be treated alike, so it would be unacceptable to apply a different standard of proof to two persons who are accused of the same type of crime,¹⁴⁶ regardless of whether they are charged jointly or separately. Another basic limitation is that the beyond reasonable doubt standard may not be varied to such an extent that it overlaps with other standards. Indeed, varying the standard of proof may not result in applying a different standard of proof. As the drafters of the Rome Statute have introduced a number of different standards of proof in the Statute for different procedural stages,¹⁴⁷ it is not permissible to apply a different standard at trial than the one provided in Article 66(3). Any variation of the standard of proof must thus occur within the proper ‘bandwidth’ of the beyond reasonable doubt standard.

Whether or not it is appropriate to apply a variable standard of proof, and, if so, how flexible the standard should be and to which categories of facts it should apply, is a policy question. This chapter takes no position on this issue. Nevertheless, it is argued that, if a variable criminal standard of proof is permitted, it is of the utmost importance that there is maximum clarity and transparency about the scope and degree of permissible variation in the standard of proof.

¹⁴³ Judgment, *Corfu Channel (United Kingdom v Albania)*, ICJ Reports 1949, at 17; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia)*, ICJ Reports 2007, paras 209 and 422; A Riddell and B Plant, *Evidence before the International Court of Justice* (London: British Institute of International and Comparative Law 2009) 123–37.

¹⁴⁴ *Nachova v Bulgaria*, Application nos 43577/98 and 43579/98, European Court of Human Rights (Grand Chamber) 6 July 2005, para. 147.

¹⁴⁵ Rule 92 bis, ter, and quarter ICTY Rules of Procedure and Evidence, IT/32/Rev. 49 (as adopted on 11 February 1994, last amended on 22 May 2013); Rule 68 (as recently amended at the request of the Court) of the ICC Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, part II.A, 3–10 September 2002 (First Session of the ASP).

¹⁴⁶ See e.g. R Dworkin, *A Matter of Principle* (New York: Oxford University Press 1985) 93.

¹⁴⁷ The most notable ones are contained in Arts 58, 61, and 66(3) of the Statute.

34.8 Conclusion

It is not the ambition of this contribution to offer a concrete suggestion about how the ICC should define the criminal standard of proof as laid down in Article 66(3) of the Statute. Rather, it is hoped that it has at least been demonstrated that, contrary to what is generally assumed, it *is* possible to define the criminal standard of proof relatively precisely. However, doing so requires a definition of the standard of proof to encompass not just a mental ‘end-state’ but also a reasoning process. The question is thus not whether the Court *can* define the criminal standard of proof, but rather whether it *should* do so.

As was seen, most domestic systems have adopted the subjective approach. However, it was shown that this approach presents a number of profound difficulties, not least that it makes rational discussion—and therefore meaningful appellate review—all but impossible. Yet, adopting the subjective approach may prove to be irresistible for the Court, because it offers the path of least resistance. Indeed, if the principled decision is made to go for a formal approach, it is no longer possible to hide behind vague concepts and general phrases. Instead, a number of difficult choices impose themselves. In the first place, it will be necessary to determine which method(s) of inductive reasoning must be applied by the fact-finder. Next, it will be necessary to determine whether beyond reasonable doubt should be a singular, uniform, standard that applies to all facts in issue or rather whether some variation is preferable. In the latter case, it is necessary to specify for which types of cases/facts such variation is allowed. Last but not least, it will be necessary to determine the level of certainty (either a single value or, in case variation is allowed, a bandwidth) that is required in order to satisfy the standard of proof. These are complex questions, which require a solid understanding of the epistemic models involved. As many lawyers are not trained in this field, they may find it challenging to navigate this unfamiliar and complex terrain and may prefer to seek refuge in the comfort of subjectivity.

However, the factor that is perhaps most likely to steer the ICC towards the subjective approach is that it gives judges maximum freedom to do what they think is right and just. Indeed, some may be wary of the perceived rigour that formal models impose. To the extent that formal methods of fact-finding eliminate purely impressionistic and intuitive fact-finding, they do limit the adjudicator’s freedom. In particular, formal methods of fact-finding make it much harder for adjudicators to engage in ‘holistic’ fact-finding, a process whereby adjudicators contemplate the evidence ‘as a whole’ and draw overall conclusions from this,¹⁴⁸ which are then subsequently ‘motivated’ by accepting all evidence that is thought to confirm the overall conclusion and rejecting or explaining away anything that contradicts it.¹⁴⁹

¹⁴⁸ Klamberg (n 8) 159 argues that ‘the Court should not base its judgment on an “intuitive holistic evaluation” of the evidence submitted. Methods of evaluation may provide a check against the judge’s intuition. It is a safeguard against cognitive bias, negligence and arbitrariness’.

¹⁴⁹ D Simon, ‘A Third View of the Black Box: Cognitive Coherence in Legal Decision Making’ (2004) 71 *University of Chicago Law Review* 511, whose research has shown that humans engage in a process of

This is not to suggest that the subjective approach systematically leads to incorrect or irrational decisions. Nevertheless, it is hard to deny that the subjective approach makes it much harder to identify and correct mistakes, simply because it offers no yardstick for what is reasonable and what is not in the context of fact-finding. Whereas judges and adjudicators should generally be trusted to carry out their mandate honourably and conscientiously, it may still seem rather odd for a modern judicial system to entrust one of its key tasks—the establishment of facts—to what is essentially a conceptual black box.

If one agrees with the quote from the late Professor Cohen at the very beginning of this chapter, it will be clear that such an approach is not suitable for the ICC. In the end, however, the Court is free to define the criminal standard as it sees fit. All options are still open in this regard. However, whatever model or definition of beyond reasonable doubt the Court may adopt, it will be a reflection of how the judges see themselves and how they conceive their role. Ultimately, the choice between a subjective or objective approach boils down to a question of trust. Do we trust the judges to act as rational agents, free from subconscious biases and immune to unreliable cognitive processes, or do we prefer them to explain their findings on the basis of a particular model of inductive reasoning? Justice is supposed to be blind. Does this mean that we must trust those who are elected to dispense it on behalf of the international community blindly as well?

what he calls ‘reversed induction’, whereby fact-finders seek to maximize the coherence of their findings by shifting their evaluation of the evidence, so that the elements that support the preferred finding are strongly endorsed and the elements that support an alternative finding are dismissed, rejected, or ignored. Crucially, this is a gradual process, in which the fact-finder *changes* her initial opinion about the strength of particular evidence in order to provide better support for the conclusion reached. Under this view, fact-finding is thus a bi-directional process, whereby the evidence influences the conclusion but the conclusion also influences the way the evidence is assessed.

35

Confirmation of Charges

*Ignaz Stegmiller**

35.1 Introduction

The confirmation of charges procedure is a novelty that was introduced under the Rome Statute. The idea of a preliminary chamber dealing with the confirmation of the charges goes back to a French proposal and an Argentine proposal of 1996.¹ Predecessors, such as the ICTY and the ICTR, did not foresee a similar procedure.² The procedural systems at the ICTY and ICTR are more simplified and the confirmation of an indictment takes place ‘in an *ex parte* hearing before a single judge, without any involvement of the Defence and is based only on the Prosecutor’s allegations’.³ However, as Ambos and Miller stated elsewhere, the ICTY and ICTR included some measures in their Rules of Procedure and Evidence (RPE) to streamline the time-consuming disclosure procedure.⁴ The ICC, taking the experience of the ad hoc tribunals into consideration, combines confirmation and disclosure procedures and therefore regulates an *intermediary phase* between the investigation phase and the trial phase—the confirmation of charges hearing according to Article 61 of the Rome Statute.

In this chapter, I will shed some light on the relationship between pre-trial and trial proceedings. I will outline the proceedings regarding the newly introduced confirmation phase before addressing the different legal avenues for the Pre-Trial Chamber (PTC) in more detail (sections 35.2 and 35.3). Out of eight situations and 21 cases which have been brought before the ICC, the Court has issued confirmation of charges decisions against 15 individuals to date. Thereby, the Chambers have confirmed charges

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¹ War Crimes Research Office (‘WCRO’), The Confirmation of Charges Process at the ICC (October 2008) at 51 *et seq.*, referring to the Draft Statute of the ICC: Working Paper submitted by France to the Preparatory Committee, A/AC.249/L.3, 6 August 1996, Art 10, and Working Paper submitted by Argentina on the Rules of Procedure to the Preparatory Committee, A/AC.249/L.6, 13 August 1996, R.61.

² R Cryer at al., *An Introduction to International Criminal Law and Procedure* 2nd edn (Cambridge: Cambridge University Press 2010) 460. The ICC uses the term ‘charges’ rather than indictment, C Safferling, *International Criminal Procedure* (Oxford: Oxford University Press 2012) 319. For the drafting history of the provisions concerning the confirmation hearing, see K Shibahara and W Schabas, ‘Article 61’ in O Triffterer (ed.), *Commentary Rome Statute of the International Criminal Court* 2nd edn (München: C H Beck 2008) paras 1 *et seq.*; WCRO, The Confirmation of Charges Process (n 1) 6–7, 44 *et seq.*

³ M Miraglia, ‘Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in Lubanga’ (2008) 6 *Journal of International Criminal Justice* 489, 490.

⁴ K Ambos and D Miller, ‘Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective’ (2007) 7 *International Criminal Law Review* 335, 336 *et seq.*

against ten individuals and rejected charges against four.⁵ In *Gbagbo*, the confirmation of charges hearing commenced in February 2013, but was later adjourned and the prosecutor was asked to provide further evidence.⁶ The most important findings of mentioned decisions are taken into account when addressing sections 35.2 and 35.3, but issues of particular importance are dealt with separately. Section 35.4 covers the modification of legal findings by the Trial Chamber if it disagrees with the PTC's characterization during the confirmation hearing. Section 35.5 stretches the bow from the descriptive chapters on the confirmation procedure to the most pertinent question of the necessity and legitimacy of such an intermediary phase.

One view states that the confirmation hearing's principle aim is to prepare, streamline, and shorten the trial procedure.⁷ However, in practice, the anticipated function as a preparation mechanism shows limited success and trial preparation is rather prolonged than shortened. In such a vein, Nerlich claims mixed success of the confirmation hearing and he calls for amendments of the Regulations of the Court.⁸ The confirmation of charges hearing allegedly constitutes a 'mini-trial' with evidence being heard before the actual trial starts.⁹ In accordance with this view, the confirmation hearing would need a refinement, giving more competencies to the PTC and allowing for a streamlined preparation of trial proceedings during and shortly after the confirmation decision.

Another view emphasizes the purpose of the confirmation of charges hearing as a control mechanism, so-called checks and balances, separating those cases and charges which should go to trial from those which should not.¹⁰ Clearly unfounded charges

⁵ Charges were confirmed in the *Situation of the DRC* against Thomas Lubanga Dyilo, Mathieu Ngudjolo Chui (on trial, Ngudjolo's verdict was not guilty; an appeal by the OTP is pending), Germain Katanga; in the *Situation of Darfur, Sudan*, against Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (Jamus was declared dead and proceedings were terminated); in the *Situation of the CAR*, against Jean-Pierre Bemba Gombo; and in the *Situation in Kenya*, against William Samoei Ruto, Joshua Arap Sang, Uhuru Muigai Kenyatta, and Francis Kirimi Muthaura (the charges against Muthaura were later withdrawn by the prosecution). Charges were declined against Callixte Mbarushimana (DRC), Bahar Idriss Abu Garda (Darfur, Sudan), Henry Kiprono Kosgey, and Mohammed Hussein Ali (both Kenya).

⁶ Decision adjourning the hearing on the confirmation of charges pursuant to Art 61(7)(c)(i) Rome Statute, *Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-432, PTC I, ICC, 3 June 2013. The decision was upheld by the Appeals Chamber in 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) Rome Statute', *Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-572, AC, ICC, 16 December 2013.

⁷ E Chaitidou, *Initiative zu verfahrensrechtlichen Reformen des Internationalen Strafgerichtshofs, Expertentreffen am 14/15 Februar 2014*, Berlin (copy on file with the author).

⁸ V Nerlich, 'The Confirmation of Charges Procedure at the International Criminal Court, Advance or Failure?' (2012) 10 *Journal of International Criminal Justice* 1339, 1354 *et seq.*

⁹ Arguing against such allegations of a 'trial before the trial', Decision on the Confirmation of Charges, *Abu Garda, Situation in Darfur, Sudan*, ICC-02/05-02/09-243-Red, PTC I, ICC, 8 February 2010, para. 39: 'The Chamber recalls that the confirmation hearing is neither a trial before the trial nor a mini-trial, and that "[t]he purpose of the confirmation hearing is limited to committing to trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought. This mechanism is designed to protect the rights of the Defence against wrongful and unfounded charges"' (footnotes omitted); also, Decision on the Confirmation of Charges, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-717, PTC I, ICC, 30 September 2008, para. 63.

¹⁰ E Withopf, 'Confirmation of Charges, The Law and Practice of the International Criminal Court: Achievements, Impact and Challenges', 26 September 2012, The Hague (copy on file with the author).

by the prosecution should not proceed to trial and result in long-lasting proceedings, infringing upon the Defendants' rights and wasting resources. If this perception prevails, the confirmation hearing should be shortened and discharged of any time-consuming determinations.

The two views are not entirely antipodal. They just stress a different focal point for the confirmation hearing. Nevertheless, there is an inherent danger of anticipating trial proceedings in conducting a confirmation hearing, and the function of the procedure must be purified. Either way, the development of the confirmation hearing depends upon crystallizing its core and clarifying the PTCs' competencies.

35.2 Proceedings during the Confirmation of Charges Phase

Any time after the initiation of an investigation in accordance with Article 53 (1) of the Rome Statute, the prosecutor may seek a warrant of arrest if there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court, and if grounds for detention (to ensure appearance at trial, etc.) under Article 58 (1) of the Rome Statute are given. If the OTP concludes that there is a sufficient basis for prosecution in accordance with Article 53(2) of the Rome Statute and as soon as the person appears before the Court, the PTC sets a date for the confirmation hearing pursuant to Article 60(1) of the Rome Statute and Rule 121(1) of the RPE. The OTP must prepare a document containing the charges (DCC) in accordance with Regulation 52, provide a copy of this document to the named person and the PTC, and give information on the evidence for the purpose of the hearing no later than 30 days before the confirmation hearing takes place (Article 61(3) of the Rome Statute and Rule 121(3) of the RPE).¹¹ The document must set out (i) the name of the person and other relevant identifying information; (ii) a statement of facts; (iii) a legal characterization.¹² In other words, it is constituted of the facts and circumstances as well as their legal characterization. In accordance with Article 63(3) of the Rome Statute, disclosure obligations must further be fulfilled and the PTC shall hold status conferences to ensure a satisfactory disclosure of evidence that the prosecution intends to rely on at the hearing (Rule 121(2) of the RPE). This disclosure obligation entails exonerating evidence,¹³ and most of the potentially exculpatory evidence ('the bulk') must be disclosed as soon as practicable *before* the hearing takes place:

Therefore, except for exceptional circumstances which might justify subsequent isolated acts of investigation, the investigation must be completed by the time the

¹¹ Shibahara and Schabas (n 2) paras 11–12; Safferling, *International Criminal Procedure* (n 2) 320. The person must also be informed of the right to apply for interim release, cf. K Calvo-Goller, *The Trial Proceedings of the International Criminal Court* (Leiden: Martinus Nijhoff 2006) 170.

¹² Regulation 52 of the Regulations of the Court, ICC-BD/01-01-04. All regulations without further reference are those of the ICC Regulations of the Court.

¹³ Art 67 (2) Rome Statute; Rules 76 and 77 RPE. In accordance with Art 54 (3) (e) Rome Statute, the Prosecutor may enter into agreements of confidentiality and not disclose certain evidence. However, this provision has to be interpreted narrowly and the excessive use of this provision has led to controversies in the Lubanga case, resulting in a provisional stay of proceedings. As the Chamber states, 'disclosure of exculpatory evidence in the possession of the prosecution is a fundamental aspect of the accused's right

confirmation hearing starts, and the Prosecution must be in possession or control of most, if not all, the potentially exculpatory materials which it must disclose under article 67(2) of the Statute before the start of the confirmation hearing.¹⁴

The broad disclosure obligations, in particular the ‘bulk’ rule and the necessity of so-called Evidence Charts, unnecessarily prolongs confirmation proceedings, it is not in conformity with the limited purpose of the hearing, and, most of all, it finds no basis in ICC law.¹⁵

The presiding judge of the Chamber determines how the hearing will be conducted, establishing the order and conditions for the presentation of evidence (Rule 122(1) of the RPE). In *Lubanga*, the following procedure was introduced: (i) reading out of the charges; (ii) opening statement by the prosecution, victims’ representatives, and the defence; (iii) consideration of any matters relating to jurisdiction, admissibility, and other procedural matters; (iv) presentation by the prosecution of evidence; (v) presentation by the defence of evidence; (vi) closing statements by the prosecution, victims’ representatives, and the defence.¹⁶ For the presentation of evidence, the Chamber might also have to rule on the admissibility of evidence on a case-by-case basis.¹⁷ It is worth noting that the confirmation hearing can take place without the person concerned being present. Under Rule 124(1) of the RPE, the person may waive this right and the PTC shall decide whether the hearing can be held in the absence of the person (Rules 124(2) and 125(1) of the RPE). In *Banda Abakaer Nourain and Mohammed Jerbo Jamus*, for example, both suspects waived their right to attend the

to a fair trial’, see Decision on the consequences of non-disclosure of exculpatory materials covered by Art 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, *Lubanga, Situation in the Democratic Republic of the Congo*, TC I, ICC, 01/04-01/06-1401, 13 June 2008, para. 92.

¹⁴ Decision on the final system of disclosure and the establishment of a timetable, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-102, PTC I, ICC, 15 May 2006, para. 131. The OTP is under an obligation to disclose all evidence it intends to rely on before the confirmation hearing and only the disclosure of a ‘fraction of the overall potentially exculpatory materials in the possession or control of the Prosecution’ might be delayed (*ibid.*, para. 127). On the obligations to disclose exculpatory material, see also Decision Rejecting the Prosecution Urgent Request and Establishing a Calendar for the Disclosure of the Supporting Materials of the Prosecution Application for a Warrant of Arrest against Germain Katanga, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-5, PTC I, ICC, 6 July 2007, 10–11. However, this disclosure obligation relates only to the bulk of evidence (‘the bulk rule’) as stated by ICC case law and amounts to core evidence only, see, *inter alia*, Decision on Art 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-621, PTC I, ICC, 20 June 2008, paras 8 and 124. See further, WCRO, The Confirmation of Charges Process (n 1) 9–10, 26–7, 39 *et seq.*; Safferling, *International Criminal Procedure* (n 2) 370; Ambos and Miller (n 4) 343–4.

¹⁵ Withopf (n 10) 5–7.

¹⁶ Decision on the schedule and conduct of the confirmation hearing, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-678, PTC I, ICC, 7 November 2006, Annex I; similarly Decision on the Schedule for the Confirmation Hearing, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-587, PTC I, ICC, 13 June 2008, Annex I. Pictures in the courtroom can only be taken at the beginning, cf. Order authorizing Photographs at the Hearing of 29 January 2007, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-795, PTC I, ICC, 29 January 2007.

¹⁷ For the *Lubanga* hearing and the application of Art 69(7) Rome Statute, Rule 122 (9) RPE see Miraglia (n 3) 491 *et seq.*

confirmation hearing and the PTC was ‘satisfied that the suspects [understood] their right to be present at the confirmation hearing as well as the consequences of waiving this right’ under Rule 124(2) of the RPE.¹⁸ In accordance with Regulation 53, the PTC shall deliver its decision within 60 days after the confirmation hearings ends. The trial phase can only begin once the charges are confirmed. Documents are maintained in a record of all proceedings by the Registry.¹⁹

Interlocutory appeals under Article 81(2)(d) of the Rome Statute against the confirmation decision are handled very reluctantly. Only in the case of *Mbarushimana* a leave to appeal by the prosecution was granted with regard to possible errors of law,²⁰ but the (negative) confirmation of charges decision was later upheld by the Appeals Chamber.²¹ In other cases, appeals were not granted.²² It is established practice by the Chambers that there is no direct right to appeal a confirmation of charges decision, as (i) the drafters intentionally excluded the decision from the categories of decisions which may be directly appealed before the Appeals Chamber; (ii) by its very nature, the decision is predicated upon an assessment of the evidence; and (iii) an appeal can only be granted under the requirements of Article 81(2)(d) of the Rome Statute and the existence of an error of law.²³ If one takes the purpose of judicial efficiency into account, the denial of a direct appeal appears consequential. Yet, if confirmation hearings rise to the level of a pre-‘mini’-trial, setting the path for trial, and involve broad disclosure obligations and witness testimony, the denial of an appeal infringes upon the rights of the prosecution and defence. This shows how practice has deviated from the idea of the drafters, leading to broader confirmation hearings than expected. The law of the ICC might emerge differently than anticipated and that is inevitable to some extent. However, the purpose of confirmation hearings should be construed narrowly, primarily focusing on an efficient and timely control of charges. Therefore, a direct appeal is rightly denied and should not be included in the Rome Statute, but, in turn, judges need to exercise judicial self-restraint and issue brief confirmation decisions based on a very low evidentiary threshold.

¹⁸ Decision on issues related to the hearing on the confirmation of charges, *Banda, Situation in Darfur, Sudan*, ICC-02/05-03/09-103, PTC I, ICC, 17 November 2010, para.4. On the presence of the person concerned, Safferling, *International Criminal Procedure* (n 2) 322 *et seq.*; Shibahara and Schabas (n 2) paras 7 *et seq.*; Ambos and Miller (n 4) 346 *et seq.*

¹⁹ Rule 121 (10) RPE.

²⁰ Decision on the ‘Prosecution’s Application for Leave to Appeal the “Decision on the Confirmation of Charges”’, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-487, PTC I, ICC, 1 March 2012.

²¹ 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’, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-514, AC, ICC, 30 May 2012.

²² Chaitidou (n 7) 5–6.

²³ Decision on the Defences’ Applications for Leave to Appeal the Decision on the Confirmation of Charges pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-399, PTC II, ICC, 9 March 2012, para. 16; Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-915, PTC I, ICC, 24 May 2007, paras 19–21; Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision Pursuant to Article 61(7)(a) and (b) Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-532, PTC II, ICC, 18 September 2009, paras 12 *et seq.*

35.3 Procedural Avenues for the Pre-Trial Chamber

At the hearing, the prosecutor must establish ‘substantial grounds’ to support each of his charges according to Article 61(5) of the Rome Statute. The Rome Statute contains different levels of suspicion: first, ‘reasonable basis to believe’ (Articles 15(3), (4), and 53(1)(a) of the Rome Statute), followed by ‘sufficient basis’ (Article 53(2) of the Rome Statute), ‘reasonable grounds’ (Article 58(1)(a) of the Rome Statute), and the already mentioned ‘substantial grounds’ (Article 61(5) of the Rome Statute). The highest standard is finally contained in Article 66(3) of the Rome Statute, which refers to ‘beyond reasonable doubt’ in order to secure a conviction. The drafters of the Rome Statute thus established progressively higher evidentiary thresholds in Articles 15, 58(1), 61(7), and 66(3) of the Rome Statute.²⁴ In fact, the ‘reasonable basis’ can be described as the first step of a *five-stage stairway*, which becomes stricter with every step taken towards trial and requires more profound evidence on each level.²⁵ In consequence, the threshold of ‘substantial grounds to believe’ is higher than the threshold required for the issuance of a warrant of arrest, but lower than the threshold required for the conviction of an accused.²⁶

The standard of proof for the confirmation of charges hearing can be divided into ‘sufficient evidence’ and ‘substantial grounds’.²⁷ It differs from the ad hoc tribunals, which mention the existence of a *prima facie* case,²⁸ and therefore, a comparison is unhelpful because the procedures are so disparate from each other.²⁹ However, the test should not be higher than a *prima facie* standard,³⁰ and, as outlined here, case law is ambiguous when it comes to exact determination of the definitions of the test.

On the one hand, in *Lubanga*, the PTC held that the ‘purpose of the confirmation of charges hearing is limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought’ and, relying on internationally recognized human rights jurisprudence,

²⁴ Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) Rome Statute, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-373, PTC II, ICC, 23 January 2012, para. 40.

²⁵ See the figure at Safferling, *International Criminal Procedure* (n 2) 339. In addition, the two stages of Art 53 must be taken into account.

²⁶ Decision adjourning the hearing on the confirmation of charges, *Gbagbo* (n 6) para. 17; C Safferling, *Internationales Strafrecht* (Berlin: Springer 2011) 309.

²⁷ Miraglia (n 3) 494.

²⁸ Arts 18(4) and 19(1) Statute of the ICTY (adopted 25 May 1993 by UNSC Res 827, as amended on 7 July 2009 by Res 1877); Arts 17(4) and 18(1) Statute of the ICTR (adopted 8 November 1994 by UNSC Res 955, as amended on 16 December 2009 by Res 1901).

²⁹ Miraglia (n 3) 498; Judgment on the appeal of the Prosecutor against the Decision on the Confirmation of Charges, *Mbarushimana* (n 21) para. 43: ‘The confirmation of an indictment at the ICTY/ICTR is an *ex parte* procedure conducted in the absence of the defence by one judge. The confirmation of charges hearing, in comparison, was deliberately established as a hearing before a Pre-Trial Chamber of three judges at which the person charged has the right to be present and to contest the evidence and following which the Pre-Trial Chamber must assess the evidence. Such a process clearly requires the Pre-Trial Chamber to go beyond looking at the Prosecutor’s allegations “on their face” as is done in confirming an indictment at the ICTY or ICTR.’

³⁰ Withopf (n 10) 9. Contrary, Judgment on the appeal of the Prosecutor against the Decision on the Confirmation of Charges, *Mbarushimana* (n 21) para. 43, stating that the test goes beyond looking at allegations ‘on their face’.

defined the evidentiary burden for the prosecution as ‘concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations’.³¹ The judges, in making this determination, refer to the principle of *in dubio pro reo*, which ‘as a general principle in criminal procedure applies, *mutatis mutandis*, to all stages of the proceedings, including the pre-trial stage’.³² However, the wording of ‘concrete and tangible proof’ suggests that the test is rather high.

On the other hand, PTCs pointed out that the standard of ‘substantial grounds’ is significantly lower in comparison to the trial stage and, as explicitly stated in Article 61(5) of the Rome Statute, the prosecutor ‘may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial’.³³ But summary evidence is given a lower probative value, and statements of anonymous witnesses, for example, are ‘evaluated on a case-by-case basis, according to whether the information contained therein is corroborated or supported by other evidence tendered into the case file’.³⁴ Due to the adversary nature of the procedure, the PTC’s analysis must also consider the defence’s allegations and evaluate their weight and persuasiveness.³⁵ In Withopf’s view, the lack of clarity does not encourage the prosecutor to rely on summary evidence and almost forces the OTP to call witnesses, transforming the confirmation hearing into a ‘mini-trial’.³⁶

In conclusion, and reiterating the purpose of the confirmation of charges hearing, the suspect should be protected against wrongful prosecution, and judicial economy is to be ensured by distinguishing cases that should go to trial from those that should not.³⁷ Rather than becoming actively involved in the investigation, the PTC monitors the prosecutor’s activities.³⁸ The test should thus amount to a very low threshold, minimize disclosure obligations for the purpose of what is necessary at this stage, and avoid delays.

On the basis of Article 61(7) of the Rome Statute and based on an evaluation of the submitted evidence, the PTC has three possibilities to conclude a confirmation of charges hearing: (i) confirm the charges; (ii) decline to confirm the charges; or

³¹ Decision on the Confirmation of Charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-803, PTC I, ICC, 29 January 2007, paras 37–9; see also Confirmation of Charges, *Katanga and Ngudjolo* (n 9) para. 65; Decision on the Confirmation of Charges, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-465-Red, PTC I, ICC, 16 December 2011, paras 40–1; Decision on the Confirmation of Charges, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, ICC, 15 June 2009, para. 29; Decision on the Confirmation of Charges, *Abu Garda* (n 9) paras 36–7; Decision Adjourning the Hearing on the Confirmation of Charges, *Gbagbo* (n 6) para. 17; Decision on the Confirmation of Charges, *Ruto, Kosgey and Sang* (n 24) para. 40; Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) Rome Statute, *Muthaura, Kenyatta and Ali, Situation in the Republic of Kenya*, ICC-01/09-02/11-382-Red, PTC II, ICC, 31 January 2012, para. 52. On the standards of proof, see further Miraglia (n 3) 494 *et seq.*; Nerlich (n 8) 1343.

³² Decision on the Confirmation of Charges, *Muthaura, Kenyatta and Ali* (n 31) para. 53.

³³ In the same vein, see Corrigendum of the ‘Decision on the Confirmation of Charges’, *Banda and Jerbo, Situation in Darfur, Sudan*, ICC-02/05-03/09-121-Corr-Red, 8 March 2011, para. 40.

³⁴ Decision on the Confirmation of Charges, *Abu Garda* (n 9) para. 52.

³⁵ Miraglia (n 3) 495; Judgment on the appeal of the Prosecutor against the Decision on the Confirmation of Charges, *Mbarushimana* (n 21) para. 40.

³⁶ Withopf (n 10) 8.

³⁷ Decision on the Confirmation of Charges, *Ruto, Kosgey and Sang* (n 24) para. 40.

³⁸ WCRO, The Confirmation of Charges Process (n 1) 58.

(iii) adjourn the hearing and request the prosecutor to consider providing further evidence or conducting further investigations, or, alternatively, amending a charge if the evidence points towards a different crime within the jurisdiction of the Court. Furthermore, the OTP might decide to withdraw charges.

35.3.1 Confirm the charges

For confirmation of charges, the prosecution presents evidence that the PTC must find sufficient to establish substantial grounds to believe that the person committed the alleged crime(s). During this hearing, the Chamber also declares specific evidence to be admissible or inadmissible, and values the probative value for the confirmation hearing.³⁹ If the charges are confirmed, the record of proceedings is transmitted to the Presidency of the Court and the case is assigned to a Trial Chamber.⁴⁰ Appeal is, in principle, not allowed.⁴¹ As common practice, the prosecution must further draft a post-confirmation DCC.⁴² This updated, and if the case may be, amended document shall be read out at the beginning of the trial.⁴³ One danger inherent to the confirmation of charges hearing can be seen in the ‘strong presumption of the person’s guilt even before the trial began’,⁴⁴ which would violate Article 66 of the Rome Statute. However, as discussed in the following section,⁴⁵ safeguards exist to prevent a ‘trial before the trial’ and the confirmation of charges hearing offers an additional filter for unfounded charges.⁴⁶ This notwithstanding, the signal of a confirmed charge points in the direction of conviction and endangers shifting the burden from the prosecutor to the accused to prove his/her innocence.⁴⁷

35.3.2 Decline the charges

The PTC may also confirm charges that reach the required threshold, but decline other charges of the DCC that do not.⁴⁸ In particular, the PTC in *Bemba* rejected the

³⁹ Decision on the Confirmation of Charges, *Lubanga* (n 31) paras 154 *et seq.*; Decision on the Confirmation of Charges, *Katanga and Ngudjolo* (n 9) paras 72 *et seq.*; Decision on the Confirmation of Charges, *Ruto, Kosgey and Sang* (n 24) paras 54 *et seq.*

⁴⁰ Art 61 (11) Rome Statute, Rules 130, 131 RPE; see, for example, Decision constituting Trial Chamber I and referring to it the case of *The Prosecutor v Thomas Lubanga Dyilo, Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-842, Presidency, ICC, 6 February 2007.

⁴¹ Shibahara and Schabas (n 2) para. 18. Appeals under Art 82 (1) (d) Rome Statute are allowed for errors in law, but the review is corrective in nature and not *de novo*. Judgment on the appeal of the Prosecutor against the Decision on the Confirmation of Charges, *Mbarushimana* (n 21) para. 15.

⁴² See, *inter alia*, Order for the prosecution to file an amended document containing the charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1548, TC I, ICC, 9 December 2008; Order for the prosecution to file an updated document containing the charges, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-450, TC V, ICC, 5 July 2012. These orders are based on Arts 64 (8) (a), 67 (1), 64 (2), and 64 (6) (f) Rome Statute.

⁴³ Art 64 (8) (a) Rome Statute.

⁴⁴ Calvo-Goller (n 11) 171 with fn. 780.

⁴⁵ See section 35.5.

⁴⁶ Ambos and Miller (n 4) mention two important safeguards: (i) the summary character and low threshold of the proceedings; and (ii) the different composition of the PTC and the Trial Chamber.

⁴⁷ In contradiction to Art 66 (2) Rome Statute.

⁴⁸ In *Katanga and Ngudjolo*, for example, most charges were confirmed, but some were declined, cf. Decision on the Confirmation of Charges, *Katanga and Ngudjolo* (n 9) 207 *et seq.*

practice of cumulative accusations and therefore dismissed some charges.⁴⁹ To date, charges against four persons were declined entirely because there was no sufficient evidential basis for the attribution of criminal conduct to these suspects and thus no individual criminal responsibility.⁵⁰ If charges are not confirmed, any previous arrest warrant also ceases to have effect.⁵¹

35.3.3 Adjourn the hearing

The PTC may adjourn the hearing and request the prosecutor to either (i) provide further evidence or conduct further investigations, or (ii) amend the charges because submitted evidence appears to establish a different crime.

In *Gbagbo*, the PTC made use of the first option under Article 61(1)(c)(i) of the Rome Statute and adjourned the hearing. The Chamber particularly discussed the difficulty of reliance on anonymous hearsay evidence in documentary evidence, its lower probative value,⁵² as well as the problematic and heavy reliance on NGO reports and press articles with regard to key elements:

Such pieces of evidence 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. Even though NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, 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 charges.⁵³

Due to the evidence submitted, the Chamber was not in a position to make a definite finding about the threshold element of crimes against humanity (existence of an attack and the policy requirement).⁵⁴ When summary evidence is insufficient, though, the Chamber needs to reject the charges, but may adjourn the hearing and give the prosecutor more time to provide further evidence.⁵⁵

The Chambers may further use Article 61(7)(c)(ii) of the Rome Statute to request the prosecutor to amend the charges. An amendment can take place *before* or *after* the

⁴⁹ Decision on the Confirmation of Charges, *Bemba* (n 31) paras 72, 190, 200 *et seq.*, 302. The appeal by the OTP was rejected, Decision on the Prosecutor's Application for Leave to Appeal, *Bemba* (n 23) para. 54 (on the practice of cumulative charges). Critical and favouring cumulative charging, WCRO, The Practice of Cumulative Charging at the ICC (May 2010) 11 *et seq.* See further Cryer et al. (n 2) 458 *et seq.*

⁵⁰ Decision on the Confirmation of Charges, *Mbarushimana* (n 31) 149 (Judge Monageng dissenting); Decision on the Confirmation of Charges, *Abu Garda* (n 9) 97; Decision on the Confirmation of Charges, *Ruto, Kosgey and Sang* (n 24) paras 293 *et seq.* (charges against Kosgey declined, at 138); Decision on the Confirmation of Charges, *Muthaura, Kenyatta and Ali* (n 31) paras 420 *et seq.* (charges against Ali declined, at 154).

⁵¹ Art 61 (10) Rome Statute.

⁵² Note, however, that rules regarding orality in the pre-trial phase are more relaxed, Judgment on the appeal of the Prosecutor against the Decision on the Confirmation of Charges, *Mbarushimana* (n 21) para. 45.

⁵³ Decision adjourning the hearing on the confirmation of charges, *Gbagbo* (n 6) paras 28 *et seq.*

⁵⁴ Decision adjourning the hearing on the confirmation of charges, *Gbagbo* (n 6) paras 22 and 36.

⁵⁵ Decision adjourning the hearing on the confirmation of charges, *Gbagbo* (n 6) para. 37, referring to Judgment on the appeal of the Prosecutor against the Decision on the Confirmation of Charges, *Mbarushimana* (n 21), para. 48.

hearing in accordance with Article 61(4) and 61(9) of the Rome Statute respectively.⁵⁶ The OTP may amend the charges up to 15 days before the hearing and must inform the person thereof (Article 61(4) of the Rome Statute and Rule 121(5) of the RPE). On its own initiative, the prosecutor may also amend the charges after they have been confirmed, but only before the trial has begun and with the permission of the PTC (Article 61(9) of the Rome Statute and Rule 128 of the RPE).⁵⁷ The amendment under Article 61(7)(c)(ii) of the Rome Statute is initiated by the PTC, but it must be borne in mind that the PTC cannot modify the charges by itself. The PTC ‘may request the prosecution to consider amending a charge. Importantly, it is the prosecution which would then amend such a charge, not the Pre-Trial Chamber’.⁵⁸ On the other hand, the OTP needs the permission of the PTC to amend charges after confirmation has taken place:

Before the confirmation hearing, the Prosecutor may continue his investigation, amend or withdraw charges without the permission of the Pre-Trial Chamber. This flexibility of the Prosecutor is more limited after the confirmation of the charges with respect to the amendment, addition or withdrawal of charges: pursuant to article 61 (9) of the Statute the Prosecutor may amend the charges after their confirmation only with the permission of the Pre-Trial Chamber; in order to add additional charges or substitute charges with more serious charges, a new confirmation hearing must be held; withdrawal of charges after the commencement of the trial is only possible with the permission of the Trial Chamber.⁵⁹

Ambos argues that the Chamber circumvented asking the OTP for an amendment in the *Bemba* case and avoided an adjournment by amending the mode of liability *proprio motu* and by *judicial fiat*.⁶⁰ From a formalistic point of view, and, moreover, taking the previous adjournment by PTC III⁶¹ and the OTP’s second version of the charges

⁵⁶ These two stages must be distinguished carefully, Corrigendum to ‘Decision on the “Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”, Kenyatta, Situation in the Republic of Kenya, ICC-01/09-02/11-700-Corr, PTC II, ICC, 21 March 2013, para. 19.

⁵⁷ Decision on the ‘Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-859, PTC II, ICC, 16 August 2013.

⁵⁸ Decision on the content of the updated document containing the charges, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-584, TC V, ICC, 28 December 2012, para. 19.

⁵⁹ Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-568, AC, ICC, 13 October 2006, para. 53; similarly, Corrigendum to Decision on the Prosecution’s Request to Amend the Final Updated Document Containing the Charges, *Muthaura and Kenyatta* (n 56) para. 19: ‘The insertion of the phrase “with permission of the Pre-Trial Chamber” in paragraph 9 makes clear that the Prosecutor is not allowed to proceed with an amendment of one or more of the charges confirmed, without a prior approval from the Chamber. Thus, the Chamber’s permission is *conditio sine qua non* for any amendment to the charges at this stage.’

⁶⁰ K Ambos, ‘Critical Issues in the *Bemba* Confirmation Decision’ (2009) 22 *Leiden Journal of International Law* 715, 724.

⁶¹ PTC III had already made use of Art 61(1)(c)(ii) Rome Statute before and adjourned the hearing for addressing Art 28 Rome Statute, cf. Decision Adjourning the Hearing pursuant to Art 61(7)(c)(ii) Rome Statute, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-388, PTC III, ICC, 3 March 2009.

into consideration, which contains both co-perpetration and command responsibility,⁶² this is not the case. The PTC confirmed some charges and declined other charges within its competence of Article 61(7) of the Rome Statute. The judges might yet show a general tendency to avoid the time-consuming amendment of charges by adjournment. Similarly to the mentioned *Bemba* case, the question of whether the Chamber is required to adjourn the hearing and request the OTP to amend charges arose in the *Lubanga* case.⁶³ In that case, the Chamber addressed the legal question of an adjournment in the context of qualifying the armed conflict (non-international as considered by the OTP in the DCC, or international as the PTC later concluded with regard to Uganda's involvement in Ituri from July 2002 to June 2003).⁶⁴ Since, in the view of the Chamber, the same conduct was criminalised under both provisions (Article 8(2)(b) (xvi) and Article 8(2)(e)(vii) of the Rome Statute), whether committed in a non-international or international conflict, the judges came to the conclusion that an adjournment and request for amendment were unnecessary.⁶⁵ After the confirmation of charges, the Trial Chamber instructed both parties to prepare their cases on the basis of both possibilities, an international or non-international armed conflict:

The parties and the participants are on notice that this is an issue that may arise and they should prepare their cases on the basis that the Bench may decide that the first group of three charges encompass both international and internal armed conflicts.⁶⁶

The Trial Chamber, applying Regulation 55 of the Court Regulations, later changed the legal characterization of the facts to the extent that the armed conflict was deemed non-international in character.⁶⁷ Rather than amending the charges to one particular legal qualification at the early confirmation hearing, a flexible approach is possible due to Regulation 55, which allows for a different legal characterization of facts as long as the rights of the defence are protected.⁶⁸ It gives the ICC judges a necessary tool for correctives. However, they should not overuse the mechanism and should bear its exceptional nature in mind.⁶⁹

⁶² Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-395, OTP, ICC, 30 March 2009.

⁶³ Shibahara and Schabas (n 2) para. 19; WCRO, The Confirmation of Charges Process (n 1) 73 *et seq.*

⁶⁴ Decision on the Confirmation of Charges, *Lubanga* (n 31) paras 200 *et seq.*, and para. 220.

⁶⁵ Decision on the Confirmation of Charges, *Lubanga* (n 31) para. 204.

⁶⁶ Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1084, TC I, ICC, 13 December 2007, para. 49.

⁶⁷ Judgment pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, 14 March 2012, paras 566–7, and para. 1359.

⁶⁸ Regulation 55 is further addressed in section 35.4. On the difference between amendment and notice under Regulation 55, see Decision on applications for notice of possibility of variation of legal characterization, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1122, TC V(a), ICC, 12 December 2013, para. 39.

⁶⁹ See, the overly restrictive, but rightly recalling the exceptional nature of Regulation 55, Dissenting Opinion of Judge Cuno Tarfusser, 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', *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3363, 27 March 2013, 40 *et seq.*, and para. 21 ('Judgment on the appeal with regard to Regulation 55, *Katanga*').

35.3.4 Withdrawal of charges

Proceedings can also be terminated by a withdrawal of charges, either before the confirmation hearing pursuant to Article 61(4) of the Rome Statute, or after the commencement of trial pursuant to Article 61(9) of the Rome Statute. If a trial has already started, the latter alternative foresees permission of the Trial Chamber. Neither provision explicitly addresses the withdrawal of charges after the decision to confirm charges, but before the actual commencement of trial. This intermediate time period might take several years, and the question of a withdrawal became practically relevant in the *Muthaura* case in which the prosecution lost its key witness and therefore stated:

While the evidence presented during the 2011 confirmation hearing was sufficient for the Pre-Trial Chamber to commit Mr Muthaura to trial under the article 61(7) ‘substantial grounds’ standard, the evidence has since evolved, and the Prosecution does not consider that there is sufficient evidence at present to prove the charges against Mr Muthaura beyond a reasonable doubt.⁷⁰

The Trial Chamber endorsed the interpretation of ‘commencement of trial’ as stated in *Lubanga* in the sense that it refers to the ‘true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses’.⁷¹ It thus identified the problem that, at the present stage, the case was in a transition phase not squarely addressed by the relevant provisions. The judges granted the withdrawal pursuant to Article 64(2) of the Rome Statute because the defence did not contest the withdrawal.⁷²

35.4 Subsequent Modification of the Legal Characterization

The determination of the underlying facts and the legal characterization thereof is of particular importance for trial. By issuing the confirmation decision, the PTC already frames the outer limits of the factual basis and, moreover, it provides a first authoritative legal characterization. While Regulation 55 of the Court Regulations allows the Trial Chamber to alter previous legal findings, the factual basis may not be changed in the same manner: ‘Regulation 55 (2) and (3) of the Regulations of the Court may not be used to exceed the facts and circumstances described in the charges or any amendment thereto.’⁷³

⁷⁰ Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-687, OTP, ICC, 11 March 2013, para. 10.

⁷¹ Decision on the withdrawal of charges against Mr Muthaura, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-696, TC V, ICC, 18 March 2013, para. 10; see also Decision on the status before the Trial Chamber of the evidence, *Lubanga* (n 66) paras 39–40.

⁷² Decision on the withdrawal of charges, *Muthaura and Kenyatta* (n 71) para. 11.

⁷³ 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’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2205, TC I, ICC, 8 December 2009, para. 1 (‘Judgment on the appeals with regard to Regulation 55, *Lubanga*’). The question arose as victims applied for the inclusion of sexual slavery into the charges, cf. Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1891, Legal Representatives of Victims, ICC, 22 May 2009.

In accordance with Regulation 55, the Trial Chamber may modify the legal characterization of facts in its final verdict (paragraph 1), or at any time during trial upon notification of the participants (paragraphs 2 and 3).⁷⁴ However, under Article 74(2) of the Rome Statute, the Trial Chamber ‘shall not exceed the facts and circumstances described in the charges and any amendments of the charges’. Thus, the document containing the charges and the decision to confirm the charges limit the factual basis for trial.⁷⁵ Other facts can only be added by the procedure under Article 61(9) of the Rome Statute.⁷⁶ Facts that were not charged can evidently not lead to a conviction of the accused.⁷⁷ A modification of the legal characterization is, however, based on an *argumentum e contrario* reading of Article 74(2) of the Rome Statute, not ruled out.⁷⁸ To what extent a legal re-characterization alters the facts and circumstances must be decided on a case-by-case basis, because any change in characterization results in a change of narrative to a certain extent.⁷⁹

In the ICC’s first verdict in *Lubanga*, the Trial Chamber made use of Regulation 55 and changed the legal characterization of the context element for war crimes.⁸⁰ Complex modification procedures based on this regulation were also initiated in the cases *Bemba, Katanga and Chui, Ruto and Sang*, and *Kenyatta*.⁸¹ Mostly in these cases the form of participation (Articles 25 and 28 of the Rome Statute) was in question and alternative modes of liability were then proposed by the judges. It must be noted that, under Regulation 55, the judges can also sever the charges. If they do so, the notice should be given at the earliest opportunity, but a re-characterization at the deliberations stage after the evidence has been heard is not incompatible with Regulation 55(2) (‘at any time during the trial’).⁸² Moreover, the stringent safeguards of Regulation

⁷⁴ For the drafting history of Rule 55 and Art 74(2), see Judgment on the appeals with regard to Regulation 55, *Lubanga* (n 73) paras 70–1, and 91; C Stahn, ‘Modification of the Legal Characterisation of Facts in the ICC System: A Portrayal of Regulation 55’ (2005) 16 *Criminal Law Forum* 1, 2 *et seq.*

⁷⁵ See, *inter alia*, Decision on the temporary suspension of the proceedings pursuant to Regulation 55(2) of the Regulations of the Court and related procedural deadlines, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2480, TC III, ICC, 13 December 2012, para. 10.

⁷⁶ Judgment on the appeals with regard to Regulation 55, *Lubanga* (n 73) para. 94.

⁷⁷ Nerlich (n 8) 1348.

⁷⁸ Judgment on the appeals with regard to Regulation 55, *Lubanga* (n 73) para. 93.

⁷⁹ A change in the narrative does not per se exceed the facts and circumstances described in the charges, see Judgment on the appeal with regard to Regulation 55, *Katanga* (n 69) para. 58. The issue will, most certainly, be revisited after the final verdict. For the Trial Chamber, see further the Dissenting Opinion of Judge Christine Van den Wyngaert, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3319, TC II, ICC, 21 November 2012, 33 *et seq.*, paras 18 *et seq.*, para. 20: ‘Charges therefore constitute a narrative in which each material fact has a particular place.... Taking an isolated material fact and fundamentally changing its relevance by using it as part of a different narrative would therefore amount to a “change in the statement of facts”’ (footnote omitted).

⁸⁰ Judgment pursuant to Art 74 of the Statute, *Lubanga* (n 67) paras 523 *et seq.*, para. 1359: ‘Pursuant to Regulation 55 of the Regulations of the Court, the Chamber modifies the legal characterisation of the facts to the extent that the armed conflict relevant to the charges was non-international in character from early September 2002 to 13 August 2003.’ Thereto, K Ambos, ‘The First Judgment of the International Criminal Court (*Prosecutor v Lubanga*): A Comprehensive Analysis of Legal Issues’ (2012) 12 *International Criminal Law Review* 115, 128–31.

⁸¹ For an analysis see WCRO, Regulation 55 and the Rights of the Accused at the ICC (October 2013).

⁸² Judgment on the appeal with regard to Regulation 55, *Katanga* (n 69) paras 14–24; see also the Trial Chamber’s position, Decision on the implementation of regulation 55, *Katanga* (n 79) paras 15 *et seq.*

55(2) and (3) for the protection of the rights of the accused must be adhered to and the Chamber must implement safeguards depending on the circumstances of the case.⁸³ It is too restrictive to interpret Regulation 55 in such a narrow way—as the dissenting opinion of Judge Cuno Tarfusser argues—that it allows only for changes for the form of participation from Article 25 to Article 28 of the Rome Statute and vice versa.⁸⁴ The question of altering the modes of participation emerged because the PTCs do not generally confirm charges on alternative modes of liability, a practice which the ad hoc tribunals approached differently.⁸⁵

The interplay between narrowing a case at the confirmation hearing and correcting the practice of limited charges by using Regulation 55 requires careful attention. The provision is based on the *iura noverit curia* principle and the ICC departs from the model followed by the ad hoc tribunals where legal characterizations are mostly binding upon the Trial Chamber.⁸⁶ It has been claimed that Regulation 55 should not be overused and should be limited to exceptional circumstances, and, in turn, confirmation decisions should leave more flexibility to charging.⁸⁷ It is self-evident that a legal characterization by the PTC cannot bind the Trial Chamber, taking Article 74 of the Rome Statute and the judges' impartial evaluation into consideration. Detailed legal discussions by the PTC have been criticized as exceeding its competence,⁸⁸ bearing in mind that profound reasoning might sometimes be necessary to determine 'substantial grounds'. However, the limits of the PTC are framed by exactly this standard of 'substantial grounds' and should therefore not enter into a fundamental legal discourse, this being the domain of the Trial Chamber and Appeals Chamber.⁸⁹ The PTC has to determine whether the presented charges can proceed on trial—nothing less, but nothing more. While, as a matter of fact, a reasoned decision by the PTC for the confirmation of charges influences further trial proceedings simply because of its existence, one should not go as far as Miraglia, who questions whether a reasoned statement of findings by the PTC is necessary at all and wants to protect the 'virginity' of the trial judge.⁹⁰ For the sake of transparency and checks and balances, the PTC should issue a well-reasoned decision to the public. Regulation 55 safeguards the impartiality of the trial judges and ensures that the legal determination of the

⁸³ Judgment on the appeal with regard to Regulation 55, *Katanga* (n 69) paras 87 *et seq.* On the safeguards see also the Dissenting opinion by Judge Van den Wyngaert, Decision on the implementation of regulation 55, *Katanga* (n 79) paras 8, 27 *et seq.*

⁸⁴ Dissenting Opinion Judge Tarfusser, Judgment on the appeal with regard to Regulation 55, *Katanga* (n 69) paras 10 *et seq.*

⁸⁵ See e.g. Decision on the Confirmation of Charges, *Bemba* (n 31) 184 *et seq.* Further Dissenting Opinion by Judge Van den Wyngaert, Decision on the implementation of regulation 55, *Katanga* (n 79) para. 5; Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1, PTC II, ICC, 8 March 2011, para. 36: 'In particular, the Chamber is not persuaded that it is best practice to make simultaneous findings on modes of liability presented in the alternative. A person cannot be deemed concurrently as a principal and an accessory to the same crime.'

⁸⁶ Cryer et al. (n 2) 457–8.

⁸⁷ WCRO, Regulation 55 (n 81) 2.

⁸⁸ Safferling, *International Criminal Procedure* (n 2) 343.

⁸⁹ Similarly, Safferling, *International Criminal Procedure* (n 2) 343.

⁹⁰ Miraglia (n 3) 498 *et seq.*; similarly, but more differentiated Safferling, *International Criminal Procedure* (n 2) 337.

PTC does not prejudice trial proceedings. It is an important new procedural tool and truly ‘reflects specific structural developments within the international criminal law system’.⁹¹

The re-characterization of legal determinations is inherent to the function of the Trial Chamber. The trial judges are obliged to base their evaluation only on the evidence submitted and discussed at the trial stage,⁹² thus the factual evidence must be re-submitted at the trial stage and cannot be anticipated by the confirmation hearing, and the same applies to the legal findings. The judges are thus not bound to the legal evaluation either by the OTP or the PTC. With regard to an early modification of charges by the PTC itself, applying the *iura noverit curia* principle to the confirmation stage is worthy of discussion,⁹³ but, in the view of the author, circumvents the carefully drafted system of Article 67(7) of the Rome Statute. The PTC must adjourn and ask the prosecutor for an amendment.⁹⁴ A functional approach rules out a transfer of Regulation 55 to the confirmation hearing.⁹⁵ Nevertheless, the question addressed by Ambos and Miller as well as Safferling goes to the very heart of the problematic modification of charges: the balance between crystal-clear charges for the defendant and legal re-determinations by the judges. The interplay between the confirmation of charges hearing, amendments of the charging document, and subsequent re-characterizations under Regulation 55 needs further fine-tuning by case law, and Chambers should carefully learn from the delays in *Lubanga*, *Bemba*, and most obviously in *Katanga*.

35.5 Conclusion: The Necessity of an Intermediary Filter Mechanism for Complex International Criminal Trials

Confirmation of charges proceedings are complex and require resources. The track record of the ICC shows nine proceedings with 21 persons having been conducted to date,⁹⁶ with more cases, especially *Gbagbo*, in the docks. Proceedings from the first appearance before the Court until the actual decision after the confirmation hearing last on average ten months.⁹⁷ It is interesting to note that proceedings *after* the decision

⁹¹ Stahn (n 74) 28.

⁹² Art 74 (2) Rome Statute.

⁹³ Ambos and Miller (n 4) 360.

⁹⁴ See section 35.3.3.

⁹⁵ Safferling, *International Criminal Procedure* (n 2) 344 with fns 138 and 139.

⁹⁶ See (n 5); also Nerlich (n 8) 1345 *et seq.*

⁹⁷ About ten months (20 March 2006–29 January 2007) in *Lubanga*, Case Information Sheet, 13 March 2012 (ICC-PIDS-CIS-DRC-01-006/12); almost one year (22 October 2007–26 September 2008) in *Katanga*, Case Information Sheet, 25 January 2013 (ICC-PIDS-CIS-DRC2-03-005/13); 8 months (11 February 2008–26 September 2008) in *Ngudjolo*, Case Information Sheet, 25 January 2013 (ICC-PIDS-CIS-DRC2-06-002/13); almost one year (4 July 2008–15 June 2009) in *Bemba*, Case Information Sheet, 15 June 2012 (ICC-PIDS-CIS-CAR-01-009/12); 11 months (18 January 2011–16 December 2011) in *Mbarushimana*, Case Information Sheet, 27 March 2012 (ICC-PIDS-CIS-DRC-04-003/11); almost one year (26 March 2013–February 2014) in *Ntaganda*, Case Information Sheet, 6 February 2014 (ICC-PIDS-CIS-DRC-02-004/14). The time period was just slightly shorter in cases of summons to appear/voluntary appearances: nine months (17 June 2010–7 March 2011) in *Banda*, Case Information Sheet, 18 October 2013 (ICC-PIDS-CIS-SUD-04-003/13); ten months (7 April 2011–23 January 2012) in *Ruto and Sang*, Case Information Sheet, 18 September 2013 (ICC-PIDS-CIS-KEN-01-012/13); ten months (8 April 2011–23 January 2012) in *Kenyatta*, Case Information Sheet, 4 February 2014 (ICC-PIDS-CIS-KEN-02-010/14); 9 months (18 May 2009–8 February 2010) in *Abu Garda*, Case

has been rendered until the trial finally commences are significantly longer (more than a year and a half).⁹⁸ Taking pending cases into consideration, the time period will increase rather than decrease, as the commencement of the trial in *Kenyatta* is rather unclear.⁹⁹ Moreover, the trial date for *Abakaer Nourain* was scheduled for 5 May 2014, and by that date more than three years since the decision to confirm the charges would have elapsed.¹⁰⁰ In the latter case, particularly issues of disclosure (handling of confidential information; adequate defence preparation; and disclosure of potentially exculpatory evidence) and finding interpreters into Zaghawa for trial have led to an extraordinary long pre-trial phase,¹⁰¹ but legality and efficiency concerns with regard to such a long process remain.

The first question is whether the confirmation hearing *as such* prolongs the whole process due to its inefficiency, or whether it is a necessary, additional procedural filter mechanism that assists in the preparation of trials and ensures due process rights. Nerlich holds the view that the success of confirmation hearings is a mixed one: the objective to filter out cases of weak evidence and protecting suspects from unnecessary exposure to trial is mostly achieved, but the ‘linkage’ phase contributes very little to the preparation of trial.¹⁰² As shown earlier, Trial Chambers consume more than one and a half years on average to commence trials even after and in addition to the confirmation of charges hearing. The contribution by the PTCs to prepare a smooth trial, to streamline, and to shorten the length of further proceedings may therefore rightly be questioned. Benefits with regard to disclosure of evidence and participation of victims are not as significant as one would wish them to be.¹⁰³ When it comes to the question of necessity of the confirmation hearing, the author thus agrees that the process is a useful tool that contributes to upholding the rights of the suspect. Abolishing the confirmation phase is not an option and is rather unrealistic.¹⁰⁴ In any event, a new procedure of checks and balances for the DCC would have to be developed.

Information Sheet, 15 June 2012 (ICC-PIDS-CIS-SUD-03-002/10); this finding does not take the *Gbagbo* case into consideration, where a final decision has not yet been issued. Because of the adjournment in the latter case, the time period will be significantly longer.

⁹⁸ Nerlich (n 8) 1346, who observes *Lubanga, Katanga, Ngudjolo, and Bemba*. The same applies to the case *Ruto and Sang*, were it took one year and eight months (23 January 2012–10 September 2013) to commence the trial, cf. *Ruto and Sang*, Case Information Sheet (n 97).

⁹⁹ In the *Kenyatta* case, the opening of the trial has been vacated after two years have passed since the decision confirming the charges, cf. Order vacating trial date of 5 February 2014, convening a status conference, and addressing other procedural matters, *Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-886, TC V(b), ICC, 23 January 2014.

¹⁰⁰ Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings, *Banda, Situation in Darfur, Sudan*, ICC-02/05-03/09-455, TC IV, ICC, 6 March 2013, para. 25.

¹⁰¹ Ibid., paras 11–20; see also Public redacted ‘Decision on the Defence request for termination of proceedings’, *Banda, Situation in Darfur, Sudan*, ICC-02/05-03/09-535-Red, TC IV, ICC, 30 January 2014.

¹⁰² Nerlich (n 8) 1354.

¹⁰³ Nerlich (n 8) 1354. With regard to disclosure, the exact timing and comprehensiveness at the pre-trial stage was disputed during the drafting process, cf. WCRO, The Confirmation of Charges Process (n 1) 59. The obligations at the pre-confirmation stage vis-à-vis disclosure after the hearing remains undecided by case law and, to some extent, contradictory, see Safferling, *International Criminal Procedure* (n 2) 370.

¹⁰⁴ Nerlich (n 8) 1355.

The second, follow-up question relates to the application and timing of the confirmation of charges hearing. In this regard, Nerlich's view to hold the hearing at a very late stage, as the first chapter of a trial proper, and mainly for trial preparation is not entirely convincing.¹⁰⁵ The WCRO's criticism, calling for an acceleration of disclosure, also does not cover the whole picture.¹⁰⁶ While the aim to achieve a better trial preparation is noteworthy,¹⁰⁷ this, in the author's view, is not the main objective of the confirmation hearing. Moreover, disclosure obligations take place at the pre-confirmation stage and after the confirmation hearing has taken place for the preparation of trial proceedings.¹⁰⁸ The pre-trial judges primarily review the prosecutor's charges vis-à-vis the existing evidence, and they do not arrange for the subsequent trial. They can assist in the preparation by streamlining further proceedings, but should under no circumstances anticipate trial proceedings. While the confirmation hearing is not meant to constitute a 'mini-trial' or pre-adjudicate guilt or innocence,¹⁰⁹ the detailed decisions of PTCs have already been criticized as potentially affecting the impartiality of the trial judges.¹¹⁰ A late timing of the hearing entails inherent dangers of impartiality and interference. The confirmation hearing would be downgraded to a status conference for the preparation of trial, and the evidentiary basis would be upgraded from a very low threshold of 'substantial grounds to believe' to something that already screens all the available evidence vis-à-vis its value at trial. The line of a full trial and the confirmation of charges might be further blurred; a tendency that has already found its way into the ICC's practice if one takes into consideration the detailed legal discussions during confirmation hearings.¹¹¹ Moreover, the argument that the confirmation hearing should be held after the investigation is fully concluded¹¹² does not support a late timing of the hearing. Certainly, investigations might not automatically end with the confirmation of charges,¹¹³ but should ideally be concluded by the time the hearing takes place,¹¹⁴ which only implies that the prosecution should follow a regular pattern of proceedings: after initiating a formal investigation (Article 53(1) of the Rome Statute), the prosecution arrives at a decision to prosecute a certain person (Article 53(2) of the Rome Statute). This might coincide with, or follow up on, an arrest warrant and the initial appearance. From the wording 'to initiate a prosecution' ('upon investigation'), it is clear that under ordinary circumstances, the main part of the investigation should be concluded. The prosecutor then issues the documents containing the charges in accordance with

¹⁰⁵ Nerlich (n 8) 1356.

¹⁰⁶ WCRO, The Confirmation of Charges Process (n 1) 62 *et seq.*

¹⁰⁷ Time-consuming discussions about disclosure might be avoided at the trial stage, Ambos and Miller (n 4) 348 with fn. 58; see also Chaitidou (n 7) 1–6.

¹⁰⁸ The past-confirmation preparation of the trial consumes significantly more time and delays proceedings.

¹⁰⁹ Withopf (n 10) 1.

¹¹⁰ Cryer et al. (n 2) 461 with fn. 270; Safferling, *International Criminal Procedure* (n 2) 337.

¹¹¹ See above section 35.4. ¹¹² Nerlich (n 8) 1356.

¹¹³ Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence', *Lubanga* (n 59) para. 54.

¹¹⁴ Ibid.; Judgment on the appeal of the Prosecutor against the Decision on the Confirmation of Charges, *Mbarushimana* (n 21) para. 44; Decision adjourning the hearing on the confirmation of charges, *Gbagbo* (n 6) para. 25.

Regulation 52. The confirmation of charges hearing succeeds the DCC and is linked to it as ‘checks and balances’. If the prosecutor needs more time to conduct investigations, he or she may ask the Chamber to postpone the hearing (Rule 121(7) of the RPE), or request a confirmation based on additional evidence at a later stage (Article 61(8) of the Rome Statute). After the confirmation decision, further disclosure obligations might arise, and the preparation and scheduling of the trial are the main focus. The preparation of the trial is, however, within the competence of the Trial Chamber, and the PTC ceases its activities with the decision to confirm the charges and then transfers the case to the newly constituted Trial Chamber by the Presidency.¹¹⁵

The main purpose of the confirmation decision is thus to determine whether a case should be sent to trial and to filter the prosecution’s allegations.¹¹⁶ Important objectives such as trial preparation, disclosure obligations, and procedural economy also play an important role at the confirmation hearing, but if conflicts arise, the objective ‘checks and balances’ of charges prevail. Future confirmation hearings and amendments should focus on judicial efficiency and the limited purpose of the hearing, which is submitting charges on trial or denying a confirmation on the basis of a considerably low legal threshold.

¹¹⁵ Decision constituting Trial Chamber I and referring to it the case of *The Prosecutor v Thomas Lubanga Dyilo, Lubanga* (n 40).

¹¹⁶ Safferling, *International Criminal Procedure* (n 2) 341; Ambos and Miller (n 4) 341 ('check and balance the Prosecutor'); Withopf (n 10) 1–2.

Trial Procedures—With a Particular Focus on the Relationship between the Proceedings of the Pre-Trial and Trial Chambers

*Håkan Friman**

36.1 Introduction

The first instance trials in two cases, *Lubanga* and *Katanga and Ngudjolo*, have concluded and verdicts have been handed down against the three accused. At the time of writing, two trials are running, in *Bemba* and in *Ruto and Sang*, and the date for the commencement of the trial has been set in *Ntaganda* (2 June 2015)¹ and *Gbagbo* (7 July 2015).² In *Banda*, the trial date was vacated and an arrest warrant was issued against the accused.³ The trial in *Kenyatta* was postponed repeatedly, and after the Trial Chamber had rejected the prosecutor's request for further adjournment and the Defence's request for termination of the case,⁴ on 5 December 2014 the Prosecutor withdrew the charges against Kenyatta without prejudice to the possibility of bringing new charges against Mr Kenyatta 'at a later date, based on the same or similar factual circumstances, should [the prosecution] obtain sufficient evidence to support such a course of action'.⁵ No other case concerning core crimes is yet in the trial phase.⁶

In light of the drawn-out proceedings to date, this review will focus on the procedural scheme of two different Chambers—Pre-Trial and Trial—both of which are

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¹ Corrigendum of 'Order Scheduling a Status Conference and Setting the Commencement Date for the Trial', *Ntaganda, Situation in the Republic of the Democratic Republic of the Congo*, ICC-01/04-02/06-382-Corr, TC VI, ICC, 28 November 2014.

² Order setting the commencement date for the trial and the time limit for disclosure, *Gbagbo, Situation in Côte d'Ivoire*, ICC-02/11-01/11-723, TC I, ICC, 17 November 2014.

³ Warrant of arrest for Abdallah Banda Abakaer Nourain, *Banda, Situation in Darfur, Sudan*, ICC-02/05-03/09-606, TC IV, ICC, 11 September 2014.

⁴ Decision on Prosecution's application for a further adjournment, *Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-981, TC V(B), ICC, 3 December 2014.

⁵ *Ibid.*, para. 56.

⁶ However, the confirmation hearing was held in another case and the decision is pending, Decision on the schedule for the confirmation of charges hearing, *Blé Goudé, Situation in Côte d'Ivoire*, ICC-02/11-02/11-165, PTC I, ICC, 22 September 2014. Moreover, charges have been confirmed regarding offences against the administration of justice (Art 70 ICC Statute) in one case, Decision pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Bemba, Kilolo, Mangenda, Babala and Arido, Situation in the Central African Republic*, ICC-01/05-01/13-749, PTC II, ICC, 22 November 2014.

engaged in trial preparations. The Pre-Trial Chamber was an international novelty when it was established by the ICC procedures and was seen as a bridge between civil- and common-law traditions.⁷ Another new feature was the contested confirmation process, in which the Pre-Trial Chamber decides whether to commit the suspect to a Trial Chamber for trial.⁸ The Pre-Trial Chamber and its functions may be described as having inquisitorial elements in a criminal process that is basically adversarial in nature, particularly at the trial stage. Unprecedented in the international context,⁹ however, the ICC confirmation process and its relationship to the trial proceedings ought to be assessed. This chapter reflects developments until the beginning of 2014, but sections 36.1 and 36.2 have been updated as of 5 December 2014.

36.2 Trial Experiences

The road towards the verdict in the first trial, in *Lubanga*, has been long and lined with numerous preliminary issues and decisions. Nearly six years passed between the arrival of the accused at the Court (17 March 2006) and the verdict (14 March 2012), during which time the accused has been deprived of his liberty. Trial preparations before the Trial Chamber lasted two years, between the confirmation of charges (29 January 2007) and the commencement of the trial hearing (26 January 2009). During that time, 54 status conferences were held. The trial hearing required 204 trial days over almost two and a half years, during which 36 witnesses for the prosecution, 24 for the defence, and three victims at the request of their legal representatives were heard, as well as 4 expert witnesses called by the Chamber. In addition, the prosecution presented 368 items of evidence, the defence 992 items, and the victims 13 items.

Before and during the *Lubanga* trial, 275 written and 347 oral decisions were rendered by the Trial Chamber, some of which were subject to interlocutory appeals and resolution by the Appeals Chamber. Issues relating to the disclosure of evidence generated by far the most decisions. A good number of decisions addressed victim participation, witness protection, admissibility of evidence, or other evidentiary matters. A total of 129 victims (34 female and 95 male) were authorized to participate in the trial proceedings.

A similar picture emerges with respect to the trial in the *Katanga and Ngudjolo* case, in which the two accused were jointly charged and tried.¹⁰ An important difference, however, is that the time for trial preparation was considerably shorter for these two defendants, who were also detained. The time between the arrival of the accused at the Court and the confirmation of charges was less than a year (about 11 months for Katanga and 7.5 months for Ngudjolo) and the trial hearing commenced 14 months

⁷ S Fernández de Gurmendi and H Friman, 'The Rules of Procedure and Evidence of the International Criminal Court' (2000) 3 *Yearbook of International Humanitarian Law* 289, 296.

⁸ Art 61 ICC Statute.

⁹ Nonetheless, one should note that domestic criminal proceedings exist with mixed adversarial and inquisitorial features.

¹⁰ Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-257, PTC I, ICC, 10 March 2008.

after the charges were confirmed. Here too the trial hearing ran for almost two and a half years, and 265 trial days were required. The prosecution called 24 witnesses and the defence 28, two victims were heard, and two expert witnesses were called by the Chamber. The judgment against Ngudjolo noted the extensive written evidence (261 items presented by the prosecution, 372 items presented by the 2 defendants, 5 items introduced by victims, and 5 by the Chamber) as well as 168 oral and 387 written decisions by the Trial Chamber. The trial against Katanga continued with further written submissions on discrete issues. In this trial, 366 victims were authorized to participate.

The trial in *Bemba* commenced on 22 November 2010, about 17 months after the confirmation of charges (15 June 2009) and almost two and a half years after the transfer of the accused to The Hague (3 July 2008). During that time, the accused has been deprived of his liberty.¹¹ The trial hearing ended with closing oral statements on 12–13 November 2014. Reportedly, the Trial Chamber has granted 5,229 victims the right to participate in the trial proceedings.

The decision on confirmation of charges in *Ruto and Sang* and *Kenyatta* were issued on 23 January 2012. In the former case, the preparations before the Trial Chamber lasted close to 18 months, while in the latter, they continued until the withdrawal of the charges. The accused in these cases have not been deprived of their liberty. Reportedly, 628 and 233 victims have been authorized to participate in the respective cases, although some victims have subsequently withdrawn from the proceedings.¹²

According to the current plan, the trial in *Gbagbo* will commence about one year after the decision on the confirmation of charges,¹³ but three years and seven months after the defendant's transfer to the Court on 30 November 2011. The accused is detained. The Pre-Trial Chamber authorized 199 victims to participate in the proceedings. In *Ntaganda*, 20 months passed between the accused's voluntary surrender to ICC custody (22 March 2013) and the confirmation decision,¹⁴ and one more year is scheduled until the trial is planned to begin.

In *Banda*, five and a half years have passed since the first appearance (7 May 2009), and three years and nine months since the confirmation decision,¹⁵ but no trial is in sight. In

¹¹ However, the Pre-Trial Chamber ordered interim release in a decision that was subsequently reversed by the Appeals Chamber; see Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-475, PTC II, ICC, 14 August 2009, and Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa', ICC-01/05-01/08-631, *Bemba, Situation in the Central African Republic*, AC, ICC, 2 December 2009.

¹² E.g. Decision on the Legal Representative's Report on the Withdrawal of Victims, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1098, TC V(A), ICC, 14 November 2013.

¹³ Decision on the confirmation of charges against Laurent Gbagbo, *Gbagbo, Situation in Côte d'Ivoire*, ICC-02/11-01/11-656, PTC I, ICC, 12 June 2014.

¹⁴ Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, *Ntaganda, Situation in the Republic of the Democratic Republic of the Congo*, ICC-01/04-02/06-309, PTC II, ICC, 9 June 2014.

¹⁵ Corrigendum of the 'Decision on the Confirmation of Charges', *Banda, Situation in Darfur, Sudan*, ICC-02/05-03/09-121, PTC I, ICC, 7 March 2011.

Blé Goudé, on the other hand, the pre-confirmation process has been much faster and the hearing was held six months after his surrender to ICC custody on 22 March 2014.

The trial in *Lubanga* resulted in a three-part verdict. First, Trial Chamber I ruled on the criminal charges and convicted Thomas Lubanga of war crimes (conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities).¹⁶ Second, after written submissions by the parties and the legal representatives for victims, and a separate hearing, the Trial Chamber handed down a decision sentencing the accused to 14 years of imprisonment.¹⁷ Lubanga brought appeals against both decisions and the prosecution against the sentence. Third, the Trial Chamber separately addressed the question of reparations in a decision¹⁸ which is also subject to appeals.¹⁹ On 1 December 2014 the Appeals Chamber confirmed the conviction and the sentence.²⁰

Upon completion of the trial in *Katanga and Ngudjolo*, the cases were severed because the question of re-characterization of charges emerged regarding one of the accused, Germain Katanga.²¹ The verdict against Mathieu Ngudjolo was issued separately. He was acquitted of all charges²² more than four years and ten months after his arrest. The prosecution has appealed the judgment. The verdict in the case against Katanga was handed down on 7 March 2014, more than five years and four months after his transfer to the Court, and the sentence two and a half months later.²³ On 25 June 2014 the defendant and the prosecution discontinued their appeals against the judgment in the *Katanga* case.

These are not merely boring facts and statistics. Instead, the experiences expose a need for reform. While bearing in mind that these first cases are conducted under a new and previously untested procedural scheme, and that the crimes and surrounding

¹⁶ Judgment pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012 (with one separate opinion and one separate and dissenting opinion).

¹⁷ Decision on Sentence pursuant to Art 76 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2901, TC I, ICC, 10 July 2012 (one judge dissenting and arguing, *inter alia*, for a 15-year sentence).

¹⁸ Decision establishing the principles and procedures to be applied to reparations, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2904, TC I, ICC, 7 August 2012.

¹⁹ The appeals have been declared admissible in part by the Appeals Chamber; Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2953, AC, ICC, 14 December 2012.

²⁰ Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, *Lubanga, Situation in the Republic of the Democratic Republic of the Congo*, ICC-01/04-01/06-3121, AC, ICC, 1 December 2014, and Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute', *Lubanga, Situation in the Republic of the Democratic Republic of the Congo*, ICC-01/04-01/06-3122, AC, ICC, 1 December 2014.

²¹ Decision on the implementation of Regulation 55 of the Regulations of the Court and severing the charges against the accused persons, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3319, TC II, ICC, 21 November 2012.

²² Judgment pursuant to Art 74 of the Statute, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-3, TC II, ICC, 18 December 2012.

²³ Jugement rendu en application de l'article 74 du Statut, *Katanga, Situation in the Republic of the Democratic Republic of the Congo*, ICC-01/04-01/07-3436, TC II, ICC, 7 March 2014, and Décision relative à la peine (article 76 du Statut), *Katanga, Situation in the Republic of the Democratic Republic of the Congo*, ICC-01/04-01/07-3484, TC II, ICC, 23 May 2014. See C. Stahn, 'Justice Delivered or Justice Denied?: The Legacy of the Katanga Judgment' (2014) 12 *Journal of International Criminal Justice* 809–834.

practical circumstances are complex and challenging, it is clear that processes have been slow and can be improved. A modest case like *Lubanga* should not require six years between the first appearance at the Court and the first instance verdict, as well as additional time (about two and a half years) for the appeals process. Some areas of the procedural scheme that deserve closer review are highlighted in the following section, with a particular focus on the consistency and coordination between the pre-trial and trial process.

Another issue that deserves further scrutiny is the Prosecutor's policy to expedite the process by 'focused investigations and prosecutions', which includes being selective with respect to the incidents, but also regarding the number of witnesses who are called to testify.²⁴ While essentially a sound policy, the track record, including declined confirmations and the acquittal of Ngudjolo due to insufficient evidence, is mixed. As a response, the Prosecutor has introduced a new policy described as 'the principle of in-depth, open-ended investigations while maintaining focus', which is geared towards a higher level of trial-readiness at the time of the confirmation hearing.²⁵ Although this issue will not be further addressed in this chapter, it should be noted that the shift may result in more witnesses and greater reliance upon 'live testimony', which could extend the length of the proceedings. Even if using mechanisms such as conducting proceedings in the state concerned and using modern technology might mitigate some problems, the dependence upon the cooperation of states and others, combined with the largely traditional cooperation regime envisaged for the Court, is in itself cumbersome and time-consuming. In this context, issues concerning witness protection and the question of sufficient resources for the gathering of evidence must also be taken into account.²⁶

Additionally, one should keep in mind that the requirements concerning translations and interpretation in these international proceedings will always be time-consuming and often cause delays, due to the scarcity of competent translators and interpreters, or otherwise. While the Court is working towards simplifications and improvements, proper services of this kind are key to fair proceedings²⁷ and should be factored in when assessing the length of the process. Needless to say, this too requires adequate resources.

36.3 Relationship between the Pre-Trial and Trial Process

Unlike the ad hoc Tribunals, the ICC procedures envisage two preparatory stages before the trial hearing to be conducted by different judicial chambers: (i) the pre-trial

²⁴ See OTP, Prosecutorial Strategy 2009–12, The Hague, 1 February 2010, para. 20.

²⁵ See OTP, Strategic Plan June 2012–15, The Hague, 11 October 2013, para. 23 ('OTP Strategic Plan').

²⁶ See H Hansberry, 'Too Much of a Good Thing in Lubanga and Haradinaj: The Danger of Expediency in International Criminal Trials' (2011) 9 *Northwestern Journal of International Human Rights* 357.

²⁷ E.g. Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'Decision on the Defence Request Concerning Languages', *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-522, AC, ICC, 27 May 2008, and Decision on the interpretation of the court proceedings, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1473, TC II, 15 September 2009. See also K Giridhar, 'Justice for All: Protecting the Translation Rights of Defendants in International War Crimes Tribunals' (2011) 43 *Case Western Reserve Journal of International Law* 799.

stage before the Pre-Trial Chamber, which ends with the decision on the confirmation of charges, and (ii) the trial preparations, which are conducted by the Trial Chamber. Main objectives of the process before the Pre-Trial Chamber are to secure the presence of the suspect, conclude the criminal investigation and formalize the charges, and conduct a judicial assessment (a confirmation process) as to whether the case should go to trial. The evidentiary threshold for an arrest warrant, confirmation of charges, and a conviction are different and increasingly onerous for the prosecution to meet. The threshold for confirmation of a charge is that ‘there is sufficient evidence to establish substantial grounds to believe’ that the person committed the crime charged,²⁸ as compared to the ‘guilt of the accused beyond reasonable doubt’ standard which is required for a conviction.²⁹ Moreover, relaxed requirements concerning the means of evidence are provided for the confirmation process and the disclosure obligations are reduced, including the possibility of withholding evidence prior to the commencement of the trial (hearing) due to security concerns.³⁰

Obviously, the confirmation of charges and the trial form part of a process, and both mechanisms aim at preparing the case for adjudication by the Court. Hence, the pre-confirmation and post-confirmation activities ought to be coordinated, to the extent possible, in order to avoid duplications and reduce the time required for the preparations for trial.

During the negotiations concerning the Rules of Procedure and Evidence there was a broad agreement that effective rules should be provided for the preparations and thus, that less time would be required for the trial itself.³¹ Nevertheless, there were strongly diverging views as to whether most of the preparations should take place pre-confirmation (by the Pre-Trial Chamber) or post-confirmation (by the Trial Chamber). Put differently, some argued that the case should be trial-ready at the confirmation hearing, or at least soon thereafter, while others claimed that the confirmation and trial processes are different in nature and scope and should be prepared separately. The primary battleground was the rules on disclosure.³² The Rules of Procedure and Evidence provide for both pre-confirmation and pre-trial disclosure, but do not unambiguously settle the question of when the ‘bulk of the disclosure’ should take place.

In practice, the Chambers of the Court have required quite extensive disclosure and other preparations, including settling preliminary matters, both pre-confirmation and pre-trial. The Pre-Trial Chambers have interpreted their mandate as requiring a rigorous confirmation process and decisions that go into great detail with respect to

²⁸ Art 61(7) ICC Statute. ²⁹ Art 66(3) ICC Statute. ³⁰ Arts 61(5) and 68(5) ICC Statute.

³¹ H Friman, ‘Investigation and Prosecution’ in R Lee et al. (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers 2001) 531.

³² E.g. H Brady, ‘Disclosure of Evidence’ in R Lee et al. (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers 2001) 422–4. See also the opposing views presented by H Brady, ‘Setting the Record Straight: A Short Note on Disclosure and “the Record of the Proceedings”’, and G Bitti, ‘Two Bones of Contention between Civil Law and Common Law: The Record of the Proceedings and the Treatment of a *Concursus Delictorum*’, both in H Fisher et al. (eds), *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin: Berlin Verlag, Arno Spitz GmbH 2001) 261 and 273, respectively.

various legal and evidentiary matters.³³ Although consistently upheld by the Pre-Trial Chambers so far, this is not an inevitable interpretation considering, in particular, the scope of the confirmation process according to the ICC Statute and the swift pre-confirmation process contemplated in the Rules of Procedure and Evidence.³⁴ Once the case has been confirmed, however, the Trial Chambers have understandably been cautious to take charge of the preparations of the case for the trial that the Chamber is to conduct. Consequently, extensive and time-consuming preparations have taken place twice, albeit for different procedural purposes. In addition, the practice among different Chambers, Pre-Trial Chambers as well as Trial Chambers, departs in some respects.

This illustrates that the relationship between the confirmation of charges and the trial processes is far from seamless, and should be further developed and standardized. Two basic solutions are available in order to avoid unnecessary duplications: (i) a more limited and swift confirmation process followed by more thorough trial preparations, or (ii) a thorough and (almost) complete pre-confirmation process whereby the case is trial-ready very soon after the confirmation decision. Arguably, the former approach reflects the current statutory regime better than the latter.³⁵ Moreover, it leaves the trial preparations in the hands of the Chamber that is responsible for the trial and counteracts the risk of the confirmation process turning into a ‘mini-trial’. Nonetheless, there are clear advantages to a prosecutorial practice aimed at completed investigations and, in that sense, cases that are ‘trial-ready’ at the time of the confirmation.³⁶ This is also acknowledged by the Appeals Chamber and in the new prosecutorial policy.³⁷

Apart from coordination with respect to disclosure of evidence, other preliminary issues that relate to the preparations for trial should also be considered. One such issue, which generates much work for the Court, is victim participation in the proceedings. The scheme developed so far requires separate decisions for the various stages of the proceedings. As will be further discussed in Chapter 45, the entire question of victim participation in the proceedings has proven to be burdensome and difficult to manage and, as noted earlier, the cases tend to involve large numbers of victims. A quite radical departure from previous practice was made by the Trial Chamber in the *Ruto and Sang* and *Kenyatta* cases, with the main model being participation through a common legal representative and an almost automatic transfer of victims from the confirmation to the trial stage as long as they accepted participation

³³ See further Stegmiller, Chapter 35, this volume.

³⁴ Rule 121 ICC Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, 3–10 September 2002 (First Session of the ASP), part II.A (adopted and entered into force 9 September 2002).

³⁵ For a different view, see e.g. V Nerlich, ‘The Confirmation of Charges Procedure at the International Criminal Court: Advance or Failure?’ (2012) 10 *Journal of International Criminal Justice* 1339.

³⁶ Ibid., 1355. See also American University, Washington College of Law, ‘Investigative Management, Strategies, and Techniques of the International Criminal Court’s Office of the Prosecutor’ (War Crimes Research Office, Washington D.C., October 2012) 61–72.

³⁷ See 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’, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-514 (OA 4), AC, ICC, 30 May 2012, para. 44. See also OTP Strategic Plan (n 25) para. 23.

through the representative.³⁸ It remains to be seen what will be the prevailing practice in this respect.³⁹

These issues have also been identified by the Court in the so-called Lessons Learnt process.⁴⁰ One area for discussion, and possibly for statutory amendments, relates to ‘the best format and content of the confirmation of charges decision for the purpose of framing the trial proceedings’.⁴¹ Another area is a system of disclosure where, *inter alia*, ‘the possibility of establishing a standard system of disclosure’ is raised.⁴²

36.4 Charges—From Confirmation to Adjudication

A novel feature of the ICC procedures is the authority of the Chamber to modify the legal characterization of the charges as presented by the prosecution. This is a mechanism known to some domestic jurisdictions (civil law) but foreign to others (common law) which the judges agreed upon (Regulation 55 in the Regulations of the Court), although the negotiating states had failed to do so.⁴³

In practice, the Chambers have made extensive use of Regulation 55. After being misapplied by (the majority of) the Trial Chamber in *Lubanga*,⁴⁴ the Appeals Chamber clarified the correct application of the regulation.⁴⁵ In *Katanga and Ngudjolo*, the Trial Chamber opted to give notice of the application of Regulation 55 during the deliberations after the conclusion of the trial hearing, a decision that was upheld by the Appeals Chamber.⁴⁶ However, one judge of the Appeals Chamber dissented and argued that the

³⁸ Decision on victims’ representation and participation, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-460, TC V, ICC, 3 October 2012, and Decision on victims’ representation and participation, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-498, TC V, ICC, 3 October 2012.

³⁹ More recently, another Pre-Trial Chamber devised a different application model, see Decision Establishing Principles on the Victims’ Application Process, *Ntaganda, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-67, PTC II, ICC, 28 May 2013.

⁴⁰ Study Group on Governance: Lessons learnt: First report of the Court to the Assembly of States Parties, ICC-ASP/11/31/Add.1, Annex. See also Ambach, Chapter 50, in this volume.

⁴¹ Ibid., point A.1.

⁴² Ibid., point B.1.

⁴³ S Fernández de Gurmendi and H Friman, ‘The Rules of Procedure and Evidence and the Regulations of the Court’ in J Doria et al. (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blischko* (Leiden/Boston: Martinus Nijhoff 2009) 807. See also C Stahn, ‘Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55’ (2005) 16 *Criminal Law Forum* 1.

⁴⁴ Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2049, TC I, ICC, 14 July 2009 (with Minority Opinion of Judge Fulford, ICC-01/04-01/06-2054, 17 July 2009).

⁴⁵ 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’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2205, AC, ICC, 8 December 2009. See also Decision on the Legal Representatives’ Joint Submissions concerning the Appeals Chamber’s Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2223, TC I, ICC, 8 January 2010.

⁴⁶ Decision on the implementation of Regulation 55 of the Regulations of the Court and severing the charges against the accused persons, *Katanga and Ngudjolo* (n 21) (Judge Van den Wyngaert dissenting),

modification raised by the Trial Chamber—from one ground to incur individual criminal responsibility to another—did not qualify to trigger the application of the regulation and, further, that the decision would violate the defendant's right to a fair trial (i.e. his right to be informed in detail of the nature, cause, and content of the charges).

Regulation 55 has also been applied by the Trial Chamber in *Bemba*. After giving notice to the parties that the Trial Chamber might modify the legal characterization of the facts so as to consider ‘in the same mode of responsibility the alternate form of knowledge contained in Article 28(a)(i) of the Statute’ (i.e. ‘should have known’ instead of ‘knew’ as a requirement for command responsibility),⁴⁷ the trial was temporarily suspended in order to allow the defence to reconsider its evidence.⁴⁸ An application by the defence for leave to appeal the decision was rejected,⁴⁹ and the trial subsequently resumed.⁵⁰ More than four months were largely spent on the question of re-characterization of the charges and the issue will most likely be raised again in an appeal against the forthcoming judgment.

This followed an earlier assessment in the confirmation process where the Pre-Trial Chamber, by application of its power to request the prosecutor to consider ‘amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court’,⁵¹ had intervened with respect to the mode of liability.⁵² In the amended document containing the charges (DCC), the prosecutor referred to criminal responsibility both under Article 25 and Article 28 of the Statute, but the Pre-Trial Chamber decided to confirm only one of the modes of liability—responsibility as a military commander under Article 28(a)—and declined to confirm the other modes charged.⁵³ In the confirmation decision, the Pre-Trial Chamber addressed only the *mens rea* requirement that the accused ‘knew’ of the crimes.⁵⁴ Consequently, the Trial Chamber, at the request of the defendant, ordered

and 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’, ICC-01/04-01/07-3363, *Katanga, Situation in the Democratic Republic of the Congo*, AC, ICC, 27 March 2013 (Judge Tarfusser dissenting).

⁴⁷ Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2324, TC III, ICC, 21 September 2012.

⁴⁸ Decision on the temporary suspension of the proceedings pursuant to Regulation 55(2) of the Regulations of the Court and related procedural deadlines, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2480, TC III, ICC, 13 December 2012.

⁴⁹ Public Redacted Version of ‘Decision on “Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and related Procedural Deadlines”’ of 11 January 2013, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2487-Red, TC III, ICC, 16 January 2013.

⁵⁰ Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-01/08-2490-Red and ICC-01/05-01/08-2497, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2500, TC III, ICC, 6 February 2013.

⁵¹ Art 61(7)(c)(ii) ICC Statute.

⁵² Decision Adjourning the Hearing pursuant to Art 61(7)(c)(ii) of the Rome Statute, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-388, PTC III, ICC, 3 March 2009.

⁵³ Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, ICC, 15 June 2009.

⁵⁴ Ibid., para. 478.

in a subsequent decision that the DCC should be amended by deleting a reference to the ‘should have known’ standard.⁵⁵ Leaving aside the question of whether the choice between alternatives for a particular mode of liability really constitutes a modification of the ‘legal characterization of facts’,⁵⁶ the Pre-Trial Chamber in effect restricted the charges with respect to the modes of liability in a way that the Trial Chamber found reason to reverse in order to apply something that the prosecutor had alleged (command responsibility based on a ‘should have known’ standard) in the DCC upon which the confirmation was based.⁵⁷ Such a risk is intrinsic in a detailed and opinionated confirmation review.

Even more challenging, however, is the fact that the Pre-Trial Chamber in *Lubanga* applied Regulation 55 in the context of the confirmation of charges and substituted charges of war crimes in a non-international armed conflict for the same offence in an international armed conflict.⁵⁸ While the Trial Chamber did not consider itself competent to annul or amend the confirmed charges, it allowed the parties to present evidence for both classifications of the conflict⁵⁹ and, finally, by applying Regulation 55, convicted the accused of war crimes committed in a non-international armed conflict.⁶⁰ However, the practice of re-qualifying charges at the confirmation stage, which arguably conflicts with the roles and powers of the prosecutor as well as the Trial Chamber, has not been repeated. In fact, one Pre-Trial Chamber has explicitly rejected the approach.⁶¹ The method envisaged in the Statute, as applied in *Bemba*,⁶² is to request the prosecutor to consider amending the charges or to refuse confirmation.

Nonetheless, this raises the broader issue of the substantive relationship between the Pre-Trial Chamber’s confirmation decision and the boundaries for the Trial Chamber’s adjudication; or to what extent is the confirmation decision binding on the Trial Chamber? Obviously, the confirmation process is meant to define ‘the

⁵⁵ Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-836, 20 July 2010, TC III, para. 121.

⁵⁶ Cf. 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’, *Katanga* (n 46) paras 46–7, 55–8, and Judge Tarfusser’s dissenting opinion to this decision.

⁵⁷ See Public Redacted Version of the Amended Document containing the charges filed on 30 March 2009, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-395-Anx3, OTP, ICC, 30 March 2009, para. 86.

⁵⁸ Decision on the confirmation of charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-803, PTC I, ICC, 29 January 2007.

⁵⁹ Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1084, TC I, ICC, 13 December 2007.

⁶⁰ *Ibid.*, para. 49, and Judgment pursuant to Art 74 of the Statute, *Lubanga* (n 16) paras 527–30, 566, and 1358–9.

⁶¹ Decision on the ‘Request by the Victims’ Representative for authorization by the Chamber to make written submissions on specific issues of law and/or fact’, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-274, PTC II, 19 August 2011, paras 7–8.

⁶² Art 61(7)(c) ICC Statute. See Decision Adjourning the Hearing pursuant to Art 61(7)(c)(ii) of the Rome Statute, *Bemba* (n 52).

subject matter of the proceedings' so that 'the parameters set forth in the charges define the issues to be determined at trial and limit the Trial Chamber's authority to the determination of those issues'.⁶³ But arguably, the legal and factual findings at the confirmation stage can only be preliminary in nature and cannot prevent different conclusions at trial.⁶⁴ So far, however, most comments on this issue have focused on the relationship between the Pre-Trial Chamber and the Prosecutor with respect to the power to frame the charges; indeed, this is an important and interesting question, but one that falls outside of the scope of the current review.

The approach taken by the Pre-Trial Chambers, including the very elaborate and detailed confirmation decisions, has also given rise to disputes in the trial proceedings. Generally, the confirmation decisions have prompted the drafting and submission of amended DCCs. According to Article 74(2) of the ICC Statute, the Trial Chamber's verdict 'shall not exceed the facts and circumstances described in the charges and any amendments to the charges'. While the Appeals Chamber has explained the terms 'facts and circumstances' and clarified that they do not cover evidence,⁶⁵ some ambiguity still remains. In *Lubanga*, for example, the Prosecutor added references to instances of enlistment or conscription of children in the amended DCC, which were not included in the DCC upon which the confirmation decision was based.⁶⁶ Hence, the question becomes whether the individual instances form part of the 'facts and circumstances', which are defined by the confirmation decision, or whether they should be considered as something else. Although explicitly being cautious to 'not exceed the facts and circumstances established by the Pre-Trial Chamber',⁶⁷ the *Lubanga* Trial Chamber did not (visibly) address this issue. The approach seems to be to consider such instances, or individual cases, as evidence and not as 'facts and circumstances'. Similarly, in subsequent confirmation decisions a distinction has been made with respect to 'subsidiary facts' which may also be included in the DCC or confirmation decision, i.e. 'facts or evidence that are subsidiary to the facts described in the charges, serving the purpose of demonstrating or supporting their existence'.⁶⁸ Although this approach is foreign to domestic jurisdictions that require a higher degree

⁶³ E.g. Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1432, AC, ICC, 11 July 2008, paras 62–3.

⁶⁴ E.g. R Cryer et al., *An Introduction to International Criminal Law and Procedure* 3rd edn (Cambridge: Cambridge University Press 2014) 464.

⁶⁵ 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', *Lubanga* (n 45) para. 90 (note 163).

⁶⁶ Compare Amended Document Containing the Charges, Art 61(3)(a), *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1573-Anx1, OTP, ICC, 23 December 2008, with Document Containing the Charges, Art 61(3)(a), *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-356-Anx2, OTP, ICC, 28 August 2006. See also Nerlich (n 35) 1349–50.

⁶⁷ Judgment pursuant to Art 74 of the Statute, *Lubanga* (n 16) para. 8.

⁶⁸ E.g. Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-373, PTC II, ICC, 23 January 2012, para. 47.

of specificity in the actual charges, it is reasonable considering the nature of the international crimes in question.⁶⁹

Further, while the Trial Chambers have often taken the view that the confirmation decision should be authoritative with respect to setting out the factual allegations for the trial,⁷⁰ the prosecution has insisted that the DCC should be authoritative. A more recent, and arguably correct, view is that the confirmation decision ‘cannot be expected to serve as the only authoritative statement of the charges for the trial’ and instead that ‘the description of the charges in the DCC, amended to harmonize it with the findings made in the confirmation decision, rather than the confirmation decision itself, provides a sufficiently authoritative statement of the charges relevant to the trial proceedings’.⁷¹ Indeed, why should the Trial Chamber relinquish its freedom to interpret and apply the law to the evidence that it is to assess, within, of course, the confirmed charges? Additionally, Article 74(2) of the ICC Statute clearly stipulates that the judgment shall be based (only) on evidence submitted and discussed before it at trial, which speaks against reliance upon the legal and evidentiary findings in the confirmation decision.

The *Lubanga* Trial Chamber concluded that ‘the power to frame the charges lies at the heart of the Pre-Trial Chamber’s functions’ and that the result is binding on the Trial Chamber.⁷² But this general statement does not clarify the extent of the binding effect. Subsequently, however, Judge Fulford indicated that the Trial Chamber is bound by the legal findings of the Pre-Trial Chamber, even when the trial judge disagrees with the finding, if a departure from it would be prejudicial to the accused.⁷³ This approach has been criticized.⁷⁴ Indeed, if the legal findings of the confirmation decision are afforded a binding effect on the trial court, the latter’s latitude to adjudicate the case would be unduly restricted.

Interestingly, the Trial Chamber in *Ruto and Sang* and in *Muthaura and Kenyatta* has expressed a quite different, and arguably more correct understanding, and has underlined that ‘it is the prosecution’s responsibility to articulate the charges’; the

⁶⁹ Moreover, the approach is consistent with the requirements of the DCC’s content, Regulation 52 of the ICC Regulations.

⁷⁰ E.g. Decision on the Filing of a Summary of the Charges by the Prosecutor, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1547, TC II, ICC, 29 October 2009, paras 14–17; Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-836, TC III, 20 July 2010, para. 37.

⁷¹ Decision on the content of the updated document containing the charges, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-522, TC V, ICC, 28 December 2012, para. 18, and Decision on the content of the updated document containing the charges, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-584, TC V, 28 December 2012, para. 21.

⁷² Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1084, TC I, ICC, 13 December 2007, paras 39–43.

⁷³ Separate Opinion by Judge Fulford, Judgment pursuant to Art 74 of the Statute, *Lubanga* (n 16) para. 2.

⁷⁴ E.g. J Ohlin, ‘Lubanga Decision Roundtable: Lubanga and the Control Theory’ (*Opinio Juris*, 15 March 2012) <<http://opiniojuris.org/2012/03/15/lubanga-and-the-control-theory-2/>> accessed 25 August 2014, and T Liefländer, ‘The Lubanga Judgment of the ICC: More than Just the First Step?’ (2012) 1 *Cambridge Journal of International and Comparative Law* 191, 210–11.

Pre-Trial Chamber may not add or modify the charges in the confirmation process, which is instead the prosecution's task, and post-confirmation amendments or withdrawal of the charges also rest with the prosecution.⁷⁵ Moreover, the Trial Chamber has held that a factual allegation is considered rejected only if the Pre-Trial Chamber explicitly said so in the confirmation decision; silence is not sufficient as a rejection.⁷⁶ Nonetheless, the Trial Chamber, as well as the parties, had to conduct a detailed and tedious process for analysing the DCC and the confirmation decision in order to determine the content in the updated DCC. Regardless of these efforts, however, there have been further calls for amendments to the charges in both cases.⁷⁷ In *Ruto and Sang*, a 'notice of possibility of variation of legal characterisation' has been issued with respect to the applicable mode of criminal liability (indirect co-perpetration, ordering or soliciting, etc.).⁷⁸

The confirmation practice has in fact created much confusion and additional work in the later preparations for trial. With a closer adherence to the confirmation process as devised in Article 61 of the ICC Statute—essentially a 'thumbs up or thumbs down' to each charge as presented by the Prosecutor (before or after an invitation to provide further evidence or to amend the charges)—and leaving determinations on issues such as re-characterization of charges, or cumulative or alternative charges to the trial, problems of this kind would be diminished.⁷⁹

Hence, establishing the nature and function of the confirmation process has a direct impact not only on the process itself, but also on the subsequent trial proceedings and the scope of the Trial Chamber's adjudication. Again, the Court has identified the relationship between the findings of the Pre-Trial Chamber and the Trial Chamber as an issue for potential reform, stating that 'the discussion needs to address the required extent of the legal interpretation made by the Pre-Trial Chamber

⁷⁵ Order regarding the content of the charges, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-475, TC V, ICC, 20 November 2012, para. 4, and Order regarding the content of the charges, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-536, TC V, ICC, 20 November 2012, para. 4.

⁷⁶ Decision on the content of the updated document containing the charges, *Ruto and Sang* (n 71) para. 19, and Decision on the content of the updated document containing the charges, *Muthaura and Kenyatta*, ICC-01/09-02/11-584 (n 71) para. 23.

⁷⁷ The Prosecution's request that the Pre-Trial Chamber authorize an amendment to the charges was denied; Decision on the 'Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute', *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-859, PTC II, ICC, 16 August 2013. The Appeals Chamber (majority), applying a very narrow interpretation of Art 61(9), dismissed the Prosecutor's appeal; Decision on the Prosecutor's appeal against the 'Decision on the Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute', *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1123, AC, ICC, 13 December 2013. In *Kenyatta*, however, amendments to the charges were granted; Corrigendum to 'Decision on the "Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute"', *Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-700, PTC II, ICC, 21 March 2013.

⁷⁸ Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1122, TC V(A), ICC, 12 December 2013.

⁷⁹ For the opposite view, see K Ambos and D Miller, 'Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective' (2007) 7 *International Criminal Law Review* 335, 359–60.

as well as the necessary degree of precision of the legal characterization of facts and modes of liability'.⁸⁰

36.5 Proper Disclosure of Evidence

As already noted, numerous preliminary issues have arisen concerning the disclosure of evidence, and the disclosure measures taken pre-confirmation and post-confirmation need better coordination. But there is also reason to briefly touch upon the disclosure system as such since it has, just like in the ad hoc Tribunals, generated so much work, debate, and criticism. Since a fuller discussion is provided in other chapters of this volume (see below Chapters 40 and 41), the focus here will primarily be on the relationship between pre-confirmation and post-confirmation disclosure.

While a scheme for making evidence available to the parties and the Court exists in all criminal justice systems, the particular 'disclosure' scheme that is devised for the ICC points towards an adversarial trial model where each party presents a separate case to the Court. The disclosure process has proven to be inherently problematic in practice, both at the ICC and the ad hoc Tribunals. In line with the earlier discussion, it could be argued that pre-confirmation disclosure should be limited to the requirements of the confirmation process and that the full disclosure for trial should take place post-confirmation. The prosecutor's obligations with respect to exonerating evidence are continuous throughout the entire process, both pre- and post-confirmation, but with the caveat set forth in Article 67(2), namely 'as soon as practicable'.

The Pre-Trial Chambers initially followed the outlined approach by requiring pre-confirmation disclosure by the prosecution of the bulk of potentially exonerating material and evidence to the preparation of the defence; called 'the bulk rule'.⁸¹ However, in more recent decisions this approach has given way to a more onerous pre-confirmation disclosure, 'the totality rule', as well as a requirement of summaries to assist the defence (and the judges).⁸² The prosecutor was denied leave to appeal the later decisions.⁸³

In addition, the practice differs with respect to whether all the evidence that is disclosed *inter partes*, and not only the evidence intended to be presented at the confirmation

⁸⁰ See Study Group on Governance: Lessons learnt (n 40) point A.1.

⁸¹ Decision on the Final System of Disclosure and the Establishment of a Time Table, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-102, PTC I, ICC, 15 May 2006, and Decision on the confirmation of charges, *Lubanga* (n 58) para. 154; Decision on Art 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-621, PTC I, ICC, 20 June 2008, para. 8.

⁸² E.g. Decision on issues relating to disclosure, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-87, PTC I, ICC, 30 March 2011; Decision Setting the Regime for Evidence Disclosure and Other Related Matters, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-44, PTC II, ICC, 6 April 2011.

⁸³ Decision on the 'Prosecution's application for leave to Appeal the "Decision on issues relating to disclosure" (ICC-01/04-01/10-87)', *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-116, PTC I, ICC, 21 April 2011; Decision on the 'Prosecution's Application for leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (ICC-01/09-01/11-44)', *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-74, PTC II, ICC, 2 May 2011.

hearing, must also be communicated to the Chamber.⁸⁴ Making all the disclosed evidence available to the Pre-Trial Chamber means that it is put on record and, thus, that a more complete court record can be transferred to the Trial Chamber upon the confirmation of charges.⁸⁵ This system, which was applied in *Bemba*, the Kenyan cases (*Ruto et al.* and *Muthaura et al.*) and *Ntaganda*, creates a form of civil-law-style ‘dossier’, albeit one that is incomplete with respect to incriminating evidence. However, in other cases, the pre-confirmation disclosure has been *inter partes* and, with a varying degree of required detail, included disclosure notes submitted by the prosecution concerning, *inter alia*, potentially exculpatory evidence, and pre-inspection reports.⁸⁶

Moreover, in *Gbagbo* the majority of the Pre-Trial Chamber (against one judge’s strong dissent) has concluded that the Prosecutor, for confirmation purposes, must ‘present all her evidence’ and that ‘the Chamber must assume that the prosecutor has presented her strongest possible case based on a largely complete investigation’.⁸⁷ Of course, such an approach will also have an impact on pre-confirmation disclosure. Since the pre-confirmation disclosure regime originally established in this case was of a more limited nature, which was also supported by both parties,⁸⁸ additional disclosure had to be ordered.⁸⁹

Quite apart from the concerns that may be raised with respect to the nature of the confirmation process and the role of the Pre-Trial Chamber, the more extensive approach to pre-confirmation disclosure can hardly be considered a success from an efficiency perspective. Regardless, the post-confirmation (pre-trial) disclosure under the auspices of the Trial Chamber has been considerable.

In *Lubanga*, the Trial Chamber concluded that ‘evidence before the Pre-Trial Chamber cannot be introduced automatically into the trial process simply by virtue of having been included in the List of Evidence admitted by the Pre-Trial Chamber, but instead it must be introduced, if necessary, *de novo*’.⁹⁰ Even in *Bemba*, where all evidence disclosed between the parties pre-confirmation was also communicated to the Pre-Trial Chamber and was thus, part of the Court record, the Trial Chamber subsequently ordered additional disclosure of Prosecution evidence for the purpose of the trial.⁹¹ This is due to the different

⁸⁴ Compare, e.g., Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-55, PTC II, ICC, 31 July 2008 (extensive access), with Second Decision on issues relating to Disclosure, *Abu Garda, Situation in Darfur, Sudan*, ICC-02/05-02/09-35, PTC I, ICC, 15 July 2009, para. 8 (limited access).

⁸⁵ Rule 130 ICC Rules of Procedure and Evidence.

⁸⁶ E.g. Decision establishing a disclosure system and a calendar for disclosure, *Gbagbo, Situation in Côte d'Ivoire*, ICC-02/11-01/11-30, PTC I, ICC, 24 January 2012.

⁸⁷ Decision adjourning the hearing on the confirmation of charges pursuant to Art 61(7)(c)(i) of the Rome Statute, *Gbagbo, Situation in Côte d'Ivoire*, ICC-02/11-01/11-432, PTC I, 3 June 2013, paras 25 and 37 (Judge Fernández de Gurmendi dissenting). The Appeals Chamber did not address these issues since they fell outside of the Pre-Trial Chamber’s leave to appeal, 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’, *Gbagbo, Situation in Côte d'Ivoire*, ICC-02/11-01/11-572, AC, 16 December 2013, paras 60–4.

⁸⁸ Decision establishing a disclosure system and a calendar for disclosure, *Gbagbo* (n 86).

⁸⁹ Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, *Gbagbo* (n 87).

⁹⁰ Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, *Lubanga* (n 72) para. 8.

⁹¹ E.g. Order on disclosure of evidence by the OTP, *Bemba, Situation in Central African Republic*, ICC-01/05-01/08-590, TC III, ICC, 4 November 2009.

nature of the processes, but was also done in order to allow the Trial Chamber to independently fulfil its obligations vis-à-vis the admissibility of evidence, which is addressed in the following.

A particular challenge is to balance the need to protect witnesses, by redactions and other measures, against the defendant's right to adequate time and facilities to prepare for trial. In fact, the need to protect witnesses, as has been apparent for example in the Kenya cases,⁹² appears to be one of the major obstacles to full disclosure of evidence at the ICC. These needs are exacerbated by the fact that many prosecutions relate to ongoing conflicts. Non-disclosure with reference to 'grave endangerment of the security of a witness or his or her family' is possible 'prior to the commencement of the trial', i.e. until the trial hearing begins.⁹³ The time required to assess and implement relocation through the ICC's Protection Programme (ICCPP), managed by the Victims and Witnesses Unit within the Registry, is an additional source of delays,⁹⁴ since such protection may be required before redactions can safely be withdrawn. The Appeals Chamber (majority) has ruled that the law as it currently stands does not allow the prosecution to unilaterally 'preventively relocate' witnesses,⁹⁵ a measure that could have expedited the lifting of redactions.

A complication with respect to protective redactions is that they require coordination not only between the different procedural stages in the same case, but also between different cases. Again, the Chambers have taken different approaches. Most Pre-Trial Chambers and the *Katanga and Ngudjolo* Trial Chamber have insisted on strict judicial supervision and pre-authorization of any redaction.⁹⁶ Other Chambers, such as the Trial Chamber in *Lubanga*,⁹⁷ have opted for a similar approach, but later amended the system to be based on post-disclosure authorization. An alternative approach, taken in *Muthaura and Kenyatta* and in *Ruto and Sang*, is the adoption of a protocol with a pre-approved set of categories of redactions that are allowed without further judicial authorization and individual assessment primarily in instances when a redaction is contested.⁹⁸ This system also permitted redactions granted by the Pre-Trial Chamber to stand without a new application, but the protocol required the disclosing party to review such material and lift redactions in accordance with the timelines provided

⁹² E.g. Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, *Muthaura and Kenyatta*, *Situation in the Republic of Kenya*, ICC-01/09-02/11-687, OTP, ICC, 11 March 2013, para. 11.

⁹³ Art 68(5) ICC Statute.

⁹⁴ American University (n 36) 63–7.

⁹⁵ Judgment on the appeal of the Prosecutor against the 'Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules' of Pre-Trial Chamber I, *Katanga and Ngudjolo*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-776, AC, ICC, 26 November 2008 (Judges Pikis and Song dissenting).

⁹⁶ E.g. Decision on the Redaction Process, *Katanga and Ngudjolo*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-819, TC II, ICC, 12 January 2009.

⁹⁷ Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1019, TC I, ICC, 9 November 2007, para. 27 (pre-authorization), and Decision on the Prosecution's Request for Non-Disclosure of Information in Six Documents, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2763-Red, TC I, ICC, 25 July 2011.

⁹⁸ E.g. Decision on the protocol establishing a redaction regime, *Ruto and Sang*, *Situation in the Republic of Kenya*, ICC-01/09-01/11-458, TC V, ICC, 27 September 2012.

therein.⁹⁹ In *Banda and Jerbo*, the Pre-Trial Chamber allowed disclosure with the same redactions as in another case without further pre-authorization.¹⁰⁰

Additionally, numerous challenges have been made and decisions rendered in all cases with respect to the prosecutor's duty to disclose exculpatory evidence. This includes the stay of proceedings in *Lubanga*,¹⁰¹ which at its core related to the interpretation of the relationship between two statutory provisions: the obligation to disclose exculpatory evidence (Article 67(2) of the ICC Statute) and the prosecutor's power to agree to non-disclosure in order to obtain confidential information (Article 54(3)(e) of the ICC Statute).

As already mentioned, the Court's 'Lessons Learnt' process has identified disclosure of evidence as a reform area. A key issue is to establish the function and nature of the confirmation process and then adapt the requirements for pre-confirmation disclosure. Since the functions and standards of the confirmation and trial processes are different, additional disclosure by the Prosecution can be expected post-confirmation. The Court has also explicitly acknowledged that 'the statutory framework and case law permit the Prosecution to alter its evidentiary presentation between confirmation and trial'.¹⁰²

Hence, the approach should be to standardize the system of disclosure, as well as the system for redactions, so that pre-confirmation and post-confirmation disclosure is designed with the function and nature of the respective process in mind. Of course, the disclosure regime must ensure the rights of the accused, which does not necessarily require judicial involvement or complete disclosure pre-confirmation. Although a 'dossier'-approach may reduce some of the problems connected with a more adversarial 'disclosure' process, this does raise difficult issues with respect to the limited nature of the confirmation process and, if available to the Trial Chamber, the risk of prejudice or bias that may affect the arbiter of facts (even a professional one). Additionally, the differences between the confirmation and trial processes limit the usefulness of a 'dossier'.¹⁰³ A more confined confirmation process, as argued here, points towards a simplified scheme for disclosure and redactions pre-confirmation, to

⁹⁹ Ibid., para. 23.

¹⁰⁰ Decision on issues relating to Disclosure, *Banda and Jerbo, Situation in Darfur, Sudan*, ICC-02/05-03/09-49, PTC I, ICC, 29 June 2010, paras 11–12 (Judge Tarfusser partly dissenting).

¹⁰¹ See Decision on the consequences of non-disclosure of exculpatory materials covered by Art 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, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01704-01/06-140, TC I, ICC, 13 June 2008, and Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled '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', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1486, AC, ICC, 21 October 2008.

¹⁰² Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Art 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-664-Red2, TC V, 25 February 2013, para. 21; see also paras 18–20 with further references.

¹⁰³ See also V Lindsay, 'A Review of International Criminal Court Proceedings under Part V of the Rome Statute (Investigation and Prosecution) and Proposals for Amendments' (2010) *Revue québécoise de droit international* (Hors série) 165, 195.

be followed by a more elaborated, yet standardized, scheme for disclosure and redactions post-confirmation.

The ‘Lessons Learnt’ process has also identified the relationship between Chambers, the OTP, and the Victims and Witness Unit in relation to witness protection, as an area for further discussion.¹⁰⁴

36.6 The Role of the Trial Chamber

In spite of the suggestion that a clear distinction between a Prosecution case and a defence case is ‘unnecessary’ at the ICC,¹⁰⁵ the practice has been an adversarial organization of the trials. As it is also the prevailing practice of most international criminal tribunals,¹⁰⁶ this scheme is likely to continue, which in turn impacts on matters such as trial preparations and the role of the Trial Chamber. However, there can be considerable differences within the boundaries of a trial scheme that is basically adversarial in nature.

In the trials so far, a bifurcated trial with a separate sentencing phase (post-conviction) has been applied or is anticipated.¹⁰⁷ Notwithstanding the distinction between distinct prosecution and defence cases, the procedural mechanism of a ‘no-case-to-answer’ submission, or ‘half way determination’, has not been employed. Although there is no explicit provision authorizing the ICC Trial Chamber to apply such a mechanism, which may lead to a full or partial acquittal without the presentation of the defence case, it has been argued that the mechanism, if cautiously applied, could promote fairness to the defence and trial efficiency, and thus should be considered by the Court.¹⁰⁸ The *Ruto and Sang* Trial Chamber has indicated its preparedness to consider such a request at the end of the prosecution case.¹⁰⁹

Generally speaking, the Trial Chamber has broad powers with respect to the preparations for and the conduct of the trial.¹¹⁰ Fairness, impartiality, and expeditiousness are explicitly set forth as specific objectives, as well as full respect of the rights of the accused and due regard for the protection of victims and witnesses. Considerable discretion applies also with respect to evidence. A recent amendment to the Rules of Procedure and Evidence, originating from the judges, allows a single judge of the Trial Chamber to be designated for the preparation of the trial,¹¹¹ which has the potential of expediting the proceedings.

In practice, the ICC Trial Chambers have taken a rather active managerial role and aimed to steer the proceedings by, *inter alia*, issuing guidelines, scheduling orders,

¹⁰⁴ See Study Group on Governance: Lessons Learnt (n 40) point B.7.

¹⁰⁵ E.g. S Kirsch, ‘The Trial Proceedings before the ICC’ (2006) 6 *International Criminal Law Review* 275, 287.

¹⁰⁶ For a thorough survey, see G Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press 2013).

¹⁰⁷ See Art 76 ICC Statute. ¹⁰⁸ See H Friman et al., ‘Charges’ in Sluiter et al. (n 106) 475.

¹⁰⁹ Decision on the Conduct of Trial Proceedings (General Directions), *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-847, TC V(A), ICC, 9 August 2013, para. 32.

¹¹⁰ In particular, Art 64(3) and (8) ICC Statute.

¹¹¹ Rule 132bis ICC Rules of Procedure and Evidence, as amended by Resolution ICC-ASP/11/Res.2.

etc. For example, the *Lubanga* Trial Chamber held 54 status conferences prior to the commencement of the trial hearing. This is fully in line with the broad powers of the Chamber according to Article 64 of the ICC Statute, and is not *per se* controversial. Certain measures, in particular requiring the prosecution to provide in advance a clear linkage between each piece of evidence and the allegations in the charges ('in-depth analysis chart'),¹¹² have been challenged, albeit unsuccessfully, but they have arguably been beneficial for the preparations and conduct of the trial. However, in *Muthaura and Kenyatta* and *Ruto and Sang*, the Trial Chamber considered an 'in-depth-analysis-chart' to be unnecessary and was satisfied with an updated DCC, that reflected the charges as confirmed by the Pre-Trial Chamber, and a Prosecution pre-trial brief 'explaining its case with reference to the witnesses it intends to call and the other incriminating evidence it intends to rely on'.¹¹³

Calling witnesses to appear in person, or even by means of audio or video technology, generally requires the cooperation of states and others, which often involves a cumbersome and time-consuming process. While live evidence is the preferred option,¹¹⁴ there is room for other means of evidence that could be further explored and could expedite the trial.¹¹⁵ In addition, certain practices adopted by the Trial Chambers, such as the prohibition on 'witness proofing',¹¹⁶ albeit welcomed by many commentators for principled and other reasons,¹¹⁷ and the antipathy towards leading questions even on cross-examination in *Bemba*,¹¹⁸ may also have added to the length of the trial.

With respect to admissibility of evidence, the Pre-Trial Chambers have generally declined to decide at the time of the submission of each piece of evidence and instead placed the emphasis on assessing the weight of the evidence in the confirmation decision. The Trial Chambers, on the contrary, have considered the question already at the time of the submission of the evidence. However, although the *Katanga and Ngudjolo* Trial Chamber found the admissibility test to be mandatory, i.e. that the relevance and probative value of each piece of evidence must be assessed before being admitted into evidence,¹¹⁹ the *Bemba* Trial Chamber (majority) decided that witness statements

¹¹² E.g. Decision on the 'Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth Analysis Chart', *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-682, TC III, ICC, 29 January 2010.

¹¹³ Decision on the schedule leading up to trial, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-440, TC V, ICC, 9 July 2012, para. 6; Decision on the schedule leading up to trial, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-451, TC V, 9 July 2012, para. 11.

¹¹⁴ Art 69(2) ICC Statute.

¹¹⁵ See American University (n 36) 35–45. See also A Fulford, 'The Reflections of a Trial Judge', speech to the ICC ASP (6 December 2010).

¹¹⁶ E.g. Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1049, TC I, ICC, 30 November 2007.

¹¹⁷ E.g. K Ambos, ‘“Witness proofing” before the ICC: Neither legally admissible nor necessary’ in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden/Boston: Martinus Nijhoff Publishers 2009) 599.

¹¹⁸ Decision on Directions for the Conduct of the Proceedings, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1023, TC III, ICC, 19 November 2010, para. 15, and Transcript of Hearing, *Bemba*, ICC-01/05-01/08-T-34-ENG, TC III, ICC, 24 November 2010, 36–7.

¹¹⁹ Decision on the Prosecutor's Bar Table Motions, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-2635, TC II, ICC, 17 December 2010, para. 13.

could be admitted *prima facie*, before the start of the presentation of evidence, without an admissibility ruling.¹²⁰ The Appeals Chamber reversed the decision in *Bemba* and explained that ‘the Trial Chamber may rule on the relevance and/or admissibility of each item of evidence when it is submitted, and then determine the weight to be attached to the evidence at the end of the trial’, or alternatively ‘the Chamber may defer its consideration of these criteria until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person’.¹²¹ Hence, the Trial Chamber ‘will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings—when evidence is submitted, during the trial, or at the end of the trial’.¹²²

Of more importance, however, is the substantive role of the Trial Chamber vis-à-vis the parties (and participants). In this sense, the activities are more fundamental in nature and go beyond setting rules and ensuring the orderly conduct of the proceedings. The *Lubanga* Trial Chamber explained that the parties (and participants) are responsible for identifying the relevant evidence, but that the Chamber has broad powers to intervene.¹²³ In practice, this approach goes further than the traditionally more passive role in common-law jurisdictions, but falls short of the active ‘truth-finding’ role of the judge in civil-law jurisdictions.¹²⁴ Nonetheless, the truth-finding function has been given priority concerning the Trial Chamber’s power to call additional evidence and the Appeals Chamber has confirmed that this authority covers both exculpatory and mitigating evidence; a civil-law feature that would be unthinkable or at least controversial in adversarial systems.¹²⁵

The Trial Chambers have used the power to call witnesses in addition to the evidence submitted by the parties. In *Lubanga*, the Chamber did so at different stages of the trial hearing: after the prosecution’s evidence¹²⁶ and after the close of the parties’ presentations of evidence.¹²⁷ The Chamber left the questions of whether and when to call

¹²⁰ Decision on the admission into evidence of materials contained in the prosecution’s list of evidence, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1022, TC III, ICC, 19 November 2010, para. 8 (Judge Ozaki dissenting).

¹²¹ Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the Admission into Evidence of Materials Contained in the Prosecution’s List of Evidence’, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1386, AC, ICC, 3 May 2011, para. 37.

¹²² Ibid.

¹²³ See Judgment pursuant to Art 74 of the Statute, *Lubanga* (n 16) para. 95 (with reference to oral directions).

¹²⁴ See K Ambos, ‘The First Judgment of the International Criminal Court (*Prosecutor v Lubanga*): A Comprehensive Analysis of Legal Issues’ (2012) 12 *International Criminal Law Review* 115, 121–4.

¹²⁵ Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 entitled ‘Decision on the Modalities of Victim Participation at Trial’, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-2288, AC, ICC, 16 July 2010, para. 86. The Appeals Chamber also found that victims may be requested to submit incriminating evidence, *ibid.*, para. 37.

¹²⁶ E.g. Transcript of Status Conference, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-T-222-ENG, TC I, ICC, 9 December 2009.

¹²⁷ Redacted Decision on the Prosecution’s Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWW-000528, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2727, TC I, 28 April 2011, paras 62–6.

court evidence to be determined in light of the development of the case.¹²⁸ In *Katanga and Ngudjolo*, however, the sequencing was pre-determined, but the Chamber underlined its power to ‘intervene at all times and order the production of all evidence necessary for the determination of the truth’.¹²⁹ A similar approach was taken in *Bemba and Ruto and Sang*, although the directions were less comprehensive.¹³⁰ Moreover, the *Katanga and Ngudjolo* Trial Chamber adopted a stronger managerial role, *inter alia*, by imposing time limits,¹³¹ an approach that may well have contributed to the shorter time for preparations between confirmation and trial in this case. Another practice that can save time is reliance upon oral decisions.

The Trial Chambers also employed the power to put questions to witnesses.¹³² The scope and mode of judicial questioning, which is unregulated, expose the Chamber’s view of its competence concerning fact-finding and trial-management. The subject matter and form of judicial questioning were raised by the defence in *Lubanga*, claiming that ‘a significant number of questions put by the Bench to the witnesses called by the prosecutor, the Court and the participating victims could “seriously affect” the “appearance of impartiality” if they are repeated during the examination of witnesses called by the accused’.¹³³ The Trial Chamber concluded that it may ask questions relating to criminal acts and charges falling beyond the scope of the confirmed charges insofar as the information is relevant for sentencing or reparations to victims, and questions that may assist in ‘establishing the true context of, and background to, the facts and circumstances described in the charges’.¹³⁴ Further, the Chamber allowed itself to ask leading questions.¹³⁵ Similar defence objections raised in *Katanga and Ngudjolo* were also rejected.¹³⁶

While the trial proceedings have broadly been similar in the different cases, certain differences exist. The first few cases have been used for developing the procedures, and testing different alternatives, which is natural in a new institution. However, the differences also create uncertainty and may cause delays. Instead of reflecting the preferences of each bench, it is now time to take stock of the practices and further

¹²⁸ E.g. Redacted version of ‘Preliminary and Final Decisions on the Group of Potential Court Witnesses’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2033, TC I, ICC, 25 June 2009, para. 16.

¹²⁹ Directions for the conduct of the proceedings and testimony in accordance with rule 140, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1665, TC II, ICC, 20 November 2009, Annex para. 3.

¹³⁰ Decision on Directions for the Conduct of the Proceedings, *Bemba* (n 118); Decision on the Conduct of Trial Proceedings (General Directions), *Ruto and Sang* (n 109).

¹³¹ E.g. Directions for the conduct of the proceedings and testimony in accordance with rule 140, *Katanga and Ngudjolo* (n 129) Annex. See also Decision No. 2 on the Conduct of Trial Proceedings (General Directions), *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-900, TC V(A), ICC, 3 September 2013, paras 27–8. See further, S Vasiliev, ‘Trial Process: Structure of Contested Trial’ in Sluiter et al. (n 106) 605–6.

¹³² Rule 140(2)(c) ICC Rules of Procedure and Evidence.

¹³³ See Decision on judicial questioning, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2360, TC I, ICC, 18 March 2010, para. 1.

¹³⁴ Ibid., paras 33–40.

¹³⁵ Ibid., paras 43–7.

¹³⁶ Transcript of Hearing, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-T-112-Red, TC II, ICC, 4 March 2010, 7–13.

standardize the trial proceedings, which in turn requires a common understanding among the judges of the role of the Trial Chamber. With respect to the format and procedure for the presentation of evidence, the need for reform has been identified in the ‘Lessons Learnt’ process.¹³⁷

36.7 Concluding Remarks

Much of what has now been discussed relates to the confirmation process conducted by the Pre-Trial Chamber. Clearly, this part of the process must be consistent with the following pre-trial phase, conducted by the Trial Chamber, and the proceedings should be regarded as a whole. Otherwise there will be unnecessary overlaps and delays in the process. But the current confirmation practice has caused complications in the trial process, which affects the length of the proceedings and, thus, the accused’s right to be tried without undue delay. Arguably, the centre of gravity in criminal proceedings should be the first-instance trial, and the confirmation should be seen as a supplementary process.

Assuming that the focus should be on optimal conditions for a fair and well-prepared trial, and that the confirmation should serve a more limited screening function, the current combination of the two procedural stages must be considered dysfunctional. Part of the problem appears to stem from the opinion that the Pre-Trial Chamber should exercise an active truth-finding role in the confirmation process. Of course, any judicial process should be as precise in substance as possible, but it is quite another matter to actively seek to ascertain ‘the truth’. In any case, such a function can only be performed at a procedural stage where all relevant material can and should be available to the adjudicator. At the ICC, this occurs at trial, while the confirmation process is deliberately circumscribed by limitations concerning the evidence which accords with the applicable evidentiary standard and indeed the functions of these proceedings. Clear indications of this in the ICC Statute are, *inter alia*, the explicit reference to lesser means of providing evidence for the purpose of confirmation (Article 61(5)) and the power to withhold disclosure of evidence for security reasons until the commencement of the trial (Article 68(5)).

It is also important to note that it is not a function of the confirmation process to assess whether the evidence is sufficient to sustain a future conviction.¹³⁸ Again, this is a task for the trial and the Trial Chamber, applying a different and higher evidentiary standard.

The Trial Chamber should be the ‘master of its own proceedings’, which necessarily includes crucial parts of the preparations for trial. With this view, the room for co-ordinating the two processes, in the sense of tasking the Pre-Trial Chamber with resolving issues of disclosure, redactions, admissibility of evidence, etc. for the purpose of the trial, is rather limited.¹³⁹

¹³⁷ See Study Group on Governance: Lessons Learnt (n 40) point B.3.

¹³⁸ See also Decision on the Confirmation of Charges, *Abu Garda, Situation in Darfur, Sudan*, ICC-02/05-02/09-243-Red., PTC I, ICC, 8 February 2010, para. 40.

¹³⁹ Cf. Nerlich (n 35) 1354–6, also noting that the contribution of the confirmation process to the preparations for trial has been limited, but arguing that this could change if the confirmation hearing is held later in the process and at a time when the Prosecutor’s investigation is concluded. Contrary to the

Obviously this view is not shared by all, and many a Pre-Trial Chamber has interpreted its confirmation mandate, including the disclosure of evidence, to go much further. One troubling consequence is the resulting ambiguity concerning the legal limits for the Trial Chamber's adjudication of the confirmed case. Another consequence is the diverging practice and duplications with respect to pre-confirmation and post-confirmation disclosure, resulting in additional work and delays. The problems have been identified in the Court's 'Lessons Learnt' process, and a point of departure should be to clarify the nature and function of the confirmation process. The review may result in statutory amendments to various legal instruments. In this process it may also be considered whether the current scheme of contested confirmation really has an added value, or if it almost inevitably results in an incomplete 'mini-trial' which, in turn, complicates rather than assists a subsequent trial.¹⁴⁰ Indeed, the screening function of the confirmation process might be sufficiently discharged with an adjusted mechanism that does not entail the aforementioned complications for the trial.

approach advocated now, however, Nerlich would rather see the Trial Chamber 'focus on the trial itself and...spend less time on trial preparation'.

¹⁴⁰ See W Schabas, 'The International Criminal Court at Ten' (2011) 22 *Criminal Law Forum* 493, 497–9 (arguing for the elimination of the confirmation hearing).

Proportionate Sentencing at the ICC

*Margaret M. deGuzman**

37.1 Introduction

The ICC is just beginning to develop a sentencing practice. The Court issued its first sentence in July 2012, ordering Thomas Lubanga to spend 14 years in prison for the widespread recruitment and use of children in armed conflict. In reaching this sentence, the Trial Chamber invoked various factors including, in particular, the gravity of the crimes. The Chamber made no attempt, however, to explain the sentence in terms of the purposes of punishing people convicted at the international level. The Appeals Chamber affirmed the sentence, again with little discussion of the purposes of punishment. The ICC's second sentencing judgment in the *Katanga* case likewise lacks substantial engagement with the purposes of punishment. These omissions are understandable. Debates concerning the morally appropriate distribution of punishment have occupied philosophers and legal scholars for centuries, and there is no resolution in sight. National systems employ vastly different approaches to the allocation of punishment, and the ICC's predecessor international tribunals have struggled rather ineffectively with the task. The drafters of the Rome Statute largely eschewed inquiry into the purposes of punishment. The ICC's judges can therefore be forgiven for their reticence to explain in detail how the sentences they inflict serve to effectuate the purposes of ICC punishment.

Nonetheless, it is important that the ICC begin to develop philosophically coherent justifications for the amounts of punishment it inflicts. As a new institution representing an amorphous 'international community', one of the ICC's most pressing tasks is to build its own legitimacy.¹ Institutional legitimacy hinges on the perceptions of relevant audiences that the institution employs appropriate processes and produces correct outcomes.² Currently, there is limited agreement at the international level on

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¹ Legitimacy in this context refers to sociological, as opposed to moral or legal, legitimacy. Sociological legitimacy considers the perceptions of relevant audiences that a regime or decision is justified. See R Fallon Jr., 'Legitimacy and the Constitution' (2005) 118 *Harvard Law Review* 1787, 1796–7.

² D Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press 2010) 579–80. See also A Hole, 'The Sentencing Provisions of the International Criminal Court' (2005) 1 *International Journal of Punishment and Sentencing* 37, 68–9 (arguing that the extent to which the ICC is perceived to promote justice is dependent on the articulation of clear sentencing purposes and a principled approach to determining sentences).

either the appropriate considerations for sentencing or the correct allocation of punishment. Without a punishment philosophy, the ICC's sentencing practice is therefore likely to be procedurally incoherent and to produce inconsistent outcomes. Indeed, the sentencing practice of the ad hoc international tribunals has been criticized on these grounds.

Adopting a punishment philosophy will not immunize ICC sentences against such criticisms. No philosophy can explain punishment allocations perfectly, nor will all constituents approve whatever philosophy the ICC adopts. Nonetheless, consistent adherence to a punishment philosophy should enhance the coherence of ICC sentencing practice. Such increased coherence will promote positive perceptions of the ICC's legitimacy. Coherent sentencing decisions will also contribute to the ICC's central mission of building a community of shared criminal law norms at the global level.

This chapter seeks to contribute to that endeavour by proposing a theory of proportionality for the ICC. The concept of proportionality is often understood in purely retributive terms—punishment should accord with the desert of the perpetrator. Indeed, the few scholars who have written about proportionality at international courts have advocated a retributive approach. This chapter argues that the ICC should reject this focus on retribution, using the concept at most as a limiting principle. That is, the judges should not inflict more punishment than they believe an offender deserves.

The focus of ICC proportionality analysis should instead be the preventive utility of international punishment. The ICC's core mission is to prevent international crimes. Crime prevention can be accomplished in various ways including through specific and general deterrence, incapacitation, and restorative justice. The most important component of prevention for the ICC, however, is norm expression. The ICC's primary purpose is to express condemnation of international crimes and thereby to build a community of shared norms at the global level. In seeking to identify proportionate punishment, therefore, ICC judges should focus primarily on the need for appropriate norm expression and secondarily on other aspects of prevention such as deterrence, incapacitation, and restorative justice. They should apply the principle of parsimony to identify the least severe punishment they believe will contribute to the prevention of future international crimes.

The chapter begins with a brief critique of the ICC's first sentencing judgment. Next, it provides an overview of the dominant theories of proportionality and some of their implications for sentencing practice. Third, the chapter examines the sources of law available to the ICC as it seeks to develop its approach to proportionality analysis, demonstrating that they support a focus on crime prevention. Fourth, the chapter explains why retributive proportionality would be both impracticable and dangerous for the ICC. Finally, the chapter proposes a preventive theory of proportionate punishment and discusses some of the theory's consequences for the ICC sentencing procedure.

37.2 The ICC's First Sentencing Judgment

In the ICC's first sentencing judgment, a divided Trial Chamber gives almost no indication of how the 14-year sentence it inflicts effectuates the purposes of ICC punishment. Indeed, parts of the majority opinion suggest that the judges have yet to

determine what justifies such punishment. For instance, at the outset of the opinion, the Trial Chamber notes that the only other international court to have sentenced offenders for recruiting or using child soldiers is the SCSL.³ The SCSL sentenced two offenders to 50 and 35 years respectively for these crimes. The Chamber considers the sentences the SCSL inflicted relevant because ‘the ad hoc tribunals are in a comparable position to the Court in the context of sentencing’.⁴ The Chamber does not explain what it means by ‘a comparable position’. The statement implies, however, that the judges view the two institutions as sharing punishment purposes. This is a highly debatable proposition. The ad hoc tribunals were established in response to conflicts in particular countries and are aimed in significant part at addressing the needs of those populations. Indeed, their statutes permit, and in some cases require, reference to local sentencing practices.⁵ Since the ICC, in contrast, aims to prevent international crimes at the global level,⁶ its sentencing goals are arguably quite different from those of the ad hoc tribunals.

The remainder of the Trial Chamber’s judgment does little to clarify the purposes guiding the sentence selected. The Chamber notes that the ICC was established to end impunity and thus to prevent future crimes.⁷ It then reviews the statutory provisions and rules governing sentencing. These include the requirement that Chamber take into account the gravity of the crime, the individual circumstances of the convicted person, and any aggravating and mitigating circumstances.⁸ The Chamber is required to balance all the relevant factors and to identify a sentence that reflects the culpability of the convicted person.⁹ Lastly, the Chamber notes that the statute requires ‘that the sentence is in proportion to the crime’.¹⁰ After listing the various requirements, the Chamber proceeds to discuss the relevant factors and to pronounce a sentence without, however, explaining the connections between the factors and the outcome. The separate opinion of Judge Odio Benito adopts a similar strategy, concluding that the sentence should be one year longer, but without justifying the claim in terms of the purposes of punishment.¹¹

Nowhere in either opinion do the judges attempt to explain how they understand the concept of proportionality or the role that culpability plays in ensuring proportionality. The principle of proportionality makes an appearance in the majority opinion when the judges cite it to reject the prosecutor’s argument that all ICC crimes should be subject to

³ Decision on the Sentence pursuant to Art 76 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2901, TC I, ICC, 10 July 2012 (‘*Lubanga* Decision on sentence’), para. 12.

⁴ Ibid.

⁵ Art 19 of the Statute of the SCSL, Agreement between the United Nations and the Government of Sierra Leone Pursuant to Security Council Resolution 1315 (2000) of 14 August 2000 (signed 16 January 2002, entered into force 12 April 2002) 2178 UNTS 137 (‘SCSL Statute’). See also Art 24 of the Statute of the ICTY, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, Annex (‘ICTY Statute’); Art 24 of the Statute of the ICTR, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Annex (‘ICTR Statute’).

⁶ Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (‘ICC Statute’).

⁷ *Lubanga* Decision on sentence (n 3) para. 16.

⁸ Ibid., para. 23.

⁹ Ibid., para. 25.

¹⁰ Ibid., para. 26.

¹¹ Dissenting Opinion of Judge Odio Benito, *Lubanga* Decision on sentence (n 3) paras 26 and 27.

a 24-year baseline sentence based on their gravity.¹² But the judges fail to explain whether 24 years would be disproportionate to some ICC crimes in terms of the offender's desert, the utility of punishment, or some combination. Indeed, neither the majority nor the dissenting opinion mentions the traditional purposes of punishment of retribution, deterrence, incapacitation, and rehabilitation. Yet, as the next section explains, the concept of proportionality cannot be understood in isolation from the purposes of punishment.¹³

The Appeals Chamber Decision affirming Lubanga's sentence also omits any explicit discussion of the purposes of punishment. However, the Appeals Chamber seems implicitly to adopt a retributive theory of proportionality when it states that '[p]roportionality is generally measured by the degree of harm caused by the crime and the culpability of the perpetrator.'¹⁴ While this statement is not on its face incompatible with the more utilitarian approach to proportionality advocated herein, the law review article that the judges cite in support of the statement treats proportionality as an entirely retributive inquiry.¹⁵ For the reasons explained in the next section, a strictly retributive approach to proportionality at the ICC would be a mistake.

37.3 Proportionality Theories

The Rome Statute's requirement that punishment be proportionate to the crime reflects a principle common to most criminal justice systems around the world. Implementation of the principle varies greatly, however. Such variation results from different beliefs and priorities regarding the purposes of punishment.¹⁶ Broadly, justifications for punishment fall into two categories: retributive theories that justify punishment, as well as its distribution, by reference to the offender's desert; and utilitarian theories that seek justification in the beneficial consequences of punishment, in particular, crime prevention. These theories and the tensions among them are the subject of an enormous body of scholarship and jurisprudence.¹⁷

Proportionality is most often discussed in retributive terms: those who commit more serious offences deserve more severe punishments.¹⁸ Indeed, many writers assume that

¹² Lubanga decision on sentence (n 3) para. 93.

¹³ K Huigens, 'Rethinking the Penalty Phase' (2000) 32 *Arizona State Law Journal* 1195, 1204 ('Proportionality in punishment is a substantive criminal law value that is impossible to understand...without resort to the theory of punishment').

¹⁴ Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06 A 4 A 6, TC I, ICC, 1 December 2014, para. 40 ('Lubanga Appeals Chamber Decision on Sentencing').

¹⁵ Ibid., n 69, citing A M Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing', 87, *Virginia Law Review* 415 (May 2001) 437–8.

¹⁶ For a good overview of how justifications for punishment impact sentencing theory and the concept of proportionality see A von Hirsch, 'Proportionality in the Philosophy of Punishment: From 'Why Punish?' to 'How Much?'' (1990) 1 *Criminal Law Forum* 259.

¹⁷ See generally G Newman, *The Punishment Response* 2nd edn (New Brunswick: Transaction Publishers 2008) (providing an overview of punishment theories, their history, and the interactions between punishment principles).

¹⁸ See e.g. I Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (W Hastie tr., Edinburgh: T & T Clark 1887; K Greenawalt, 'Punishment' (1983) 74 *Journal of Criminal Law and Criminology* 343, 347; P Robinson, 'Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical' (2008) 67 *The Cambridge Law Journal* 145.

the term ‘proportionality’ inherently refers to a retributive approach to distributing punishment.¹⁹ Utilitarian theorists also endorse proportionality, however, albeit a different version. For utilitarian theorists, punishment is justified only to the extent that it serves to promote social goods, in particular, crime prevention.²⁰ Proportionality therefore requires sentences that are sufficient but not excessive in relation to the expected social goods.²¹ Without attempting to summarize the vast literature developing variations on these theories, what follows sets forth the basic arguments as they pertain to the quest for a theory of international sentencing proportionality.

37.3.1 Retributive proportionality

Retributive theories justify punishment entirely based on the desert of the perpetrator. A rich literature exists invoking moral principles to explain the concept of ‘desert’. For some retributivists, for example, punishment is deserved because the offender has violated the social contract,²² while for others desert derives from the devaluation of the victim inherent in the criminal act.²³ Retributive proportionality holds that punishment should be calibrated to the perpetrator’s desert. While retributive theories differ in their emphases, all measure desert in terms of the harm the offender caused and the offender’s culpability in relation to that harm. The more serious the offender’s crime along these axes, the more punishment is deserved.

An important divide in theories of retributive proportionality concerns whether proportionality is conceived as a cardinal or ordinal principle. Early retributive theorists, most famously Immanuel Kant, believed that punishment must be cardinally proportionate to desert.²⁴ To be morally justified, the seriousness of the punishment must precisely match the extent of the offender’s desert. An early formulation of this idea is the principle of *lex talionis*, which holds that a murderer deserves to be killed, a batterer deserves to be beaten, and so on.²⁵ Although modern retributivists reject *lex talionis* as the appropriate principle of proportionality, some continue to understand proportionality in cardinal terms.²⁶ For them, proportionality requires sentences that reflect adequately the absolute gravity of the crime in terms of desert.

¹⁹ See e.g. A Hoel, ‘The Sentencing Provisions of the International Criminal Court: Common Law, Civil Law, or Both?’ (2007) 33 *Monash University Law Review* 264, 288 (‘Given that the sentencing provisions of the ICC have endorsed proportionality, it would seem to be uncontroversial that retribution will be endorsed as the primary sentencing purpose’); M Tonry, ‘Selective Incapacitation: The Debate Over its Ethics’ in A von Hirsch and A Ashworth (eds), *Principled Sentencing* (Boston: Northeastern University Press 1992) 166 (implying a definition of proportionality that is entirely retributive and stating that proportionality is relatively unimportant to utilitarians theorists).

²⁰ Greenawalt (n 18) 352.

²¹ See J Bentham, *An Introduction to the Principles of Morals and Legislation* (New York: Dover 2007).

²² See e.g. H Morris, ‘Persons and Punishment’ (1968) 52 *Monist* 475, 476–9.

²³ See e.g. J Hampton, ‘The Retributive Idea’ in J Murphy and J Hampton (eds), *Forgiveness and Mercy* (Cambridge: Cambridge University Press 1988) 124–8; J Hampton, ‘An Expressive Theory of Retribution’ in W Cragg (ed.), *Retributivism and its Critics* (Stuttgart: Franz Steiner 1992) 5–11.

²⁴ Kant (n 18) 196.

²⁵ See A von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press 1993).

²⁶ See e.g. (n 108) for a discussion of Jens Ohlin’s cardinally retributive approach to international proportionality.

Many modern retributivists, however, reject the idea that cardinally proportionate punishment can be identified.²⁷ Theorists have responded to this problem in two ways. Some, most notably Norval Morris, have retreated from the notion of desert as the basis for proportionality, advocating instead the use of desert as a limiting principle.²⁸ In Morris' 'limiting retributivism', desert remains a cardinal principle, but functions only as an upper, and, more controversially, a lower limit on just punishment.²⁹ Within the broad range of punishments that are 'not undeserved', proportionate punishment is that which advances the utilitarian goals of punishment at the lowest cost.³⁰ Morris' limiting retributivism thus privileges the utilitarian goal of parsimony over the principle of equality.³¹ Other scholars have endorsed Morris' limiting retributivism with modifications. Richard Frase, for instance, argues that proportionality should largely be a matter of retributive considerations, with utilitarian concerns applicable only within a narrow range of deserved sentences.³²

Other retributive theorists, such as Andrew von Hirsch, respond to the incommensurability of crime and punishment by treating desert not as a cardinal concept but as an ordinal one.³³ Rather than seeking to identify deserved punishment in absolute terms, ordinal proportionality merely aspires to impose punishment that places the defendant's sentence in appropriate relationship to other sentences on a spectrum of seriousness.³⁴ Without claiming to know the right punishment for murder, for example, an ordinal theory of retributive proportionality posits that murderers generally deserve greater punishment than thieves.

This version of retributive proportionality is difficult to justify in terms of moral principle. Ordinal retributive proportionality does not assure that the offender receives the punishment he or she deserves but merely that the punishment is in the

²⁷ M Tonry, 'Individualizing Punishments' in A Ashworth et al. (eds), *Principled Sentencing: Readings on Theory and Policy* (Oxford: Hart Publishing Limited 2009) 356 (stating that while 'rigid retributivists' advocate cardinal proportionality, 'subtler retributivists...admit that in the abstract we can never agree on the single ideally appropriate punishment for any crime...'). For a discussion of this problem from a utilitarian perspective see A Ristropf, 'Desert, Democracy, and Sentencing Reform' (2006) 96 *Journal of Criminal Law and Criminology* 1293, 1308–13 (arguing that the concept of desert is too elastic to provide meaningful guidance for sentencing policies).

²⁸ See N Morris, 'Punishment, Desert and Rehabilitation' in H Gross and A von Hirsch (eds), *Sentencing* (Oxford: Oxford University Press 1981) 268–9.

²⁹ Ibid.

³⁰ Ibid., 267. See also R Frase, 'Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?' (2005) 89 *Minnesota Law Review* 571, 591 (elaborating on the theory of limited retributivism, which 'allows all traditional punishment purposes to play a role but places retributive outer limits both on who may be punished (only those who are blameworthy), and how hard they may be punished (within a range of penalties which would be widely viewed as neither unfairly severe or unduly lenient)'). The most recent proposed sentencing provision for the US Model Penal Code adopts this theory of proportional sentencing. Model Penal Code: Sentencing xxiv (Tentative Draft No. 2, 2011).

³¹ R Frase, 'Limiting Retributivism' in M Tonry (ed.), *The Future of Imprisonment* (Oxford: Oxford University Press 2006) 83 (discussing Morris' theory).

³² Ibid., 83–119. ³³ Von Hirsch (n 25) 18–19.

³⁴ See e.g. A von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55, 79–83; P Robinson, 'A Sentencing System for the 21st Century?' (1987) 66 *Texas Law Review* 1, 7. Notably, the United States Supreme Court has employed both relative and absolute conceptions of desert in its sentencing jurisprudence. See Y Lee, 'Why Proportionality Matters' (2012) 160 *University of Pennsylvania Law Review* 1835, 1840.

appropriate relationship to the punishments inflicted on other offenders. Without principles anchoring the entire punishment scale, all offenders could be receiving more or less punishment than they deserve. Proponents of ordinal retributive proportionality have generally failed to supply such anchoring principles.³⁵

Rather than seeking moral principles to anchor the punishment scale, some advocates of ordinally retributive proportionality turn to utilitarian justifications for this way of distributing punishment. Professor Paul Robinson and others argue that an ordinally retributive approach to the allocation of punishment is required because (i) people share a high level of agreement about how certain ‘core’ crimes rank in terms of seriousness; and (ii) sentences that fail to accord with these shared intuitions will be considered illegitimate.³⁶ Proponents of this ‘empirical desert’ approach to retributive proportionality sometimes hint at a moral basis for its adoption by arguing that shared intuitions about relative seriousness are based in human biology.³⁷ More frequently, however, the claim is that, whatever the source of the intuitions, they must be followed in order to ensure respect for the system—a consequentialist argument.³⁸

In sum, retributive proportionality comes in ordinal and cardinal varieties and is variously justified by reference to moral principles and utilitarian considerations.

37.3.2 Utilitarian proportionality

Utilitarian theories justify punishment according to the social benefits it produces, in particular, the prevention of crime through general and specific deterrence, rehabilitation, and incapacitation, as well as through the expression and diffusion of social norms. Punishment is justified only to the extent that it produces such benefits. Utilitarian proportionality thus requires that punishment be sufficiently severe, but no more severe than necessary, to prevent future crimes. As Cesare Beccaria wrote in 1764, ‘[p]unishments... and the method of inflicting them, should be chosen in due proportion to the crime so as to make the most efficacious and lasting impression on the minds of men, and the least painful impressions on the body of the criminal’.³⁹

³⁵ See e.g. Von Hirsch, 1990 (n 16) 288 ('Desert tells us more about comparative punishment than it does about setting the penalty scale's anchoring points'); ibid., 282–3 (describing the anchoring points of the punishment scale as a 'convention').

³⁶ P Robinson and R Kurzban, 'Concordance and Conflict in Intuitions of Justice' (2007) 91 *Minnesota Law Review* 1829, 1892; P Robinson et al., 'The Origins of Shared Intuitions of Justice' (2007) 60 *Vanderbilt Law Review* 1633, 1687; P Robinson and J Darley, 'Intuitions of Justice: Implications for Criminal Law and Justice Policy' (2007) 81 *Southern California Law Review* 1, 1; but see D Braman et al., 'Some Realism about Punishment Naturalism' (2010) 77 *The University of Chicago Law Review* 1531, 1532 (challenging the idea of shared intuitions of deserved punishment); C Slobogin and L Brinkley-Rubinstein, 'Putting Desert in its Place' (2013) 65 *Stanford Law Review* 77 *passim*.

³⁷ See e.g. J Darley, 'Realism on Change in Moral Intuitions' (2010) 77 *University of Chicago Law Review* 1643, 1643 (discussing perspective that people's judgments regarding punishment and justice are due in part to evolution of cognitive biases); Braman et al. (n 34) 1532–3 (explaining that 'Punishment Naturalists' believe 'highly nuanced intuitions about most forms of crime and punishment are broadly shared because they are innate'); J Mackie, 'Morality and the Retributive Emotions' (1982) 1 *Criminal Justice Ethics* 3, 8 (suggesting biological explanation for human desire for retributive justice).

³⁸ See Robinson and Darley (n 36) 1–2.

³⁹ See Cesare di Beccaria, *Of Crimes and Punishments* (J Grigson tr., New York: Marsilio Publishers 1996) 49.

Drawing on Beccaria's work, Jeremy Bentham elaborated a number of rules of utilitarian proportionality.⁴⁰ Professor Richard Frase classifies such rules as concerning either 'ends proportionality' or 'means proportionality'.⁴¹ Ends proportionality reflects the basic utilitarian insight that the cost of punishment should not outweigh its benefits.⁴² According to ends proportionality, more serious crimes should be punished more severely because the benefits derived from punishing them are likely greater. Ends proportionality therefore shares with retributive proportionality the view that punishment should be calibrated to the seriousness of the crime.⁴³ However, while retributive proportionality calculates the severity of crime in relation to both harm and culpability, ends proportionality focuses on harm, considering culpability only to the extent that it is related to the likely benefits of punishment, such as the prevention of future crimes.⁴⁴ Means proportionality, or what others have called the principle of parsimony,⁴⁵ seeks to ensure that the least burdensome punishment necessary to achieve the desired consequences is employed.⁴⁶

Thus, while a retributivist punishes purely in accordance with the offender's desert, for a utilitarian, punishment should be no greater than necessary to promote the expected social goods, in particular the prevention of future crimes.

37.3.3 Expressive proportionality?

A third category of punishment theories is often labelled 'expressive' theories.⁴⁷ Expressive theories view punishment as warranted when it appropriately expresses moral condemnation of the offender's conduct.⁴⁸ Expressive theories differ as to the purpose of such condemnation, however. Some expressive theories are deontological and thus closely linked with retributive theories. For them, expression is considered a good in itself because of its value to the offender, to the victim, to society at large, or to some combination.⁴⁹ Other expressive theories are utilitarian, valuing denunciation as a means of achieving social goods such as crime prevention or reformation of the offender.⁵⁰

⁴⁰ See Bentham (n 21) 83–4.

⁴¹ Frase (n 31) 592–7.

⁴² Ibid., 592.

⁴³ Ibid., 594.

⁴⁴ Ibid.

⁴⁵ Bentham (n 21) 401; N Morris, *The Future of Imprisonment* (Chicago: University of Chicago Press 1974) 60–2.

⁴⁶ Frase (n 31) 595.

⁴⁷ Included in this category are what some have called 'moral-educative' theories. M Tonry, 'Rethinking Unthinkable Punishment Policies in America' (1999) 46 *UCLA Law Review* 1751, 1764.

⁴⁸ See e.g. J Feinberg, 'An Expressive Theory of Punishment' in J Feinberg (ed.), *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton University Press 1970) 101–5; D Kahan, 'What Do Alternative Sanctions Mean?' (1996) 63 *University of Chicago Law Review* 591, 598; H Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 2nd edn (Oxford: Oxford University Press 2008) 169–70 (discussing the expressive or denunciatory theory of punishment of James Fitzjames Stephen and the related views of Lord Denning).

⁴⁹ See e.g. A Duff, 'Punishment, Retribution and Communication' in Ashworth et al. (n 25) 127 (endorsing a theory based on the communication of censure 'to the offender and to a wider audience that includes the victim'); J Hampton, 'Correcting Harms Versus Righting Wrongs: The Goal of Retribution' (1992) 39 *UCLA Law Review* 1659, 1686 (arguing that expression vindicates the value of the victim); Kahan (n 48) 598 (punishment expresses to the offender that his assessment of the victim's value is wrong); Huigens (n 13) 1246 (arguing for an expressive theory of punishment based in virtue).

⁵⁰ H Hart rejected the notion that expression alone could justify punishment and opined that such an approach would come 'uncomfortably close to human sacrifice as an expression of religious worship'.

An important example of the latter type is the theory of ‘positive general prevention’ popular in Germany and parts of Scandinavia.⁵¹ The theory builds on the work of Emile Durkheim, who posited that criminal law’s function is to maintain social cohesion.⁵² Although there are many varieties of positive general prevention, the central claim is that criminal law’s purpose is to project and reinforce norms against criminal behaviour.⁵³ Norm projection prevents crime because people internalize the norms and comply with them. Such ‘positive’ prevention is distinguished from ‘negative’ efforts to discourage violations of those norms, for example through incapacitation and deterrence.⁵⁴

Unlike retributive and utilitarian theorists, expressive theorists have not articulated a unique theory of proportionate punishment,⁵⁵ and thus there is no concept of ‘expressive proportionality’ in the literature. To the extent such theorists address proportionality, they rely on retribution (ordinal or cardinal) or a combination of retribution and utility as the grounds for distributing punishment. Among retributive expressivists, some, like Andrew von Hirsch, argue that only punishment that is ordinally retributive can adequately express the correct degree of moral condemnation of an offence.⁵⁶ On this view, the central task in sentencing is to identify the punishment that accurately reflects the offenders’ desert in relation to the desert of other offenders.⁵⁷ Other retributive expressivists give desert a less prominent role in sentencing. For instance, Anthony Duff takes the following view of the role of retributive proportionality in sentencing:

What matters is to find a sentence that will be communicatively adequate to the offence and the offender. This will be possible only if the sentencers have some

H Hart, *Law, Liberty, and Morality* (Stanford: Stanford University Press 1963) 53–4 (describing deontological expressive theories as the ‘extreme thesis’ and the utilitarian versions as the ‘moderate thesis’).

⁵¹ See e.g. M Dubber, ‘Theories of Crime and Punishment in German Criminal Law’ (2005) 53 *American Journal of Comparative Law* 679 *passim* (providing an overview of Roxin and his theory); Tonry (n 47) 1765–6. The theory is sometimes cast as an attempt to reconcile retribution and utility. See Dubber, ‘Theories’ (n 51) 699; G Fletcher, *The Grammar of Criminal Law: American, Comparative, and International* vol. I (Oxford: Oxford University Press 2007) 254 (stating that positive general prevention has linkages with deontology and noting that this idea is also found in the work of Feinberg, Murphy, and others).

⁵² E Durkheim, *The Division of Labor in Society* (G Simpson tr., New York: Free Press 1933) 102; Tonry (n 47) 1764.

⁵³ See Tonry (n 47) 1764; Fletcher (n 51) 254; J Andenaes, *Punishment and Deterrence* (Ann Arbor: University of Michigan Press 1974) *passim*; P Törnudd, ‘Sentencing and Punishment in Finland’ in M Tonry and K Hatlestad (eds), *Sentencing Reform in Overcrowded Times: A Comparative Perspective* (Oxford: Oxford University Press 1997) 189–94.

⁵⁴ Tonry (n 47) 1765.

⁵⁵ See e.g. H Bedau, ‘Feinberg’s Liberal Theory of Punishment’ (2001) 5 *Buffalo Criminal Law Review* 103, 136 (criticizing Joel Feinberg for failing to articulate a theory of proportionality). Indeed, some scholars assert that expressive theories fail to supply a normative justification for punishment and are instead descriptive. See e.g. M Adler, ‘Expressive Theories of Law: A Skeptical Overview’ (200) 148 *University of Pennsylvania Law Review* 1363, 1414 ([T]he fact that the institution we call “punishment” is essentially expressive hardly makes out the normative claim that punishment is justified in virtue of its expressive cast).

⁵⁶ See e.g. Von Hirsch (n 16) 279. For an expressive retributivist who seems to take a cardinal approach to proportionality see Hampton (n 49) 1690 (“The more awful the wrong, the larger the purported gulf between wrongdoer and victim, and thus the more substantial and severe the punishment must be in order to defeat the wrongdoer and thereby deny his claim to superiority”).

⁵⁷ Duff (n 49) 132 (commenting on von Hirsch’s approach to proportionality).

substantial discretion as to the kind of sentence they impose: sentences must not be disproportionate to the seriousness of the crime, but, within the limits set by this looser demand for negative proportionality, sentencers need not try to find *the* proportionate kind or severity of sentence.⁵⁸

Likewise, theories focused on the utility of expression, such as positive general prevention, tend to advocate a limiting role for retributive proportionality in sentencing.⁵⁹ Desert provides the upper and, more arguably, the lower bounds of appropriate punishment. Within these limits, utilitarian proportionality principles govern, in particular the principle of parsimony. A proportionate sentence inflicts the least punishment necessary to express the appropriate degree of condemnation of the offence. More serious crimes will generally be punished more strongly in order to maintain the proper respect for the norms.⁶⁰ That said, it is not necessary for sentences to be strictly ordered according to desert or to reflect desert in an absolute sense.

37.3.4 Implications of proportionality theory for sentencing practice

The theories of proportionality have important implications for sentencing practice. First, while each of the theories requires punishment decision-makers (whether legislators or judges) to calibrate punishment in some sense to the gravity of the offence committed, the theories differ in terms of the factors that contribute to the gravity determination. In a sense, therefore, the concept of gravity itself is given different meanings under the different philosophical perspectives. A decision-maker seeking to gauge culpability will understand gravity differently from one seeking to prevent future crimes.

The theories approach the gravity determination differently both in terms of focus and emphasis. With regard to focus, retributive theories, whether rooted in expression or otherwise, are generally backward-looking. The gravity of an offence for the purposes of proportionate punishment is a function of the harm committed and the culpability of the offender for that harm. Gauging harm is a complex task that involves considering both the quantity and quality of suffering the offence caused.⁶¹ Culpability is a function of the offender's role, mental state, and so on at the time of the offence. Retributive proportionality analysis does not consider the potential for future harm—whether from the particular offender or from others. Nor does it usually consider the offender's mental state or actions after the offence.⁶²

⁵⁸ Ibid., 132.

⁵⁹ T Lappi-Seppälä, 'Penal Policy in Scandinavia' (2007) 36 *Crime and Justice* 217, 233 ('The main function of the proportionality principle—as seen in the Finnish theory—was thus to define the upper limit that the punishment may never exceed').

⁶⁰ Tonry (n 47) 1766.

⁶¹ See generally A von Hirsch and N Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1.

⁶² Some retributivists do consider post-crime actions relevant to proportionality. For instance Jean Galbraith argues that a defendant's good deeds, including those done after the offence was committed, should affect the desert calculation. 'The Good Deeds of International Criminal Defendants' (2012) 25 *Leiden Journal of International Law* 799, 811–12.

In contrast, utilitarian proportionality analysis requires decision-makers to look both backward and forward. The extent of harm caused and the offender's culpability are relevant inasmuch as they help the decision-maker to understand the amount of punishment necessary to prevent future crimes, achieve rehabilitation, and so on. Other factors that contribute to the likelihood of future crimes are also part of the gravity determination, however. These might include, for example, the offender's reputation or past good works unrelated to the crime, as well as actions taken after the crime such as guilty pleas, cooperation, apologies, and restitution, none of which would normally be relevant to a purely retributive proportionality analysis.⁶³

The theories also approach the gravity determination differently in terms of the emphases given to harm and culpability. For many retributivists, culpability is the primary focus—punishment should take harm into account but should principally strive to reflect culpability.⁶⁴ In contrast, utilitarian theorists consider culpability only to the extent that it relates to the possibility of future harm.⁶⁵ Moreover, while retributive theories consider harm in an undifferentiated manner, utilitarian theories necessarily prioritize among harms. A theory based on norm promotion, for example, such as positive general prevention, focuses on harms that can be prevented through general moral education, rather than on the particular harms an individual offender has inflicted or may inflict in the future.

These differences in focus and emphasis have implications for sentencing procedure. For example, proponents of retributive proportionality tend to favour *ex ante* determinations of the gravity of crimes, for instance through sentencing guidelines.⁶⁶ This is particularly true of those who advocate ordinally retributive proportionality.⁶⁷ For them, fairness through equal punishment is paramount and such fairness is best ensured through mandatory or at least strictly applied guidelines.⁶⁸ Utilitarian theorists, particularly those who advocate general prevention, tend to be more comfortable affording judges broad discretion to allocate punishment according to the social gains expected from punishment in particular cases.⁶⁹

⁶³ See e.g. Frase (n 31) 45 (noting that while many forms of cooperation are not seen as reducing a defendant's deserts, some are—at least under a broad definition of desert); Tonry (n 27) 357 (criticizing retributivists such as von Hirsch for limiting culpability determinations to the offenders' crimes and criminal records); B Grey, 'Neuroscience, PTSD, and Sentencing Mitigation' (2012) 34 *Cardozo Law Review* 53, 78–84 (explaining why retributivists only allow culpability-reducing circumstances to mitigate sentences, not expressions of remorse or personal circumstances that have no effect on responsibility); R Christopher, 'The Prosecutor's Dilemma: Bargains and Punishments' (2003) 72 *Fordham Law Review* *passim* (comparing the difficulties of prisoner-initiated plea bargains in a retributivist system to the same difficulties of prosecutor-initiated plea deals in consequentialist systems).

⁶⁴ M Moore, 'Victims and Retribution: A Reply to Professor Fletcher' (1999) 3 *Buffalo Criminal Law Review* 65, 66 (discussing retributivists who believe that 'what deserves punishment are the inner thoughts of an individual').

⁶⁵ Frase (n 31) 595.

⁶⁶ See e.g. J Ohlin, 'Towards a Unique Theory of International Criminal Sentencing' in G Sluiter and S Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (London: Cameron May International Law and Policy 2009) 381–413.

⁶⁷ See e.g. A von Hirsch, 'Criminology: Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and their Rationale' (1983) 74 *Journal of Criminal Law and Criminology* 209, *passim* (explaining that sentencing guidelines are necessary to eliminate subjectivity in deciding sentences and to 'specify the quantum of punishment that is deemed deserved').

⁶⁸ Tonry (n 19) 167.

⁶⁹ See Lappi-Seppälä (n 59) 283.

The theoretical differences also suggest different roles for victims in the sentencing process. Some retributivists consider that retribution is in some sense ‘due’ to the victims of crimes.⁷⁰ Such a view mitigates in favour of a substantial role for victims at sentencing in order to ensure that their needs are satisfied through the punishment inflicted. A utilitarian approach focused on community rehabilitation might also afford a significant role to the victim. On the other hand, a theory focused on general norm promotion would accord little or no role to the victim in determining proportionate punishment since the victim has no greater insight than the judge into what punishment will adequately express the relevant norms.

Additionally, where retributive proportionality tends to counsel against sentence-based plea bargains, preventive proportionality suggests such deals can be productive at least when the sentence remains adequate to convey the requisite condemnation. The admission of wrongdoing confirms the condemnatory message and reduces the need for punishment.

In sum, a court’s theory of proportionality can affect sentencing procedures and outcomes, at least in some cases. What theory, then, should the ICC judges adopt? The following section considers whether anything in the ICC’s sources of law supports adopting a particular approach to proportionality.

37.4 Proportionality Principles in the ICC’s Applicable Law

In seeking to understand the concept of proportionality for sentencing, the ICC judges must look to the applicable law. The Court’s sources of law are, in the first place, the Statute, Elements of Crimes, and Rules of Procedure and Evidence; second, applicable treaties, and principles and rules of international law; and third, general principles of law derived from national legal systems.⁷¹ Although these sources provide no clear answers, they suggest that the ICC should privilege utilitarian sentencing goals, particularly the goal of crime prevention, and adopt an understanding of proportionality compatible with that goal.

37.4.1 The Rome Statute and Rules of Procedure and Evidence

The Rome Statute requires that sentences be proportionate to the crimes committed, permitting either the prosecutor or the defendant to appeal disproportionate sentences.⁷² Neither the Statute nor the Rules of Procedures and Evidence (‘Rules’) explain what proportionality requires, however. Indeed, neither document mentions retribution or goals such as crime prevention in connection with sentencing.⁷³

The Statute’s provision regarding sentencing is succinct. It simply requires the judges to ‘take into account such factors as the gravity of the crime and the individual

⁷⁰ See e.g. Galbraith (n 62) 810–11.

⁷¹ Art 21 ICC Statute.

⁷² Art 81(2)(a) ICC Statute.

⁷³ One commentator claims that the ‘ICC framework...clearly favours retribution’ but does not justify this claim. Hoel (n 19) 276. See also ibid., 288 (‘Given that the sentencing provisions of the ICC have endorsed proportionality, it would seem to be uncontentious that retribution will be endorsed as the primary sentencing purpose’).

circumstances of the convicted person'.⁷⁴ If a life sentence is awarded, it must be 'justified by the extreme gravity of the crime and the individual circumstances of the person'.⁷⁵ An examination of the drafting history of the Statute's sentencing provisions does not clarify whether the drafters envisioned a retributive or utilitarian approach to proportionate sentencing.⁷⁶ Indeed, it seems likely that the question was purposely left unresolved because reaching philosophical agreement would have been very difficult.

The statutory provision most relevant to the Court's understanding of the proportionality principle is the preamble's assertion that the purpose of the ICC is 'to put an end to impunity for the perpetrators of [international] crimes and thus to contribute to the prevention of such crimes'.⁷⁷ Some commentators cite the goal of ending impunity as evidence of the Court's retributive agenda.⁷⁸ In light of the rest of the sentence, however, a better interpretation is that ending impunity is not a goal in itself but is rather a means of preventing future crimes. Read this way, the language supports a utilitarian justification for the Court's work. Although the Court's general justifying aim does not necessarily dictate its approach to proportionate sentencing,⁷⁹ in the absence of a sentencing philosophy, this utilitarian language provides some indication of the general orientation of the drafters.

The Rules, on the other hand, contain language that more clearly suggests a retributive approach to proportionality. Rule 145 instructs the judges to '[b]ear in mind that the totality of any sentence of imprisonment and fine...must reflect the culpability of the accused person'.⁸⁰ The idea that a sentence should 'reflect' the offender's culpability is usually associated with retributive proportionality. As such, the use of the word 'reflect' can be read to imply a strictly retributive approach to proportionality. Indeed, as already mentioned, the Appeals Chamber seems to adopt such a reading in its decision affirming Lubanga's sentence.⁸¹ However, the wording is also compatible with a limiting role for retribution in proportionality determinations. A sentence need not capture an offender's culpability 100% in order to 'reflect' that culpability. Instead, a sentence within the range of 'not underserved' punishment, to use Morris' wording, also reflects the offender's culpability. A limiting approach to culpability (as well as desert more generally) is compatible with a predominantly utilitarian approach to proportionality. At least according to expressive theories of prevention, a sentence

⁷⁴ Art 78 ICC Statute. ⁷⁵ Art 77(1)(b) ICC Statute.

⁷⁶ M Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (Ardsley: Transnational Publishers 1998) 286.

⁷⁷ Preamble ICC Statute.

⁷⁸ See e.g. A Woods, 'Moral Judgments and International Crimes: The Disutility of Desert' (2012) 52 *Virginia Journal of International Law* 633, 640 (claiming that the Statute's goal of ending impunity may be 'suggestive of the retributive impulse'); M Pensky, 'Amnesty on Trial: Impunity, Accountability, and the Norms of International Law' (2008) 1 *Ethics & Global Politics* 1, 1 (arguing that the anti-impunity norm is based on a retributivist conception of criminal justice).

⁷⁹ For example, the purpose of establishing the Court could be general prevention, but sentencing could nonetheless be conducted according to retributive principles.

⁸⁰ Rule 145(1)(a) of the Rules of Procedure and Evidence, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A (adopted and entered into force 9 September 2002) ('ICC RPE').

⁸¹ *Supra* n 4 and accompanying text.

that is within the range of deserved punishments is more likely to contribute to crime prevention.⁸²

The remainder of Rule 145 confirms that harm and culpability should be considered relevant factors in sentencing, without clarifying which considerations should be given priority. The Rule contains a non-exhaustive list of factors the judges must consider in addition to the gravity of the crime and individual circumstances listed in the Statute. While these purport to be ‘additional’ factors, they should be understood as fleshing out the notions of gravity of crime and individual circumstances.⁸³ With regard to the gravity of the crime, the Rule mentions the following factors: ‘the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime’.⁸⁴ With regard to the circumstances of the individual, the Rule includes ‘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’.⁸⁵ The Rule goes on to list as ‘aggravating factors’ a number of considerations that could also be subsumed under the gravity and individual circumstances, including relevant prior convictions, abuse of power, and number and vulnerability of victims.⁸⁶

All of these factors are equally relevant to retributive and utilitarian versions of proportionality. One aspect of the Rule is suggestive of a utilitarian approach to proportionality, however. The list of mitigating circumstances includes, ‘[t]he convicted person’s conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court’.⁸⁷ Socially beneficial post-crime conduct, including cooperation with the court, is not generally considered relevant to retributive proportionality.⁸⁸ The inclusion of such considerations therefore suggests that ICC sentencing should aim, at least in part, to achieve socially beneficial consequences such as restoring victims and fostering justice beyond the case at hand.

37.4.2 Proportionality principles in treaties and customary international law

The next sources of law for the ICC to consider are applicable treaties and principles and rules of international law. Potentially applicable treaties include those concerning human rights.⁸⁹ Although some international and regional human rights treaties have

⁸² See *supra* nn 57–8 and accompanying text.

⁸³ The *Lubanga* Sentencing Judgment treats them this way. See *Lubanga* Decision on sentence (n 3) paras 36–91. The Appeals Chamber Decision, in contrast, asserts that there are several ways of interpreting the relationship between the factors listed in the statute and those listed in the rules, and declines to resolve the issue. ‘*Lubanga Appeals Chamber Decision on Sentencing*’, paras 62–6. One judge dissented from this aspect of the decision, arguing that the factors in the rules should be interpreted as elaborating upon the factors in the statute. *Ibid.*, Partly Dissenting Opinion of Judge Sang-Hyn Song, ICC-01/04-01/06-3122-Anx1, January 12, 2014, paras 2–3.

⁸⁴ Rule 145(1)(c) ICC RPE.

⁸⁵ *Ibid.*

⁸⁶ Rule 145(2)(b) ICC RPE.

⁸⁷ Rule 145(2)(a) ICC RPE.

⁸⁸ See *supra* Implications of proportionality theory for sentencing practice.

⁸⁹ Art 21 ICC Statute (‘The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.’).

been interpreted to require proportionate sentencing, they do not clearly mandate a retributive or utilitarian approach to the concept.⁹⁰ Indeed, some commentators consider a retributive approach to punishment to be a violation of human rights law,⁹¹ while others suggest that the right to human dignity requires that desert function as the upper limit to punishment.⁹²

The Statute's reference to 'principles and rules of international law' amounts to an invocation of customary international law.⁹³ It is beyond the purview of this chapter to engage in a thorough investigation of whether any customary international law principles or rules of proportionality exist. It is instructive, however, that the ICC's predecessor tribunals have not clearly identified such principles or rules. Indeed, the sentencing jurisprudence of these tribunals fails to identify a consistent theory of proportionality, whether based in customary international law or otherwise.

Although the judgment of the IMT is sometimes cited as evidence of a retributive approach to punishment,⁹⁴ in fact the judgment does not specify whether the punishment imposed was calibrated to desert, prevention, or both.⁹⁵ The ICTY and ICTR sentencing judgments, in contrast, virtually all discuss or at least mention the purposes of punishment in relation to the determination of sentences. Nonetheless, despite having sentenced more than a hundred defendants collectively over the course of almost two decades, the ICTY and ICTR have not reached a consensus on the principles of proportionate punishment.⁹⁶ In virtually all of their sentencing judgments the tribunals affirm the importance of both retribution and deterrence;⁹⁷ they also sometimes mention rehabilitation.⁹⁸ Yet the judgments are unclear about how these goals relate to the sentences handed down and do not consistently identify priorities among the goals. Some judgments state that deterrence

⁹⁰ See generally D van Zyl Smit and A Ashworth, 'Disproportionate Sentences as Human Rights Violations' (2004) 67 *Modern Law Review* 541; but see R Sloane, 'The Expressive Capacity of International Punishment: the Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 *Stanford Journal of International Law* 39, 82 (arguing that human rights law implicitly adopts the Kantian principles that underpin modern retributivism).

⁹¹ See e.g. M Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 *Harvard Human Rights Journal* 39, 58 ('Adequate retribution is impossible unless those inflicting punishment violate the rights of human rights violators').

⁹² Van Zyl Smit and Ashworth (n 90) 542; Frase (n 31) 17 ('Maximum allowable desert is a human rights issue').

⁹³ For a discussion of this assertion see M deGuzman, 'Article 21 Applicable Law' in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court—Observers' Notes, Article by Article* 2nd edn (Münich: C H Beck 2008).

⁹⁴ Sloane (n 90) 66; Ohlin (n 66) 388.

⁹⁵ Judgment of the Nuremberg International Military Tribunal 1946 (1947) 41 *American Journal of International Law* 172, 175.

⁹⁶ See Sloane (n 90) 68 (stating that 'confusion about the justifications for punishment and its distribution among different kinds of defendants plagues the jurisprudence'); S D'Ascoli, *Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC* (Oxford: Hart Publishing 2011) 34 ('Although the "traditional" purposes of sentencing have been upheld in different ways by international tribunals, the question of which rationale(s) international sentencing should pursue still remains open').

⁹⁷ See e.g. Sentencing Judgment, *Tadić*, ICTY-94-1-Tbis-R117, TC, ICTY, 11 November 1999, para. 9.

⁹⁸ See e.g. Judgment, *Stakić*, IT-97-24-A, AC, ICTY, 22 March 2006, para. 402 (the Appeals Chambers 'notes that the jurisprudence of the Tribunal and the ICTR consistently points out that the two main purposes of sentencing are deterrence and retribution. Other factors, such as rehabilitation, should be considered but should not be given undue weight').

should be given less weight than retribution,⁹⁹ while others highlight deterrence as most important.¹⁰⁰ Another category emphasizes the stigma associated with international convictions.¹⁰¹ Scholars who have studied the sentencing decisions disagree on the tribunals' priorities, with some arguing that the judges give pride of place to retribution¹⁰² and others seeing the decisions as emphasizing deterrence.¹⁰³

37.4.3 General principles derived from national systems

An examination of national systems for the purpose of deriving general principles is also inconclusive. While national systems generally accept the principle of proportionality,¹⁰⁴ there is significant diversity in their approaches to implementing that principle.¹⁰⁵ Indeed, national criminal laws rarely address explicitly the appropriate theoretical approach to proportionate sentencing. Evidence of proportionality principles therefore, to the extent it exists, must be deduced from general statements about the goals of sentencing. While a comprehensive review of such statements is beyond the purview of this chapter, the surveys others have conducted support the conclusion that many national systems pursue utilitarian objectives in sentencing, while retribution is a focus in a more limited number.

Professors Kevin Heller and Markus Dubber collected information regarding 16 national systems in their *Handbook of Comparative Criminal Law*. In all of these systems, utilitarian aims such as crime prevention and offender rehabilitation are considered important purposes of punishment.¹⁰⁶ Silvia D'Ascoli's survey of six national

⁹⁹ See e.g. Judgment, *Tadić*, IT-94-1-A, AC, ICTY, 15 July 1999, para. 48; Judgment, *Delalić et al.*, IT-96-21-A, AC, ICTY, 20 February 2001, para. 801. See also M Harmon and F Gaynor, 'Ordinary Sentences for Extraordinary Crimes' (2007) 5 *Journal of International Criminal Justice* 683, 694 (citing ICTY decisions stating that deterrence should not be given undue prominence).

¹⁰⁰ See e.g. Judgment, *Delalić et al.*, IT-96-21-T, TC, ICTY, 16 November 1998, para. 1234 ('Deterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law').

¹⁰¹ See e.g. Sentencing Judgment, *Erdemović*, IT-96-22-T, TC, ICTY, 29 November 1996, para. 64 (holding that the purpose of punishing crimes against humanity 'lies precisely in stigmatizing criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole').

¹⁰² M Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 *Northwestern University Law Review* 539, 560–1; M Bassett, 'Defending International Sentencing: Past Criticism to the Promise of the ICC' (2009) 16 *Human Rights Brief* 22 (stating the tribunals' emphasis on gravity suggests retribution is the underpinning of international punishment); R Henham, 'The Philosophical Foundation of International Sentencing' (2003) 1 *Journal of International Criminal Justice* 64, 66 (stating that retribution is the predominant justification in ICL sentencing and arguing against this approach).

¹⁰³ See e.g. J Meernik and K King, 'The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis' (2003) 16 *Leiden Journal of International Law* 717, 723; S Dana, 'Genocide, Reconciliation and Sentencing Jurisprudence in the ICTY' in R Henham and P Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Aldershot: Ashgate Publishing 2007) 261.

¹⁰⁴ D'Ascoli (n 96) 75.

¹⁰⁵ G Newman, 'Punishment Philosophies and Practices around the World' in M Natarajan (ed.), *International Crime and Justice* (Cambridge: Cambridge University Press 2011) 80 ('The scale by which punishments are matched to crimes remains a particularly difficult puzzle').

¹⁰⁶ See K Heller and M Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford: Stanford University Press 2011).

systems yielded similar results, with several adopting a mix of utilitarian and retributive objectives and a few focusing exclusively on achieving social goods.¹⁰⁷ Islamic systems in particular tend to focus on retribution, although some scholars of Islamic law argue that deterrence is also a permissible consideration.¹⁰⁸ With a few exceptions, even national systems that consider retribution to be an appropriate role of sentencing do not privilege that goal over utilitarian considerations. Indeed, as Richard Frase has written, most Western nations employ a version of limiting retributivism wherein retribution's role is to provide rough boundaries for appropriate punishment but utilitarian objectives largely drive sentence determinations.¹⁰⁹

In sum, the sources of law applicable to the work of the ICC do not provide a clear answer to the principles of proportionality the Court should employ in sentencing. However, to the extent those sources suggest a relevant principle, it is that the Court should privilege utilitarian concerns over retribution.¹¹⁰

37.5 Rejecting International Retributivism

Despite the dominance of utility—in particular, prevention—as the guiding principle in the Rome Statute and in most national systems of criminal justice, the limited scholarship addressing international proportionality mostly advocates a retributive approach. This section reviews that scholarship and offers a critique of retributive international proportionality. It argues that the international community lacks shared norms of desert, that judgments of desert are particularly complex in the international context, and that the rhetoric and narratives of international criminal law enhance the risk that undeserved punishment will be inflicted. As such, a retributive approach to proportionality at the ICC would be both impracticable and dangerous.

37.5.1 The dominance of retributivism in international proportionality scholarship

The few scholars who have considered the appropriate proportionality theory for international courts have virtually all advocated a retributive approach. Professor Jens Ohlin is a particularly vocal advocate of cardinally retributive proportionality

¹⁰⁷ D'Ascoli (n 96) 75–6.

¹⁰⁸ Newman (n 105) 80; R Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge: Cambridge University Press 2005) 30–1.

¹⁰⁹ Frase (n 31) 21. The US Model Penal Code, for example, adopts retribution as a limiting principle but requires that sentences be driven primarily by utilitarian considerations. See generally A Ristroph, 'How (Not) to Think Like a Punisher' (2009) 61 *Florida Law Review* 727 (critiquing the Model Penal Code's limiting retributivism). The European Union has made some efforts to achieve consensus on the question of sentencing purposes to promote uniformity, but has failed. See e.g. Hoel (n 19) 277.

¹¹⁰ In addition to deriving general principles from an overview of national jurisdictions, the ICC is permitted, when appropriate, to consider the laws of the national system that would normally exercise jurisdiction over the crime. Art 21(c) ICC Statute. This formulation is rather awkward, because the idea of consulting the laws of particular jurisdictions seems antithetical to the project of identifying 'general principles'. See deGuzman (n 93). In rare cases, this source of law could lead the Court to adopt a retributive approach to proportionality.

in international punishment.¹¹¹ According to Professor Ohlin, international sentences have often been inappropriately lenient because judges have understood proportionality in terms of relative desert rather than seeking to capture the absolute gravity of the offence.¹¹² Professor Ohlin does not explain how judges should assess such absolute gravity, and thus determine which punishments fit which international crimes. He asserts, however, that international crimes are generally so grave as to require harsh punishment including, in some cases, the death penalty.¹¹³ Several other scholars implicitly endorse a cardinally retributive approach to international proportionality.¹¹⁴

In contrast to these cardinal international retributivists, a few scholars have implicitly and, less frequently, explicitly, called for an ordinally retributive approach to proportionality in international punishment. Most notably, Professor Robert Sloane has argued for ordinally retributive proportionality in international sentencing to support his expressive theory of international punishment.¹¹⁵ Indeed, Professor Sloane labels his approach ‘expressive proportionality’, although his proportionality theory (as opposed to his justification for international punishment) is entirely retributive.¹¹⁶ Professor Sloane rejects cardinal proportionality for international punishment on the grounds that international crimes are so severe that cardinally proportionate punishment would often require sentences prohibited by human rights law, including the death penalty.¹¹⁷ Instead, he argues that international punishment should reflect ordinal retributive proportionality in order to express appropriate condemnation of international crimes. According to Professor Sloane, '[p]unishments should convey the right degree of international condemnation *relative* to other defendants within the jurisdiction of the relevant tribunals. To maintain its legitimacy, an international

¹¹¹ Professor Ohlin has written four pieces of scholarship advocating a cardinally retributive approach to proportionality in international sentencing: Ohlin, ‘Towards a Unique Theory’ (n 64) 399; J Ohlin, ‘Proportional Sentences at the ICTY’ in B Swart et al. (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press 2011) 323 (Ohlin, ‘Proportional Sentences’); J Ohlin, ‘Applying the Death Penalty to Crimes of Genocide’ (2005) 99 *American Journal of International Law* 747 (Ohlin, ‘Applying the Death Penalty’); J Ohlin, ‘Commentary: Hassan Ngeze v Prosecutor’ in A Klip and G Sluiter (eds), *Annotated Leading Cases of International Tribunals* vol. XXIV (Antwerp: Intersentia 2009) 938 (critiquing ICTR defendant’s argument that his sentence was ordinally disproportionate on the grounds that only cardinal proportionality is required).

¹¹² Ohlin, ‘Proportional Sentences’ (n 111) 328; Ohlin, ‘Towards a Unique Theory’ (n 66) 398–9.

¹¹³ Ohlin, ‘Applying the Death Penalty’ (n 111).

¹¹⁴ See Galbraith (n 62) 810–11 (arguing that a certain amount of retribution is ‘due’ both to the individual victims of international crimes and the groups to which they belong); S Dana, ‘The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?’ (2014) 3 *Penn State Journal of Law & International Affairs* 30 (arguing that the punishment international courts have inflicted has often been too low to reflect adequately the offenders’ culpability); S Glickman, ‘Note: Victims’ Justice: Legitimizing the Sentencing Regime of the International Criminal Court’ (2004) 43 *Columbia Journal of Transnational Law* 229, 247–8 (‘A review of the sentences issued by the ICTY and ICTR reveals that, although the Trial Chambers of both Tribunals stressed retribution as a primary justification for punishment, most of the sentences handed down by the ICTY were far too lenient to actually reflect this rationale’); K Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World* (London: Routledge 2012) 55 (stating, with limited discussion, that retribution ‘sets the severity limits’ for international sentences).

¹¹⁵ Sloane (n 90) 83.

¹¹⁶ Ibid.; see also ibid., 44 (claiming that ‘international human rights law...insists on a ‘just deserts’ concept of proportionality in sentencing’).

¹¹⁷ Ibid., 82.

tribunal must express censure, disapproval, and condemnation equally across disparate local circumstances.¹¹⁸

Professor Sloane admits that ‘a coherent ICL sentencing scheme requires some account of cardinal proportionality’, but declines to offer such an account.¹¹⁹ Instead, he states that in light of the incommensurability of international crimes and punishment, ‘[t]he arbitrary establishment, but consistent application, of cardinal guidelines may be the best we can expect’.¹²⁰ Other international criminal law scholars have implicitly endorsed an ordinal approach to proportionality without acknowledging, let alone resolving, the anchoring problem.¹²¹

In sum, the few scholars who have written about international proportionality endorse either ordinally or cardinally retributive versions of the concept. Although some authors mention utilitarian goals as relevant to the allocation of international punishment,¹²² none has advanced a utilitarian theory of international proportionality. As the next section elaborates, the retributive approach to proportionality advocated in the scholarship is impracticable because the international community lacks shared norms to guide determinations of desert in either the cardinal or ordinal senses.

37.5.2 The absence of shared norms of retribution

Retributive proportionality requires judges to determine what punishment an offender deserves either in an absolute sense or relative to other offenders. The most common criticism of such theories is that this task is impossible—crimes and punishments are incommensurable.¹²³ The criticism has even greater force at the international level. While philosophers have attempted to identify principled ways of measuring desert and punishment, such efforts remain incomplete at best.¹²⁴ Absent such justification, judgments about appropriate punishment remain largely, if not entirely, a matter of community norms. Whether norms concerning cardinal or ordinal desert are sufficiently strong at the national level to form the basis for punishment’s allocation is a

¹¹⁸ Ibid., 83.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ P Chifflet and G Boas, ‘Sentencing Coherence in International Criminal Law: The Cases of Biljana Plasvic and Miroslav Bralo’ (2012) 23 *Criminal Law Forum* 135, 158–9 (suggesting that the refusal of international courts to adopt sentencing guidelines and crime hierarchies indicates that they are not sentencing according to the gravity of the crimes); V Baghi and T Maruthi, ‘The Principle of Proportionality in International Criminal Law’ (2011) 7 *Acta Universitatis Danubius* 11 (equating proportionality with retribution).

¹²² See e.g. Harmon and Gaynor (n 99) 711–12 (‘Low sentences, however well intentioned, not only weaken respect for human dignity and the rule of law, but may frustrate and impede reconciliation in the areas in which the crimes were committed’); A Keller, ‘Punishment for Violations of International Criminal Law’ (2001) 12 *Indiana International & Comparative Law Review* 53, 65–6 (criticizing ICTY sentences as inadequate for deterrence).

¹²³ See e.g. Ristropf (n 27) 1308–13 (arguing that the concept of desert is too elastic to provide meaningful guidance for sentencing policies).

¹²⁴ M Thorburn and A Manson, ‘The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning’ in A von Hirsch and A Ashworth (eds), *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press 2005) 285 (describing the efforts of von Hirsch and others as well as criticisms of those efforts as incomplete and ineffective).

matter of much debate.¹²⁵ It is clear, however, that no such norms are available at the international level to dictate punishment at international criminal courts.

37.5.2.1 Absence of norms regarding cardinal desert

As noted in the previous section, many modern retributive theorists have rejected cardinal retributivism,¹²⁶ but the theory has been revived in the international criminal law literature.¹²⁷ Proponents of cardinally retributive international punishment have not identified principles or norms to govern judgments of desert, nor can they. When punishment was largely a matter of doing to the offender what the offender did to the victim, the idea of cardinal proportionality made a certain amount of sense.¹²⁸ Now that punishment is almost entirely a question of time in prison, however, it has become highly questionable if not ludicrous to suppose that we can identify the ‘right’ amount of time for each crime. A quantity of years is simply too crude a metric for such subtle moral judgments. Moreover, as some scholars have noted, people have different levels of tolerance for incarceration, so that even equal sentences do not necessarily impose equal suffering.¹²⁹

The impracticability of seeking to identify absolutely deserved punishment for particular crimes is reflected in the diversity of sentencing norms around the world. If humans shared intuitions about absolutely deserved punishments, presumably those intuitions would be reflected in consistent punishments across different cultures—at least those that claim to pay attention to desert. Instead, punishment norms vary greatly around the world. Some countries, such as the United States, are known for their harsh punishment cultures, while others, such as the Scandinavian countries, punish much more leniently for the same crimes. The Anders Breivik is instructive. Breivik, a Norwegian man convicted of killing 77 people, received a sentence of 21 years in prison. Norwegians, including families of the victims, generally expressed satisfaction with this sentence.¹³⁰ In contrast, in the United States the sentence was viewed as drastically lower than what Mr Breivik deserved.¹³¹ The absence of international consensus on

¹²⁵ Proponents of empirical desert claim that community norms concerning desert must form the basis for distributing punishment, while critics argue that such norms are inadequate to the task. Compare Robinson and Darley (n 36) 24 (arguing that failure to abide by community norms will decrease respect for the system) with Slobogin and Brinkley-Rubinstein (n 34) *passim* (presenting results of studies finding that agreement about appropriate punishment is weak). See also M Ryan, ‘Proximate Retribution’ (2012) 48 *Houston Law Review* 1049, 1064–5 (discussing empirical studies that show little agreement among cultures as to cardinal ranking, or sequencing of offences for the purposes of retribution).

¹²⁶ See (nn 25, 31, 112), and accompanying text; see also Robinson and Kurzban (n 36) 1835 ([m]odern notions of desert are ordinal rather than cardinal').

¹²⁷ See (nn 108, 109), and accompanying text.

¹²⁸ See (nn 22, 23), and accompanying text.

¹²⁹ See A Kolber, ‘The Subjective Experience of Punishment’ (2009) 109 *Columbia Law Review* 182, 213 (discussing how prison sentences will affect different people in different ways); Thorburn and Manson (n 121) 291–2 (discussing the extent to which von Hirsch and Ashworth take such issues into account in their work advocating a just deserts approach to proportionality).

¹³⁰ See M Lewis and S Lyall, ‘Norway Mass Killer Gets the Maximum: 21 Years’, *The New York Times*, 24 August 2012; L Bevanger, ‘Anders Behring Breivik: Norway Court Finds Him Sane’, *BBC News: Europe*, 24 August 2012.

¹³¹ See e.g. J Sager, ‘Mass Murderer Anders Breivik’s Insanely Short Prison “Sentence” Puts No Value on Life’ (*The Stir*, 24 August 2012) <http://thestir.cafemom.com/in_the_news/142485/mass_>

what criminals deserve is also evidenced in the widely divergent sentences handed down by the various international criminal tribunals.¹³²

37.5.2.2 Absence of norms to anchor the desert scale

Advocates of an ordinal approach to retributive proportionality argue that absolute judgments of desert are unnecessary. What matters is that each offender receives the 'right' punishment in relation to the punishment awarded to all other offenders.¹³³ They acknowledge, however, that punishment scales must be anchored somehow. Proponents of ordinal retributive proportionality tend to look to community norms to supply the upper, and perhaps lower, limits of acceptable punishment for particular crimes and for the system as a whole.¹³⁴ In many national systems, such anchoring norms are contained in statutorily mandated maximum and sometimes minimum punishments for particular crimes.¹³⁵ Some systems also provide judges with guidance regarding such norms through sentencing guidelines.

As explained, sentencing norms, including anchoring norms, vary widely across cultures. Moreover, the drafters of the ICC statute declined to supply the Court with guidance in this regard, with two possible exceptions: (i) the 30-year maximum term of incarceration for most crimes; and (ii) the option of life imprisonment for crimes of exceptional gravity.¹³⁶ Whether these provisions should be viewed as anchors for judgments of desert is debatable. Does the 30-year maximum imply that most international criminals deserve no more than 30 years in prison? Some retributivists, including Professor Ohlin, would certainly reject this proposition. The 30-year cap can just as plausibly be read as a limit on the cost of international justice rather than as an anchor for judgments of desert. Moreover, the availability of life imprisonment cannot be viewed as reflecting a consensus that such punishment is sometimes deserved because some of the Statute's negotiators view life imprisonment as a human rights violation.¹³⁷ Instead, the inclusion of this option alongside the 30-year limit represents a compromise between negotiators from different sentencing cultures.¹³⁸ Finally, even if these two provisions are read as anchors

murderer_anders_breiviks_insanely> accessed 30 March 2014 (claiming the sentence is 'insanely short' and sends the message that 'life in Norway isn't worth the time it takes to create it'); 'Norwegian Killer of 77 Gets 21 Years' (*The Right Handed Cowboy* 25 August 2012) <<http://www.texasbrady.com/archives/2292>> accessed 30 March 2014 (an American blogger calling it 'the most ridiculous sentence I have ever heard of'); The Associated Press, 'Breivik Deemed Sane, Sent to Prison for Massacre in Norway', *The Washington Times*, 24 August 2012.

¹³² See D'Ascoli (n 96) 236.

¹³³ See (nn 32, 34), and accompanying text.

¹³⁴ Von Hirsch (n 34) 77–9.

¹³⁵ See Frase (n 31) 97–103.

¹³⁶ Art 77(1)(a)–(b) ICC Statute.

¹³⁷ Many states are parties to treaties prohibiting the death penalty, including the Second Optional Protocol to the International Covenant on Civil and Political Rights (74 States Parties), the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (13 States Parties), Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (46 States Parties), and Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (43 States Parties). See also 'Death Penalty: Ratification of International Treaties', *Amnesty International* <<http://www.amnesty.org/en/death-penalty/ratification-of-international-treaties>> accessed 27 February 2013.

¹³⁸ R Fife, 'Article 77: Applicable Penalties' in Triffterer (n 93) 986.

for judgments of desert at the ICC, they provide the judges with only very limited guidance regarding ordinal retributive proportionality.

37.5.2.3 Absence of shared intuitions of relative desert

Even assuming anchoring norms could be identified for international sentences, ordinal retributive proportionality would also require that each case be placed in the retributively appropriate rank order. Proponents of ‘empirical desert’ suggest that such ordering is achievable even in the absence of guiding moral principles because all humans share intuitions about relative desert for certain core crimes.¹³⁹ Identifying these shared intuitions is simply a matter of conducting empirical studies to reveal which crimes people consider more and less serious.

Although no international criminal law scholar has endorsed the empirical desert thesis, Andrew Woods claims that the approach is at the core of the international criminal regime.¹⁴⁰ While this assertion is debatable, Woods correctly rejects the approach for international sentencing. As Woods points out, whatever its merits in the national context, empirical desert cannot justify international retributive proportionality.¹⁴¹ First, the evidence that proponents of empirical desert marshal in favour of the thesis is highly context- and community-specific, supporting the existence of contingent community norms, rather than universal intuitions.¹⁴² Indeed, a series of studies calls into question the validity of the empirical desert claims even in the national context.¹⁴³ Second, even assuming the persuasiveness of the studies, they do not encompass complex international crimes but are instead limited to a very small set of ‘core’ crimes such as theft, rape, and murder.¹⁴⁴

37.5.3 The particular complexity of international judgments of desert

The difficulty of identifying deserved punishment is magnified at the international level for at least two reasons. First, international judges are both physically and culturally distant from the offenders and the crimes they commit. While the crimes largely take place in armed conflict, and thus far all in Africa, the judges hail from around the world and work in The Hague. Even assuming some principles or norms could be identified to guide judges, applying them consistently under such circumstances would be extremely challenging.

Second, international crimes are usually considerably more complex than most ‘ordinary’ crimes. Genocide, crimes against humanity, and war crimes are comprised not only of constitutive acts, such as rape and murder, but also of contextual

¹³⁹ See (n 34) and accompanying text.

¹⁴⁰ Woods (n 78) 635.

¹⁴¹ Ibid., 681.

¹⁴² Ibid., 648.

¹⁴³ Slobogin and Brinkley-Rubinstein (n 36) 80. Cf. C Berdejo and N Yuchtman, ‘Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing’ (2013) 95 *The Review of Economics and Statistics* 741, 742 (concluding that, rather than adhering to community norms to decide sentencing, judges succumb to political pressure and give higher sentences towards the end of their terms in the hope of re-election).

¹⁴⁴ Slobogin and Brinkley-Rubinstein (n 36) 80.

elements such as a nexus with armed conflict for war crimes and a widespread or systematic attack against a civilian population for crimes against humanity. The more complex structure of these crimes makes it more difficult to quantify and qualify the harm the crimes cause and the degree of the offenders' culpability. For example, an assessment of culpability for rape as a crime against humanity must take into account not only the harm and culpability associated with the rape, but also the harm and culpability inherent in the connection between the rape and the broader attack against a population of which the rape is part. The harm to be measured, then, is not just the harm to the immediate victims and his or her family, but rather to the entire 'population' that is the subject of the attack.¹⁴⁵ The offender's culpability relates not only to his or her mental state with regard to the rape, but also to the extent of his or her awareness or intent with regard to the rape's connection to the broader attack.

Indeed, the contexts in which international crimes are often committed themselves makes judgments about desert particularly problematic. Unlike national-level offenders, perpetrators of international crimes often act in compliance with prevailing social norms.¹⁴⁶ Whether punishing those who comply with social norms is morally appropriate is itself a matter of debate.¹⁴⁷ Assuming punishment is appropriate, there is nothing approaching consensus as to the appropriate amount of punishment under such circumstances. Moreover, those involved in international crimes often play multiple roles, further complicating assessments of culpability. For instance, many child soldiers have both suffered and perpetrated terrible crimes. No agreement exists as to whether child soldiers deserve punishment at all, let alone to what extent.¹⁴⁸ Finally, the group nature of international crimes often obscures questions of individual culpability. Indeed, some commentators question whether this feature of international crimes renders them incompatible with the principle of individual culpability.¹⁴⁹

In sum, efforts to judge an offender's desert, which are already highly complex and controversial for national crimes, become even more complex and contested at the international level.

¹⁴⁵ One author argues that indirect harms should play a greater role in judgments of desert at the national level as well. See Ryan (n 125) 1049 (arguing that indirect harms, such as the effect of the wrongdoing on the victims' families or the effects on society in general, should play a role in sentencing).

¹⁴⁶ See Woods (n 76) 654–6; D Wippman, 'Atrocities, Deterrence, and the Limits of International Justice' (1999) 23 *Fordham International Law Journal* 473, 477 (discussing a survey conducted by the ICRC that demonstrated that war criminals and civilians in Bosnia did not view their attacks on other civilians as wrongful, as they viewed the situation as 'total war'); Sloane (n 87) 81 (internationally criminal conduct often conforms 'to a norm that prevails within the criminal's literal community, be it national, ethnic, racial or martial').

¹⁴⁷ See e.g. Z Bohrer, 'Is the Prosecution of War Crimes Just and Effective? Rethinking the Lessons from Sociology and Psychology' (2012) 33 *Michigan Journal of International Law* 749, 783–6 (discussing whether acts committed under 'sociopsychological coercive conditions' should be punished).

¹⁴⁸ M Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford: Oxford University Press 2012) 2.

¹⁴⁹ See e.g. E van Sliedregt, 'The Curious Case of International Criminal Liability' (2012) 10 *Journal of International Criminal Justice* 1171, 1173 (arguing that the unique features of international criminality 'put pressure' on the principle of individual culpability).

37.5.4 Rhetoric, narrative, and the danger of undeserved international punishment

While retributivist commentators have lamented what they perceive as the under-punishment of many international offenders,¹⁵⁰ a significant and underappreciated risk exists that judges intent on retribution will inflict more punishment than offenders deserve. This risk stems from international criminal law's dominant rhetoric of extreme gravity as well as the political narratives that tend to divide conflict participants into good and evil. Such rhetoric and narratives risk exaggerating the perceived culpability of at least some international offenders.

Rhetorics serve to frame contested issues in law as in other aspects of human interaction.¹⁵¹ The most critical contested issue in international criminal law is the justification for international jurisdiction in criminal law, an area typically reserved to states. The rhetoric that has developed to justify international intervention is that of the extreme gravity of the crimes at issue. International crimes are universally labelled 'the most serious crimes'. Indeed, a common critique of retributive justifications for punishment in international criminal law is that no punishment can capture adequately the desert of those who perpetrate such crimes.¹⁵² Yet, as I have argued elsewhere, many international crimes are not as serious as is often supposed, and the current trend is towards an expansive understanding of international criminality.¹⁵³ For instance, the subject-matter jurisdiction of the ICC extends to isolated war crimes committed by individual soldiers.¹⁵⁴ For some such crimes, both the harms inflicted and the offender's culpability may be relatively low.¹⁵⁵ The disconnect between the actual seriousness of many international crimes in terms of harm and culpability and the dramatic rhetoric that prosecutors, judges, and civil society employ to describe them renders a retributive approach to proportionality particularly troubling at the international level. The influence of gravity rhetoric on sentencing decision-makers may lead to inflated sentences that violate principles of both retributive fairness and of utilitarian parsimony.

Relatedly, judgments of desert in international criminal law are complicated by the role that international politics often plays in shaping the narratives of blame in conflict situations. The international community, and by extension international courts, sometimes 'takes sides' in complex intra- and international conflicts. One side is painted as evil and prosecuted, while the other side is painted as good, or at least far less evil, and its crimes are largely ignored.¹⁵⁶ This can foster a narrative of blame that

¹⁵⁰ See e.g. Ohlin (n 64) 382; Dana (n 111).

¹⁵¹ A Amsterdam and J Bruner, *Minding the Law: How Courts Rely on Storytelling, and How their Stories Change the Way We Understand the Law—and Ourselves* (Cambridge, Mass.: Harvard University Press 2000) 1–18.

¹⁵² H Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books 2006) 287–8; Woods (n 78) 653–4.

¹⁵³ M deGuzman, 'How Serious Are International Crimes? The Gravity Problem in International Criminal Law' (2012) 51 *Columbia Journal of International Law* 18.

¹⁵⁴ Art 8 ICC Statute.

¹⁵⁵ This may be the case, for example, with regard to the abuse of a flag of truce. Art 8(2) ICC Statute.

¹⁵⁶ S Nouwen and W Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941, 951 (showing how ICC

fails to account for the wrongs done by the other side and thus magnifies the apparent desert of those prosecuted. Indeed, the ‘evil’ side is painted as extremely evil, even monstrous, helping to forge solidarity around the international response, but also potentially exaggerating perceptions of blameworthiness.¹⁵⁷

In sum, a retributive approach to proportionality is unworkable at the ICC. Retributive international proportionality would require judges to make determinations of ‘just deserts’ in a community—the international community—that lacks common punishment norms. Such judgments would be particularly difficult in light of the physical and cultural distances between international judges and the crimes they adjudicate as well as the complex nature of the crimes. Finally, a retributive approach would risk over-punishing at least some defendants in light of international criminal law’s dominant rhetoric and narratives.

37.6 Preventive International Proportionality

Rather than seeking to inflict the right amount of retribution, proportionality analysis at the ICC should be driven by the institution’s central goal of crime prevention guided by the principle of parsimony.¹⁵⁸ That is, ICC judges should impose the least severe punishments that they believe will serve to prevent international crimes. This approach to proportionality comports with the Rome Statute’s focus on prevention as well as with the prevalence of utilitarian justifications for punishment among the world’s criminal justice systems. It also avoids a retributive emphasis that at least some of the Court’s constituents would consider a violation of human rights.¹⁵⁹

The concept of retribution need not be completely excluded from ICC proportionality determinations. Indeed, Rule 145’s focus on culpability, as well as the sentencing practices of other international courts, suggest that retribution will be a factor in ICC proportionality determinations. But retribution’s role should be to limit rather than determine appropriate sentences. The judges should never inflict more punishment than they believe an offender deserves. Beyond this loose restriction, however, punishment should be a function of preventive utility.

The ICC’s preventive mission has several dimensions, including specific and general deterrence, incapacitation, and restorative justice. The most important preventive function of ICC punishment, however, is its moral educative, or norm-promoting,

prosecutions have facilitated a dichotomous good–evil narrative in Uganda and Sudan); C Mahony, ‘Prioritising International Sex Crimes before the Special Court for Sierra Leone: Another Instrument of Political Manipulation?’ in M Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes* vol. XIII (Oslo: Torkel Opsahl Academic EPublisher 2012) 59, 75 (arguing that the SCSL adopted a politically driven one-sided narrative of the conflict in Sierra Leone).

¹⁵⁷ J Kennedy, ‘Monstrous Offenders and the Search for Solidarity through Modern Punishment’ (2000) 51 *Hastings Law Journal* 829, 845 (arguing that narratives of monstrosity evoke emotions like anger and hatred that help forge solidarity and encourage harsh punishment).

¹⁵⁸ Preamble ICC Statute. While not in the context of sentencing, one ICC Pre-Trial Chamber has stated that prevention should be privileged over ‘retributory effects’ of the Court’s work. Decision on the Prosecutor’s Application for Warrants of Arrest, Art 58, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07, PTC I, ICC, 10 February 2006, para. 49.

¹⁵⁹ See (n 88).

effect. This section first sets forth how the ICC judges should understand the goal of crime prevention in determining appropriate sentences, and then discusses some of the implications of the proposed proportionality analysis for sentencing procedure.

37.6.1 Components of prevention

Although prevention is often used synonymously with deterrence, the latter is just one component of the former. Criminal punishment has the potential to prevent future crime not only by impacting the decision-making of potential offenders (deterrence), but also by incapacitating and rehabilitating offenders, restoring communities, and impacting the normative environment in which all community members make decisions (norm expression). Of these, norm expression is the most important function of ICC punishment. As such, ICC judges should be most mindful of the communicative aspects of the sentences they impose, while also bearing in mind the other components of prevention to the extent appropriate in particular cases.

37.6.1.1 Norm expression

The ICC's central goal, and thus the most important objective of the punishments it inflicts, is to express global condemnation of international crimes. Through such condemnation, the ICC aims to change norms around the world that permit, or even encourage, such crimes. Preventive proportionality at the ICC therefore principally aims to identify sentences that are adequate, but no more than adequate, to promote relevant norms. The question of how the ICC should determine the amount of punishment necessary for effective norm expression is one that requires additional scholarly and judicial attention; only a few preliminary thoughts can be offered here.

First, the judges should recognize that they have the opportunity, particularly with their early sentencing decisions, to establish the ICC's sentencing norms. As an institution of the global legal order, the ICC's actions should reflect global norms to the extent they exist, but the Court also plays an important role in forging such norms. Sentencing is one area where the ICC's work must be significantly creative, at least in the Court's early years.

Norm creation through institutional action is an iterative process: the ICC acts, constituents respond, and the ICC adjusts accordingly. If the global community disagrees strongly enough with the ICC's sentences, it will react, either through representatives, such as the ICC's ASP, or through more direct forms of communication including public and social media.

Second, the judges should bear in mind that unless ICC sentences are drastically out of line with minimum or maximum standards around the world (e.g. one month for genocide or a life sentence for a minor war crime), they are unlikely to draw widespread negative reactions. As a general matter, the global community's attention regarding ICC actions focuses principally on decisions about which situations to investigate, cases to prosecute, and defendants to convict. It is through these decisions that the ICC largely effectuates its expressive function. While sentencing decisions

matter greatly to individual offenders and sometimes to particular communities, they are less critical to the global community.

Moreover, as discussed, there are no global metrics against which to judge ICC sentences, except perhaps at the extremes. The absence of global norms reduces the persuasive force of any criticisms of ICC sentences raised in particular communities. The communities most likely to criticize ICC sentences are those most affected by the crimes in the cases adjudicated. If the ICC adopts the approach suggested herein it will sometimes impose sentences out of line with the norms in those communities and will be criticized on that basis. The ICC should not heed such criticisms, reminding those communities instead that its role is to enforce global rather than local norms.¹⁶⁰

Third, in light of the absence of established norms and the minor role sentencing plays in international norm expression, the principle of parsimony will generally dictate sentences on the lenient end of the severity spectrum. Harsh punishment is unnecessary to promote the norms against international crimes and would even be counterproductive with respect to communities that reject harsh punishment as a matter of national norms. Moreover, as I have argued elsewhere, such leniency comports with the ICC's foundational identification with the human rights movement.¹⁶¹

At the same time, adequate norm expression requires that the ICC gauge the severity of punishment according to the gravity of the crimes. In conducting gravity determinations for this purpose, the judges should privilege considerations related to harm over those related to culpability. Although culpability is also relevant to such determinations (and is important in ensuring that punishment does not exceed desert), the aspect of the crime that is most visible to the global community is the harm the crime caused. In exceptional cases, particularly those involving high leadership, culpability may also be quite visible and should be emphasized. In cases involving mid- or lower-level participants, however, it is primarily the harm of the crime that concerns the global community rather than the particular individual's culpability for that harm. Indeed, to the extent that leadership role is relevant in determinations of gravity for expressive proportionality, it is less due to culpability than to the leader's greater potential for inflicting harm.

Moreover, the ICC judges should privilege general considerations of harm related to the type of crime committed over the specific harm caused in the particular case. Again, it is the general harm that is most relevant to norm expression. Thus, for example, in the *Lubanga* case, assessing gravity for purposes of determining proportionate punishment is largely a matter of measuring the harms associated with the large-scale recruitment and use of child soldiers, rather than assessing Lubanga's role or the particular harms he caused. Lubanga's sentence will be proportionate with respect to the goal of norm expression if it inflicts the least punishment necessary to express the international community's condemnation of such crimes.

¹⁶⁰ Space constraints preclude a fuller discussion of the extent to which the ICC should consider the norms and preferences of the national communities most affected by the crimes it adjudicates. For a fuller discussion see deGuzman (n 153).

¹⁶¹ M deGuzman, 'Harsh Justice for International Crimes?' (2014) 39 *Yale Journal of International Law* 1.

37.6.1.2 General deterrence

The next, most important aspect of ICC prevention is general deterrence. Deterrence theory posits that punishment affects future decisions about whether or not to commit crimes by the offender (specific deterrence) and by the public at large (general deterrence). The theory assumes that such decisions are based on rational cost/benefit calculations that take account of the likelihood and severity of punishment. A great deal of scholarship has been devoted to debating the soundness of these assumptions.¹⁶²

With regard to the ICC specifically, many scholars have expressed doubts regarding the potential for deterrence in light of the low likelihood of ICC punishment and the irrationality of many of those who commit international crimes.¹⁶³ Such doubts are justified and indeed explain the primacy of norm expression over deterrence as the ICC's core preventive function. Nonetheless, general deterrence remains a key aspiration of the ICC and thus a component of preventive proportionality.

Again, the precise manner in which the ICC should factor general deterrence into proportionality determinations requires further study. At a minimum, however, the judges should ensure that ICC punishments are not so insignificant that potential future offenders will consider them irrelevant to any cost/benefit calculations about whether to commit international crimes. The principle of parsimony should guide such judgments so that sentences should be no higher than the minimum the judges believe adequate for norm promotion and general deterrence. Moreover, as for the goal of norm expression, general deterrence counsels place greater emphasis on harm than on culpability in the proportionality analysis.¹⁶⁴

37.6.1.3 Specific deterrence and incapacitation

In some cases, the need for specific deterrence and incapacitation will also factor into the ICC's proportionality analysis. Often, once an international offender is apprehended, the offender loses the political power necessary to commit future international crimes. In such cases, specific deterrence and incapacitation will not be important aspects of the ICC's proportionality analysis. Many of the ICC's cases, however, take

¹⁶² See e.g. P Robinson and J Darley, 'Does the Criminal Law Deter? A Social Science Investigation' (2004) 24 *Oxford Journal of Legal Studies* 173, 205 (arguing that the deterrence theory in the criminal law is 'wildly misguided').

¹⁶³ See e.g. M Drumbl, 'Punishment, Post-genocide: From Guilt to Shame to Civis in Rwanda' (2000) 75 *NYU Law Review* 1221, 1254–5 (questioning the effectiveness of the ICTR and ICTY in deterring crimes against humanity); J Ku and J Nzelibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' (2006) 84 *Washington University Law Review* 777, 832 (arguing that the threat of international prosecution may exacerbate the risk of atrocities); but see P Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *American Journal of International Law* 7, 10 (arguing that international criminal law has a deterrent effect); J Charney, 'Editorial Comment: Progress in International Law Criminal Law?' (1999) 93 *American Journal of International Law* 452, 462 (arguing that consistent prosecution of leaders may eventually deter those who provoke the circumstances that encourage international crimes); T Meron, 'From Nuremberg to The Hague' (1995) 149 *Military Law Review* 107, 110–11 (arguing that international criminal law would have a greater deterrent effect if prosecutions were more consistent and national legal systems prosecuted similar offences in a similar way).

¹⁶⁴ See (n 63) and accompanying text.

place in the context of ongoing conflicts. Sometimes, therefore, individuals may have the opportunity to regain power and reoffend after serving their ICC sentences. In such cases, the ICC should consider the need for specific deterrence and incapacitation in determining proportionate punishment. Of course, such punishment should never exceed the offender's desert and should be limited by the principle of parsimony.

37.6.1.4 Restorative justice

Restorative justice, in its broadest sense, connotes efforts to restore victims, perpetrators, and communities so that they can live harmoniously together.¹⁶⁵ Like specific deterrence and incapacitation, restorative justice is not a primary aim of ICC punishment.¹⁶⁶ Given the small number of cases the ICC can prosecute in each situation, it is ill-equipped effectively to restore individuals, let alone whole communities. For that reason, the ICC's primary responsibility in sentencing is not to the victim communities but to the global community.¹⁶⁷

Nonetheless, in some situations there may be reason to believe that the ICC can promote restoration in relevant communities through sentencing. In such circumstances, preventive proportionality suggests the Court should take account of the impact of punishment on restoration in deciding sentence lengths, at least when this goal does not conflict with the goals of norm expression and general deterrence. For instance, when a defendant is willing to apologise, engage in community service, or otherwise make amends in the relevant victim communities in exchange for a shorter sentence, the ICC may take such restorative actions into account in determining the appropriate sentence.

In fact, such actions will also be relevant to norm expression since the offender's acknowledgement of wrongdoing reduces the need for condemnation through punishment. The judges should be careful, however, not to reduce punishment below that necessary to express adequate condemnation of the crimes at issue. The ICTY's sentence of Biljana Plavšić is instructive in this regard. Plavšić, a high-ranking politician responsible for very widespread and devastating crimes in the former Yugoslavia, was sentenced to 11 years in prison.¹⁶⁸ The judges justified this relatively lenient sentence by stating that Plavšić's decision to plead guilty to the charges against her contributed to reconciliation in former Yugoslavia.¹⁶⁹ The sentence has been widely criticized as overly lenient. While some scholars have opined that the sentence was inadequately retributive,¹⁷⁰ its real flaw may have been that it failed to express sufficient condemnation of Plavšić's crimes.

¹⁶⁵ See C Menkel-Meadow, 'Restorative Justice: What Is It and Does It Work?' (2007) 3 *Annual Review of Law & Social Science* 161, 163.

¹⁶⁶ The ICC's efforts at restorative justice instead focus on victim participation in proceedings and reparations. See Arts 68 and 75 ICC Statute.

¹⁶⁷ The extent to which the ICC should aim to satisfy victim communities is the subject of a substantial debate that is beyond the scope of this chapter.

¹⁶⁸ Sentencing Judgment, *Plavšić*, IT-00-39&40/1, TC, ICTY, 27 February 2003, para. 132.

¹⁶⁹ Ibid., para. 73. ¹⁷⁰ See e.g. Chifflet and Boas (n 121) 148.

In sum, ICC proportionality analysis should focus largely on ensuring that sentences adequately express global norms and, to a lesser extent, promote general deterrence. Judges should also take account of specific deterrence, incapacitation, and restorative justice in relevant cases, but only to the extent that such goals do not conflict with norm expression.

37.6.2 Implications of preventive proportionality for sentencing procedure

Adopting a predominantly utilitarian approach to proportionality will have important implications for sentencing procedure at the ICC. For instance, preventive proportionality mitigates the adoption of sentencing guidelines, which a number of scholars have urged upon the Court.¹⁷¹ Retributive proportionality, particularly of the ordinal variety, is greatly assisted by guidelines or even mandatory rankings that enhance consistency. In contrast, preventive proportionality is better achieved by affording judges discretion to take account of the various components of prevention according to the dictates of particular cases. Rather than requiring that judges impose more severe punishments for crimes against humanity than for war crimes, for example, preventive proportionality suggests that judges should have discretion to impose harsher punishment whenever they believe the need for condemnation is particularly strong. This may be the case, for example, with respect to crimes involving sexual or gender violence. Because such crimes are under-punished in many parts of the world, the need to express global condemnation of them is particularly strong. As such, preventive proportionality may require more punishment for a war crime committed on the basis of sex or gender than for a crime against humanity involving more widespread harm that was not inflicted on a discriminatory basis.

Second, preventive proportionality will require ICC judges to provide substantial explanations of the grounds for their decisions in sentencing judgments. Justifications for retributive proportionality are relatively straightforward: judges (or legislators) are expressing their views as to the amount of punishment deserved in particular cases. While the criteria they use to determine desert in each case may require justification, the basic rationale remains the same. In contrast, determinations of preventive proportionality will be more complex, at least some of the time. In some cases, for instance, the judges will consider incapacitation or restorative justice relevant to the proportionality analysis, while in others they will not. The resulting inconsistencies may strike observers as unjust unless the judges offer persuasive justifications.

Moreover, by providing substantial explanations for their sentencing decisions ICC judges can moderate the effects of any criticism of those decisions on perceptions of the ICC's legitimacy. In light of divergent sentencing norms around the world, ICC sentences will likely appear insufficiently severe to some audiences and perhaps overly severe to others. Criticisms based on inconsistencies with local norms are particularly likely in the communities most affected by the crimes already noted. To enhance the

¹⁷¹ See e.g. Ohlin (n 66) 382, 397.

perceived legitimacy of their decisions, ICC judges should explain why they are not sentencing offenders in accordance with the local norms of the communities where they committed their crimes. That is, that their sentences aim at global crime prevention rather than at local justice objectives. Such objectives are better pursued in national systems, which, it is hoped, will be encouraged to act by ICC involvement. For the same reason, victims should not play a substantial role in ICC sentencing determinations.

37.7 Conclusion

To ensure the perceived legitimacy of its sentencing judgments, the ICC must identify and articulate a theory of proportionate punishment. The ICC should explain that its sentences do not seek to capture the full extent of each offender's desert. Instead, without inflicting more punishment than an offender deserves, ICC sentences seek to prevent international crimes at the lowest cost to the international community. Such prevention is effectuated in particular through the expression of global condemnation of such crimes but also through general deterrence as well as, in some cases, specific deterrence, incapacitation, and restorative justice. The ICC's judges should not only set forth a general philosophy of proportionate punishment but also explain in each case why they believe the punishment chosen is adequate, and no more than adequate, to promote the relevant aspects of the Court's preventive mission. The international community will then have the information required to react and, if it disagrees, to change the ICC's approach to proportionate punishment.

The Role of the Appeals Chamber

*Volker Nerlich**

38.1 Introduction

While domestic judiciaries are usually hierarchically structured and allow for one or more levels of appeal from a first-instance court's decision, this is not necessarily the case on the international plane. Neither of the two post-Second World War International Military Tribunals provided for the possibility of an appeal; the ICJ, the IACtHR, and the African Court on Human and Peoples' Rights are all single-instance jurisdictions. In contrast, the judicial system of the European Union consists, since 1988, of two instances: the General Court (formerly: European Court of First Instance) and the European Court of Justice. The ad hoc ICTY and ICTR also comprise two instances: judgments and certain interlocutory decisions of the trial chambers may be appealed to the tribunals' appeals chambers. Similarly, under certain conditions, judgments of the Sections of the European Court of Human Rights may be referred to that court's Grand Chamber.

The ICC (or the Court) also belongs to the category of international courts that have more than one instance: under certain conditions, interlocutory and final decisions of the ICC's Pre-Trial and Trial Chambers may be appealed to the Appeals Chamber. Given that the ICC is a criminal jurisdiction, the existence of an appellate level is easily explained: modern human rights law provides that a person convicted of a criminal offence must have the right to have the conviction and sentence reviewed by a higher court.¹ Accordingly, the drafters of the Rome Statute of the ICC provided, from early on in the drafting process, for an Appeals Chamber and the right to appeal.²

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¹ Art 14(5) International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; Art 2 Protocol No. 7 to the European Convention on Human Rights and Fundamental Freedoms (adopted 22 November 1984, entered into force 1 November 1988) ETS No. 117; Art 8(2)(h) American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123. See also Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168 (OA3), AC, ICC, 13 July 2007, para. 38; G Boas et al., 'Appeals, Reviews, and Reconsideration' in G Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press 2013) 939, 1002.

² See Art 5(b) of the 1994 Draft Statute for an International Criminal Court (1994) *Yearbook of the International Law Commission* 27. In contrast, the (Revised) Draft Statute for an international criminal court that the United Nations Committee on International Criminal Jurisdiction put forward specifically excluded the right to appeal (see Report of the Committee on International Criminal Jurisdiction, UN Doc A/2136 (1952) Annex 1, Art 50; Report of the 1953 Committee on International Criminal Jurisdiction, UN Doc A/2645 (1953) Annex, Art 49). The question of whether an international criminal court should provide for the right of appeal was, however, discussed in the Committee: while some members considered that there should be a right to appeal to avoid potential miscarriages of justice,

It should be noted, however, that the right to appeal under the Rome Statute goes beyond what is mandated by human rights law: not only is the convicted person entitled to appeal, but also the Court's prosecutor and, in certain circumstances, victims participating in the proceedings, states, etc. Furthermore, as mentioned earlier, not only may the conviction or sentence be appealed, but also acquittals, reparation orders, and certain interlocutory decisions of the Pre-Trial and Trial Chambers of the Court.

In the following sections, the role and function of the ICC's Appeals Chamber will be analysed. In particular, the first jurisprudence of the Appeals Chamber will be assessed with a view to ascertaining the Appeals Chamber's conceptual relationship with the other Chambers of the Court.

38.2 The Appeals Chamber in the Context of the ICC

In domestic legal systems, judges of appellate courts are often more experienced than their colleagues at first-instance courts and have been promoted or specifically appointed to sit at the appellate level. Thus, while the power to reverse or amend decisions of the first-instance courts is often based on specific provisions in the law, it is usually accompanied by a sense of hierarchy within the judiciary and the expectation—rightly or wrongly—that judges at the appellate level may have a better understanding of the law. This gives decisions of appellate courts importance and relevance beyond the specific cases in which they were made—be it in the form of binding precedent or as guidance for future cases.

In contrast to the hierarchical structure of domestic judiciaries, all judges of the ICC are elected in the same way, irrespective of whether they will serve in the Pre-Trial, Trial, or Appeals Chambers³ of the Court: following a complicated voting procedure, candidates for judicial office must obtain a two-thirds majority in the ASP and are elected for a non-renewable term of office of nine years.⁴ In the election process, it is unknown whether

others were of the view that this could undermine the Court's authority (see Report of the Committee on International Criminal Jurisdiction, para. 159). It should be noted, however, that the draft Statute provided for a court consisting of nine judges, sitting *en banc*. It appears that the size of the Court was an important factor in deciding against a right of appeal (*ibid.*, para. 159). On the drafting process of Art 81 of the Rome Statute, see H Brady and M Jennings, 'Appeal and Revision' in R Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International 1999) 294; W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press 2010) 931–2. On the drafting of the relevant provisions of the Rules of Procedure and Evidence see H Brady, 'Appeal' in R Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, New York: Transnational Publishers 2001) 575.

³ Pursuant to Art 34(b) of the Statute, the judiciary comprises the Appeals Division, the Trial Division, and the Pre-Trial Division. Pursuant to Art 39(2)(a), the judicial functions in each Division are exercised by Chambers, which, in case of the Appeals Chamber, comprises all five judges of the Appeals Division, and, in case of the Pre-Trial and Trial Chambers, by three judges of the respective Divisions or, in the case of the Pre-Trial Chamber, by a single judge. Note that certain functions of the Trial Chamber for the purpose of the preparation of the trial may be exercised by a judge designated by that Chamber, see Rule 132bis of the Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, 3–10 September 2002 (First Session of the ASP), part II.A (adopted and entered into force 9 September 2002). It could be argued that this provision is, pursuant to Rule 149 of the Rules of Procedure and Evidence, also applicable *mutatis mutandis* to proceedings before the Appeals Chamber.

⁴ See Art 36(3)–(8) of the Statute. Exceptionally, a judge may stand for re-election under the conditions set forth in Art 37(2) of the Statute.

candidates, if elected, will serve in the Appeals Chamber (which comprises five judges) or any of the other Chambers of the Court (which comprise three judges each), and the ASP has no influence on their assignment. Rather, it is for the Presidency of the Court (previously the plenary of judges) to assign, after consultation, the judges to the three judicial Divisions.⁵ Article 39(1) of the Statute provides some guidance for the Presidency's decision. First, the President of the Court is *ex officio* a member of the Appeals Division. Second, '[t]he assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualification and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law'.⁶ Article 39(1) also provides that the Pre-Trial and Trial Divisions should 'be composed predominantly of judges with criminal trial experience'.⁷ Thus, while there are criteria for the assignment of judges to the Appeals Chamber, they are based on the specific functions of the Chamber, but not in the sense that the Appeals Chamber is hierarchically superior to the other Chambers of the Court. In this regard, it is also noteworthy that Article 39(3)(b) and (4) of the Statute has been interpreted so as to allow judges who were previously assigned to a Pre-Trial or Trial Division to be reassigned to the Appeals Division. Furthermore, judges of the Appeals Chamber who previously sat on a given case at the Pre-Trial or Trial level are usually recused from sitting on appeals arising from that case. Thus, judges from the Pre-Trial and Trial Divisions will be temporarily assigned to the Appeals Chamber to sit on certain appeals. This transferability of judges from first-instance Chambers to the Appeals Chamber further underlines the equal status of each judge of the Court, irrespective of the Chamber to which he or she is assigned.

In sum, the judges of the Appeals Chamber are coming from the same pool of judges as those of the Pre-Trial and Trial Chambers. There is no hierarchy in status between the judges of the Appeals Chamber on one hand and the judges of the other Chambers on the other hand.⁸ Nevertheless, there is a functional difference: despite the equal status of all judges, the Statute vests the Appeals Chamber with the power to review, within certain limits, the decisions of the other Chambers of the Court. This contrasts with domestic systems, where there is usually both a hierarchical and a functional difference between first-instance and appellate courts. It is arguably for that reason that

⁵ See Rule 4bis of the Rules of Procedure and Evidence. Rule 4bis was introduced and Rule 4, which previously vested the power to assign judges to the judicial Divisions in the plenary, amended by the ASP with Resolution ICC-ASP/10/Res1 (20 December 2011).

⁶ Art 39(1), third sentence, of the Statute.

⁷ This, however, does not necessarily mean that international lawyers will be in the majority in the Appeals Division: the minimum voting requirements for the elections of judges make it likely that, in any event, a majority of the 18 judges has a criminal law background. Under Art 36(3)(b) of the Statute, each candidate must either have 'established competence in criminal law and procedure' or 'established experience in relevant areas of international law'. At the first election, at least nine judges with criminal law experience had to be elected, compared to only five judges with an international law background (see Art 36(5) of the Statute). This proportion is to be maintained in subsequent elections.

⁸ Wryly, it could be argued that the difference between the Appeals Chamber and the Pre-Trial and Trial Chambers is purely numerical: there are five judges in the former, while only three in the latter. However, in a given case, there may even be no numerical majority: if a unanimous decision of, say, a Trial Chamber, is overturned on appeal by a two-to-three majority of the Appeals Chamber, a total of five judges would have been in favour of the Trial Chamber's original decision that is reversed.

the Appeals Chamber has held that the other Chambers of the Court are not ‘inferior courts’ vis-à-vis the Appeals Chamber.⁹ As will be further expanded, it is submitted that this peculiarity has an impact generally on the role of the Appeals Chamber and may explain the Chamber’s approach, for instance, in relation to the giving of ‘guidance’ on questions of law that are related to, but not decisive for, the appeal at hand.

38.3 Jurisdiction of the Appeals Chamber

Broadly speaking, the jurisdiction of the Appeals Chamber covers appeals against final decisions of the Trial Chamber at the end of a trial, including reparation orders (hereinafter referred to as ‘final appeals’), and appeals against certain interlocutory decisions of the Pre-Trial and Trial Chambers rendered in the course of the proceedings (hereinafter referred to as ‘interlocutory appeals’). Naturally, the first appeals that reached the Appeals Chamber were in the latter category, and the jurisprudence in that field is more developed.¹⁰ For that reason, interlocutory appeals will be discussed first.

38.3.1 Interlocutory appeals

As mentioned previously, there is no human rights requirement that interlocutory decisions of first-instance courts, taken in the preparation or in the course of a trial, must be subject to appeal. Even in respect of detention, human rights law requires only that the detained person must be able to seek judicial review of his or her detention, but not that the first-instance court’s decision on detention must be subject to further appellate review. Thus, the legislator in each jurisdiction is faced with the question of whether, and to what extent, interlocutory appeals in criminal proceedings should be permitted. Clearly, there is a tension between, on one hand, the desire to resolve important issues early on in a trial by allowing for interlocutory appeals, and, on the other hand, the delay that interlocutory appeals inevitably cause.¹¹ As will be seen later in the chapter, the drafters of the Rome Statute, when setting out the framework for interlocutory appeals, sought to address this tension by carefully delineating the conditions under which interlocutory appeals may be brought. In line with this approach, the first jurisprudence of the Court has interpreted this framework restrictively and circumscribed closely which decisions may be appealed.

The central provision in respect of interlocutory appeals is Article 82(1) of the Statute, which sets out the decisions that are subject to interlocutory appeal. Nevertheless, this list is not complete: Article 82(2) provides for an appeal against a Pre-Trial Chamber’s decision under Article 57(3)(d) (authorization to take specific

⁹ Judgment on the Prosecutor’s Application for Extraordinary Review (n 1) para. 30.

¹⁰ On the first jurisprudence on interlocutory appeals see also F Eckelmans, ‘The First Jurisprudence of the Appeals Chamber of the ICC’ in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff 2009) 527; H Friman, ‘Interlocutory Appeals in the Early Practice of the International Criminal Court’ in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff 2009) 553.

¹¹ See also Boas et al. (n 1) 968; Friman (n 10) 555–6.

investigative steps on the territory of a state without having secured that state's cooperation under Part 9 of the Rome Statute). Furthermore, Article 81(3)(c)(ii) provides for an appeal against a decision of a Trial Chamber exceptionally to maintain the detention of an acquitted person, pending the outcome of the appeal against his or her acquittal.

The appeals provided for in Article 82(1) and (2) and Article 81(3)(c)(ii) fall into two broad categories: those directed against decisions that are appealable as of right (Article 82(1)(a) to (c), and Article 81(3)(c)(ii) of the Statute) and those that are appealable only with the leave of the Chamber that issued the impugned decision (Article 82(1)(d) and Article 82(2) of the Statute). This dichotomy is taken up in the Rules of Procedure and Evidence and in the Regulations of the Court: Rule 154 and Regulation 64 regulate the procedure for appeals as of right, while Rule 155 and Regulation 65 regulate for appeals that require leave of the first-instance Chamber.¹²

38.3.1.1 Appeals under Article 82(1)(a)

Under Article 82(1)(a) of the Statute, decisions 'with respect to jurisdiction or admissibility' may be appealed. This provision corresponds to the final sentence of Article 19(6) of the Statute, which provides for a right to appeal. Article 19, which governs the procedure for admissibility proceedings, is also relevant for determining the potential appellants against decisions with respect to jurisdiction or admissibility. The *chapeau* of Article 82(1) provides that 'either party' may raise an appeal, which, in a criminal law context, would usually be understood as referring to the accused person or suspect and the prosecution. Nevertheless, Article 19(2)(b) and (c) also grants states the right to challenge, under certain conditions, the Court's jurisdiction or the admissibility of a case. It follows that states must also be entitled to bring an appeal against a decision in respect of jurisdiction or admissibility. Thus, in the context of appeals under Article 82(1)(a), 'either party' must be understood as including not only the suspect and the prosecution, but also states.¹³ This is expressly set out in Article 18, which governs preliminary rulings regarding admissibility: its paragraph 4 specifically provides that the 'State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber'. Interestingly, this formulation suggests that potential suspects do not have a right to appeal against preliminary admissibility rulings, even though it is conceivable that they will have been identified by the prosecutor at the early stages of an investigation.

¹² The procedural scheme for the two categories of appeals differs slightly: for the former category, the appellant has to file a notice of appeal before the Appeals Chamber, followed by the document in support of the appeal, to which the other participant(s) respond; for the latter category, the potential appellant has to apply for leave to appeal before the first instance Chamber that rendered the decision at issue; if leave to appeal is granted, the appellant files immediately the document in support of the appeal, followed by the responses of the other participant(s).

¹³ See Boas et al. (n 1) 967; for a differing view see R Roth and M Henzelin, 'The Appeal Procedure of the ICC' in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* vol. II (Oxford: Oxford University Press 2002) 1551.

The Appeals Chamber has interpreted the term ‘decision with respect to jurisdiction or admissibility’ restrictively. In a decision rendered in the *Kenya* situation, the Appeals Chamber explained that

the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case. It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility.¹⁴

On that basis, the Appeals Chamber rejected as inadmissible¹⁵ an appeal brought by the Republic of Kenya against a decision of a Pre-Trial Chamber that had rejected Kenya’s request that the Court and the prosecutor should provide assistance to Kenya in respect of its own investigations into the post-election violence.¹⁶ The Appeals Chamber found as unpersuasive Kenya’s argument that the assistance sought must be seen in the context of the admissibility challenge that Kenya had brought; regardless of this context, the decision under appeal was, in the opinion of the Appeals Chamber, *not* a decision in respect of admissibility.¹⁷

Similarly, in a decision rendered in the *Ruto et al.* case, the Appeals Chamber dismissed as inadmissible an appeal brought by the two accused that was directed against the Pre-Trial Chamber’s interpretation of the term ‘organizational policy’ as a component of the contextual element of crimes against humanity (see Article 7(2)(a) of the Statute).¹⁸ Before the Pre-Trial Chamber, the accused had challenged the Court’s jurisdiction on the basis that the Pre-Trial Chamber’s interpretation of the term was flawed; the Pre-Trial Chamber disposed of the challenge to jurisdiction as part of its decision on the confirmation of the charges. This decision became the subject of an appeal, which was brought under Article 82(1)(a) of the Statute. The Appeals Chamber noted that the two accused did not question the Court’s temporal, territorial, or personal jurisdiction over the case, nor did they challenge that the Court had jurisdiction over crimes against humanity, and that the ‘organizational policy’ element was part of the definition of those crimes.¹⁹ The Appeals Chamber found that the interpretation of the term ‘organizational policy’ and whether there was sufficient evidence to find that there was such a policy was not a question of the jurisdiction of the Court, but one

¹⁴ Decision on the admissibility of the ‘Appeal of the Government of Kenya against the “Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence”’, *Situation in the Republic of Kenya*, ICC-01/09-78 (OA), AC, ICC, 10 August 2011, para. 15.

¹⁵ The Appeals Chamber developed the concept of ‘inadmissibility’ of appeals through its jurisprudence. An appeal is dismissed as inadmissible if it does not fall under the Appeals Chamber’s jurisdiction or is otherwise not properly before it. In that case, the Appeals Chamber does not consider the merits of the appeal and does not specifically confirm the impugned decision. Furthermore, instead of rendering a ‘judgment’ on the interlocutory appeal, the Appeals Chamber usually issues a ‘decision’ to dismiss an inadmissible appeal. On the concept of ‘inadmissibility’ see Eckelmans (n 10) 538 *et seq.*

¹⁶ *Ibid.*, paras 1–2.

¹⁷ *Ibid.*, paras 18–21.

¹⁸ Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-414 (OA3, OA4), AC, ICC, 24 May 2012.

¹⁹ *Ibid.*, para. 23.

of whether or not the charges against the accused could be confirmed. The Appeals Chamber noted that if it were to consider the merits of the submissions of the accused any further, ‘it would, in fact, be assessing the correctness of the decision to confirm the charges against them, insofar as it related to the existence of an “organizational policy”’, and this notwithstanding the fact that the accused had neither sought nor obtained leave to appeal the confirmation decision.²⁰

38.3.1.2 Appeals under Article 82(1)(b) and Article 81(3)(c)(ii)

Under Article 82(1)(b) of the Statute, decisions ‘granting or denying release of the person being investigated or prosecuted’ may be appealed as of right. A large number of interlocutory appeals heard by the Appeals Chamber thus far were brought under this provision, which is hardly surprising, given the fundamental character of the right to liberty. The Appeals Chamber has developed a specific jurisprudence on appeals relating to interim release. Notably, the Appeals Chamber has adopted a relatively deferential standard of review, in particular in view of the fact that whether the (continued) detention of an individual appears necessary for one or more of the grounds listed in Article 58(1)(b) of the Statute involves ‘an element of prediction’.²¹

As with respect to appeals against decisions on jurisdiction or admissibility, the Appeals Chamber has interpreted the right to appeal decisions under Article 82(1)(b) of the Statute narrowly: in *Lubanga*, it found that a decision confirming the charges against an accused was not a decision denying his release.²² The Appeals Chamber found that ‘[t]he decision confirming the charges neither grants nor denies release. The effect or implications of a decision confirming or denying the charges do not qualify or alter the character of the decision’.²³ Similarly, in the *Mbarushimana* case, the Appeals Chamber found that a decision *denying* the confirmation of charges did not amount to a decision granting the suspect release.²⁴ The Appeals Chamber found that even though, under Article 61(10) of the Statute, any warrant ceases to have effect if charges are not confirmed, and notwithstanding the fact that the Pre-Trial Chamber specifically ordered Mr Mbarushimana’s release, this did not change the character of the decision on the confirmation of charges.²⁵ In the same decision, the Appeals Chamber dismissed the prosecutor’s appeal—also brought under Article 82(1)(b)

²⁰ Ibid., para. 29.

²¹ Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-824 (OA7), AC, ICC, 13 February 2007, para. 137.

²² Decision on the admissibility of the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la confirmation des charges’ of 29 January 2007, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-926 (OA8), AC, ICC, 13 June 2007.

²³ Ibid., para. 15 (footnote omitted).

²⁴ Reasons for ‘Decision on the appeal of the Prosecutor of 19 December 2011 against the “Decision on the confirmation of the charges” and, in the alternative, against the “Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana” and on the victims’ request for participation’ of 20 December 2011, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-483 (OA3), AC, ICC, 24 January 2012.

²⁵ Ibid., paras 21–2.

of the Statute—against the Pre-Trial Chamber’s decision rejecting the prosecutor’s request to stay the release of Mr Mbarushimana pending the determination of the prosecutor’s application for leave to appeal the confirmation decision. The Appeals Chamber found that, even though the granting of a stay would have affected Mr Mbarushimana’s release, it was merely ‘a procedural decision that did not address the substance of whether release should be granted or whether Mr Mbarushimana should remain in detention’.²⁶

Appeals brought under Article 81(3)(c)(ii) also relate to the detention of an accused. As a rule, if an accused person is acquitted at the end of the trial, he or she shall be released immediately (Article 81(3)(c) of the Statute). Nevertheless, the prosecutor may request that the Trial Chamber exceptionally order the continued detention of the acquitted person, pending the resolution of the prosecutor’s appeal against the acquittal. The Trial Chamber’s decision on such a request by the prosecutor is liable to direct appeal. In the *Ngudjolo* case, following Mr Ngudjolo’s acquittal by the Trial Chamber, the prosecutor requested the Trial Chamber to order his continued detention, which, however, was rejected. The prosecutor appealed against this decision, but subsequently discontinued the appeal,²⁷ in light of the fact that the Appeals Chamber had dismissed the prosecutor’s request that the Appeals Chamber order suspensive effect²⁸ and that Mr Ngudjolo had been released.

It is interesting to note that the specific appeals procedure foreseen in Article 81(3)(c)(ii) of the Statute could have lent itself to an analogous application in case of release of a suspect following the non-confirmation of the charges. The situation is arguably comparable: in case of an acquittal as well as in case of the non-confirmation of charges, the first-instance Chamber takes a decision that leads, as a rule, to the release of the person concerned. In case of an acquittal, the immediate release may be prevented by an order of the Trial Chamber under Article 81(3)(c)(i) of the Statute; arguably, in case of non-confirmation of the charges, a Pre-Trial Chamber may reach the same result by ordering a stay of the implementation of the confirmation decision.²⁹ Nevertheless, according to the cited jurisprudence of the Appeals Chamber, such a decision cannot be appealed as of right, whereas a decision under Article 81(3)(c)(i) is liable to direct appeal.

38.3.1.3 Appeals under Article 82(1)(c)

Article 82(1)(c) of the Statute provides for an appeal against a Pre-Trial Chamber’s decision to act on its own initiative pursuant to Article 56(3) of the Statute and to take investigative steps in case of a unique investigative opportunity. Pursuant to Article

²⁶ Ibid., para. 31.

²⁷ See Prosecution’s Notice to the Registrar of its Discontinuance of its Appeal against Trial Chamber II’s oral decision to release Mathieu Ngudjolo, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-18 (OA), OTP, ICC, 9 January 2013.

²⁸ See Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-12 (OA), AC, ICC, 20 December 2012.

²⁹ Note, however, that in the case against Callixte Mbarushimana, the Pre-Trial Chamber found that it had no power to order such a stay; see Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-469, PCT I, ICC, 19 December 2011.

56(3)(b), the right to appeal lies with the prosecutor only, which highlights the ‘constitutional’ character of the appeals procedure—it is the prosecutor who, under the Rome Statute, is vested with the power to investigate crimes under the Court’s jurisdiction;³⁰ only under the narrow exception of Article 56(3)(a) is the Pre-Trial Chamber entitled to investigate itself—and its decision is liable to immediate review by the Appeals Chamber upon appeal by the prosecutor. Thus far, no appeals have been brought under this provision (and, indeed, it appears that no decision under Article 56(3)(a) has been taken by any of the Pre-Trial Chambers).

38.3.1.4 Appeals under Article 82(1)(d) and Article 82(2)

The second category of interlocutory appeals includes those that do not lie as of right, but require the leave of the Pre-Trial or Trial Chamber that issued the impugned decision. The central provision in this regard is Article 82(1)(d), which provides for an appeal against [a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings'.³¹

This provision, which was the basis for the majority of the appeals that the Appeals Chamber has considered thus far, has some peculiarities. First, it is noteworthy that it is the first-instance Chamber, and not the Appeals Chamber itself, that decides whether a given decision may be appealed. The argument against such a procedure is obvious: the first-instance Chamber could be perceived to be ‘biased’, as it could seek to ‘protect’ its ‘own’ decisions against appellate review by not granting leave to appeal.³² This ‘problem’ could be seen as being exacerbated by the Appeals Chamber’s jurisprudence that refuses the review of decision of the Pre-Trial and Trial Chambers that reject applications for leave to appeal.³³ Upon closer analysis, however, the wisdom of Article 82(1)(d) of the Statute becomes apparent: proceedings before the Appeals Chamber take some time and, for that reason, any interlocutory appeal has the potential of delaying the proceedings before the first-instance Chamber. Therefore, the first-instance Chambers are best placed to assess the impact of the delay on its proceedings and to balance it against the advantage that clarifying the issue at hand by Appeals Chamber would have. In this regard, it is noteworthy that the Appeals Chamber, in one of its early decisions, clarified that the ‘material advance of the proceedings’ referred to in Article 82(1)(d) must not be understood as a reference to time-saving. Rather, it refers to ‘moving forward’ the judicial process by ‘ensuring that the proceedings follow the right course’.³⁴ It must also be highlighted that, even if a Chamber declines to grant leave to appeal, the party concerned will, if necessary, often have the opportunity to

³⁰ See Art 54 of the Statute.

³¹ On these criteria see C Staker, ‘Article 81: Appeal against Decision of Acquittal or Conviction or against Sentence’ in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* 2nd edn (München: C H Beck 2008) 1449, margin number 11.

³² See also Boas et al. (n 1) 964 and 1005–6 on the experience at the ICTY and ICTR.

³³ See Judgment on the Prosecutor’s Application for Extraordinary Review (n 1).

³⁴ Ibid., para. 15.

raise the issue in the context of an eventual final appeal at the end of the trial. Against this background, it appears convincing that it is the first-instance Chamber, and not the Appeals Chamber, that decides on applications for leave to appeal.

The other question relating to Article 82(1)(d) of the Statute arises in respect of what is actually the object of the appeal. The provision lends itself to two possible interpretations. First, it could be said that it is the ‘issue’ certified for appeal that is brought before the Appeals Chamber. The Appeals Chamber has defined ‘issue’ as

an identifiable subject or topic requiring a decision for its resolution [...] An issue is constituted by a subject the resolution of which is essential for the resolution of a matter arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.³⁵

This would imply that, on appeal, it is the task of the Appeals Chamber to decide the issue and to determine, for instance, whether the Pre-Trial or Trial Chamber’s interpretation of the law, as applied in the decision under review, was correct. This would also mean that, at least in the normal course of events, the Appeals Chamber’s jurisdiction is limited to the issue on appeal and that it cannot address—either on its own motion or at the request of the appellant—other matters arising from the decision that are not encompassed by the issue in relation to which leave to appeal was granted.

An alternative approach would be to assume that, once leave to appeal has been granted by the Pre-Trial or Trial Chamber, the entire decision is put before the Appeals Chamber. The Appeals Chamber would decide whether the decision was erroneous, based on the grounds of appeal put forward by the appellant. The ‘issue’ would only be relevant and potentially limit the Appeals Chamber’s jurisdiction if a decision contains rulings on several, distinguishable subject matters (e.g. on disclosure and on victim participation), and leave to appeal was not granted in respect of all of those ‘issues’. In such situation, an appellant could arguably not raise grounds of appeal in respect of those rulings in relation to which leave to appeal has not been granted.

This distinction appears to be merely semantical at first sight. It has, however, a potentially significant impact on the conduct of interlocutory appeals and the relationship between the Appeals Chamber and the other Chambers of the Court. Under the former approach, it is in the hands of the first-instance Chamber to define to a large extent the subject matter of an appeal, including the grounds of appeal that the appellant may raise before the Appeals Chamber. Indeed, the exact formulation of the issues in relation to which leave to appeal is granted is often a bone of contention between the parties in the first-instance Chamber, and Pre-Trial and Trial Chambers occasionally have reformulated the issues in their decisions granting leave to appeal, thereby directly impacting on the appellate process. In contrast, the second approach leads to a clearer distinction between the ‘issue’ and the grounds raised on appeal. Under this approach, the potential appellant would have to convince the first-instance Chamber that the decision in relation to which leave to appeal is sought involves an ‘issue’. The question of the existence of an ‘issue’ would be primarily about the importance of the

³⁵ Judgment on the Prosecutor’s Application for Extraordinary Review (n 1) para. 9.

decision for the overall proceedings. For instance, it could be said that a decision on disclosure of potentially important exculpatory evidence would involve an ‘issue’ in terms of Article 82(1)(d), because whether the evidence ought to be disclosed could have significant impact on the further case. Whether the first-instance Chamber’s decision was correct or not would, however, not be part of the ‘issue’, but would be addressed in the arguments of the appellant before the Appeals Chamber.

Arguably, the latter approach is preferable because it allows for a clearer distinction between the functions of the first-instance Chamber in the granting of leave to appeal and the actual appellate process. In particular, the first-instance Chamber would not be put in a position where it has to decide whether certain arguments should be raised before the Appeals Chamber. Nevertheless, the practice of the Court thus far, while arguably not entirely consistent, appears to be leaning in the other direction: the ‘issue’ in relation to which leave to appeal has been granted determines and delineates the jurisdiction of the Appeals Chamber. Accordingly, the Appeals Chamber has refused to consider arguments on appeal that fall outside the ‘issue’, in particular, if the first-instance Chamber has rejected leave to appeal in that regard.³⁶ This practice has led parties to discontinue appeals. In the *Banda and Jerbo* case, the defence, having been granted leave to appeal in relation only to one of two issues for which leave to appeal had been sought, decided not to pursue the appeal. It stated that denying leave to appeal the second issues ‘prevented [it] from proceeding to explore the adequacy of the Trial Chamber’s decision to proceed to trial and keep the Defence complaints in mind’.³⁷ This case would have lent itself to an alternative understanding of the relationship between the ‘issue’ and the arguments on appeal. At issue was a decision denying a request for a stay of proceedings in the case. Given the character of such a decision, it could be said that it clearly involved an ‘issue’ in terms of Article 82(1)(d) of the Statute and that, once leave to appeal has been granted, the appellants should be free to raise any ground of appeal against that decision they saw fit.

It must, however, be noted that the Appeals Chamber does not accept a first-instance Chamber’s decision granting leave to appeal at face value. In the *Lubanga* case, the Trial Chamber granted leave to appeal in respect of a decision ordering that three detained witnesses, who had concluded their testimony and should have been returned to the DRC, could not be returned because of their pending applications for political asylum in the Netherlands.³⁸ Nevertheless, the Appeals Chamber rejected the appeal as inadmissible, noting that the Trial Chamber had granted leave to appeal, notwithstanding the fact that the conditions for the granting of leave

³⁶ See the references cited in 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’, *Gbagbo, Situation in Côte d’Ivoire*, ICC-02/11-01/11-572 (OA5), AC, ICC, 16 December 2013, fn. 142.

³⁷ Defence Notice to the Registrar of the Discontinuance of the Defence appeal against the Decision on the defence request for a temporary stay of proceedings (ICC-02/05-03/09-410), *Banda and Jerbo, Situation in Darfur, Sudan*, ICC-02/05-03/09-435 (OA3), 21 December 2012, para. 11.

³⁸ Decision on two requests for leave to appeal the ‘Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2779, TC I, ICC, 4 August 2011.

to appeal under Article 82(1)(d) had not been fulfilled, ‘on an exceptional basis’ pursuant to Article 64(6) of the Statute.³⁹ Also in the *Lubanga* case, the Appeals Chamber rejected an appeal as inadmissible even though the Trial Chamber had granted leave to appeal under Article 82(1)(d). It found that, contrary to the Trial Chamber’s own characterization of the decision, the ‘Decision establishing the principles and procedures to be applied to reparations’⁴⁰ was appealable under Article 83(4) because it was deemed to be a reparations order. Therefore, the appeal brought under Article 82(1)(d), which was brought following a decision granting leave to appeal, was inadmissible.⁴¹ The Appeals Chamber found that ‘[w]here necessary, the Appeals Chamber itself has to establish the true nature of an impugned decision, in order to ensure that the decision in question is appropriately before it, and that the appeal is determined pursuant to the correct legal basis’.⁴² This shows that the Appeals Chamber considers that it is for itself to determine whether or not it has jurisdiction over a given case, and that the first-instance Chamber cannot modify the Appeals Chamber’s jurisdiction.

38.3.2 Appeals against final decisions of the Trial Chamber

As noted in the previous section, the Appeals Chamber also has jurisdiction to hear appeals against the final decisions rendered by a Trial Chamber at the end of a trial: decisions of conviction, and sentence, as well as reparations orders may be appealed as of right. Furthermore, the prosecutor may appeal against decisions of acquittal. In addition, the prosecutor may also appeal against convictions or sentences on behalf of the convicted person.⁴³

At the time of writing, the Appeals Chamber has rendered judgments only in respect of the appeals against the conviction and sentencing decisions in the *Lubanga* case. Nevertheless, fundamental questions—such as the standard of review⁴⁴ and the criteria for the admission of additional evidence on appeal—have been resolved in these judgments. In relation to the standard of review for appeals against conviction decisions, the Appeals Chamber has essentially adopted the same standards as those

³⁹ Decision on the ‘Urgent Request for Directions’ of the Kingdom of the Netherlands of 17 August 2011, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2799 (OA19), AC, ICC, 26 August 2011.

⁴⁰ Decision establishing the principles and procedures to be applied to reparations, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2904, TC I, ICC, 7 August 2012.

⁴¹ Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2953 (A1, A2, A3, OA21), AC, ICC, 14 December 2012, paras 51 *et seq.*

⁴² *Ibid.*, para. 50.

⁴³ Note that according to Regulation 70 of the Regulations of the OTP, before lodging an appeal on behalf of a convicted person the prosecutor shall consult with the convicted person or his or her counsel.

⁴⁴ On the standard of review see J Doria, ‘Standards of Appeals and Standards of Revision’ in J Doria, H Gasser, and C Bassiouni, *The Legal Regime of the International Criminal Court* (Leiden: Martinus Nijhoff 2009) 945; C Staker, ‘Article 83: Proceedings on Appeal’ in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* 2nd edn (München: C H Beck 2008) 1481, margin number 7.

developed in respect of interlocutory appeals.⁴⁵ Notably, in relation to alleged factual errors, the Appeals Chamber applies a deferential standard of review and will not assess the evidence *de novo*.⁴⁶ In respect of appeals against a Trial Chamber's sentence, the Appeals Chamber has highlighted the discretionary character of sentencing decision and has applied its deferential standard of review for discretionary decision to such appeals.⁴⁷

In relation to admission of additional evidence on appeal, Regulation 62 of the Regulations of the Court, which sets out the procedure for requests for the admission of additional evidence on appeal, provides for two possible approaches to the admission of additional evidence: the Appeals Chamber may decide first on the admissibility of the additional evidence (Regulation 62(2)(a)), or it may decide to rule on that question together with the other issues arising in the appeal. These two possible ways of proceeding reflect broadly the different approaches to the admission of evidence in common-law jurisdictions and in jurisdictions following the Romano-Germanic tradition. In the *Lubanga* case, the Appeals Chamber followed the latter approach. It noted that it had discretion to choose between the two procedures and found that, in the circumstances of that case, it was 'more efficient to hear the prosecutor's submissions also in relation to those arguments of Mr Lubanga that are based on the proposed additional evidence, even if the Appeals Chamber has not yet ruled on the admissibility of that evidence'.⁴⁸

In the *Lubanga* case, the Appeals Chamber also clarified under which criteria it would admit additional evidence on appeal. Underlining that the evaluation of the evidence is the primary responsibility of the relevant Trial Chamber and that the admission of additional evidence on appeal must therefore be the exception, the Appeals Chamber found that it 'will generally not admit additional evidence on appeal unless there are convincing reasons why such evidence was not presented at trial, including whether there was lack of due diligence'.⁴⁹ In addition, 'it must be demonstrated that the additional evidence could have led the Trial Chamber to enter a different verdict, in whole or in part'.⁵⁰ These criteria are in keeping with the fact that appeals are not conceptualized as *de novo* trials, but as being corrective in nature.⁵¹ In that regard, the somewhat opaque norm of Article 83(2) must be noted.

⁴⁵ Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-3121-Red, paras 16 *et seq.*

⁴⁶ *Ibid.*, para. 27.

⁴⁷ Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-3122, paras 36 *et seq.*

⁴⁸ Directions under Regulation 62 of the Regulations of the Court, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2958 (A5, A6), AC, ICC, 21 December 2012, para. 8.

⁴⁹ Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-3121-Red, paras 57-8.

⁵⁰ *Ibid.*, para. 59. The Appeals Chamber has, however, also highlighted that even if the criteria for the admission of additional evidence on appeal are not fulfilled, 'it is within its discretion to admit additional evidence on appeal [...] if there are compelling reasons for doing so' (*ibid.*, para. 62).

⁵¹ See Staker, 'Article 81' (n 31) margin numbers 31 *et seq.*

Article 83(2) states, first of all, that on appeal, the Appeals Chamber has the power to '[r]everse or amend the decision or sentence', or to '[o]rder a new trial before a different Trial Chamber', if the Appeals Chamber finds that the 'proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that decision or sentence was materially affected by an error of fact or law or procedural error'.⁵² The provision continues: '[f]or these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue'. It is unclear whether this power may be exercised only in situations where the Appeals Chamber has already found an error in the decision under review and now must determine whether to reverse or amend it or to order a new trial, or whether this provision recognizes the power of the Appeals Chamber to call additional evidence in order to determine whether the decision under review was erroneous.

As regards appeals against orders for reparations, some issues have already been addressed. In the decision on the admissibility of appeals brought against the reparations order rendered in the *Lubanga* case,⁵³ the Appeals Chamber clarified, in particular, who the parties to such an appeal are. It found that the convicted person has a right to appeal, irrespective of whether or not the reparations order specifically ordered him to pay reparations.⁵⁴ The Appeals Chamber found furthermore that the term 'victim' in Article 82(4) included individuals who had not participated as victims in the trial proceedings, but only now claimed reparations.⁵⁵ This includes individuals whose requests for participation were rejected at trial, given that 'reparations proceedings are a distinct stage of the proceedings and it is conceivable that different evidentiary standards and procedural rules apply to the question of who is a victim for the purposes of those proceedings'.⁵⁶ The Appeals Chamber also clarified that, despite the formulation of Article 82(4), the right to appeal lies with the victims, not their legal representatives, although an appeal may only be brought with the assistance of a legal representative.⁵⁷ Finally, the Appeals Chamber found that the prosecutor was not a party to an appeal against a reparations order and therefore was not entitled to make submissions on it.⁵⁸ In contrast, under Article 82(4), *bona fide* owners of property affected by a reparations order are entitled to appeal; this has not yet arisen in practice.

38.3.3 Revision of conviction/sentence

Article 84 of the Statute provides for the possibility of the revision of the conviction or sentence.⁵⁹ The procedure is in two steps: first, the applicant—the convicted person, or,

⁵² It is noteworthy that there is some inconsistency between the language used in Art 83(2) and in Art 81(1)(b), which lists the grounds of appeal that may be raised by the convicted person or on behalf of that person, including '[a]ny other ground that affects the fairness or reliability of the proceedings or decision' (emphasis added).

⁵³ Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings (n 41).

⁵⁴ Ibid., para. 66.

⁵⁵ Ibid., paras 69–70.

⁵⁶ Ibid., para. 70.

⁵⁷ Ibid., para. 67; for a differing view see Roth and Henzelin (n 13).

⁵⁸ Ibid., para. 74.

⁵⁹ See C Staker, 'Article 84: Revision of Conviction or Sentence' in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* 2nd edn (München: C H Beck 2008) 1487.

in case of the convicted person's death, close family members or individuals specifically authorized to bring such an application—or the prosecutor on the convicted person's behalf must apply to the Appeals Chamber, seeking revision of the conviction or sentence. For that purpose, it must be demonstrated that decisive new evidence has been discovered, that decisive evidence relied upon at trial was false, forged, or falsified, or that one or more of the judges who participated in the conviction decision or the confirmation decision were guilty of misconduct of sufficient gravity to justify their removal from office.⁶⁰ Second, and only if the Appeals Chamber considers the application to be founded, will a decision be made as to whether the conviction or sentence should be revised. The decision on the revision itself is taken either by the Appeals Chamber, by the original Trial Chamber, or by a newly constituted Trial Chamber. There have been no revision proceedings in the practice of the Court thus far.

38.3.4 Review of sentence

Article 110 of the Statute provides for the review of the sentence of a convicted person. Such a review is carried out once the convicted person has served two-thirds of the sentence or, in case of life imprisonment, 25 years. The review proceedings are automatic and not dependent on an application by the convicted person. This appears appropriate, given that, while serving the sentence, it is likely that the convicted person will not be represented by a lawyer who could assist in the formulation of a request for review. According to Rule 224 of the Rules of Procedure and Evidence, review proceedings are conducted before a panel of three judges of the Appeals Chamber. This is somewhat peculiar, given that, according to Article 39(2) of the Statute, the judicial functions of the Appeals Chamber are carried out by the Chamber sitting *en banc* of five judges. Thus far, no review proceedings have been carried out.

38.3.5 Disqualification of the Prosecutor or Deputy Prosecutor

Finally, the Appeals Chamber has jurisdiction to hear requests for the disqualification of the prosecutor or deputy prosecutor.⁶¹ This is, apart from the review of sentence proceedings, the only case of original jurisdiction of the Appeals Chamber. In the practice of the Court so far, requests for the disqualification of the prosecutor have been brought in three cases.⁶² Interestingly, two of these cases concerned investigations for

⁶⁰ Art 84(1)(a), (b), (c), respectively. That the conviction or sentence should be subject to revision if one or more of the judges who participated in the confirmation of charges were guilty of misconduct is somewhat peculiar: the confirmation of charges is a prerequisite for the trial, but the guilt of the accused is determined exclusively by the Trial Chamber, subject to the powers of the Appeals Chamber on appeal. Thus, it could be argued that any misconduct in the confirmation process would be inconsequential for a subsequent conviction and there is therefore no need to disturb the conviction or sentence. It is also peculiar that Art 84(1)(c) does not expressly refer to misconduct of any of the judges of the Appeals Chamber (though it could be argued that the judges of the Appeals Chamber also 'participate in the conviction' if a conviction is upheld on appeal).

⁶¹ See Art 42(8) of the Statute.

⁶² See Request to Disqualify the Prosecutor from Participating in the Case against Mr Saif Al Islam Gaddafi, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-133 (OA3), 3 May 2012;

alleged offences against the administration of justice (Article 70 of the Statute), and thus not the ‘core’ jurisdiction of the Court. The Appeals Chamber found that the right to seek the disqualification of the prosecutor extends to suspects of such offences.⁶³

38.4 Early Jurisprudence: Cautious Exercise of its Powers

As summarized in the previous section, the Appeals Chamber of the ICC has jurisdiction over a broad variety of subject matters and wide-ranging powers to influence the proceedings before the first-instance Chambers. The early jurisprudence of the Appeals Chamber, however, reflects a rather cautious approach to the exercise of these powers.

Generally, the Appeals Chamber has refused to address issues that go beyond what is required for reaching a decision on the appeal at hand. In particular, the Appeals Chamber has adopted a stringent approach to the ‘material effect’ requirement under Article 83(2) of the Statute. Under this provision, which the Appeals Chamber has found to be applicable in interlocutory appeals as well, the Appeals Chamber will reverse a decision under review only if it is ‘materially affected’ by an error. According to the jurisprudence of the Appeals Chamber, this requires a showing that the decision would have been ‘substantially different’ without the error.⁶⁴ In determining whether this test is met, the Appeals Chamber considers the *outcome* or operative part of the decision under review; whether the *reasoning* may have been different is irrelevant. If an alleged error does not have the potential to materially affect the impugned decision, the Appeals Chamber often does not even consider the arguments raised. For instance, in the appeal against the Trial Chamber’s decision on the admissibility of the *Katanga* case, the Appeals Chamber decided not to address the appellant’s argument that the Trial Chamber had erred when it found that the admissibility challenge had been brought out of time. The Trial Chamber had considered the merits of the admissibility challenge regardless of its timing, and thus the issue of whether the challenge had been filed out of time had no impact on the Trial Chamber’s eventual decision, finding that the case was admissible.⁶⁵ The Appeals Chamber noted that if it were to address the correctness of the Trial Chamber’s

Confidential *Ex Parte* Application with Confidential Annexes of Dr David Nyekorach-Matsanga for the Disqualification of the Prosecutor Pursuant to Article 42 (8) of the Statute (public redacted version), *Situation in the Republic of Kenya*, ICC-01/09-89-AnxI-Red (OA2), 28 May 2012, referred to in the Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga, *Situation in the Republic of Kenya*, ICC-01/09-96-Red (OA2), AC, ICC, 11 July 2012; Requête aux fins de récusation de l’Accusation dans le cadre de l’enquête et des poursuites visant M. Aimé Kilolo Musamba, *Bemba et al.*, *Situation in the Central African Republic*, ICC-01/05-01/13-233 (OA), 3 March 2014.

⁶³ Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga (n 62) para. 17.

⁶⁴ Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, *Situation in the Democratic Republic in the Congo*, ICC-01/04-169 (OA), AC, ICC, 13 July 2006, paras 83–4.

⁶⁵ 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, *Katanga and Ngudjolo*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1497 (OA8), AC, ICC, 25 September 2009, paras 37–8.

interpretation of the law in respect of the timing of the admissibility challenge, it would, in fact, be giving an advisory opinion on an *obiter dictum*; this, however, was not the Appeals Chamber's role.⁶⁶ Indeed, the reluctance to give 'advisory opinions' is a recurring theme in the Appeals Chamber's jurisprudence both prior to and after the *Katanga* admissibility judgment.⁶⁷ Recently, in the *Gbagbo* case, the Appeals Chamber declined to consider the arguments raised by the prosecutor against certain statements of the Pre-Trial Chamber as to the evidentiary standard to be applied in relation to the decision on the confirmation of the charges.⁶⁸ The Appeals Chamber noted that the Pre-Trial Chamber had refused to grant leave to appeal in respect of this issue, as it did not arise from the decision under review, which was merely a decision on the adjournment of the confirmation hearing, and that any findings by the Appeals Chamber would therefore be merely of an advisory character.⁶⁹

Thus, contrary to the practice of the Appeals Chambers of the ICTY and ICTR, which have used their first cases to clarify and develop the law,⁷⁰ the Appeals Chamber of the ICC has taken an approach of judicial restraint.⁷¹ Unless a matter is decisive for the outcome of the appeal, the Appeals Chamber usually does not rule on it. The first jurisprudence of the ICC Appeals Chamber also lacks the almost textbook-like approach of some early judgments of the ICTY and ICTR Appeals Chambers. The ICC Appeals Chamber's judgments are generally 'minimalist' and provide only as much reasoning and explanation as is strictly necessary.

There may be several explanations for such an approach. While the applicable legal instruments of ICTY and ICTR often lacked in detail and the tribunals therefore often had to 'identify' the applicable law in their first cases, the density of legal regulation at the ICC is much higher. In addition, in respect of the procedural law, the Rome Statute allows for much flexibility and differing approaches. By adopting an

⁶⁶ Ibid., para. 38. The judgment on the appeal on the admissibility decision in *Katanga* illustrates also another aspect of the Appeals Chamber's approach: the Appeals Chamber found that the Trial Chamber's approach to determining the admissibility of the case was flawed: in the words of the Appeals Chamber, the Trial Chamber had put 'the cart before the horse' by determining that the DRC was 'unwilling' or 'unable' to prosecute the case against Mr Katanga, without first considering whether there actually were investigations ongoing in the DRC that related to the same case. Nevertheless, for the Appeals Chamber, this was not a reason to reverse the impugned decision; rather, it considered that the result—namely that the case was admissible before the Court—was correct, although based on alternative reasoning.

⁶⁷ For references to prior jurisprudence, see fn. 62 of the 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 (n 65).

⁶⁸ 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' (n 36).

⁶⁹ Ibid., para. 65.

⁷⁰ Perhaps the best example of this is the *Tadić* case before the ICTY: in the interlocutory appeal on jurisdiction, the ICTY Appeals Chamber provided an extensive analysis of the scope of war crimes committed in non-international armed conflict (see Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić*, IT-94-1-AR72, AC, ICTY, 2 October 1995, paras 96 *et seq.*). In the *Tadić* final appeal, the Appeals Chamber set the ground for, *inter alia*, the future understanding of the modes of liability before the ICTY and ICTR, in particular, in respect of the three forms of 'joint criminal enterprise' (see Judgment, *Tadić*, IT-94-1-A, AC, ICTY, 15 July 1999, paras 185 *et seq.*).

⁷¹ See also B Batros, 'The Judgment on the Katanga Admissibility Appeal: Judicial Restraint at the ICC' (2010) 23 *Leiden Journal of International Law* 343.

approach of judicial restraint, the Appeals Chamber has given room for growth and for a step-by-step development of the law. Arguably, although this means that many important issues have not yet been the subject of Appeals Chamber jurisprudence, this is a prudent approach in the context of the Rome Statute. The ‘judicial restraint’ approach may also be explained by the Appeals Chamber’s role in the ICC framework—as it is not a higher court vis-à-vis the other Chambers, it would be of limited value to provide ‘guidance’ on matters that are not truly before the Appeals Chamber.

In such circumstances, the question could be raised as to whether there is actually any added value in having an Appeals Chamber, or whether a single-level jurisdiction would be more efficient. Leaving aside the argument that, in any event, human rights law demands the provision for a right to appeal of the convicted person,⁷² it is suggested that the ICC’s Appeals Chamber *does* have an important function to play. The various Chambers of the Court have issued and will continue to issue numerous and sometimes contradictory decisions on a variety of issues. The particular significance of the Appeals Chamber in this context is its ability to ensure coherence and consistency of the law. Admittedly, the legal framework for such a task is challenging: under Article 21(2) of the Statute, the Court ‘may apply principles and rules of law as interpreted in its previous decisions’, but it is not obliged to do so. Even if the Appeals Chamber were to establish a system of binding precedent—either in relation to the first-instance Chambers or the Appeals Chamber itself (as the ICTY Appeals Chamber did in its *Aleksovski* judgment⁷³), the legal value of such a decision would be doubtful. Arguably, and particularly in light of Article 21(2) of the Statute, the Appeals Chamber cannot issue a decision that would limit its rights and powers in the future (or indeed the rights and powers of the Pre-Trial and Trial Chambers in future cases).⁷⁴ Nevertheless, the Appeals Chamber arguably will be able to fulfil a meaningful role beyond its intervention in specific cases only if it follows, as a matter of policy, its own precedent. The adoption of such an approach is made more challenging and at the same time more necessary by the fact that the composition of the Appeals Chamber changes frequently. At least every three years new judges will join the Appeals Chamber while others leave. In addition, the assignment of judges who previously sat in Pre-Trial or Trial Chambers may make the recusal of such judges and the temporary assignment of other judges to specific appeals necessary. Clearly, frequent changes in the composition of the Appeals Chamber bear the inherent risk of inconsistent and conflicting decisions. Nevertheless, if the Appeals Chamber is to achieve more than justice in respect of individual cases and contribute to establishing a coherent jurisprudence of the Court more generally, its judges are arguably well advised to follow, as a rule, the Chamber’s own precedent.

In light of this, the development of the law in small steps rather than in sweeping leaps and the exercise of judicial self-restraint may be the most effective approach to building a lasting and meaningful role of the Appeals Chamber in the ICC system, as understandable as calls for a less ‘minimalist’ role of the Appeals Chamber may be.

⁷² See (n 1) and accompanying text.

⁷³ Judgment, *Aleksovski*, IT-95-14/1-A, AC, ICTY, 24 March 2000, paras 89 *et seq.*

⁷⁴ On the use of precedent in international jurisdictions see G Guillaume, ‘The Use of Precedent by International Judges and Arbitrators’ (2011) 2 *Journal of International Dispute Settlement* 5.

‘A Stick to Hit the Accused With’

The Legal Recharacterization of Facts under Regulation 55

*Kevin Jon Heller**

39.1 Introduction

Regulation 55 was one of 126 regulations¹ adopted by the judges of the ICC on 26 May 2004.² Entitled ‘Authority of the Chamber to Modify the Legal Characterisation of Facts’, it provides as follows:

1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.
2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.
3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall: (a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and (b) If necessary, be given the opportunity to examine again, or have examined

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¹ Regulations of the Court, adopted by the judges of the Court on 26 May 2004, Fifth Plenary Session The Hague, 17–28 May 2004, Official documents of the International Criminal Court, ICC-BD/01-01-04.

² 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’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2205, AC, ICC, 8 December 2009 ('Lubanga appeals judgment'), para. 71.

again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).

Regulation 55 has already had a significant effect on a number of ICC cases. In *Lubanga*, the Pre-Trial Chamber used the Regulation to recharacterize the conflict in the DRC from non-international to international, while the Trial Chamber considered (but ultimately rejected) adding five additional charges involving sexual violence and inhuman treatment. In *Bemba*, the Pre-Trial Chamber relied on the Regulation to decline to confirm charges brought by the OTP that it considered unnecessarily cumulative, while the Trial Chamber recharacterized the mental element of command responsibility adopted by the Pre-Trial Chamber from knowledge to negligence. And most dramatically, in *Katanga*, the Trial Chamber invoked the Regulation more than six months after the end of the trial to recharacterize the applicable mode of participation from indirect co-perpetration to common-purpose liability and then convicted the accused on the basis of the recharacterized mode.

The impact of Regulation 55 is, moreover, only likely to increase. The OTP has asked the Trial Chamber to give notice in both *Ruto* and *Kenyatta* that the charged mode of participation is subject to recharacterization. *Ruto* and *Kenyatta* are alleged to be responsible for a variety of crimes against humanity as indirect co-perpetrators. In both cases, the OTP wants the Trial Chamber to also consider convicting them on the basis of any of the forms of complicity listed in Article 25(b)–(d) of the Rome Statute—from ordering to aiding and abetting.³ The Trial Chamber has already granted the OTP’s request in *Ruto*.

This chapter provides a comprehensive critique of Regulation 55. Section 39.2 argues that the judges’ adoption of Regulation 55 was *ultra vires*, because the Regulation does not involve a ‘routine function’ of the Court and is inconsistent with the Rome Statute’s procedures for amending charges. Section 39.3 explains why, contrary to the practice of the Pre-Trial Chamber and Trial Chamber, Regulation 55 cannot be applied either prior to the trial or after the trial has ended. Finally, section 39.4 demonstrates that the Pre-Trial Chamber and Trial Chamber have consistently applied Regulation 55 in ways that undermine both prosecutorial independence and the accused’s right to a fair trial.

39.2 Is Regulation 55 *Ultra Vires*?

Regulation 55 is *ultra vires* in two respects. First, it does not involve a ‘routine function’ of the Court. Second, it conflicts with the Rome Statute’s provisions for amending the charges against the accused.

39.2.1 Routine function

Article 52(1) of the Rome Statute provides that ‘[t]he judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority,

³ Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute').

the Regulations of the Court necessary for its routine functioning'.⁴ In *Lubanga*, the accused challenged Regulation 55 as *ultra vires*, arguing that 'it affects directly the substance of the trial and the rights of the accused and therefore goes beyond the "routine functioning" of the Court'.⁵ The Appeals Chamber, however, disagreed:

The Appeals Chamber notes that the term 'routine functioning' is not defined any further in the Statute or the Rules of Procedure and Evidence. However, the term has been described as a 'broad concept' and it has been observed that 'routine functioning' also concerns matters of 'practice and procedure'. The Appeals Chamber notes furthermore that the Regulations of the Court contain several important provisions that affect the rights of the accused person, *inter alia*, on detention and on the scope of legal assistance paid by the Court. Thus, while the Appeals Chamber acknowledges that the question of modification of the legal characterisation of facts is an important question that directly impacts on the trial, it is not persuaded that for that reason alone, it cannot be part of the routine functioning of the Court.⁶

The Appeals Chamber's defence of Regulation 55 is unconvincing. As noted, the various Chambers have relied on Regulation 55 to refuse to confirm evidentiarily adequate charges brought by the OTP, to consider adding multiple new and more serious charges against an accused in the middle of a trial, and to recast the applicable mode of participation in a case long after the trial was over. It is difficult to see how such changes, which fundamentally alter the relationship between the Chambers, the OTP, and the Defence, can be considered 'routine'⁷—particularly in comparison to other regulations adopted by the judges. Indeed, it is revealing that the scholar the Appeals Chamber cites in support of the supposed ordinariness of the Regulation, Claus Kress, notes dryly in the same article that '[t]his rather important provision is found in a spot within the house of international criminal procedure where not everybody would have bothered to search'.⁸ Even Carsten Stahn, the most prominent academic supporter of Regulation 55, acknowledges that the provision serves 'primarily as a substitute, rather than a complement, of the concept of the amendment of the charges within the context of the ICC system'.⁹ At least as interpreted by the various Chambers, therefore, Regulation 55 clearly violates Article 52(1).

That said, it is not surprising that the Appeals Chamber considers Regulation 55 to be routine, despite how aggressively it has been used by the Pre-Trial Chamber and Trial Chamber. After all, the judges themselves wrote and adopted the Regulation. That conflict of interest is both obvious and problematic, counselling in favour of a

⁴ Art 52(1) ICC Statute.

⁵ *Lubanga* appeals judgment (n 2) para. 67.

⁶ Ibid., para. 69; see also C Stahn, 'Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55' (2005) 16 *Criminal Law Forum* 1, 12 (arguing that 'Art 52 is broad enough to allow for the adoption of regulations which clarify elements of the trial procedure or provide the capacity to function effectively as a Court, including a norm on the treatment of the legal characterization of facts').

⁷ See S SáCouto and K Cleary, 'Defining the Case against an Accused before the International Criminal Court: Whose Responsibility Is It?', War Crimes Research Office (2009) 50.

⁸ C Kress, 'The Procedural Texts of the International Criminal Court' (2007) 5 *Journal of International Criminal Justice* 537, 540.

⁹ Stahn (n 6) 29.

very restrictive understanding of the concept of ‘routine’. As Dov Jacobs notes, ‘the legitimacy of the international criminal law system rests on a clear separation of roles between those who create the rules and those who apply them’.¹⁰ Unfortunately, when given the choice between judicial modesty and expanding the scope of their own power, the Appeals Chamber chose the latter.

39.2.2 Amending charges

In addition to limiting the Regulations to ‘routine functions’ of the Court, Article 52(1) also provides that all regulations must be ‘in accordance’ with the Rome Statute. That limitation is echoed by Regulation 1, which provides that the Regulations ‘shall be read subject to the Statute’.¹¹ Regulation 55, however, directly conflicts with the Rome Statute’s provisions for amending the charges against an accused.¹² In particular, because it permits the Trial Chamber to alter the charges confirmed by the Pre-Trial Chamber—with regard to both crimes and modes of participation—Regulation 55 is inconsistent with paragraphs 9 and 11 of Article 61, which provide as follows:

Article 61: Confirmation of the Charges Before Trial

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.
11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

Article 61(9) makes clear that only the OTP has the authority to amend the charges against the accused post-confirmation. And Article 61(11) explicitly binds the Trial Chamber to the charges as confirmed by the Pre-Trial Chamber. As Stahn notes, the reference to paragraph 9 in Article 61(11) ‘can only be reasonably interpreted as an exclusion of amendments of the charges at the trial stage. Otherwise the third sentence of Article 61(9) would be pointless’.¹³

Two solutions have been offered to the conflict between Regulation 55 and Article 61. First, the Appeals Chamber has simply held that Article 61 does not prohibit the Trial

¹⁰ D Jacobs, ‘A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court?’ in W Schabas et al. (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Surrey: Ashgate 2013) 222.

¹¹ Regulation 1 of the Regulations of the Court, ICC-BD/01-01-04, 26 May 2004 (‘ICC Regulations’).

¹² Jacobs (n 10) 215 (‘In light of the absence of any provision relating to an amendment of the charge after the commencement of trial, it is difficult to imagine how Regulation 55 can in fact be reconciled with the Statute as it stands’); see also SáCouto and Cleary (n 7) 48.

¹³ Stahn (n 6) 15.

Chamber from amending the charges during trial. Second, Stahn and Sienna Merope argue that recharacterizing a charged crime and/or mode of participation does not, in fact, qualify as an ‘amendment’ to the charges. Neither solution, however, is tenable.

39.2.2.1 Does Article 61(9) permit amendments?

In *Lubanga*, the Appeals Chamber rejected the accused’s claim that adding multiple new and more serious charges during trial would violate Article 61. In its view, nothing in Article 61(9) prohibits a Trial Chamber from using Regulation 55 to amend the confirmed charges during trial:

First, the Appeals Chamber recalls that article 61(9) addresses primarily the powers of the Prosecutor to seek an amendment, addition or substitution of the charges, at his or her own initiative and prior to the commencement of the trial; the terms of the provision do not exclude the possibility that a Trial Chamber modifies the legal characterisation of the facts on its own motion once the trial has commenced. Regulation 55 fits within the procedural framework because at the confirmation hearing, the Prosecutor needs only to ‘support each charge with sufficient evidence to establish substantial grounds to believe’, whereas during trial, the onus is on the Prosecutor to prove ‘guilt beyond reasonable doubt’. Thus, in the Appeals Chamber’s view, article 61(9) of the Statute and Regulation 55 address different powers of different entities at different stages of the procedure, and the two provisions are therefore not inherently incompatible.¹⁴

There are a number of problems with the Appeals Chamber’s reliance on Article 61(9)’s alleged silence concerning the use of recharacterization to amend the charges. To begin with, it sits uneasily with Article 61(7), which contemplates recharacterizing the charges during confirmation, but specifically prohibits the Pre-Trial Chamber from doing so itself. According to Article 61(7)(c)(ii), if the Pre-Trial Chamber believes that the ‘evidence submitted appears to establish a different crime within the jurisdiction of the Court’, the proper response is to ‘[a]djourn the hearing and request the Prosecutor to consider... [a]mending a charge’. As Jacobs notes, the Pre-Trial Chamber’s limited power reflects the fact that, under the Rome Statute, the OTP is ‘the primary organ responsible for determining the content of the charges and their amendment’.¹⁵

To be sure, Article 61(7) does not explicitly prohibit the *Trial Chamber* from amending the charges confirmed by the Pre-Trial Chamber. But Article 61(11) does, which is another significant problem with the Appeals Chamber’s position. As noted, Article 61(11) entitles the Trial Chamber to exercise ‘any function of the Pre-Trial Chamber that is relevant and capable of application in [subsequent] proceedings’, with one notable exception: the power to amend the charges against the accused. Only the OTP has the authority to alter the charges once the trial has begun, as the third sentence of Article 61(9) makes clear.¹⁶

¹⁴ *Lubanga* appeals judgment (n 2) para. 77.

¹⁵ Jacobs (n 10) 208.

¹⁶ See Minority Opinion on the ‘Decision Giving Notice to the Parties that the Legal Characterisation of Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of Court’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2054, TC I, ICC, 17 July

Remarkably, the Appeals Chamber did not even *mention* Article 61(11) in the *Lubanga* judgment. Even worse, it completely undermined its own position when it concluded that although Article 61(9) permits the Trial Chamber to legally recharacterize the ‘facts and circumstances’ in the charges, it prohibits the Trial Chamber from modifying those facts and circumstances itself:

[N]ew facts and circumstances not described in the charges may only be added under the procedure of article 61(9) of the Statute. The Trial Chamber’s interpretation of Regulation 55 would circumvent article 61(9) of the Statute and would blur the distinction between the two provisions. As the Prosecutor notes, the incorporation of new facts and circumstances into the subject matter of the trial would alter the fundamental scope of the trial. The Appeals Chamber observes that it is the Prosecutor who, pursuant to article 54(1) of the Statute, is tasked with the investigation of crimes under the jurisdiction of the Court and who, pursuant to article 61(1) and (3) of the Statute, proffers charges against suspects. To give the Trial Chamber the power to extend *proprio motu* the scope of a trial to facts and circumstances not alleged by the Prosecutor would be contrary to the distribution of powers under the Statute.¹⁷

Every consideration cited by the Appeals Chamber applies equally to the legal characterization of facts. Introducing new crimes and different modes of participation *in media res* ‘alter[s] the fundamental scope of the trial’ no less than introducing new facts and circumstances; as discussed in detail below, both the prosecutorial and defence strategy are influenced as much (if not more so) by the legal characterization of facts than by the facts themselves. Moreover, and relatedly, Article 54(1) does not distinguish between the Prosecutor’s investigation of facts and her determination of charges. On the contrary, subparagraph (b) specifically instructs the Prosecutor to ‘[t]ake appropriate measures to ensure the effective investigation and prosecution of *crimes* within the jurisdiction of the Court’.¹⁸

The Appeals Chamber’s reference to the Prosecutor’s authority under Article 61 to proffer charges is the most baffling of all. Although the Rome Statute does not define ‘charge’, Regulation 51—adopted by the judges at the same time as Regulation 55—specifically provides that ‘[t]he document containing the charges referred to in article 61 shall include’ not only ‘[a] statement of facts’, but also ‘[a] legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28’. By the judges’ own reckoning, therefore, the prosecutor’s right to ‘proffer charges against suspects’ necessarily includes the right to specify *both* the relevant facts and the relevant legal characterization of those facts.¹⁹ So what justifies distinguishing between facts and legal characterization for the purposes of Article 61(9)? On that critical question, the Appeals Chamber’s judgment is revealingly silent.

¹⁷ *Lubanga* appeals judgment (n 2) para. 94. ¹⁸ Art 54(1)(b) ICC Statute (emphasis added).

¹⁹ See *Lubanga* Regulation 55 dissent (n 16) para. 11 (‘Regulation 52 describes what constitutes a criminal charge for the purpose of trials before the ICC’); Jacobs (n 10) 217.

39.2.2.2 Is recharacterization an amendment?

As Judge Fulford noted in his *Lubanga* dissent, ‘[i]nevitably, it follows that a modification to the legal characterisation of the facts under Regulation 55 must not constitute an amendment to the charges, an additional charge, a substitute charge or a withdrawal of a charge, because these are each governed by Article 61(9)’.²⁰ Even Stahn accepts that conclusion.²¹ In his view, though, a Trial Chamber does not actually amend the charges against an accused when it relies on Regulation 55 to legally recharacterize the facts:

It is possible to change the legal characterization of a crime without changing the charges. The charges are composed of two elements: a factual element, the ‘statement of the facts, including the time and place of the alleged crime’, and a legal element, the ‘legal characterization of facts’. If a Chamber modifies only the second component, the legal characterization of facts, while basing its assumptions on the facts set out in the charges, it does not automatically amend the charges.²²

Stahn’s belief that a charge is amended only if the facts and circumstances are modified is irreconcilable with Article 61, which repeatedly privileges the legal characterization of facts over the facts themselves with regard to the nature of a ‘charge’. Paragraph 5 provides that ‘[a]t the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged’—a formulation that not only distinguishes between the ‘charge’ and the supporting facts, but also equates the charge with the specific crime the accused is alleged to have committed. Paragraph 6 similarly distinguishes between charges and facts, providing that, at the confirmation hearing, the accused may either ‘(a) Object to the charges’ or ‘(b) Challenge the evidence presented by the Prosecutor’. Paragraph 8, in turn, provides that ‘[w]here the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence’—making clear that declination reflects the OTP’s failure to establish the accused’s (potential) responsibility for a particular crime, not its failure to establish its factual allegations (hence the paragraph’s focus on ‘additional evidence’). Even more revealingly, paragraph 9 provides that, post-confirmation, ‘[i]f the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held’. If the legal characterization of facts is not an essential element of a charge, paragraph 9’s reference to ‘more serious charges’ makes no sense: in the context of a criminal trial, the seriousness of a charge is signalled by the nature of the alleged crime, not by the kind of facts the prosecution uses to prove that crime.²³

²⁰ *Lubanga* Regulation 55 dissent (n 16) para. 17.

²¹ Stahn (n 6) 25 n 79 (noting that ‘an amendment of the charge after the beginning of the trial... [is] prohibited by Art 61(9)’).

²² *Ibid.*, 17.

²³ See e.g. A Danner, ‘Constructing a Hierarchy of Crimes in International Criminal Law Sentencing’ (2001) 87 *Virginia Law Review* 415, 463–4.

This laundry list of provisions obviously skips paragraph 7 of Article 61, and for good reason: that paragraph alone suffices to call into question Stahn's argument. To begin with, like the other paragraphs, paragraph 7 equates 'the charges' with the 'crimes charged'—'[t]he 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'. More importantly, though, subparagraph (c) specifically provides that it is necessary to amend a charge when 'the evidence submitted appears to establish *a different crime* within the jurisdiction of the Court'. If legally recharacterizing facts at the confirmation stage requires a formal amendment to the charges, it is impossible to plausibly maintain that legally recharacterizing facts during trial does not.

This interpretation of the nature of a charge, it is important to note, is supported by the ICC's (admittedly limited) jurisprudence.²⁴ In *Bemba*, the Pre-Trial Chamber held that Article 61(7)(c)(ii) requires the OTP to formally amend the charges whenever the evidence establishes either a different crime under Articles 6, 7, and 8 or a different mode of participation under Articles 25 and 28.²⁵ Similarly, in *Katanga*, the Trial Chamber not only specifically distinguished between 'the charges' confirmed by the Pre-Trial Chamber and the 'alleged facts underpinning the charges',²⁶ it also described the 'constituent elements' of a 'confirmed charge' as the 'contextual circumstances as well as the material and mental elements' of the crime in question.²⁷ Indeed, the Trial Chamber viewed the legal characterization of facts as so central to the concept of a charge that it required the OTP—over its strenuous objection—to prepare an 'analytical table' specifying the precise items of evidence the prosecution intended to use at trial to prove the elements of both the charged crime and the applicable mode of participation.²⁸

Finally, the idea that recharacterizing facts to establish an unconfirmed crime does not amend the charges is simply 'at odds with any common sense idea of what "change" means'.²⁹ The 'recharacterization of facts' requested by the victims in *Lubanga*, for example, would have resulted in the accused facing conviction not only for the war crimes of enlisting, conscripting, and using child soldiers, but also for the crimes against humanity of sexual slavery, inhuman treatment, and cruel treatment—a difference that would have resulted in a far longer sentence than the one the accused

²⁴ It is also worth noting that the OTP took the position in *Lubanga* that recharacterizing facts to add new charges constituted an amendment. See Prosecution's Application for Leave to Appeal the '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', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2074, TC I, ICC, 12 August 2009 ('Lubanga leave to appeal'), para. 24.

²⁵ Decision Adjourning the Hearing Pursuant to Art 61(7)(c)(ii) of the Rome Statute, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-388, PTC III, ICC, 3 March 2009, para. 26.

²⁶ Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-956, TC II, ICC, 13 March 2009, para. 5.

²⁷ Ibid., para. 13.

²⁸ Ibid., para. 11.

²⁹ Jacobs (n 10) 215.

actually received.³⁰ Given that possibility, it is difficult to disagree with Judge Fulford's conclusion that 'the proposals advanced by the victims [did] not raise the possibility that the legal characterisation of the facts may change. Instead, the victims [sought] to add five additional charges'.³¹

39.3 Has the Judiciary Correctly Interpreted Regulation 55?

The fundamental problem with Regulation 55, in short, is that it is *ultra vires*. Even if we accept the general legitimacy of the Regulation, though, it is clear that the judges have wrongly applied it both prior to the trial and after the trial has ended.

39.3.1 Lubanga

In *Lubanga*, the Pre-Trial Chamber invoked Regulation 55 to recharacterize the qualification of the conflict in the DRC.³² In its Document Containing the Charges, the OTP alleged that the accused was responsible for the war crime of conscripting, enlisting, and using children to participate actively in non-international armed conflict, a violation of Article 8(2)(e)(vii) of the Rome Statute.³³ After the confirmation hearing, however, the Pre-Trial Chamber held that the accused should be tried for the war crime of conscripting, enlisting, and using children to participate actively in *international* armed conflict instead, a violation of Article 8(2)(b)(xxvi).³⁴ The Pre-Trial Chamber recognized that Article 61(7)(c)(ii) required it to adjourn the hearing and ask the prosecutor to amend the charges if 'the evidence before it appear[ed] to establish that a crime other than those detailed in the Document Containing the Charges has been committed'.³⁵ But it nevertheless insisted that it did not have to comply with the provision, because the provision was intended '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'³⁶ and Articles 8(2)(e)(vii) and 8(2)(b)(xxvi) criminalized the same conduct.³⁷ The OTP immediately sought leave to appeal the Pre-Trial Chamber's recharacterization of the conflict,³⁸ but the Pre-Trial Chamber refused, pointing out that if it had, in fact, exceeded its authority under Article 61(7), the Trial

³⁰ See e.g. B Holá et al., 'Consistency of International Sentencing: ICTY and ICTR Case Study' (2012) 9 *European Journal of Criminology* 539, 547.

³¹ *Lubanga* Regulation 55 dissent (n 16) para. 34.

³² The case also involved a dispute between the OTP, defence, and Trial Chamber concerning the use of Regulation 55 to add additional charges against the accused. That dispute is discussed in the next section.

³³ Submission of the Document Containing the Charges Pursuant to Art 61(3)(a) and of the List of Evidence Pursuant to Rule 121(3), *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-356, PTC I, ICC, 28 August 2006, para. 12.

³⁴ Decision on the Confirmation of Charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-803-tENG, PTC I, ICC, 29 January 2007, 156.

³⁵ Ibid., para. 202.

³⁶ Ibid., para. 203.

³⁷ Ibid., para. 204.

³⁸ Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-915, PTC I, ICC, 24 May 2007, para. 41.

Chamber could simply re-characterize the facts back to non-international armed conflict.³⁹ Indeed, that is precisely what the Trial Chamber did at the end of the trial.⁴⁰

The Pre-Trial Chamber's casual disregard of Article 61(7)(c)(ii) is troubling. To begin with, the Pre-Trial Chamber made no attempt to defend its assertion that the purpose of the provision 'is 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'. Some sort of defence was clearly necessary, given that the subparagraph requires adjournment whenever the evidence appears to establish 'a different crime'—not 'a materially different crime'. In fact, not only are Articles 8(2)(e) (vii) and 8(2)(b)(xxvi) different crimes,⁴¹ they are *materially* different crimes, because the Trial Chamber specifically held in *Lubanga* that the nature of the armed conflict in question is a material element of every war crime that the prosecution is required to prove.⁴²

The Pre-Trial Chamber's position is also inconsistent with the drafting history of Article 61(7). France proposed a version of the Article during PrepComm that would have permitted the Pre-Trial Chamber to amend the indictment *sua sponte* 'by giving some facts another characterization',⁴³ but that proposal was opposed by a number of common-law states, 'who feared the excessive judicial interference at the stage of investigation and prosecution would undermine the independence of the Prosecutor'.⁴⁴ Similarly, states ultimately rejected a more limited proposal in the Zutphen Draft of the Rome Statute that would have permitted the Pre-Trial Chamber to 'confirm only part of the indictment [and amend it], giving a different qualification to the facts'.⁴⁵

39.3.2 *Bemba*

The Pre-Trial Chamber applied Regulation 55 even more aggressively in *Bemba*. In the Document Containing the Charges, the OTP alleged that the accused was responsible for the crimes against humanity of murder, rape, and torture, and the war crimes of murder, rape, torture, outrages upon personal dignity, and pillaging.⁴⁶ Following the confirmation hearing, the Pre-Trial Chamber concluded that the OTP had presented sufficient evidence in support of the crimes against humanity charges and all of the war crimes charges other than torture.⁴⁷ But it nevertheless refused to confirm the charges of torture as a crime against humanity and outrages upon personal dignity as

³⁹ *Ibid.*, para. 48.

⁴⁰ See Judgment Pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012 ('Lubanga trial judgment'), para. 566.

⁴¹ Jacobs (n 10) 210. ⁴² *Lubanga* trial judgment (n 40) para. 504.

⁴³ Art 48(5) of the Draft Statute for the ICC: Working Paper Submitted by France to the Preparatory Committee on the Establishment of an ICC, UN Doc A/AC.249/L.3 (6 August 1996).

⁴⁴ F Guariglia, 'Art 56' in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court—Observers' Notes, Article by Article* 2nd edn (München: C H Beck 2008) 736–7.

⁴⁵ Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, UN Doc A/AC.249/1998/L.13 (4 February 1998) 96.

⁴⁶ Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, ICC, 15 June 2009 ('Bemba decision on charges'), para. 71.

⁴⁷ SáCouto and Cleary (n 7) 20–2.

a war crime, because it concluded that those charges were ‘cumulative’ with the crime against humanity of rape and the war crime of rape, respectively.⁴⁸ In its view, because permitting the OTP to engage in cumulative charging ‘places an undue burden on the Defence’, as ‘a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges’.⁴⁹

The OTP sought leave to appeal, arguing that the Pre-Trial Chamber did not have the authority under Article 61(7) to decline to confirm charges for any reason other than evidentiary insufficiency.⁵⁰ The Pre-Trial Chamber rejected the request, justifying its rejection of cumulative charging on the following grounds:

[T]he Pre-Trial Chamber must carefully filter the cases to be sent to trial and detect deficiencies which would otherwise flaw the entire proceedings. Hence, the Chamber’s role cannot be that of merely accepting whatever charge is presented to it. To restrict the competences of the Pre-Trial Chamber to a literal understanding of article 61(7) of the Statute, to merely confirm or decline to confirm the charges, does not correspond to the inherent powers of any judicial body vested with the task to conduct fair and expeditious proceedings while at the same time paying due regard to the rights of the Defence.⁵¹

This interpretation of Article 61(7) is indefensible. The Pre-Trial Chamber is not entitled to ignore an interpretation of the Rome Statute it admits is ‘literal’ simply because it prefers a different interpretation. Article 21 specifically requires the Court to apply ‘[i]n the first place, this Statute’, and the sources of ‘applicable law’ specified in Article 21 do not include the Court’s ‘inherent powers’. At most, therefore, the judges are entitled to invoke their inherent powers only when all of the sources of applicable law are silent—which the Pre-Trial Chamber openly admitted was not the case here.

The Pre-Trial Chamber’s claim to be protecting the right of the defence also rings hollow, because it acknowledged—in response to complaints by the Office of Public Counsel for the Victims (OPCV)—that its rejection of cumulative charging would not prevent the Trial Chamber from using Regulation 55 to legally recharacterize the facts at trial if it concluded that a different characterization was more appropriate.⁵² In other words, as Susana SáCouto and Katherine Cleary note, the Pre-Trial Chamber ‘rejected the victims’ claims, in part, by using an argument that is contrary to efficiency and the rights of the Defence, since if the Trial Chamber can later re-characterize the charges, neither party can be absolutely certain what the relevant charges will be, even after the case moves to trial’.⁵³

Finally, it is worth noting that the Pre-Trial Chamber’s rejection of cumulative charging was inconsistent with its earlier approach to the recharacterization

⁴⁸ *Bemba* decision on charges (n 46) para. 202.

⁴⁹ Id.

⁵⁰ Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo’, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-532, PTC II, ICC, 18 September 2009, para. 5.

⁵¹ Ibid., para. 52.

⁵² *Bemba* decision on charges (n 46) para. 203.

⁵³ SáCouto and Cleary (n 7) 26–7.

of the accused's mode of participation. The original Document Containing the Charges alleged that the accused was responsible for the charged crimes against humanity and war crimes as an indirect co-perpetrator. According to the Pre-Trial Chamber, however, the evidence presented at the confirmation hearing indicated that the accused could also be responsible for the charged crimes as a superior. It thus adjourned the hearing and requested the OTP to amend the charges to include superior responsibility,⁵⁴ which it did.⁵⁵ At no point during the litigation over cumulative charging did the Pre-Trial Chamber acknowledge its earlier practice—much less explain why it felt obligated to comply with Article 61(7)(c)(ii) in one situation but not the other.

39.3.3 Katanga

Unlike *Lubanga* and *Bemba*, *Katanga* involved recharacterization by the Trial Chamber. The OTP charged the accused with a variety of war crimes against humanity under Article 25(3)(a) of the Rome Statute, which holds a person criminally responsible if he 'commits such a crime, whether as an individual or jointly with another or through another person, regardless of whether that other person is criminally responsible'. The Pre-Trial Chamber confirmed nearly all of the charged crimes, holding that there was sufficient evidence to conclude that the accused was responsible for them as an indirect co-perpetrator.⁵⁶ The trial began in November 2009 and ended in May 2012.⁵⁷

Six months later, the Trial Chamber notified the parties that it intended to consider the accused's criminal responsibility not only as an indirect co-perpetrator under Article 25(3)(a), but also as a person who 'contributes to the commission... [of] a crime by a group of persons acting with a common purpose' under Article 25(3)(d).⁵⁸ The accused immediately sought leave to appeal, arguing, *inter alia*, that Regulation 55 did not permit a Trial Chamber to legally recharacterize facts during deliberations.⁵⁹ The Trial Chamber granted leave, but the Appeals Chamber rejected the accused's argument, holding that recharacterization during deliberations was consistent with Regulation 55(2)'s 'at any time during the trial' requirement:

The Appeals Chamber observes that, at the time the Impugned Decision was rendered, the trial was at the deliberations stage and that no decision under article 74 of the Statute had yet been rendered. Furthermore, nothing in the Statute, the Rules of Procedure and Evidence or the Regulations of the Court prevents the Trial Chamber from re-opening the hearing of evidence at the deliberations stage of the proceedings.

⁵⁴ *Bemba* decision on charges (n 46) para. 15.

⁵⁵ SáCouto and Cleary (n 7) 20.

⁵⁶ Decision on the Confirmation of the Charges, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-717, PTC I, ICC, 30 September 2008, 210–12.

⁵⁷ S SáCouto and K Cleary, 'Regulation 55 and the Rights of the Accused at the International Criminal Court', War Crimes Research Office (2013), 28.

⁵⁸ *Katanga and Ngudjolo* Regulation 55 decision (n 1) para. 7.

⁵⁹ 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', *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3363, AC, ICC, 27 March 2013, para. 9.

The Appeals Chamber therefore concludes that, for the purposes of regulation 55 of the Regulations of the Court, the trial is ongoing at the present time. The timing of the Impugned Decision was therefore not incompatible with regulation 55 of the Regulations of the Court.

The Appeals Chamber's argument is unconvincing. The question was not whether the Trial Chamber is entitled to hear additional evidence during deliberations, but whether deliberations fall within Regulation 55's requirement that recharacterization take place 'during the trial'. Nothing in the Rome Statute or Rules of Procedure and Evidence clearly specifies when the 'trial' is over. Nevertheless, the Appeals Chamber's insistence that the trial does not end until judgment has been rendered under Article 74 is inconsistent with a number of provisions in the Rome Statute. Paragraph 1 of Article 63, for example, provides that '[t]he accused shall be present during the trial'. The accused obviously has no right to be present during deliberations, indicating that 'the trial' in Article 63 refers to the proceedings that end with closing arguments.

The Appeals Chamber's interpretation of 'during the trial' also conflicts with Article 64(7)'s insistence that '[t]he trial shall be held in public'. If the trial includes deliberations, deliberations must also be public—which is specifically prohibited by Article 74(4), which provides that '[t]he deliberations of the Trial Chamber shall remain secret'. Similarly, including deliberations within the trial creates a direct conflict between Article 74(4)'s secrecy requirement and Article 64(10), which requires the Trial Chamber to 'ensure that a complete record of the trial...is made and that it is maintained and preserved by the Registrar'.

Finally, and most importantly, it is impossible to reconcile the Appeals Chamber's position with Article 74(1), which provides that '[a]ll of the judges of the Trial Chamber shall be present at each stage of the trial *and* throughout their deliberations'. Article 74 explicitly distinguishes between the trial phase and the deliberation phase of a case—and has so distinguished since PrepComm.⁶⁰

39.4 Is Regulation 55 Consistent with the Rights of the Prosecution and the Defence?

In addition to being *ultra vires* and improperly interpreted by the judiciary, Regulation 55 has also consistently been applied by the Pre-Trial Chamber and Trial Chamber in ways that undermine both prosecutorial independence and the accused's right to a fair trial.

⁶⁰ See e.g. Art 72(1) of the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for an International Criminal Court, UN Doc A/Conf.183/2/add.1 (14 April 1988) ('A quorum consists of [at least four] [all] members of the Trial Chamber. The judgement shall be given only by judges who have been present at each stage of the trial before the Trial Chamber and throughout its deliberations'); see also O Triffterer, 'Art 74' in Triffterer (n 44) 1392 (noting that unlike at the trial phase, all of the members of the Trial Chamber only need to be present for 'the decisive parts of the deliberations').

39.4.1 Prosecutorial independence

Prosecutorial independence is at the heart of the ICC's institutional structure.⁶¹ That independence is at its apex prior to trial, where the OTP has nearly exclusive authority regarding whom to charge, what charges to bring, and whether to amend or withdraw charges.⁶² But it remains critical at trial as well, where the adversarial nature of the proceedings means that the prosecution controls the presentation of the inculpatory case—deciding which witnesses to call, what questions to ask them, which documents to introduce into evidence, how to conduct cross-examination, etc.⁶³

Legal recharacterization prior to trial has consistently undermined prosecutorial independence. That effect is most obvious in *Bemba*, where the Pre-Trial Chamber refused to confirm the charges of torture as a crime against humanity and outrages upon person dignity as a war crime, despite acknowledging that the prosecution had established substantial grounds to believe the accused had committed them. The decision meant that the prosecution had to go to trial on the Pre-Trial Chamber's preferred charges, not on its own—a serious violation of the OTP's rights under Article 67 of the Rome Statute. Moreover, the non-confirmation had a negative impact on the prosecution's trial strategy; as the OTP noted in its (rejected) application for leave to appeal, rape and torture as crimes against humanity have different elements, requiring different proof:

For instance, the Prosecution need not prove to secure a conviction for rape a certain quantum of pain or suffering endured by the victim, and a torture victim need not have endured 'a physical invasion of a sexual nature' as a distinctive element of rape. Not all rape that is validly so charged will meet the legal standards for torture, but that which does should be able to be charged as such, notwithstanding that it is torture committed through rape. Moreover, the man forced to watch his wife being raped repeatedly and viciously is not himself a victim of rape, but he can be properly viewed as a torture victim.⁶⁴

The OTP also noted that the logic of the Pre-Trial Chamber's rejection of cumulative charging could be extended to prevent it from charging both multiple categories of international crime—war crimes and crimes against humanity, or crimes against humanity and genocide—based on the same acts.⁶⁵ That is a disturbing possibility, given that such charges have long been an accepted part of international criminal practice.⁶⁶

The Pre-Trial Chamber's recharacterization of the conflict in *Lubanga* from non-international to international also undermined the OTP's right to determine how to present its case at trial. Simply put, the Prosecution did not believe that the

⁶¹ See Art 42(1) ICC Statute ('The Office of the Prosecutor shall act independently as a separate organ of the Court').

⁶² Art 67 ICC Statute.

⁶³ See S Vasiliev, 'Trial' in L Reydams et al. (eds), *International Prosecutors* (Oxford: Oxford University Press 2012) 714.

⁶⁴ *Lubanga* leave to appeal (n 24) para. 18.

⁶⁵ Id.

⁶⁶ See e.g. K Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press 2011) 91.

evidence indicated the conflict was international and was concerned that the Pre-Trial Chamber's recharacterization threatened the viability of its case.⁶⁷ Fortunately for the OTP—and unfortunately for the defence—the Trial Chamber simply re-characterized the conflict back to non-international at the end of the trial.

The other recharacterization dispute in *Lubanga* provides an even more striking example of the tension between Regulation 55 and prosecutorial independence. As noted earlier, had the Trial Chamber ultimately granted the OPCV's request for recharacterization, the accused would have faced five additional charges involving sexual violence. Such recharacterization would have undermined the OTP's charging practice in the case—which is why the OTP protested the Pre-Trial Chamber's decision in no uncertain terms.⁶⁸ Rightly or wrongly,⁶⁹ the OTP made a conscious choice to restrict the charges against Lubanga to the conscription, enlistment, and use of child soldiers—as it noted in its 2003–6 activities report, including sexual violence charges would have required additional investigation, and the OTP needed to begin trial before Lubanga was released from custody in the DRC.⁷⁰

Adding five additional sexual violence charges through recharacterization would also have significantly complicated the OTP's plan for the trial. In part, that would have reflected the timing of the Trial Chamber's notice of the recharacterization, which was issued on the final day of the prosecution's case in chief.⁷¹ As the OTP noted in its request for leave to appeal, such a significant change to the charges against the accused would have required it 'to investigate, prepare and address incidents and events that were not pleaded' in the original Document Containing the Charges.⁷² More fundamentally, though, adding sexual-slavery charges would have upended the OTP's entire trial strategy, which was to prove Lubanga's responsibility for using child soldiers and then use sexual violence as an aggravating factor to justify 'an appropriately severe sentence'.⁷³ The OTP thus insisted that recharacterizing the facts would not only be unnecessary, but would actually be counterproductive:

[T]he aggravating (or mitigating) factors and the 'circumstances of the crime' which will be relevant under Rule 145(1)(b) for sentencing are not the same as or limited to the 'circumstances described in the charges'. Just because a factor or circumstance is appropriate for consideration at sentencing under Rule 145(1)(c) or (2)(b) does not

⁶⁷ Decision on the Status before the Trial Chamber of the Evidence Heard by the Pre-Trial Chamber and the Decision of the Pre-Trial Chamber in Trial Proceedings, and the Manner in which Evidence Shall be Submitted, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1084, TC I, ICC, 13 December 2007, para. 28.

⁶⁸ *Lubanga* leave to appeal (n 24) para. 24 ('[T]he Majority Decision intrudes on the Prosecutor's role and ability "to exercise the powers and fulfil the duties" allocated in the Statute, including seeking an amendment of the charges').

⁶⁹ See e.g. S Merope, 'Recharacterizing the *Lubanga* Case: Regulation 55 and the Consequences for Gender Justice at the ICC' (2011) 22 *Criminal Law Forum* 311–46.

⁷⁰ Report of the Activities Performed during the First Three Years (June 2003–June 2006), OTP, 12 Sept 2006, 8.

⁷¹ SáCouto and Cleary (n 7) 29.

⁷² *Lubanga* leave to appeal (n 24) para. 25.

⁷³ Prosecution's Observations on the Consequences of the Appeal Judgment of 8 December 2009, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2215, TC I, ICC, 22 December 2009, para. 19.

necessarily make it one of the ‘circumstances described in the charges’ to be considered for the purposes of a recharacterisation under Regulation 55. There will be factors or circumstances relevant for sentencing that will not have been described in the charges; and it is entirely appropriate for the Chamber to take into consideration for sentencing the full range of factors regarding the crime and the damage to victims details of the commission of the crimes and their particular impact on the victims which emerge during the trial.⁷⁴

In retrospect, the OTP’s strategy was seriously mistaken: the Trial Chamber ultimately refused to consider sexual violence an aggravating factor, concluding that ‘the link between Mr Lubanga and sexual violence, in the context of the charges, ha[d] not been established beyond a reasonable doubt’.⁷⁵ Indeed, the Trial Chamber ‘strongly deprecate[d] the attitude of the former Prosecutor’—Luis Moreno-Ocampo—‘in relation to the issue of sexual violence’, specifically citing his failure to charge the accused with sexual slavery.⁷⁶ The OTP’s failure, however, does not justify the Trial Chamber’s interference with its trial strategy in *Lubanga*: an integral aspect of prosecutorial independence is the right to be wrong.

39.4.2 The right to a fair trial

Article 64(2) of the Rome Statute requires the Court to ‘ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused’. One of the most important rights of the accused is the right ‘[t]o have adequate time and facilities for the preparation of the defence’.⁷⁷ Indeed, as noted by Judge Van den Wyngaert in her Regulation 55 dissent in *Katanga*, that right ‘is of such significance in the [recharacterization] context that it is recapitulated with additional language in Regulation 55(3)(a), which provides that the accused must be given “adequate time and facilities for the effective preparation of his or her defence”’.⁷⁸

The central assumption of Regulation 55 is that the effective preparation of a defence requires little more than rebutting the facts in the Document Containing the Charges. That assumption is what justifies permitting the Trial Chamber to legally recharacterize the facts to support new crimes and different modes of participation in the middle of the trial—or after it. If the core of an effective defence is simply rebutting the facts, it does not matter how those facts are legally characterized; the defence will remain the same.

This view of criminal defence is openly embraced by both judges and scholars. Here is the Trial Chamber in *Katanga*, explaining its belief that recharacterizing the accused’s mode of production and reopening the trial after the defence had presented its entire case-in-chief would not prejudice the accused: ‘In this case, all the facts likely

⁷⁴ Ibid., para. 20.

⁷⁵ Decision on Sentence Pursuant to Art 76 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2901, TC I, ICC, 10 July 2012, para. 75.

⁷⁶ Ibid., para. 60.

⁷⁷ Art 67(1)(b) ICC Statute.

⁷⁸ Dissenting Opinion of Judge Christine Van den Wyngaert, *Katanga* Regulation 55 decision (n 1) para. 48 (emphasis in original).

to be considered for recharacterization on the basis of article 25(3)(d) of the Statute were already discussed at the trial and the Accused had the opportunity to defend himself and did so.⁷⁹

And here is Stahn, explaining why the accused would not be prejudiced by recharacterizing facts during or after the trial to support a crime not originally charged:

[A] qualification of conduct as a different legal crime does not constitute an ‘additional charge’ or a ‘more serious charge’ within the meaning of Article 61(9). The qualification of facts by the Trial Chamber is not an amendment of the charge after the beginning of the trial (as prohibited by Article 61(9), third sentence), but a technique of legal interpretation of the Chamber, which must be exclusively based on the facts and circumstances described in the original charge. This safeguard excludes any possibility that the accused is convicted on the basis of factual elements or conduct that was not made available to him/her.⁸⁰

This is a desiccated understanding of Defence strategy. In some cases, the Defence will indeed focus solely on rebutting the facts—attacking the credibility of a witness or establishing an alibi, for example. In most cases, though, the Defence will not only attempt to rebut the facts, it will also focus on rebutting the Prosecution’s legal characterization of those facts—its claim that the facts, if proven, establish that the accused was responsible for the charged crime. Indeed, it is a time-honored Defence strategy to concede certain facts (and in some cases, even uncharged crimes) to highlight their inability to prove the accused’s responsibility for the charged crime. After all, an accused is convicted of *crimes*, not *acts*.

Because effective criminal defence focuses on rebutting facts *and* rebutting legal characterizations, recharacterizing facts to support new legal characterizations during or after trial will almost always substantially undermine the accused’s right to effectively prepare his defence. Indeed, to see the truth of that claim, we have to look no further than the five cases in which the Trial Chamber has recharacterized facts, considered recharacterizing facts, or been asked to recharacterize facts.

39.4.2.1 Lubanga

Although the Trial Chamber ultimately decided not to use Regulation 55 to add new charges in the middle of the trial, the Appeals Chamber quite pointedly refused to rule out such additions. On the contrary, as noted earlier, it simply noted ‘that the text of Regulation 55 does not stipulate, beyond what is contained in sub-regulation 1, what changes in the legal characterisation may be permissible’.⁸¹ It is thus highly likely that either the OTP or the victims will attempt to add charges in a future case.

Lubanga serves as an object lesson for why such additions are inconsistent with the accused’s right to prepare an effective defence. The accused’s entire defence strategy—investigation, opening argument, cross-examination of the Prosecution’s witnesses,

⁷⁹ *Katanga* Regulation 55 decision (n 1) para. 33.

⁸¹ *Lubanga* appeals judgment (n 2) para. 100.

⁸⁰ Stahn (n 6) 25, note 79.

direct testimony of the witnesses for the Defence, closing argument—was designed to accomplish two things: (i) rebut the facts on which the child-soldier charges were based; and (ii) counter the Prosecution’s argument that those facts legally constituted the ‘conscription’, ‘enlistment’, or ‘use’ of child soldiers. Had the Trial Chamber added new sexual violence and inhuman treatment charges in the middle of the trial, that defence would have been fatally undermined—and that would have been true even if the facts underlying the child-soldier charges were capable of supporting the sexual-violence and inhuman-treatment charges, an idea that the Trial Chamber ultimately rejected.⁸² As the Defence pointed out, the war crime of conscripting, enlisting, or using child soldiers has only one material element in common with the war crimes of sexual slavery, cruel treatment, and inhuman treatment: the existence of armed conflict.⁸³ And, of course, the war crime of conscripting, enlisting, or using child soldiers does not even have that contextual element in common with the crime against humanity of sexual slavery—which would have required the defence to develop a legal strategy for rebutting the idea that the accused’s actions were part of a widespread or systematic attack on a civilian population. In short, had the Trial Chamber granted the victims’ request for recharacterization, the Defence would have needed to develop a completely new legal strategy in the middle of the trial. How that would have been possible, even if the Trial Chamber had granted the Defence a liberal amount of time to prepare, is difficult to imagine.

39.4.2.2 Bemba

As noted earlier, the Pre-Trial Chamber complied with Article 67(1)(c)(ii) when it adjourned the confirmation hearing and successfully requested the OTP allege that the accused was responsible for the charged crimes not only as an indirect co-perpetrator, but also as a superior under Article 28 of the Rome Statute. Strangely, after the restarted confirmation hearing was over, the Pre-Trial Chamber did not analyse whether the OTP had introduced sufficient evidence to establish that the accused ‘should have known’ that the forces under his control were committing crimes, because it concluded that the evidence indicated he had actual knowledge of those crimes.⁸⁴ Moreover, when the OTP’s subsequently filed Amended Document Containing the Charges included the ‘should have known’ language, the Pre-Trial Chamber struck the allegation at the Defence’s request.⁸⁵

⁸² Decision on the Legal Representatives’ Joint Submissions Concerning the Appeals Chamber’s Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2223, TC I, ICC, 8 January 2010, paras 33–6.

⁸³ Defence Appeal against the Decision 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’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2112-tENG, AC, ICC, 10 September 2009, para. 53.

⁸⁴ 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, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2324, TC III, ICC, 21 September 2008 (‘Bemba Regulation 55 notice’), para. 1. Either mental state suffices for the responsibility of a military commander. See Art 28(a)(i) ICC Statute.

⁸⁵ See Sá Couto and Cleary (n 57) 16–17.

That was, however, only the beginning of the story. Five weeks into the Defence's case-in-chief, and two years after the beginning of trial, the Trial Chamber gave notice that it might invoke Regulation 55 to recharacterize the mental element of superior responsibility to include whether the accused should have known that his forces were committing crimes.⁸⁶ The defence, not surprisingly, was outraged, pointing out that the contemplated recharacterization was completely inconsistent with how the Pre-Trial Chamber had framed the issue and would undermine the strategy it had been pursuing since the investigation phase of the case:

Mr Bemba was charged with one theory of liability; the alternative now proposed was rejected by the Chamber competent to set the framework of charges; Defence preparations were made on that basis; the Trial Chamber heard that case and the evidence relevant to it and let the Prosecution proceed and close its case on that basis; like the Defence (and Prosecutor), the Chamber asked questions based on that case; the Defence investigated and decided to present evidence relevant to that case, and no other; the Defence never prepared for or sought to meet an alternative theory of liability (nor was it required to); the witnesses which it now intends to call have been interviewed and they are being called in relation to that case.⁸⁷

The OTP argued, by contrast, that the recharacterization would not prejudice the accused, because '(a) the proposed change is not a substantial departure from the findings in the confirmation decision', and '(b) the evidence offered to establish the Accused's knowledge would also necessarily prove that he should have known of the crimes'.⁸⁸

The Defence clearly had the better argument. To begin with, it is difficult to describe an objective mental state (negligence) as 'not a substantial departure' from a subjective mental state—and a high one at that (knowledge). It is obviously considerably easier to prove that a reasonable person would have known a particular fact than that the accused actually knew it. Indeed, to see the folly of the OTP's position, we need only consider a scenario in which the Trial Chamber recharacterized the mental state of a crime from negligence to knowledge. In that situation, would the OTP dismiss the difference as 'not a substantial departure'? To ask the question is to answer it.

The OTP's second claim was even weaker. It is true that, if the prosecution proved that the accused knew his forces were committing crimes, it would necessarily prove that he should have known they were. *But that assumes the prosecution could prove knowledge.* If the Prosecution cannot prove knowledge, the Trial Chamber's recharacterization could easily mean the difference between conviction and acquittal: whereas the accused would have to be acquitted under the charges as confirmed by the Pre-Trial Chamber, he could still be convicted under the charges as recharacterized by the Trial Chamber (because the prosecution might still be able to prove negligence).

⁸⁶ *Bemba* Regulation 55 notice (n 84) para. 5.

⁸⁷ Defence Submission on the Trial Chamber's Notification under Regulation 55(2) of the Regulations of the Court, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2365-Red, TC III, ICC, 18 October 2012, para. 43.

⁸⁸ Prosecution's Submissions on the Procedural Impact of Trial Chamber's Notification Pursuant to Regulation 55(2) of the Regulations of the Court, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2334, TC III, ICC, 8 October 2012, para. 3.

Predictably, the Trial Chamber went ahead with the recharacterization, thereby making it easier in the middle of the trial for the prosecution to obtain a conviction. That action not only undermined the accused's right to prepare an effective defence, it also violated his right under Article 67(1) of the Rome Statute 'to a fair hearing conducted impartially'—an issue discussed in more detail in the following section.

39.4.2.3 Katanga

As discussed previously, the Trial Chamber notified the parties well after the trial had ended that it intended to consider whether the accused could be convicted of the charged crimes on the basis of an uncharged mode of participation—common-purpose liability. Judge Van den Wyngaert dissented from the majority's decision, arguing that its application of Rule 55 went 'well beyond any reasonable application of the provision and fundamentally encroaches upon the accused's right to a fair trial'.⁸⁹ And she reiterated that complaint after the Trial Chamber convicted Katanga on the basis of the recharacterized mode of participation.⁹⁰

It is difficult to disagree with Judge Van den Wyngaert, because the recharacterization undermined the defence's entire trial strategy, which focused solely on rebutting the Prosecution's claim that the accused was responsible for the charged crimes as an indirect co-perpetrator—the mode of participation that the Pre-Trial Chamber had confirmed. The Defence did not need to address the very different idea that Katanga was liable for the charged crimes as a contributor to a group crime, and not simply because that mode of participation was not confirmed. More importantly—and more troubling—the Pre-Trial Chamber had specifically noted in its Confirmation Decision that its findings on indirect co-perpetration 'render[ed] moot further questions of accessory liability'.⁹¹

Had Katanga known—or even been able to foresee—that the Trial Chamber would consider convicting him as a contributor to a group crime, the Defence would have pursued a very different strategy.⁹² To begin with, the two modes of participation have very different mental elements: indirect co-perpetration requires proof that the accused *intended* to commit the charged crimes; common-purpose liability simply requires proof that the accused *knew* that the group intended to commit those crimes. The Defence not only had no reason to deny that the accused knew his (unidentified) former subordinates intended to engage in criminal activity—because doing so would not incriminate him as an indirect co-perpetrator—but Katanga himself *conceded* that knowledge during his testimony.⁹³ As any good defence attorney knows,

⁸⁹ Dissenting Opinion Judge Christine Van den Wyngaert, *Katanga* Regulation 55 decision (n 1) para. 1.

⁹⁰ Minority Opinion of Judge Christine Van den Wyngaert, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436-AnxI, TC II, ICC, 17 March 2014 ('Katanga trial dissent'), para. 1.

⁹¹ Dissenting Opinion Judge Christine Van den Wyngaert, *Katanga and Ngudjolo* Regulation 55 decision (n 1) para. 30.

⁹² *Ibid.*, para. 39.

⁹³ See J Easterday, 'Germain Katanga Completes Testimony before ICC', *International Justice Monitor*, 31 October 2011. Decision on Victims' Representation and Participation, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-460, TC V, ICC, 3 October 2012, para. 14.

making non-inculpatory factual admissions is often an effective legal strategy. The Trial Chamber's decision to recharacterize the charged mode of participation thus relied, at least in part, on Katanga's own testimony—a troubling situation, as Judge Van den Wyngaert pointed out in her Regulation 55 dissent.⁹⁴

The two modes of participation also have different physical elements: whereas indirect co-perpetration requires the accused to have 'control' over the charged crimes, common-purpose liability simply requires the accused to 'contribute' to the charged crimes. As with the mental element, therefore, the defence could freely admit that Katanga contributed to the charged crimes without running the risk of being held responsible for them as an indirect co-perpetrator. Indeed, that is precisely what Katanga did.⁹⁵ The Trial Chamber's decision to recharacterize thus meant, as Judge Van den Wyngaert explains in her dissent to the trial judgment, that a sound strategic decision by the defence ultimately helped convict Katanga:

57. [T]he Chamber questioned Germain Katanga extensively on his role as coordinator between the APC and the fighters of Walendu- Bindi. It should come as no surprise that Germain Katanga enthusiastically answered the many questions about his role as coordinator. Undoubtedly, he was under the impression that the Chamber was interested in his defence against the Prosecutor's allegation that he was the top commander of the Ngiti fighters of Walendu-Bindi and that he had total control over their actions. This allegation was crucial for him to be considered an indirect perpetrator under the control theory interpretation of article 25(3)(a). The facts concerning his role as coordinator, about which Germain Katanga testified, were, viewed in this context, purely exculpatory as they undermined the Prosecutor's thesis that he had 'control over the crimes' committed by his subordinates.
58. However, now the Majority relies heavily on Germain Katanga's role as a coordinator for its finding that he made a 'significant contribution' in the sense of article 25(3)(d). In other words, the Majority has turned a perfectly legitimate defence against the confirmed charges into a major point of self-incrimination under a different form of criminal responsibility.⁹⁶

Judge Van den Wyngaert is right: this is 'nothing short of the Chamber co-opting a valid defence and turning it against the accused'.⁹⁷

39.4.2.4 Ruto and Kenyatta

In Ruto and Kenyatta, the Trial Chamber faced the problem whether to consider Ruto and Kenyatta's guilt not only as indirect co-perpetrators, but also on the basis of *any* of the accessory modes of participation in Article 25(3)—ordering, soliciting, inducing, aiding or abetting, or contributing to a group crime. Unfortunately, it has granted the

⁹⁴ Dissenting Opinion Judge Christine Van den Wyngaert, *Katanga and Ngudjolo* Regulation 55 decision (n 1) para. 45.

⁹⁵ Ibid., para. 5.

⁹⁶ *Katanga* trial dissent (n 90) paras 57 and 58.

⁹⁷ Ibid., para. 40.

OTP's request in *Ruto* to give notice that it may do so.⁹⁸ The danger of such 'recharacterization', even when the accused has notice of it (unlike in *Katanga*), is evident: the Defence will now have to rebut each and every possible form of complicity during trial, because it cannot be sure which one(s) the Trial Chamber will ultimately deem to be the proper legal characterization of the facts. Having to defend against such ambiguous charges is not only manifestly unfair, it will also make Ruto's trial far more complicated and time-consuming than necessary.

39.4.3 Practical implications

Regulation 55, in short, significantly complicates the accused's ability to prepare an effective defence. Most fundamentally, as *Ruto* and *Kenyatta* illustrate in stark detail, the constant threat of recharacterization forces the Defence to rebut every factual allegation in the Document Containing the Charges—even those that can, in light of the charged crimes and mode of participation, be safely ignored or conceded. The Defence cannot safely ignore or concede *any* facts in favor of challenging the Prosecution's legal argument, because those facts could end up being legally recharacterized to support uncharged crimes or uncharged modes of participation during or after the trial.⁹⁹

Regulation 55 is thus also likely to frustrate efficient trial management. In order to promote shorter, more streamlined trials, Rule 69 of the Rules of Procedure and Evidence permits the Trial Chamber to consider proven any 'alleged fact... contained in the charges, the contents of a document, the expected testimony of a witness or other evidence' that is not contested. Trial Chambers have routinely relied on Rule 69; in *Lubanga*, for example, the Chamber used it to justify ordering the parties 'to prepare a draft schedule of agreed facts to be considered by the Chamber eight weeks before the commencement of the trial'.¹⁰⁰ In light of the ongoing possibility of recharacterization, no rational Defence team will agree to any fact that is even remotely contested—thus rendering Rule 69 a virtual nullity.

Moreover, contrary to Stahn's argument that Regulation 55 encourages 'a precise charging practice from the very beginning of the proceedings',¹⁰¹ the never-ending threat of recharacterization actually does precisely the opposite. First, it encourages the OTP to 'draft the document containing the charges as broadly as possible, leaving the facts and circumstances at a level of generality that will then allow for evidence that emerges at trial to easily fit within them and thus allow legal recharacterization'.¹⁰² The broader the factual allegations, the greater the possibility of recharacterization. Second, the Regulation reduces the OTP's incentive to be precise concerning the legal characterization of the facts in the Document Containing the Charges, 'because any "mistake" in the legal characterisation could be "corrected" at trial'.¹⁰³

⁹⁸ Decision on Applications for Notice of Possibility of Variation of Legal Characterization, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1122, TC V(A), ICC, 12 December 2013, para. 44.

⁹⁹ See e.g. Merope (n 69) 344 (noting that the result of a broad interpretation of Regulation 55 requires 'a hyper vigilant defence that closely curtailed any statement made by a witness, lest it be used as a basis for new charges').

¹⁰⁰ Decision on Agreements between the Parties, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1179, TC I, ICC, 8 January 2010, para. 11.

¹⁰¹ Stahn (n 6) 30.

¹⁰² Merope (n 69) 343.

¹⁰³ Jacobs (n 10) 218.

Even worse, the possibility of recharacterization after trial, explicitly countenanced by the Appeals Chamber in *Katanga*, undermines another essential component of the right to a fair trial: the accused's right 'not to be compelled to testify or confess guilt and remain silent'.¹⁰⁴ Because Regulation 55 permits post-trial recharacterization of the charges, the accused cannot make an informed determination about whether he should testify in his own defence—if the charges change after he has testified, his testimony could end up being inculpatory instead of exculpatory, especially if part of his defence strategy is to concede the existence of facts that are harmless relative to the charged crimes and mode of participation.

Indeed, as discussed, that is precisely what happened in *Katanga*. The accused chose to testify on the assumption that the prosecution had to prove that he was guilty of the charged crimes as an indirect co-perpetrator. As part of his defence strategy, he effectively conceded both the mental and physical elements of contributing to a group crime—a rational decision, given that the Pre-Trial Chamber had assured him that 'further questions of accessory liability' were moot. The Trial Chamber then recharacterized the mode of participation to include common-purpose liability—relying heavily on Katanga's own testimony to do so—and convicted him on the basis of the recharacterized mode. The Trial Chamber thus directly penalized the accused for exercising his right to testify on his own behalf, as Judge Van den Wyngaert notes in her dissent to the trial judgment.¹⁰⁵

Although the majority in the Regulation 55 decision acknowledged that 'the Accused might have expressed himself differently had he known beforehand that his statements would be used under article 25(3)(d)', it insisted that Katanga 'elected of his own free will to testify' and 'was fully aware of the existence of Regulation 55'.¹⁰⁶ Judge Van den Wyngaert rightly mocks this position in her trial dissent, noting that the majority's hyper-formalism 'begs the question why the Chamber did not think of this possibility itself at the time and, if it did so, why it did not find it necessary to inform the accused of [that] fact'.¹⁰⁷ More fundamentally, however, the majority's exceedingly narrow view of 'free will—which reduces it to the absence of physical coercion—simply underscores how dramatically Regulation 55 undermines the right to silence enshrined in Article 67(1)(g) of the Rome Statute: no rational accused will ever testify on his own behalf if the mere existence of Regulation 55 puts him on notice that anything he says can be used—even long after the trial has ended—to convict him of any charge that might be supported by the 'facts and circumstances' in the Confirmation Decision.

39.4.4 The 'impunity' rationale and judicial impartiality

The Appeals Chamber has consistently taken the position that Regulation 55 is necessary to avoid impunity. Its statement in *Lubanga* is typical:

[T]he Appeals Chamber notes that Mr Lubanga Dyilo's interpretation of article 61(9) of the Statute bears the risk of acquittals that are merely the result of legal

¹⁰⁴ Art 67(1)(g) ICC Statute.

¹⁰⁵ *Katanga* trial dissent (n 90) para. 58.

¹⁰⁶ *Katanga and Ngudjolo* Regulation 55 decision (n 1) para. 52.

¹⁰⁷ *Katanga* trial dissent (n 90) para. 56.

qualifications confirmed in the pre-trial phase that turn out to be incorrect, in particular based on the evidence presented at the trial. This would be contrary to the aim of the Statute to ‘put an end to impunity’ (fifth paragraph of the Preamble). The Appeals Chamber is of the view that a principal purpose of Regulation 55 is to close accountability gaps, a purpose that is fully consistent with the Statute.¹⁰⁸

There are two fundamental problems with this defence of Regulation 55. First, even if the impunity rationale provided a compelling normative argument for recharacterization, that rationale would not justify the Regulation itself. The *ultra vires* issue is not whether the ICC functions better with Regulation 55 than without it, but whether the Regulation is a routine function and consistent with the Rome Statute.¹⁰⁹ And as discussed in section 39.1, Regulation 55 is neither.

Second, the impunity rationale does not, in fact, provide a compelling normative argument for recharacterization—at least not in the manner that the Appeals Chamber has suggested. To see why, it is important to distinguish between the two phases of Regulation 55 recharacterization: *pre-recharacterization*, when the Trial Chamber is deciding whether to invoke subregulation 2; and *post-recharacterization*, when the Trial Chamber adopts measures under subregulation 3 designed to ensure that the accused has the time and resources necessary to effectively prepare a defence to the recharacterized charges.

The Appeals Chamber’s defence of Regulation 55 focuses on the pre-recharacterization phase. Its impunity rationale imagines and depends upon the following sequence of events: (1) the OTP brings charges against an accused; (2) the Pre-Trial Chamber confirms those charges; (3) the Prosecution fails to prove the confirmed charges at trial; but (4) the evidence introduced at trial proves different and unconfirmed charges. In such a situation, according to the Appeals Chamber, it would create an ‘accountability gap’ to require the Trial Chamber to acquit the accused even though—to quote *Katanga*—‘the evidence presented clearly established his or her guilt based upon the appropriate legal characterisation of the facts’.¹¹⁰

The problem with the Appeals Chamber’s argument is the assumption that the accused’s guilt regarding an uncharged crime¹¹¹ can be ‘clearly established’ by the evidence presented at trial. That confident assumption overlooks a critical fact: *the evidence of the accused’s guilt for the uncharged crime will never have been adversarially tested prior to recharacterization*. The Prosecution and Defence will have focused their attention on the charged crime; they will not have argued for and against the uncharged crime. Recharacterization pursuant to Regulation 55, therefore, is actually based on the *Trial Chamber’s* belief that the evidence presented at trial ‘clearly

¹⁰⁸ *Lubanga* appeals judgment (n 5) para. 77; see also *Katanga* appeals judgment (n 59) para. 21. Scholars have also defended the impunity rationale. See Stahn (n 6) 3; G Bitti, ‘Two Bones of Contention between Civil and Common Law: the Record of the Proceedings and the Treatment of a *Concursus Delictorum*’ in H Fischer et al. (eds), *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin: Berlin Verlag 2001) 287.

¹⁰⁹ See Jacobs (n 10) 217 (‘One can wonder whether this broad teleological policy approach can be an adequate legal justification for a statutory provision’).

¹¹⁰ *Katanga* appeals judgment (n 59) para. 21.

¹¹¹ Or the charged crime on the basis of a different mode of participation, as in *Katanga*.

establishes' the accused's guilt for an uncharged crime, not on the Prosecution's belief. In *Katanga*, for example, 'the prosecution made no effort to charge under Article 25(3) (d), even in the alternative'.¹¹²

The existence of the adversarial post-recharacterization phase does not change this basic flaw in the impunity rationale. Although subregulation 3 is designed to provide the accused with sufficient time to prepare an effective defence to the new charge, it is far from clear whether that is possible in the middle of the trial—much less long after it has ended. In *Bemba*, for example, the Defence ultimately asked for the trial to be restarted early, because it concluded that additional investigation was impossible in light of its lack of resources, the absence of cooperation from the DRC and CAR, and the accused's ongoing detention.¹¹³ Even more obviously, the Trial Chamber's decision to recharacterize in *Katanga* was motivated, at least in part, by the accused's own testimony. All the time in the world to prepare a new trial strategy could not undo that damage.

More importantly, though, the existence of the post-recharacterization phase does not compensate for the fact that the impetus to recharacterize comes from the Trial Chamber, not from the prosecution.¹¹⁴ Simply put, when the Trial Chamber decides to recharacterize, the judges are functioning as advocates, not as neutral umpires¹¹⁵—they are intervening in the case to ensure that the accused is convicted despite the Prosecution's failure to prove the charged crimes beyond a reasonable doubt. Such activism may be appropriate in an inquisitorial system, but it is not appropriate at the ICC, whose trials are—for all their inquisitorial elements—still fundamentally adversarial.¹¹⁶ Indeed, as Judge Van den Wyngaert noted in her Regulation 55 dissent in *Katanga*, the Rome Statute specifically imposes the duty 'to establish the truth...of whether there is criminal responsibility under this Statute' on the Prosecution¹¹⁷; the Trial Chamber has no equivalent duty.¹¹⁸

A decision by the Trial Chamber to recharacterize *sua sponte*, therefore, is inconsistent with Article 67(1) of the Rome Statute, which guarantees the accused 'a fair hearing conducted impartially'. A Trial Chamber does not act impartially when it intervenes during or after a trial to save the prosecution from itself—especially in light of Article 64(8)(b), which gives the Trial Chamber the right to conduct trial proceedings in a non-adversarial manner if it so chooses.¹¹⁹ If a Trial Chamber wants to assume primary responsibility for determining the accused's guilt, it should adopt an inquisitorial trial structure *ex ante*, not *in media res* or *ex post*.

¹¹² Dissenting Opinion of Judge Christine Van den Wyngaert, *Katanga and Ngudjolo* Regulation 55 decision (n 1) para. 30.

¹¹³ SáCouto and Cleary (n 57) 23.

¹¹⁴ This is the case even where, as in *Lubanga*, the OPCV asks for recharacterization. Victims are not parties to the proceedings. See Decision on Victims' Representation and Participation, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-460, TC V, ICC, 3 October 2012, para. 14.

¹¹⁵ Jacobs (n 10) 219.

¹¹⁶ See Dissenting Opinion of Judge Christine Van den Wyngaert, *Katanga and Ngudjolo* Regulation 55 decision (n 1) para. 34; Jacobs (n 10) 219.

¹¹⁷ See Rome Statute, Art 54(1)(a).

¹¹⁸ Dissenting Opinion of Judge Christine Van den Wyngaert, *Katanga and Ngudjolo* Regulation 55 decision (n 1) para. 34.

¹¹⁹ A fact that Judge Van den Wyngaert noted in her *Katanga* Regulation 55 dissent. See *ibid.*, para. 54.

39.5 Conclusion

Regulation 55 is deeply problematic. The most damning criticism is that the judges lacked the authority to adopt the Regulation in the first place, because recharacterization is not a ‘routine function’ and cannot be reconciled with the Rome Statute’s well-defined procedures for amending the charges against an accused. The Regulation has also been consistently misinterpreted and wrongly invoked to recharacterize facts both before and after trial. And finally, both the Pre-Trial Chamber and the Trial Chamber have routinely applied the Regulation in a manner that undermines both prosecutorial independence and the accused’s right to a fair trial.

An impartial judiciary concerned with maintaining the Rome Statute’s distribution of authority between the judges, the OTP, the victims, and the Defence would invalidate Regulation 55. Unfortunately, with regard to the Regulation, the judiciary is anything but impartial. After all, the judges themselves wrote it. Regulation 55 thus represents the most indefensible form of judicial law-making—particularly aggressive and particularly self-interested all at once.

Disclosure Challenges at the ICC

*Alex Whiting**

40.1 Introduction

It is a familiar dynamic. The Defence complains that the Prosecution failed to make timely or complete disclosure of inculpatory or exculpatory evidence in its possession. The Prosecution responds, either disputing the claim or acknowledging error. The judges assess whether the materials should have been disclosed and whether there was malfeasance or inadvertence, but in any case they (usually) urge the Prosecution to do a better job going forward in fulfilling its disclosure obligations.

Versions of this litigation have played out again and again at the ICC, and at the ad hoc international criminal tribunals as well.¹ Commentators echo the complaints of the Defence and judges, deplore the Prosecution's repeated failures to meet its disclosure obligations, and urge reforms.² It is a subject that seems never to go away, never seems to be resolved, and is replayed over and over in an endless loop. As David Scheffer has written, 'one of the most reliable constants of criminal procedure—domestic or international—is the discord between the Prosecutor, defence counsel, and judges over the timing and manner of disclosure of evidence to each of them. This is, and will be, no less true for the ICC'.³ But why is that so? Why is disclosure so difficult? Why can the Prosecution not just get it right—not just mostly right, but always and consistently right? Why does disclosure seem so hard?

It is not to say that the Prosecution always fails in its disclosure responsibilities. The truth is in fact otherwise. Generally the prosecution is diligent and thorough in fulfilling its obligations. But at the same time, the Prosecution seems unable to 'solve' the disclosure challenge once and for all. Complaints invariably arise from the Defence

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¹ See e.g. Decision on Accused's Ninety-First Disclosure Violation Motion, *Karadžić*, IT-95-5/18-T, TC III, ICTY, 7 May 2014; Decision on Defence Interlocutory Appeal against the Trial Chamber's Decision on EDS Disclosure Methods, *Mladić*, IT-09-92-AR73.2, TC I, ICTY, 28 November 2013; Decision on Defence Application Pursuant to Art 64(4) and Related Requests, *Kenyatta*, *Situation in the Republic of Kenya*, ICC-01/09-02/11-728, TC V, ICC, 26 April 2013.

² See also Khan and Buisman, Chapter 41, this volume; K Gibson and C Lussiaà-Berdou, 'Disclosure of Evidence' in K Khan et al. (eds), *Principles of Evidence in International Criminal Justice* (Oxford: Oxford University Press 2010) 306; S SáCouto and K Cleary, 'Expediting Proceedings at the International Criminal Court', War Crimes Research Office, Washington College of Law at American University (2011), 61 ('Late disclosure of material by the Prosecution to the Defense has been one of the principal causes of delay at the ICC').

³ D Scheffer, 'A Review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence' (2008) 21 *Leiden Journal of International Law* 151.

about disclosure, and while these complaints are not always justified, or are often overblown, there is nonetheless the sense that the prosecution continues to fall short in achieving 100% compliance.

In fact, disclosure is a problem that will likely never be solved. It can be *managed*—and better management is in fact critical to better compliance—but it will never be completely solved in the sense of disappearing as a source of contention between the parties or being perfectly achieved. It is a subject that will always produce some complaint, conflict, and litigation because it is embedded in the challenges that are central to the cases themselves at the ICC. Although disclosure is a precondition to fair adversarial proceedings⁴, it does not sit outside and apart from those proceedings, but is instead subject to the difficulties that are largely inherent to the cases prosecuted at the ICC. In other words, there are distinctive features of international criminal prosecutions that will invariably create conflicts at the margins of the disclosure regime.

The ICC, like the ad hoc international criminal tribunals before it, prosecutes complex cases of mass atrocity arising out of complete political and social upheaval. It does so with relatively few resources, relying on cooperation from States Parties and other investigative bodies. As a permanent institution, the ICC is designed to move quickly when atrocities occur. Often the prosecution must navigate unfamiliar cultures and confront language and translations issues. The cases are sprawling and layered, even when the allegations are relatively focused. They are unlike national cases in important ways. In most domestic criminal cases, the alleged criminality sits outside the norm and is aberrational. The lines of relevance are therefore more distinct. In cases of mass atrocity, often the reverse is true: the criminality has become the norm, and determining what is relevant to the case becomes significantly more challenging. Witnesses and evidence are particularly fragile, and security issues are often paramount.

All of these particular dynamics of international criminal cases pose special challenges for the conduct of the case and for disclosure. In addition to these substantive challenges, disclosure can become a litigation tactic in the hands of the parties. The prosecution can have incentives to interpret its obligations as narrowly as possible, while the defence can be motivated to shift the focus away from the accused and the substance of the alleged crimes to the prosecution and the ‘conduct’ of the proceedings. These tendencies exist in national cases as well, but may be more pronounced in international prosecutions because of the stakes and the lack of a common tradition and practice. These aspects make it difficult for the judges, who often lack experience managing complex cases and may be unfamiliar with the litigation tactics and practices of the parties, to evaluate the conduct or claims of the two sides. Finally, international criminal trials are highly public and scrutinized events, and therefore the judges will be particularly mindful to ensure that the proceedings *appear* fair, which may push the judges to grant broader disclosure rights than substantive fairness in fact requires.

All of these factors mean that disclosure disputes at the ICC are not likely to disappear anytime soon. From the side of the prosecution, disclosure is primarily a management problem that must be prioritized alongside its other work. For their part, the

⁴ Gibson and Lussiaà-Berdou (n 2) 306.

judges will need to sort through the challenges and the claims to determine how to ensure that the goals of disclosure are fully realized while also making sure that the cases continue to move forward.

This chapter will proceed in two parts. The first part will sketch out the disclosure regime at the ICC, the second will seek to identify the challenges that the prosecution faces in managing disclosure; the conclusion will seek to suggest approaches for the way forward.

40.2 The Framework

The Rome Statute,⁵ and the accompanying Rules of Procedure and Evidence⁶, set forth the ‘what’ and the ‘when’ of disclosure by the prosecution. The theory of disclosure is that it underpins a fair trial. The Prosecution is considered to have superior investigative resources, and is therefore required to share the core of its investigation with the Defence in order to redress the assumed imbalance.⁷ The logic is derived from the model of a state (with vast resources and access to evidence) prosecuting an individual or group of individuals. In the international criminal prosecution world, however, this premise does not always hold true. In some cases, the underlying politics of the situation mean the Defence has better access to the evidence and at times even superior resources (as when the defence is supported by a state).⁸ The disclosure rules do not, however, adjust to these circumstances.

Furthermore, in the background of the ICC disclosure regime is the Article 54(1)(a) requirement that the Prosecution ‘extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally’. Thus in principle the Prosecution will gather both incriminating and exonerating information and evidence, both of which must be disclosed (pursuant to different rules) to the accused.⁹ In the early days of the ICC, the OTP sought to keep its investigations narrow, which in turn should have made disclosure more manageable. Reacting in part to criticisms that the trials at the ad hoc tribunals were too expansive and too long, the first prosecutor of the ICC adopted a policy of ‘focused investigations’.¹⁰ In several instances, however, the judges have criticized the Prosecution’s investigations as being insufficiently thorough.¹¹ The Prosecution has already announced

⁵ Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (‘ICC Statute’).

⁶ Rules of Procedure and Evidence, Official Records of the ASP to the Rome Statute of the ICC, First session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A (adopted and entered into force 9 September 2002).

⁷ Gibson and Lüssiaà-Berdou (n 2) 306; L Büngener, ‘Disclosure of Evidence’ in C Safferling (ed.), *International Criminal Procedure* (Oxford: Oxford University Press 2012) 346–7.

⁸ For example, defence counsel were well supported and resourced in the Croatia and KLA cases at the ICTY and continue to be so in the Kenya cases at the ICC.

⁹ Büngener (n 7) 345 (linking the Prosecutor’s obligation to investigate both sides to stronger inquisitorial approach at ICC).

¹⁰ Prosecutorial Strategy 2009–12, OTP, 1 February 2010, 4ff.

¹¹ Judgment Pursuant to Art 74 of the Statute, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-3-tENG, TC II, ICC, 18 December 2012, paras 115–23; Judgment Pursuant

that it will adjust its practices and conduct more in-depth investigations while trying to maintain focus.¹² There may not be a return to the broad investigations of the ad hoc tribunals, but the ICC's investigations are likely to be more extensive than they have been to date. These broader investigations will invariably give rise to additional challenging questions regarding the scope of disclosure.

40.2.1 Incriminating evidence

On the side of incriminating evidence, the rules are relatively straightforward. In advance of the confirmation hearing and the trial, the Prosecution must disclose all of the incriminating information it will offer at that stage of the proceedings. Specifically, Article 61(3) requires that prior to the confirmation hearing the prosecution must provide the defence with 'the document containing the charges' and 'the evidence on which the Prosecution intends to rely at the hearing'. Rule 76(1) states that '[t]he Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses'. Although the Rule is entitled 'Pre-trial disclosure relating to prosecution witnesses', it has been interpreted to require disclosure of all statements of witnesses upon which the Prosecution intends to rely at the confirmation stage, regardless of whether the Prosecution intends to call the witnesses to testify.¹³

Further, Rule 77 requires the prosecution to provide to the Defence any 'books, documents, photographs and other tangible objects' that the Prosecutor intends to use as evidence at the confirmation hearing or trial. Rule 121 further specifies that these materials must be provided no later than 30 days before the confirmation hearing. Article 64(3)(c) then requires the disclosure before trial of any evidence not previously disclosed, i.e. incriminating evidence not relied upon at the confirmation hearing but to be used at trial.

40.2.2 Exonerating evidence and information material to the preparation of the defence

The rules governing the disclosure of exonerating evidence or information are more complicated. Article 67(2) requires the prosecution to 'disclose to the defence evidence

to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012 ('Lubanga trial judgment'), paras 178–484; Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Art 61(7)(c)(i) of the Rome Statute, *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-432, PTC I, ICC, 3 June 2013; C Buisman, 'The Prosecutor's Obligation to Investigate Incriminating and Exonerating Circumstances Equally: Illusion or Reality?' (2014) 27 *Leiden Journal of International Law* 205.

¹² Strategic Plan: June 2012–15, OTP, 11 October 2013, 6.

¹³ See e.g. Decision Setting the Regime for Evidence Disclosure and Other Related Matters, *Ntaganda, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-47, PTC II, ICC, 12 April 2013, para. 12. Rule 76(3) also requires the prosecution to provide the statements in their original language as well as in 'a language which the accused fully understands and speaks'. In the *Ntaganda* case, however, the Pre-Trial Chamber sought to minimize the translation burden and therefore required the Defence to identify which statements needed to be translated into Kinyarwanda, the language of the accused. *Ibid.*, paras 21–2.

in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence'. Although this provision refers only to 'evidence', it has been interpreted broadly as applying to any 'material' that falls within its definition.¹⁴

Rule 77 is potentially even broader in its application with respect to the disclosure of information useful to the defence. In addition to requiring the prosecution to disclose material that it intends to use at trial, Rule 77 also mandates that the prosecution turn over all 'books, documents, photographs and other tangible objects... which are material to the preparation of the defence'. This provision has a surprising provenance for the ICC, as it derives originally from US law. When the ICTY was first being established, the US proposed a comprehensive set of Rules of Procedure and Evidence ('ICTY Rules'), largely based on US procedure.¹⁵ Many of these proposed provisions became a part of the ICTY Rules, including Rule 66(B), which requires the prosecutor to disclose 'any books, documents, photographs and tangible objects... which are material to the preparation of the defence'. This rule was derived from Federal Rule of Criminal Procedure 16(a)(1)(E) in the US, which similarly requires the government to disclose items that are 'material' to the preparation of the defence. When the ICC Rules of Procedure and Evidence were adopted, Rule 66(B) from the ICTY then migrated over and became Rule 77 in the ICC Rules.

The same rule has been interpreted differently, however, in the US, at the ICTY, and at the ICC. The central question is whether the rule requires only a showing of relevance to the case, which is an extremely low threshold and could apply to any information that has any connection at all with the issues in the case, or whether 'material' requires something more than relevance.

In the US, the term 'material' has force. It is not enough to argue that the information at issue is 'relevant'. Rather, there must be a showing that it is 'material' to the Defence, which has been defined as requiring a showing not just that the information might be relevant to the case, but that it will be specifically helpful to the Defence. Cases in the US have held that 'the requested information must have more than an abstract relationship to the issue presented; there must be some indication that the requested discovery will have a significant effect on the defence'.¹⁶

The ICTY adopted a similar approach to its version of the rule, interpreting 'material to the preparation of the Defence' to mean information that is 'significantly helpful to an understanding of important inculpatory or exculpatory evidence; it is material if there is a strong indication that... it will play an important role in uncovering

¹⁴ Decision on the Consequences of non-disclosure of exculpatory materials covered by Art 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, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1401, TC I, ICC, 13 June 2008, paras 88–9.

¹⁵ G Boas and W Schabas, *International Criminal Law Developments in the Case Law of the ICTY* (Leiden: Martinus Nijhoff 2003) 3–4.

¹⁶ *United States v Dzhokhar Tsarnaev*, Order (D. Ma., 27 November 2013). See also *United States v Zhen Zhou Wu*, 680 F.Supp.2d 287, 290 (D. Ma. 2010) ('Evidence "material to preparing a defense" includes any evidence that could significantly refute the Government's case in chief').

admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal'.¹⁷ One commentator described this interpretation as 'broad',¹⁸ and perhaps it is in comparison to the US approach, but it nonetheless requires more than a showing of 'relevance'.

The ICC has interpreted its version of the rule much more expansively. While citing the ICTY jurisprudence, the ICC Appeals Chamber in the *Lubanga* case significantly broadened the scope of what falls into material for the preparation of the defence under Rule 77. The accused in the case was charged with enlisting and conscripting child soldiers and using them in hostilities. The Defence requested material 'relating to the use of child soldiers by other individuals or groups' aside from the accused's group itself.¹⁹ The Defence acknowledged that 'the use by other armed groups of child soldiers' could not be a basis for 'excluding criminal responsibility' of the accused, but nonetheless argued that the information would be 'useful...and even necessary...to be able to understand the situation in Ituri at that time'.²⁰ The Trial Chamber rejected this argument as follows:

[T]he Chamber is unpersuaded, on the basis of the material before it, that the evidence relating to the use of child soldiers by other individuals or groups is relevant to the charges the accused faces. Any evidence on this subject will not undermine the Prosecution case and on the basis of what has been revealed by the Defence (following an invitation from the Bench for assistance on this issue), it does not support any defence or line of argument to be relied on by the accused. Put otherwise, this area of evidence has not been demonstrated to relate to a live issue in the case and it is not one that could assist the accused.²¹

This approach of the Trial Chamber was very much in keeping with that of the US and at the ICTY, but the Appeals Chamber at the ICC rejected this analysis and broadened considerably the scope of disclosure required by Rule 77. Although the Appeals Chamber cited positively to the ICTY and US jurisprudence, it concluded that Rule 77 'should be understood as referring to all objects that are relevant for the preparation of the defence'.²² In other words, it found that the Rule covers all 'relevant' information to the defence without any additional qualification, and thus without any showing that it could have a 'significant effect' on the defence or could be 'significantly helpful' to the Defence.

¹⁷ Decision on the Motion by the accused Zejnil Delalić for the disclosure of evidence, *Delalić*, IT-96-21-T, TC II quater, ICTY, 26 September 1996, para. 7.

¹⁸ H Brady, 'Disclosure of Evidence' in R Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers 2001) 411.

¹⁹ Transcript, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-T-71-ENG ET WT, TC I, ICC, 18 January 2008, 8.

²⁰ Transcript, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-T-69-ENG ET WT, TC I, ICC, 10 January 2008, 62.

²¹ Transcript, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-T-71-ENG ET WT, TC I, ICC, 18 January 2008, 8.

²² Judgment on the Appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1433, AC, ICC, 11 July 2008, para. 77.

'Relevance' is of course an expansive term, as was demonstrated by the outcome of the decision itself. The Appeals Chamber concluded that the Defence had sufficiently justified its entitlement to the information under Rule 77 because the information about the use of child soldiers by other groups was 'useful' and 'even necessary...to understand the situation in Ituri at the time'.²³ The Appeals Chamber further noted that the information might also be relevant 'to understand the phenomenon of the use of child soldiers and their demobilization in the DRC' and to the sentencing phase of the proceedings, if any.²⁴ On this view, one could argue that any contextual or background information related to the conflict or events in question could be 'relevant', and therefore subject to disclosure. This approach might be manageable in national criminal investigations, but given the kinds of cases investigated by the ICC—complex cases arising out of broad societal conflict and breakdown—this interpretation of Rule 77 potentially requires the disclosure of vast amounts of information without a meaningful showing that it could be helpful to the Defence. The consequences are significant burdens on the Prosecution, potential conflicts with security concerns with witnesses and governments, and large volumes of information that the Defence must process.²⁵

40.2.3 Limits on disclosure

There are five relatively narrow grounds under which disclosure can be limited or postponed: internal documents of the prosecution, witness security, ongoing investigation, confidential lead evidence, and national security.

First, Rule 81(1) states that '[r]eports, memoranda or other internal documents prepared by a party...in connection with the investigation or preparation of the case are not subject to disclosure'. As the judges have interpreted this provision, however, it does not in fact limit any disclosure that the Prosecution is otherwise obligated to provide under the Statute or Rules. If an 'internal document' of the prosecution contains any information that falls under Article 67 or Rule 77, then the prosecution must disclose that information to the defence, even if it is not required to disclose the entire document. In the *Lubanga* case, the prosecution contended that it was not required to disclose an internal investigator report containing an assessment of a potential witness's credibility, but only any information contained within the document falling under the disclosure rules.²⁶ The Chamber agreed:

The prosecution is correct in its contention that the evaluations or assessments of its investigators are not ordinarily disclosable; instead, it is the information and material that led to any relevant evaluations or assessments that, depending on the

²³ Ibid., para. 82. ²⁴ Id. ²⁵ See Gibson and Lussiaà-Berdou (n 2) 330.

²⁶ Redacted Decision on the Prosecution's Disclosure Obligations arising out of an Issue Concerning Witness DRC-WWW-0031, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2656-Red, TC I, ICC, 20 January 2011, para. 12 ('the prosecution has determined that although material may be subject to restrictions on disclosure (e.g. Rules 81 and 82 of the Rules), it is appropriate to "isolate information that ought to be disclosed from that which constitutes non-disclosable internal work product" in order to provide it to the accused').

circumstances, should be provided to the defence under Article 67(2) of the Statute or Rule 77 of the Rules.²⁷

Similarly, in the *Bemba* case, the Pre-Trial Chamber ruled that while the Prosecution was not required to disclose screening notes in their entirety, as they do not constitute ‘statements’ under Rule 76, it does have an obligation to disclose any Article 67(2) or Rule 77 material contained within the notes.²⁸ Therefore, Rule 81(1) excludes from disclosure no information that falls within Article 67(2) or Rule 77, but only subjective conclusions or analysis of the Prosecution or investigative staff of the OTP.

Second, pursuant to Article 68(5) and Rule 81(4), the prosecution can withhold disclosure required for any proceeding that takes place before trial if the disclosure would lead to the ‘grave endangerment of the security of a witness or his or her family’.²⁹ The Appeals Chamber has held that there exists a presumption of disclosure, that non-disclosure must be justified on a case-by-case basis, and that the Court should select the least restrictive protective measures available.³⁰ Since the provision applies only to proceedings before trial, it allows only for the *delay* of disclosure through the confirmation and up to trial, but not the ultimate denial of disclosure required under the Statute and Rules. And the Prosecution must disclose as much as it can in the meantime, consistent with protecting the security of witnesses. In other words, the Prosecution must consider whether specific redactions to the disclosure will be sufficient to meet the protection concerns before seeking to delay the disclosure of an entire document.

Although witness protection only allows for delayed disclosure, it shapes both the conduct of the investigation and the disclosure process. If a witness is put into danger as a result of his or her interaction with the Court, the Court is obligated to take whatever steps are necessary, including the relocation of the witness and his or her family out of the situation country, to ensure their safety.³¹ But given the costs of witness protection and the limited resources of the Court, it must be a last resort option.³² Accordingly, during the investigation phase, the OTP must consider the disclosure and security implications of each piece of evidence it collects. Although it has an obligation to conduct a balanced investigation that is sufficiently broad ‘to establish the truth’,³³ it must also try to minimize its witness protection obligations as much as

²⁷ Ibid., para. 16.

²⁸ Public Redacted Version of ‘Decision on the Defence Request for Disclosure of Pre-Interview Assessments and the Consequences of Non-Disclosure’, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-750-Red, TC III, ICC, 9 April 2010, paras 33–4.

²⁹ Art 68(5) ICC Statute.

³⁰ Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-568, AC, ICC, 13 October 2006, paras 36–7.

³¹ Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-475, AC, ICC, 13 May 2008, paras 1 and 44.

³² D Chaikell and L Smith van Lin, ‘Witnesses before the International Criminal Court, International Bar Association Report’ (2013), 27 (‘Protection and witness support come at a massive cost to the Court’).

³³ Art 54(1)(a) ICC Statute.

possible by collecting only evidence that is truly pertinent. But this is a challenge, because it can be difficult to know in advance whether a witness's evidence will be significant or not, and once the OTP interviews a witness, then disclosure obligations are triggered. So the Prosecution has developed a mechanism to 'screen' witnesses before interviewing them in order to determine if they are in a position to provide truly pertinent evidence for the investigation.³⁴

Witness protection also has implications in the disclosure phase. It requires the Prosecution to assess not just whether investigative material must be disclosed pursuant to the Statute and Rules, but whether disclosure could put any witnesses at risk and if so, what steps must be taken to protect the witnesses. This can be a complex assessment, and an ongoing one. Consideration must be given not just to the witness making the statement, but also to what the witness might reveal about other witnesses or potential witnesses that could put them in danger. So, if two people witness an event and both would be endangered if it were known that they were witnesses, then the Prosecution must consider redacting not just the name of each person from that person's own statement, but also the name of the *other* witness if it is contained within the statement. In other words, the Prosecution must consider how information could directly affect the security of witnesses and how information that is connected to other information that has been disclosed or is otherwise known could have that effect. Moreover, this assessment will change as the security circumstances evolve and as security measures are put into place for individual witnesses. The Prosecution might disclose a heavily redacted witness statement at the beginning of the disclosure process, a less redacted version later on if witnesses mentioned within the statement are protected, and a fully unredacted version even later if the witness is protected. At each stage, the prosecution must make what can be very nuanced judgments about what must and can be disclosed.³⁵

The third basis for withholding disclosure is to protect an ongoing investigation. Rule 81(2) allows the prosecution to apply to the Chamber *ex parte* if disclosure 'may prejudice further or ongoing investigations'. The rule further specifies that if the Prosecution subsequently wishes to use the information at the confirmation hearing or trial, it must provide adequate disclosure. The Appeals Chamber has held that a chamber considering an application under Rule 81(2) must consider similar factors as when reviewing proposed measures to protect the security of witnesses.³⁶ In

³⁴ Public Redacted Version of 'Decision on the Defence Request for Disclosure of Pre-Interview Assessments and the Consequences of Non-Disclosure', *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-750-Red, TC III, ICC, 9 April 2010, para. 3 (describing screenings as an assessment of whether a witness can provide relevant information).

³⁵ The suggestion made by Khan and Buisman in Chapter 41 of this volume that the Prosecution uses witness security for strategic purposes is unfounded. First, as they themselves acknowledge, any redactions or delayed disclosure based on witness security must be approved by the judges. Second, managing witness security and its impact on disclosure is a burden for the Prosecution, and its interest is not to increase this burden but rather to minimize as much as possible its witness security obligations.

³⁶ Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-475, AC, ICC, 13 May 2008, para. 97.

particular, the Prosecution has the burden ‘to establish that the potential prejudice to investigations is objectively justifiable, would result from disclosure to the Defence (as opposed to the general public) and could be overcome or reduced by redactions’.³⁷ Presumably, if the information withheld is exculpatory, then disclosure could be withheld but not ultimately denied.³⁸

Fourth, the Prosecution can withhold the disclosure of lead information that it collects pursuant to Article 54(3)(e) which allows the prosecutor to ‘[a]gree 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 new evidence, unless the provider of the information consents....’ This provision was the subject of considerable litigation during the ICC’s first case, almost brought the proceedings to an end, and has been the subject of considerable discussion and writing.³⁹ The problem arose because the prosecution collected potentially exculpatory information pursuant to Article 54(3)(e) and therefore found itself caught between the dictates of disclosure contained in Article 67(2) and the confidentiality promised pursuant to Article 54(3)(e). The Appeals Chamber ultimately held that only a chamber, and not the prosecution acting on its own, can decide if potentially exculpatory information may be withheld from the Defence and what remedy, if any, will be available if disclosure is withheld.⁴⁰ The Appeals Chamber found that if the prosecution is unable to disclose potentially exculpatory information because it has been collected pursuant to Article 54(3)(e), then the chamber should consider whether ‘counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the non-disclosure of the information’.⁴¹ If adequate counter-balancing measures cannot be identified, then dismissal of some or all of the counts may be required.

After playing a major part in the ICC’s first case, Article 54(3)(e) is unlikely to have a starring role in future litigation. The *Lubanga* case made it clear that disclosure obligations will largely trump any guarantees provided under Article 54(3)(e), and that even when there is a clash between these provisions, the judges will interpret the prosecution’s disclosure duties very broadly. This decision has had the effect of dramatically diminishing the value of Article 54(3)(e). If the prosecution and information providers cannot be certain that confidentiality will be maintained while preserving the integrity of the case, there will be reluctance on all sides to provide or collect such confidential information. Since the Prosecution cannot know in advance what kinds of

³⁷ Ibid., para. 98.

³⁸ Given the time that generally elapses between charging and trial, it is difficult to imagine a scenario where exculpatory information would still pose a danger of prejudicing an ongoing investigation at the time of trial.

³⁹ A Whiting, ‘Lead Evidence and Discovery before the International Criminal Court: The *Lubanga* Case’ (2009) 14 *UCLA Journal of International Law & Foreign Affairs* 207.

⁴⁰ Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled ‘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’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1486, AC, ICC, 21 October 2008, paras 46–7.

⁴¹ Ibid., para. 48.

information it will collect before it gives Article 54(3)(e) guarantees, it will always take a risk if it relies on that provision to gather lead information that it will collect potentially exculpatory information that it will be unable to disclose. For this reason, the OTP signalled after the *Lubanga* case that it would limit its collection of confidential information.⁴² As the US Supreme Court stated in a different context, '[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all'.⁴³

Finally, as something of a corollary to Article 54(3)(e), Article 72 allows a state to intervene if it learns that information is about to be disclosed that it believes would 'prejudice its national security interests'. The Government of Kenya sought to rely on this provision to support its request to be present during the confirmation hearing of Francis Muthaura, Uhuru Kenyatta, and Mohammed Ali, arguing that 'certain allegations may involve information impinging on the national security interests of the State of Kenya' within the meaning of Article 72.⁴⁴ The Pre-Trial Chamber rejected Kenya's request, finding that Article 72 narrowly allows a state to intervene only to block disclosure that might prejudice its national security interests and does not provide standing to states to raise broad and generalized national security concerns.⁴⁵ To date, there is no public information available that this provision has ever been invoked by a state. That is not surprising, since states will generally be proactive in taking steps to ensure that the Prosecution does not receive information in the first place that could jeopardize its national security interests.

In sum, the various limitations on disclosure are narrow. In most cases, they allow for delayed but not denied disclosure. When there is a conflict between disclosure and another imperative, disclosure will largely prevail. So not only are the prosecution's disclosure obligations broad, they are largely absolute. Nonetheless, they do not appear on their face to be impossible to administer. What, then, makes them difficult? The next section attempts to answer that question.

40.3 The Challenges

Although the ICC combines common-law and civil-law aspects, the investigation phases and the management of disclosure follows closely the common-law model. The prosecution gathers the evidence and has the responsibility, pursuant to the rules set forth here, to disclose to the defence. The drafters of the Rome Statute could have, but did not, adopt a model whereby an investigative judge manages the investigation and creates a dossier available to both parties.⁴⁶

⁴² Prosecutorial Strategy 2009–12, OTP, 1 February 2012, para. 34(b).

⁴³ *Upjohn Co. v United States*, 449 US 383, 393 (1981).

⁴⁴ Decision on the 'Request by the Government of Kenya in Respect of the Confirmation of Charges Proceeding', *Muthaura et al., Situation in the Republic of Kenya*, ICC-01/09-02/11-340, PTC II, ICC, 20 September 2011, para. 4.

⁴⁵ Ibid., para. 11.

⁴⁶ Gibson and Lussiaà-Berdou (n 2) 311–12 (comparing civil-law to common-law system regarding disclosure).

Could the OTP mimic the function of an investigative judge, create a dossier, and simply disclose all of the investigative materials to the Defence? This is not a plausible solution for three reasons. First, the challenges of witness security require the prosecution to be selective in its disclosure. Threats to witnesses will be a feature of many if not all ICC investigations and prosecutions because the ICC is poised to act quickly when atrocities occur, by nature the cases emerge from enormous social and political disruption, and the stakes for high-level suspects are high, providing strong incentives to interfere with witnesses.⁴⁷ If the Prosecution need not disclose information that could jeopardize the security of a witness, then it should not.

Second, aside from security concerns, witnesses may have legitimate privacy interests in keeping their statements from being widely disseminated. Witnesses may speak about events that are traumatic or alternatively embarrassing to them. Their statements should not simply be disclosed if there is no affirmative requirement for the OTP to do so.

Third, the Defence will complain if the Prosecution simply discloses masses of documents without any filtering or specific identification of exculpatory material.⁴⁸ At the ICTY, following an amendment to the exculpatory disclosure rule (Rule 68) allowing electronic disclosure, the Prosecution sought to satisfy its duty of disclosure by placing all non-confidential materials on a searchable system called the Electronic Disclosure Suite (EDS). The Prosecution contended that the Defence was better situated than the prosecution to search the materials for exculpatory information. The defence appealed in the *Karemera* case, and the Appeals Chamber held that ‘the Prosecution’s Rule 68 obligation to disclose extends beyond simply making available its entire collection in a searchable format. A search engine cannot serve as a surrogate for the Prosecution’s individualized consideration of the material in its possession’.⁴⁹ Thus the Prosecution risks complaint from the Defence, and rebuke from the judges, both if it discloses too little information and if it discloses too much.

For all of these reasons, therefore, the Prosecution will be obliged to make decisions about what information in its possession must be disclosed pursuant to the Statute and the Rules. It is this process of disclosure that has bedevilled all of the international tribunals. Even in national systems, disclosure can be a chronic problem. In the United States, for example, which has disclosure rules that are similar to those at the international tribunals, disclosure disputes are a regular feature of criminal litigation, and judges and commentators routinely deplore the failure of prosecutors in some

⁴⁷ R Goldstone and G Bass, ‘Lessons from the International Criminal Tribunals’ in S Sewall and C Kaysen (eds), *The United States and the International Criminal Court* (Lanham: Rowman & Littlefield 2000) 51, 52–3 (‘By having a court [the ICC] already set up, the world can make the timely delivery of justice more likely’); Gibson and Lussiaà-Berdou (n 2) 313 (witness protection and disclosure).

⁴⁸ S Zappalà, ‘The Prosecutor’s Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE’ (2004) 2 *Journal of International Criminal Justice* 620, 625–6 (‘...the core of the provision does not lie in the disclosure of materials per se, but rather in the duty of the Prosecutor to enable the defence to effectively use those materials to prepare its case. The very heart of disclosure of exculpatory materials is their *identification and characterization as exculpatory*’).

⁴⁹ Gibson and Lussiaà-Berdou (n 2) 331 (quoting Decision on Joseph Nzirorera’s 21st Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Théophile Urikumwenimana), *Karemera*, ICTR-98-44-T, TC III, ICTR, 22 April 2009.

cases to provide full and proper disclosure.⁵⁰ Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals wrote last year in *United States v Olsen* that '[t]here is an epidemic of *Brady* [US Supreme Court decision requiring prosecutors to disclose exculpatory information] violations abroad in the land'.⁵¹ Similar complaints have arisen in other national systems, like in the UK.⁵² The disclosure cases that become prominent tend to be on the extreme end of a range of disclosure battles that occur routinely in criminal cases.⁵³ Some of the disputes across the range arise from clear failings by Prosecutors (through malfeasance, incompetence, or inadvertence), others from systemic factors or good faith disagreements about the scope of disclosure obligations in a particular case, and still others from strategic decisions by defence counsel to divert attention from the substance of the case to the conduct of the investigation and prosecution.⁵⁴ Many disclosure fights combine several of these elements, and often there will be disagreement even among the judges about how a dispute should be resolved. For example, in the *Olsen* case in which Judge Kozinski spoke of an 'epidemic' of disclosure violations, the majority of judges of the Ninth Circuit concluded that the exculpatory information that the government had not disclosed was *not* material, and therefore there was no violation of the Prosecutor's duties, while Chief Judge Kozinski and four other judges thought otherwise.⁵⁵

For all of the disclosure disputes that arise in domestic cases, it can be expected that there will be even more such disputes at the international tribunals, including at the ICC, and that disclosure battles will continue to be a regular feature of international criminal prosecutions. That is not to say that there should be tolerance for prosecutorial failures to comply with disclosure obligations.⁵⁶ Just the opposite is true. The possibility of prosecutorial malfeasance or incompetence resulting in a failure to abide by the disclosure requirements could, with the proper combination of training, management, and oversight, be reduced or even eliminated. But even putting aside these extreme cases, there will still remain a vast number of contentious fights surrounding disclosure because of the nature both of the cases at the international tribunals and the courts themselves as institutions.

The cases that are prosecuted at the ICC and other international courts are unlike domestic criminal cases in ways that complicate every stage of investigation and

⁵⁰ See K McMunigal, 'The (Lack of) Enforcement of Prosecutor Disclosure Rules' (2010) 38 *Hofstra Law Review* 847, 847 ('Criminal defense lawyers and academics have long complained of failures by prosecutors to honor their constitutional and ethical obligations to disclose exculpatory information').

⁵¹ *United States v Olsen*, Ordering denying petition for rehearing, No. 10-36063 (9th Circuit, 10 December 2013) (Kozinski, C.J., dissenting).

⁵² See e.g. B Emmerson, 'Prosecution in the Dock', *The Guardian*, 14 November 1999 ('The reputation of the criminal justice system has been badly damaged over the last 10 years by a series of miscarriages of justice, many arising out of non-disclosure of evidence to the defence').

⁵³ J Moore, 'Democracy and Criminal Discovery Reform after Connick and Garcetti' (2012) 77 *Brooklyn Law Review* 1329, 1345–6.

⁵⁴ See K McMunigal, 'Prosecutorial Disclosure Violations: Punishment vs. Treatment' (2013) 64 *Mercer Law Review* 711.

⁵⁵ *United States v Olsen*, Ordering denying petition for rehearing, No. 10-36063 (9th Circuit, 10 December 2013).

⁵⁶ For example, there was no excuse for the disclosure failure discussed in the opening paragraphs of Khan and Buisman, Chapter 41, this volume.

adjudication. They erupt out of massive societal disruption and involve widespread and significant violence across space and time. They emerge from conflict on a large scale that usually has deep roots in ethnic, religious, nationalist, or political strife. Further, the crimes during such times become normalized rather than aberrational.⁵⁷ As one commentator has put it, '[i]n this delusional context, criminal conduct that is normally characterized as "deviance" is transformed into acceptable, even desirable, behavior'.⁵⁸ While the tribunals generally focus on those most responsible, the crimes themselves are only possible because of the participation of many actors at all levels.

The nature of the cases investigated and prosecuted by the international tribunals has implications for evidence collection and disclosure. Because of the scope of the cases, the lines between relevant and irrelevant evidence become blurred. The Prosecution often presents historical evidence, through experts or lay witnesses, to give context and background to the conflict. In the *Lubanga* case, for example, the prosecution called Gérard Prunier and the Chamber called Roberto Garretón to provide, among other things, evidence about the history of the conflict in the DRC.⁵⁹ On its side, the Defence in many cases focuses not on the crimes, or on not just the crimes, but instead on the larger causes of the conflict and the responsibility of the different parties.⁶⁰ In the prosecution of Radovan Karadžić, for example, the Defence called Momčilo Krajišnik to testify, in part, that the conflict in Bosnia was caused by the Bosnian Muslims and Croats. Krajišnik testified that '[t]he institutions of the Serb people were in fact formed to protect the constitutional framework and the rights of the Serb people from unconstitutional acts of Muslims and Croats'.⁶¹ This background information makes its way into the judgments, which invariably contain sections devoted to the history and causes of the conflict. Thus, although the modern international tribunals have jurisdiction only for *jus in bello* crimes and not *jus ad bello* violations, the causes of the conflict and the 'fault' of the different sides inevitably seeps into the cases and it becomes very difficult to draw a line between these subjects and the crimes at issue.

Further, although a *tu quoque* defence—which focuses on the crimes committed by the 'other side'—is not legally valid, the Defence also often finds ways to argue the relevance of such information relating to the activities of the other parties. In the *Lubanga* case, for example, the Appeals Chamber found in its decision on the scope of Rule 77 that evidence relating to the use by 'other individuals or groups', aside from

⁵⁷ A Whiting, 'In International Criminal Prosecutions, Justice Delayed Can be Justice Delivered' (2009) 50 *Harvard Journal of International Law* 323.

⁵⁸ P Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *American Journal of International Law* 7, 11.

⁵⁹ *Lubanga* trial judgment (n 11) paras 67–91.

⁶⁰ Some defendants appear to focus on making appeals to their domestic constituency rather than the judges. D Rieff, 'Milošević in Retrospect' (2006) 82 *Virginia Quarterly Review* 8, 13 ('[Milošević's] oral and written denunciations of the entire proceeding were directed at the public back home in Serbia and Montenegro rather than at the Court itself').

⁶¹ V Šarić, 'Karadžić Witness Says Serbs "Provoked" into War', *Institute for War & Peace Reporting*, 15 November 2013.

the accused and his group, was relevant and should be disclosed.⁶² The defence in the *Limaj* case, a prosecution of three members of the Kosovo Liberation Army (KLA) for crimes committed against Serbs and Albanians suspected of collaborating with Serbs, focused in part on crimes committed by Serbs. One defence counsel started his opening statement by focusing on the crimes of the other side, arguing that ‘the concerted and concentrated efforts of Serb forces were bent on a campaign against both the emergent KLA and the Kosovo Albanian people as a whole’.⁶³ The counsel conceded that he could not assert a *tu quoque* defence, but contended nevertheless that the actions of the Serbs were relevant:

In raising these facts, the Defense does not of course intend to raise a defence of *tu quoque*. We readily acknowledge that that defence, that is to say that the other parties committed atrocities, is not a defence to a charge of war crimes or crimes against humanity in this Tribunal. It is, however, submitted that in order to do justice in this case, your Honours must at all times bear in mind the appalling reality of the human rights situation in Kosovo during the time period alleged in the indictment.⁶⁴

In the *Kupreškić* case, a prosecution of members of Bosnian-Croat forces for an attack on Ahmići, the Trial Chamber ruled that evidence that Bosnian Muslims may have also committed crimes was irrelevant to the extent it supported a *tu quoque* defence, but could be relevant as context evidence, to explain the behaviour of the accused, or to rebut the Prosecution’s allegations that Bosnian-Croat forces committed widespread or systematic crimes.⁶⁵

Thus, given the nature of the cases prosecuted at the international tribunals, the scope of potentially relevant information can be vast. In addition to information about the alleged crimes and perpetrators themselves, the Prosecution must consider whether evidence relating to the causes of the conflict, the social and political context and background of the alleged events, and the actions of other groups might also somehow be relevant and disclosable. In the ICC prosecution of Abdallah Banda Abakaer Nourain (Banda), a rebel leader in Sudan, for crimes allegedly committed on a single day in the context of an attack on an African Union Mission in Sudan, the defence sought access to nearly all of the materials confidentially submitted by the OTP in a case prosecuting the other side, namely in support of an arrest warrant for the President of Sudan, Omar Hassan Ahmad Al Bashir (Al Bashir). The Trial Chamber rejected the request, finding that the material was too remotely related to the charges against Banda and that disclosure would be extremely burdensome on the Prosecution, but the Appeals Chamber reversed, finding that the Trial Chamber had applied too restrictive a test under Rule 77 and should not have considered the burden on the Prosecution.⁶⁶ In the end, while the Prosecution may not have to disclose

⁶² Judgment on the Appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1433, AC, ICC, 11 July 2008, para. 82.

⁶³ Transcript, *Limaj*, IT-03-66-T, TC II, ICTY, 18 November 2004, 433.

⁶⁴ Ibid., 435–6.

⁶⁵ Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, *Kupreškić*, IT-95-16-T, TC II, ICTY, 17 February 1999.

⁶⁶ Judgment on the Appeal of Mr Abdallah Banda Abakaer Nurain and Mr Saleh Mohammed Jerbo Jamus against the Decision of Trial Chamber IV of 23 January 2013 entitled ‘Decision on the Defence’s

all of the materials sought, it will have to review the materials and disclose at least of a portion of the documents supporting the Al Bashir arrest warrant. Because the ICC will often investigate both sides of a conflict, each investigation will generate potentially relevant information for all other investigations within the situation (or even for situations in neighbouring countries), further complicating the disclosure obligation.

Moreover, the amount of information that the OTP collects or receives can be substantial. The ICTY has collected millions of documents, many of which are un-translated. Within this vast collection are entire archives of documents obtained by the ICTY. This creates enormous potential for inconsistencies among documents or statements that must be disclosed as ‘exculpatory’. As noted earlier, the first Prosecutor of the ICC sought to address the difficulties of managing large amounts of information by conducting narrow and focused investigations. But the judges have repeatedly pushed the OTP to conduct broader and deeper investigations, and in many cases it is difficult for the Prosecution to control what evidence it receives. For example, before the ICC began investigating the Kenya cases, the Waki commission had already conducted an extensive investigation. It would have been impossible for the ICC to conduct its own investigation without receiving this information. In all of the investigations being conducted by the ICC, there are also parallel investigations and inquiries being conducted by governments, commissions of inquiry, international bodies, international and local NGOs, and journalists. It is in the interest of the investigations to receive materials from these groups, but the OTP must then manage security and disclosure with respect to all of these forms of information. The scope of the prosecution’s disclosure obligation and the quantity of information it receives vastly complicates its task. The Defence and judges will have numerous opportunities to second-guess the prosecution’s assessments about how far its disclosure obligations run and specific judgments about what information must be disclosed.

Further, what constitutes exculpatory information or information material to the Defence can be highly contentious. In the *Karadžić* case, the Prosecution at the end of the Defence case provided statements of three witnesses it wished to call in rebuttal.⁶⁷ The defence filed a disclosure violation motion, alleging that the statements contained exculpatory information and should have been disclosed years earlier.⁶⁸ In the end, the defence, the Prosecution, and the judges had three different assessments on whether the statements were in fact exculpatory. One of the statements was of Ramo Hodžić, a Bosnian Muslim in the Bratunac Municipality who was arrested and then exchanged for Serb prisoners.⁶⁹ The Defence claimed that this statement was *entirely* exculpatory because it showed that not all of the Bosnian Muslims were killed by the Serbs.⁷⁰ The Prosecution responded that *nothing* in the statement was exculpatory because the Prosecution’s case was always that some Bosnian Muslims were killed and others were deported as part of the ethnic cleansing campaign in Bratunac, and that therefore the

⁶⁷ Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’, *Banda, Situation in Darfur, Sudan*, ICC-02/05-03/09-501, TC IV, ICC, 28 August 2013.

⁶⁸ Decision on Accused’s Eighty-Ninth and Ninetieth Disclosure Violation Motions, *Karadžić*, IT-95-5/18-T, TC III, ICTY, 16 April 2014, para. 6.

⁶⁹ *Ibid.*, para. 7.

⁷⁰ *Ibid.*, para. 8.

⁷⁰ *Id.*

witness's statement was entirely inculpatory (which is why the prosecution sought to call him in rebuttal).⁷¹ The judges agreed that the deportation of the witness was not exculpatory, but the fact that the witness was not mistreated during his detention was, even though the Prosecution alleged only that *some* of the prisoners were abused, but not all of them.⁷² Thus there was no agreement on whether the statement was exculpatory at all and if it was, *how* it might be exculpatory. This illustrates nicely how determinations about disclosure can often require judgment calls, about which there will be differing views. At what point does a witness's statement or a document contradict the Prosecution's case? What if a witness is inconsistent with another witness only on minor details? If the Prosecution's case is not categorical, i.e. does not allege that *all* members of a particular group were targeted, then are statements showing that *some* members of the group were spared exculpatory? These are just some of the many difficult and highly contextual determinations that will inevitably become the subject of litigation.

The situation is even more complicated because the Prosecution's understanding of the evidence and its own case, as well as the defence case, is not static but is instead highly dynamic.⁷³ Accordingly, its view of what is exculpatory or relevant will inevitably evolve during the course of the case. It is not to say necessarily that fundamental questions about core criminal responsibility shift dramatically after charges are brought against a suspect. But it is in the nature of litigation, and in many ways its *purpose*, that as a case unfolds and heads to trial, and even during trial, issues are further refined and honed. Key witnesses must come to court to testify, rather than simply having their statements admitted into evidence, because it is thought that the process of testifying in court, under oath, in the presence of the accused, and with cross-examination will more likely result in more reliable and precise evidence. As the defence challenges evidence and presents its witnesses, the Prosecution's view of the evidence may develop. That is all true in domestic criminal litigation, but the potential for refinement in understanding over time is even greater in international criminal prosecutions. As already noted, the crimes at issue are enormously complex—often involving the participation of numerous actors and entities across time and space—and stem from complicated and layered trends in society. In addition, the access to information by international tribunals is ordinarily substantially lower than it is for domestic investigators and prosecutors, particularly in the short term.⁷⁴ The Prosecution simply does not have the powers to access information—through witness interviews, subpoenas, searches, surveillance, or electronic interception—that domestic investigators ordinarily do. Thus while it may receive lots of information, it may not always receive, at least not immediately, the *best* information that would allow it to gain a complete understanding of events. Moreover, the OTP is necessarily operating in 'foreign' territory, that is, in an environment that is both geographically and culturally removed from the Court itself. As the OTP investigates, it must learn

⁷¹ Ibid., paras 10–11. ⁷² Ibid., para. 17.

⁷³ A Whiting, 'Dynamic Investigative Practice at the International Criminal Court' (2013) 76 *Law & Contemporary Problems* 163.

⁷⁴ See Whiting (n 57).

how language and cultural norms affect what information means and how it should be interpreted. It may, as happened at the ICTY, receive vast amounts of information that is in a non-working language of the Court. Because of the volume of information, it may be impossible to translate all of it in its entirety, but the Prosecution will nonetheless be responsible for reviewing it for disclosure purposes, making mistakes or disputes about disclosure inevitable.

In addition, the defence has no obligation to disclose its case to the Prosecution before trial or even during the Prosecution's case, and in many cases it will not necessarily fully know its case until the prosecution case is developed and revealed. Although most lines of defence can be anticipated by the Prosecution, there are some defences or (more likely) aspects of defences that may be unexpected. This further hinders the Prosecution's ability to assess what it must disclose. Thus because of the nature of litigation, the complexity of the cases at the ICC, the prosecution's (evolving) access to information, and the Defence's right to remain silent about its case, the Prosecution's understanding of the information in its possession will continually be in some state of flux.

It is not difficult to see how the dynamic nature of international criminal investigations affects disclosure. As the Prosecution reviews materials before the charging decision and even after charging, it continually gains a deeper understanding of the information in its possession and the events being investigated. As it learns and focuses more, it must continually re-review information that it has already reviewed for disclosure, even as more information is coming in (from the principal investigation as well as other investigations within the situation). This continual review increases the chance for mistakes and differing judgments, particularly at the margins. In addition, the cases are all extremely high profile and politically charged in the regions from which they derive. The judges will often (quite properly) feel enormous pressure to ensure that the cases are both fair and *appear* fair to the accused. In some instances, this may cause them to err on the side of providing more disclosure to the defence than is strictly required, causing the potential for a fissure between the rules as written and those as applied.

Aside from the nature of the cases themselves at the ICC, there are aspects of the institution that also make disclosure challenging. First, it is well known that resources at all of the international tribunals, including the ICC, are very limited.⁷⁵ Particularly if the OTP collects large quantities of information, it can be challenging to devote sufficient resources to conduct continual, ongoing disclosure reviews (and to be clear, the disclosure obligations require the prosecution to review its vast materials again and again). Second, the tribunals by their very nature bring together lawyers, investigators, and judges from a range of jurisdictions and practices. They will inevitably have varying understandings and experiences about how disclosure should be effectuated and what kinds of evidence might be considered relevant or exculpatory. Third, disclosure can become a litigation tactic in the hands of the parties, which may be familiar to judges from certain common-law countries but less familiar to judges from elsewhere.

⁷⁵ Ibid., 174–9.

Prosecutors are under enormous pressure to bring successful cases with few tools and resources, and may at times interpret the disclosure rules in ways to limit disclosure in the hope of gaining a tactical advantage. In the prosecution of Radislav Krstić, the Prosecution did not disclose a damning intercept of the accused until using it to cross-examine him after he testified. The Trial Chamber excluded the evidence, and the Appeals Chamber agreed with the Defence that it constituted ‘sharp practice’ by the Prosecution but declined to impose any sanctions.⁷⁶

As for defence counsel, they are advocates and will often be inclined by their roles to argue that nearly all information in the Prosecution’s possession should be disclosed (though at the same time arguing against having too much information dumped on them), and that nearly all failures to disclose information have prejudiced the defence. Further, it can be a tactic for the defence to focus on the legitimacy of the tribunal itself and the procedures of the prosecution and the court rather than on the charges themselves.⁷⁷ In the *Karadžić* case, for example, the legal adviser to the accused has filed continual motions (over 92) alleging failures to disclose exculpatory information, contending each time that the accused suffered prejudice as a result of the failure to disclose. The Trial Chamber has regularly found either that the Prosecution did not violate the disclosure rules or, if it did, that the defence suffered no prejudice.⁷⁸ It can be inferred from the frequency and nature of the legal adviser’s motions that they are designed primarily for their publicity value, with little expectation that they will succeed in court. For judges who are familiar with litigation, particularly in common-law countries, these tactics will be neither surprising nor difficult to manage. But judges who lack this familiarity may find it less easy to assess the arguments of the parties and their relative merits.

40.4 Conclusion

Combining the breadth of the disclosure rules, the ambiguity of these rules at the margins, the scope and nature of the cases at the ICC, and the features of the institution itself, it is easy to see how disclosure disputes and difficulties will likely be a regular feature of international criminal cases. Inevitably, particularly in cases involving large amounts of material, the Prosecution will make judgment calls that will be disputed by the defence and, in some cases, criticized by the judges. Even with respect to that material about which all parties might later agree should be disclosed, it will be difficult to achieve 100% compliance. Given the nature of the task and the institutional

⁷⁶ Judgment of the Appeals Chamber, *Krstić*, IT-98-33-A, AC, ICTY, 19 April 2004, paras 172–5.

⁷⁷ E Suljagić, ‘Justice Squandered? The Trial of Slobodan Milošević’ in E Lutz and C Reiger (eds), *Prosecuting Heads of State* (Cambridge: Cambridge University Press 2009) 176, 183.

⁷⁸ See e.g. Decision on Accused’s Ninety-First Disclosure Violation Motion, *Karadžić*, IT-95-5/18-T, TC III, ICTY, 7 May 2014. In their chapter, Khan and Buisman complain that in many instances the prosecution provided ‘tardy’ disclosure in the *Karadžić* case, but at the same time they concede that the Trial Chamber almost always found no prejudice to the Defence because either the Defence received the information in time to use it or the information was cumulative. Khan and Buisman, Chapter 41, this volume. Where the Defence is not prejudiced, disclosure has worked, achieving its objectives of ensuring that the Defence receives the information in time to use it. Khan and Buisman suggest that there may also be a cumulative effect, but that has not been substantiated.

limitations, some missed or late disclosure will, unfortunately, be inevitable in these complex international cases. Disclosure is not a topic that will ‘go away’ or be solved, but will instead be a recurring issue at the tribunals.

Where does this lead us? It does *not* lead to the conclusion that the prosecution may step back from its disclosure commitments or engage in ‘sharp practices’ with regard to these obligations. Proper disclosure is key to the fairness and legitimacy of the process and the institution, and every reasonable effort should be made to ensure that it is done. In fact, the analysis of disclosure challenges in this chapter should lead to the conclusion that *more* not less must be done to meet these challenges. In sum, disclosure must be made central to the work of the institution and must be better managed by all parties.

This effort must, of course, start with the Prosecution. There has been exhaustive discussion about why prosecutors fail in their disclosure obligations, but the focus is generally on the individual prosecutors themselves: are they intentionally or negligently failing in their disclosure obligations? Are prosecutors, as advocates, capable of effectuating fair and complete disclosure? What steps could be taken to ensure better compliance? These are important questions, but there is a systemic dimension as well. It is inevitable that, as a professional matter, disclosure will be often viewed as a secondary obligation by individual prosecutors and investigators. They will see their first task as investigating and prosecuting the crimes. Compared to this work, disclosure can feel like drudgery, often assigned to junior lawyers or shared among all the lawyers on the team who do their best to make time for the work after their investigation tasks are done. That is not to say that prosecutors do not take disclosure seriously, or think it is unimportant. Nothing could be further from the truth, and the reality is that investigators and prosecutors devote staggering resources to the process of disclosure. But there is no disclosure without there first being an investigation, and *how* disclosure is managed on a team can be a challenge because it is necessary to have the lawyers who are involved in the investigation (and who are the busiest because of the demands of the investigation) working on disclosure, as they will be the ones with the best ability to assess what information should be disclosed.

It is thus an office responsibility, as opposed to solely the responsibility of individual prosecutors, to ensure that disclosure is prioritized. The OTP must therefore find a way to ensure that sufficient resources are dedicated to the work of disclosure and that the core prosecution team is involved in managing and guiding the disclosure. To this end, it will be important to have a senior person focused on information management and disclosure, and lawyers whose first priority is disclosure but who also have an intimate familiarity with the workings of the case. In other words, the OTP must focus on devising an adequate disclosure *system* to manage all of the disclosure challenges outlined in this chapter, in addition to ensuring that individual prosecutors are properly trained and motivated to do their work. Elevating the status of the disclosure obligation within the institution and developing a systematic approach to disclosure will also ensure that there is a consistent approach to the work across all cases.

Further, the judges will need to develop a nuanced understanding of the disclosure obligations and challenges facing the prosecution. The point is not for the judges to ease up on the Prosecution, but rather to help manage the disclosure challenges to

ensure that the Defence is given sufficient time, resources, and tools to fulfil its obligations (which, at the end of the day, is the whole reason disclosure is important). The pre-trial process should be structured to give the prosecution time to best meet its obligations, and then when problems do arise, the judges must be willing to consider solutions, such as granting the defence additional time or re-calling witnesses, to protect the rights of the accused. The judges will have to accept that it will be impossible to ‘finish’ or ‘complete’ disclosure by some imposed date; while the core of the disclosure can be provided in advance, it is inevitable in these cases that there will continue to be some disclosure provided on a ‘rolling basis’ as the Prosecution continues to refine its understanding of its case and the defence case, and continues to re-review and assess its information.⁷⁹ In other words, the judges should realize that perfection is unlikely to be achieved in these cases and that it will be a task of the court and the parties to manage the difficulties that arise. In addition, the judges should recognize that the confirmation process and the trial are distinct events, and that the prosecution’s investigation will necessarily continue after confirmation.⁸⁰ Accordingly, the Prosecution should be required to provide the necessary disclosure for the confirmation hearing in advance of that event, and then the disclosure required for trial between the confirmation decision and the beginning of trial. The scheme set forth in the Rome Statute contemplates that the Prosecution may rely on different evidence at confirmation and at trial, and therefore the disclosure processes should be kept separate. Although many judges and the Defence repeatedly acknowledge that the confirmation process is not to be a ‘mini-trial’, more and more the push is to make it precisely that and to have the Prosecution’s case finalized, fully disclosed, and fully litigated by confirmation. The impetus is contrary to the way the Statute is designed and is not in the interest of the mission of the Court.⁸¹

Further, the judges should avoid adding to the disclosure burdens on the prosecution. In some cases, the judges have insisted that the Prosecution produce an ‘in-depth analysis chart’, or ‘IDAC’ for short, linking each piece of evidence to each element of each crime charged. These charts, which are an invention of the ICC and did not exist at the ad hoc tribunals, are extremely burdensome on the Prosecution and are of very little use to the defence and the judges.⁸² Evidence in a criminal case does not come in neat, little packets that can be simply linked to individual elements. Rather, the evidence supporting the elements of crimes charged is usually based on lots of pieces put together or inferences drawn from long transcripts or documents. Accordingly, when the Prosecution has attempted to produce an IDAC they have become extremely unwieldy and difficult to use.⁸³ The primary interest of the Defence in insisting on an IDAC seems to be to attempt to freeze or lock-in the evidence before the confirmation hearing or trial. But these cases and the litigation process require that there be some

⁷⁹ See Prosecution’s Response to Karadžić’s Motion to Set Deadlines for Disclosure, *Karadžić*, IT-95-5/18-PT, TC III, ICTY, 17 September 2009 (providing defence for practice at ICTY to allow ongoing disclosure before and during trial).

⁸⁰ Whiting (n 73). ⁸¹ Id.

⁸² Transcript, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-T-18-ENG CT WT, TC V, ICC, 12 June 2012, 38–42 (setting forth objections to IDAC).

⁸³ Ibid., 40.

flexibility in how the evidence develops and is analysed, so long as the Defence has sufficient notice of the case against the accused and the core of the evidence supporting the charges. Rather than the charts, the judges should request a pre-confirmation or pre-trial brief (or a footnoted document containing the charges) in which the prosecution sets forth its theory of the case with the key evidence supporting the charges. The focus, therefore, should be on providing sufficient notice to the Defence, not trying to lock the Prosecution in on each single piece of evidence that might support each element in the case.

At the end of the day, there is no question that the prosecution can always do better when it comes to disclosure, and making it a priority within the institution will go a long way towards accomplishing that goal. But, given the challenges of the cases and the institution, it must also be understood that disclosure is a problem that will likely always be with us and must be managed by the parties and the judges.

Sitting on Evidence?

Systemic Failings in the ICC Disclosure Regime— Time for Reform

*Karim A A Khan QC** and *Caroline Buisman***

41.1 Introduction

After three years of battling charges levelled against him by the Prosecutor of the ICC, 11 March 2013 was a good day for Ambassador Francis Kirimi Muthaura. This was the day the Prosecutor of the ICC, Fatou Bensouda, sought leave of the Trial Chamber to withdraw the charges against him.¹ The principal reason for withdrawing that case was the Prosecutor's decision to drop the key Prosecution witness (witness 4) in its case against Ambassador Muthaura because the witness had recanted a crucial part of his evidence and, in other key respects, the Prosecutor accepted that he had lied.²

This information was not new to the Prosecution. The asylum application became available to the Prosecution more than one year *before* the confirmation hearing. If this information had been disclosed to the Defence, as it ought to have been, there was every prospect that the Prosecution's case would never have been confirmed.³ Witness 4 had been the only Prosecution witness supporting key meetings alleged by the Prosecution upon which the charges were based. In addition, the Defence had

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¹ Statement by ICC Prosecutor on the Notice to withdraw charges against Mr Muthaura (11 March 2013) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx> accessed 22 June 2014; Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-687, OTP, ICC, 11 March 2013, para. 1.

² Ibid. See also Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Art 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-664-Red2, OTP, ICC, 26 February 2013, para. 41.

³ Ibid., paras 7–9, 41, and 44–6.

been vociferous in maintaining that the account of witness 4 was riddled with contradictions and was wholly unreliable.

This case illustrates that late, inadequate, or non-disclosure of relevant material can have catastrophic consequences for a suspect or accused. A case that should not have passed first muster, never mind confirmation, was committed for trial. This case ended well for Ambassador Muthaura, because the Trial Chamber granted the Prosecutor's request for withdrawal of the charges against him.⁴ However, this cannot disguise serious flaws and inadequacies in the OTP's internal mechanisms—and in fundamentally deficient reviewing decisions that had an obviously detrimental impact on the rights of an accused. The withdrawal before the Trial Chamber was more than a year after the Pre-Trial Chamber had rendered its confirmation decision.⁵ Even more notably, it came two years after key material, upon which withdrawal was predicated, had come into the hands of the Prosecution. During this time, Ambassador Muthaura and his family had suffered significant mental stress and wasted considerable time and resources on preparing a defence against the allegations made against him—allegations that turned out to be false. On any fair review, the case discloses significant weaknesses that, if left unresolved, could eventually lead to a miscarriage of justice before the ICC. Indeed, if to bring a false case based upon false witnesses is the litmus test, a miscarriage of justice occurred, despite the eventual withdrawal of charges. An innocent man was put through the hassle, inconvenience, and expense of defending himself at confirmation and on, well into the trial stage at the ICC. This speaks nothing of the opprobrium and acute anguish the accused faced due to the nature of the charges. All stakeholders—victims, accused persons, and the international community-at-large—have a right to expect better from the OTP.

The case against Ambassador Muthaura clearly demonstrates the importance of full and timely disclosure to the Defence of all information relevant to the case. More specifically, the Defence is entitled to receive, in a timely manner, all items available to the Prosecution that are incriminatory, potentially exculpatory, or material to the preparation of the Defence. The right to full and timely disclosure is one of the most fundamental rights of suspects and accused persons before the ICC. It is embodied in multiple provisions in the Rome Statute and the Rules of Procedure and Evidence, most notably Article 67 of the Rome Statute. Regrettably, this is also the most violated right of suspects and accused persons. The weaknesses identified in the case of Ambassador Muthaura are, unfortunately, not an isolated incident at the ICC. Complaints about late, inadequate, or non-disclosure are a recurrent theme in cases before the ICC, and very often these complaints are shown to be absolutely valid.

This chapter will examine the difficulties the defence has encountered as a result of late, inadequate, or non-disclosure of material relevant to the case. It will illustrate

⁴ Decision on the withdrawal of charges against Mr Muthaura, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-696, TC V, ICC, 18 March 2013.

⁵ Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Muthaura, Kenyatta and Ali, Situation in the Republic of Kenya*, ICC-01/09-02/11-383-Red, PTC II, ICC, 23 January 2012.

these difficulties by citing multiple examples of disclosure irregularities, often experienced first-hand by one or both of the authors, having been involved in the defence of multiple defendants before the ICC. Drawing heavily on the authors' own experience before the ICC, this chapter will argue that the current disclosure regime of the ICC places an inordinate burden on limited Defence resources and improperly and unnecessarily constrains the ability of Defence teams to effectively and efficiently prepare for, and conduct the defence of the client. The authors make a number of proposals for improvement, which in their view would help resolve many of the problems faced today.

41.2 General Legal Principles

Disclosure is at the core of any criminal trial. Provided it is done properly, disclosure is one of the most important methods of guaranteeing a fair trial. Disclosure obligations on the Prosecution are intended to rectify the imbalance between the Prosecution and defence in terms of time and resources to investigate the case.

The right to full and timely disclosure follows from a number of fair trial rights explicitly incorporated in Article 67 of the Rome Statute, which embodies the rights of the accused. Apart from the general right to a fair trial, the most relevant provisions are Articles 67(1)(a) and 67(1)(b). Pursuant to Article 67(1)(a), an accused must 'be informed promptly and in detail of the nature, cause and content of the charge[s]' against him or her. Article 67(1)(b) embodies the right of an accused to have adequate time and facilities for the preparation of his or her defence. These rights can be respected only if the accused receives full and timely disclosure of all material that is relevant to the charges laid against him/her. There is no exact time by which such disclosure must take place to comply with these provisions. Nor does Article 67 provide any guidance on how many details must be disclosed to the Defence, although it does set out minimum key standards that must be observed. However, whether a violation of such rights has occurred is a fact-specific determination and will depend on the overall circumstances of the case, the importance and type of information concerned, as well as the stage of the proceedings.⁶

Two main categories of disclosure material can be distinguished: incriminatory information, on the one hand; and information which is exculpatory, or material to the preparation of the defence, on the other.

41.3 Incriminatory Information

The scope of the Prosecutor's duty to disclose incriminatory information depends on the stage of the proceedings. At the ICC, there are two stages of disclosure: pre-confirmation disclosure and post-confirmation disclosure.

⁶ See e.g. Decision on Art 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-621, PTC I, ICC, 20 June 2008, paras 8, 65–6, 70, and 124–5.

41.3.1 Pre-confirmation disclosure

Pursuant to Article 61(3), within a reasonable time prior to the confirmation hearing, the Prosecution is required to provide the suspect with a copy of the document containing the charges (DCC), and to inform him or her of the evidence upon which it intends to rely for the purpose of the confirmation hearing. Pursuant to Rule 121(3), this should be done no later than 30 days before the date of the confirmation hearing. Amendments to the charges and the list of evidence, as well as additions to the list of evidence, must be provided to the suspect and Trial Chamber 15 days prior to the hearing at the latest.⁷ This is also the deadline for the Defence to provide a list of evidence it wishes to present at the confirmation hearing.⁸

By comparison to the ICTY and ICTR, these are rather short deadlines. At these ad hoc tribunals, the Prosecutor is under an obligation to disclose to the defence the material it relied upon to obtain the indictment against the accused within 30 days of his or her initial appearance.⁹ In practice, the Prosecution of the ICC reads Article 61(3) through the prism of Rule 121(3). By arguing that disclosure of all evidence to be relied upon, together with the DCC, 30 days before the confirmation hearing satisfies the obligation of timely disclosure, the Prosecution significantly hampers effective defence preparation and the material ability to effectively confront charges. It is submitted that the better view is that the OTP should disclose all incriminatory evidence it intends to rely upon and all evidence material to the preparation of the defence and/or exonerating at the earliest opportunity. The Defence can then start reviewing and preparing the case in good time before the confirmation hearing. It is submitted that Rule 121(3) would then apply—as originally intended—as a final cut-off point by which the Prosecution must nail its ‘colours to the mast’ and identify the evidence it actually wishes to rely upon at confirmation. Properly interpreted, Rule 121(3) should act as a cut-off point by which the Prosecution identifies the evidence it has *already* disclosed and which the Defence would have had adequate time to consider. It is suggested that it should no longer, in practice, be interpreted by the Prosecution as a licence to disclose its key evidence to the defence at the last minute.

That Rule 121(3) has been interpreted in this fashion by the Prosecution can hardly be denied. The initial appearance of Mr Abu Garda was held on 18 May 2009.¹⁰ The Defence did not receive *any* disclosure material for more than three months after this date. It finally received disclosure in two parts: the first part on 24 August 2009,¹¹

⁷ See Rule 121(4) and (5) Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, 3–10 September 2002 (First Session of the ASP) part II.A (adopted and entered into force 9 September 2002).

⁸ See Rule 121(6) Rules of Procedure and Evidence.

⁹ Rule 66 of the ICTY Rules of Procedure and Evidence, IT/32/Rev 49, mandates that the prosecutor shall make available to the defence ‘within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused’.

¹⁰ This is largely based on the first author’s own experience as lead counsel for Mr Abu Garda. For more details on the disclosure difficulties in this case, see K Khan QC and A Shah, ‘Defensive Practices: Representing Clients before the International Criminal Court’ (2014) 76 *Law and Contemporary Problems* 191, 201–3.

¹¹ Prosecution’s Communication of Potentially Exonerating Evidence Disclosed to the Defence on 24 August 2009, *Abu Garda, Situation in Darfur, Sudan*, ICC-02/05-02/09-65, OTC, ICC, 25 August 2009.

less than two months prior to the commencement of the confirmation hearing on 19 October 2009; and the second part of the material, which included revised versions of summaries of interview transcripts of six prosecution witnesses, on 14 September 2009,¹² a mere few days prior to the 30-day deadline. The DCC was disclosed on 10 September 2009.¹³

With its own deadline to file its list of evidence 15 days prior to the commencement of the confirmation hearing, the Defence, which only consists of 3 persons under the Court's legal aid regime at the confirmation stage,¹⁴ had little more than a month and a half to analyse several thousands of pages of material while preparing for the confirmation hearing and conducting defence investigations. The Defence in the *Abu Garda* case had the added difficulty that it could not enter the state (Sudan) where the charged crimes were committed.¹⁵ Following clear instructions from the Single Judge that such late disclosure should not be repeated, the defence received much timelier disclosure in the related case of *Banda and Jerbo*.¹⁶ *Banda and Jerbo* involved the same facts and much of the same disclosure material as *Abu Garda*.¹⁷

Also, in the *Kenya I* and *II* cases, the Single Judge was keen to avoid disclosure by either party at the final deadline under the Rules. With a view 'to guaranteeing the fairness and expeditiousness of the disclosure proceedings',¹⁸ the Single Judge issued a disclosure calendar establishing specific disclosure deadlines of evidentiary materials for both parties which were much earlier than the deadlines under Rule 121.¹⁹ The learned Single Judge emphasized that both parties were to strictly comply with their disclosure deadlines.²⁰

Despite the clear order of the learned Single Judge, a large amount of disclosure material was again received by the defence at the very last minute—precisely on the 30-day deadline detailed in Rule 121(3), to be exact. On this date, the Defence received

¹² Prosecution's Communication of Incriminating Evidence Disclosed to the Defence on 14 and 17 September 2009, *Abu Garda, Situation in Darfur, Sudan*, ICC-02/05-02/09-112, OTP, ICC, 18 September 2009.

¹³ Public Redacted Version of Prosecution's 'Document Containing the Charges Submitted Pursuant to Article 61(3) of the Statute' filed on 10 September 2009, *Abu Garda, Situation in Darfur, Sudan*, ICC-02/05-02/09-91-Red, OTP, ICC, 24 September 2009.

¹⁴ Counsel, a legal assistant, and a case manager.

¹⁵ Defence Request for a Temporary Stay of Proceedings, *Banda and Jerbo, Situation in Darfur, Sudan*, ICC-02/05-03/09-274, Defence teams of Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, 6 January 2012.

¹⁶ ICC-02/05-03/09.

¹⁷ Transcript of Status Conference, *Banda and Jerbo, Situation in Darfur, Sudan*, ICC-02/05-03/09-T-5-ENG ET WT, PTC I, ICC, 23 June 2010, 14.

¹⁸ Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure between the Parties, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-62, PTC II, ICC, 20 April 2011, para. 15.

¹⁹ Ibid.

²⁰ She denied a Prosecutor's request for an extension of one of the disclosure deadlines but granted additional time to submit proposed Art 81(2) and 81(4) redactions. See Decision on the 'Prosecution's Application for Extension of Time Limit for Disclosure', *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-82, PTC II, ICC, 10 May 2011. Similarly, she granted the defence additional time to propose redactions. See Decision on the 'Defence's Application for Extension of Time to Submit Properly Justified Proposals for Redactions', *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-215, PTC II, ICC, 21 July 2011.

the DCC from the prosecution,²¹ as well as an ‘in-depth analysis chart’ counting several thousands of pages, which was intended to assist the Defence and judges to better comprehend the prosecution’s theory of the case.²² In addition, the Defence in *Kenya I* and *II* received thousands of pages of allegedly incriminating material, including over a thousand pages of transcripts of witness interviews.²³ This clearly gave the Defence too little time to undertake a proper analysis of the late disclosure, particularly while actively preparing for the confirmation hearing itself and continuing defence investigations based on earlier disclosure, including interviewing witnesses.

To exacerbate matters, the Single Judge in *Kenya I* imposed a deadline on the defence teams to indicate who, if anyone, they intended to call to testify. This deadline was 15 days after the promulgation of the order. The Defence was still attempting to review and absorb massive amounts of allegedly incriminating material at this time. Most importantly, the defence had not yet received the DCC and the totality of the evidence.²⁴ Yet it was required to announce its own witnesses. The Defence effectively suggested that this was to put the proverbial ‘cart before the horse’ and requested an extension of this deadline. A week’s extension was granted. This was still before the defence received the DCC and the last thousand or so pages of disclosure material.²⁵ The Single Judge’s reasoning was revealing:²⁶

[T]he Defence was expected to progressively prepare its case upon receipt of the relevant piece of evidence in accordance with the Calendar for Disclosure. If, conversely,

²¹ Prosecution’s Submissions on the ‘Order to the Prosecutor to File a Proposed New Redacted Version of the Art 58 Application (ICC-01/09-01/11-157)’, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-165-Red, PTC II, ICC, 7 July 2011, para. 19 (indicating that the DCC will be filed on 1 August and not before); Public with Public Annex A and Confidential Annex B Prosecution’s Document Containing the Charges and List of Evidence submitted pursuant to Art 61(3) and Rule 121(3), *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, OTP, ICC, ICC-01/09-01/11-242, 2 August 2011.

²² Corrigendum to Decision on the Defences’ Requests for a Compliance Order in regard to Decision ‘ICC-01/09-02/11-48’, *Muthaura, Kenyatta and Ali, Situation in the Republic of Kenya*, ICC-01/09-02/11-167-Corr, PTC II, ICC, 12 July 2011, in particular paras 20 and 21; Decision on the Defence Requests in Relation to the Submission of a Comprehensive In-Depth Analysis Chart, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-191, PTC II, ICC, 13 July 2011; Prosecution’s submission of comprehensive in-depth analysis chart of evidence included in the list of evidence, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, PTC II, ICC, ICC-01/09-01/11-241, 1 August 2011.

²³ Prosecution’s Document Containing the Charges, List of Evidence and Comprehensive In-Depth Analysis Chart of Evidence Included in the List of Evidence Submitted Pursuant to Art 61(3) and Rule 121(3), *Muthaura, Kenyatta and Ali, Situation in the Republic of Kenya*, ICC-01/09-02/11-257, OTP, ICC, 19 August 2011; Prosecution’s Communication to the Defence of Incriminating Evidence pursuant to Art 61(3)(b), *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-237, OTP, ICC, 1 August 2011.

²⁴ Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-153, PTC II, ICC, 29 June 2011.

²⁵ Defence Application for Extension of Time to Submit Information on Viva Voce Witnesses to be Called at the Confirmation Hearing, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-168, Defence, 8 July 2011, paras 12 and 13; Decision on the Defence Application of Time to Submit Information on Viva Voce Witnesses to be Called at the Confirmation Hearing, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-176, PTC II, ICC, 11 July 2011.

²⁶ Decision on the Defence Application of Time to Submit Information on Viva Voce Witnesses to be Called at the Confirmation Hearing, *Ruto, Kosgey and Sang* (n 25) para. 17.

the Defence was to wait until the disclosure of the Prosecutor's evidence is finalized—or even until the DCC is filed—to start preparing their case, the existence of intermediate deadlines within the context of the disclosure proceedings would serve a very limited purpose, if at all.

Yet, it goes against all principles of fairness to ask the Defence to disclose its case and the witnesses it intends to rely on before it is fully informed of the charges against the suspect. Clearly, the Defence should not have been put in that position until it had adequate time to absorb the thousands of pages of disclosure material; but most importantly, until it had received the DCC. The Single Judge herself had previously acknowledged that the importance of the DCC should not be underestimated and had a direct bearing on the defence's ability to prepare adequately for the confirmation hearing.²⁷ In light of these issues, it is fair to conclude that the confirmation proceedings were rushed through, giving the Defence inadequate preparation time, which was unfair.

In the event that the Prosecution fails to abide by its disclosure obligations, the defence may address itself to the Pre-Trial Chamber, which may issue disclosure orders to the Prosecution. The Pre-Trial Chamber may also issue such orders *proprio motu*.²⁸ However, the problem both in *Kenya I* and *II* was that the prosecution had not, strictly speaking, violated its disclosure obligations under the Rules (as opposed to the principles underlying the Statute). Defence counsel for Ambassador Muthaura submitted that the Pre-Trial Chamber should not:

[B]e hamstrung or handcuffed to a rigid rule that, in all cases, 30 days before the [confirmation] hearing is consistent with the obligations or consistent with the rights of the suspect to have adequate time and facilities and also a reasonable time before the hearing to get all the evidence.²⁹

However, though the Single Judge in *Kenya I* and *II* encouraged 'the parties to fulfill their disclosure obligations as soon as practicable and not only on the date when the deadline as provided by the statutory documents expire[d]',³⁰ and set strict disclosure deadlines, she still permitted the Prosecution to disclose significant material to the Defence very late in the day and in a manner that was hardly conducive to an effective confirmation hearing, in which the Defence could effectively challenge the Prosecution's case.

²⁷ Decision on the 'Prosecution's Request for Extension of Page Limit for the Document Containing the Charges', *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-154, PTC II, ICC, 1 July 2011, para. 5.

²⁸ This is explicitly allowed under Rule 121(1) of the Rules of Procedure and Evidence. See also Decision on the 'Prosecution's Application Requesting Disclosure after a Final Resolution of the Government of Kenya's Admissibility Challenge' and Establishing a Calendar for Disclosure Between the Parties, *Ruto, Kosgey and Sang* (n 18) para. 15.

²⁹ Transcript of Status Conference, *Muthaura, Kenyatta and Ali, Situation in the Republic of Kenya*, ICC-01/09-02/11-T-2-ENG ET WT, PTC II, ICC, 18 April 2011, 13, lines 14–20.

³⁰ Decision Setting the Regime for Evidence Disclosure and Other Related Matters, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-44, PTC II, ICC, 6 April 2011, para. 10. In that same paragraph, the Single Judge also expressed the view that 'the deadlines established by rule 121 of the Rules are only indicative of the minimum time limits that a party can avail itself to comply with its disclosure obligations'.

Compounding difficulties caused by how the deadlines in the Rules are interpreted is the fact that there is not necessarily a systematic approach among different Pre-Trial Chambers to the issue of disclosure. This is problematic because, if the bulk of disclosure takes place at, or close to, the 30-day final deadline, the defence is placed in a very difficult position to meet its own deadline 15 days later.³¹

A further problem is that the Prosecutor is not under an obligation to submit the entirety of the material in her possession which is relevant to the charges. The prosecutor may rely upon summaries and redacted statements at confirmation. At this stage of proceedings, the prosecutor must support ‘each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged’ (Article 61(5) of the Rome Statute). Thus, the scope of disclosure for confirmation hearing differs from that pertaining at trial. The standard of proof at the confirmation stage is ‘substantial grounds to believe’, while the standard at trial is ‘beyond reasonable doubt’. Whilst the Prosecution cannot withhold incriminatory evidence to later ambush the defence or mislead it to prepare its case on a false basis, it may disclose summaries of such evidence, including anonymous statements, anonymous interviews, and anonymous summaries pursuant to Article 61(5) of the Rome Statute. The Prosecutor relies heavily on this provision.³² Such anonymous summaries tend to be very succinct. Both in the *Katanga* and *Kenya I* and *II* confirmation proceedings, such summaries were often no longer than one page. This makes it extremely difficult, if not practically impossible, for the Defence to conduct proper investigations in preparation of the confirmation hearing.

This is highly unsatisfactory, whilst acknowledging that the confirmation hearing is not intended to be a ‘mini-trial’³³ but merely as a means to protect suspects against ‘wrongful and wholly unfounded charges’.³⁴ Out of 16 cases before the ICC, 4 were not confirmed, 1 was withdrawn before trial and should not have been confirmed,³⁵ and 2 have been sent back for a second confirmation hearing, one of which was accompanied by precise instructions from the Pre-Trial Chamber for the Prosecutor to implement and rectify deficiencies in investigations.³⁶ Confirmation hearings must be meaningful and effective. This, in turn, requires timely prosecution disclosure which gives the Defence time to read and digest prosecution evidence and to conduct certain investigations. Late disclosure cannot become—or appear to become—a deliberate trial tactic of the Prosecution so as to impede the defence and to thwart the very purpose of the confirmation process—which is to sieve out ‘wrong cases’ and avoid the

³¹ See further Khan and Shah (n 10) 201–4.

³² See e.g. Public redacted version of the ‘Decision on the Use of Summaries of the Statements of Witnesses 267 and 243’ issued on 3 April 2008, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-644, PTC I, ICC, 25 June 2008, authorizing the use of summaries for witnesses 267 and 243.

³³ Decision on the confirmation of charges, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-717, PTC I, ICC, 30 September 2008, para. 64.

³⁴ Ibid., para. 63.

³⁵ The case against Ambassador Francis Kirimi Muthaura. See introduction.

³⁶ See Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, *Gbagbo, Situation in Côte d'Ivoire*, ICC-02/11-01/11-432, PTC I, ICC, 3 June 2013, paras 15, 37, and 42–4.

danger of an accused being compelled to defend himself against ‘wrongful and wholly unfounded charges’.

41.3.2 Post-confirmation disclosure

If and when a charge is confirmed and the suspect (now formally designated an ‘accused’) is committed to trial, the Trial Chamber to which the case is assigned is under an obligation to ‘provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial’ (Article 64(3)(c)).

The incriminating material that must be disclosed is described in Rule 76 of the ICC Rules of Procedure and Evidence. This rule imposes an obligation upon the Prosecutor to disclose to the Defence ‘the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses’. Thereafter, the Prosecutor must ‘advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses’.

The Appeals Chamber gave a broad interpretation to ‘prior statements’ under Rule 76, requiring the Prosecutor to disclose any prior statements, irrespective of the form in which they are recorded.³⁷ The prosecutor does not have a duty to produce a signed written record pursuant to Rule 111 if she has produced an audio- or video-recording pursuant to Rule 112.³⁸ The Prosecutor must produce and disclose a transcript if she opts for the latter.³⁹ For the Defence, it would be significantly more useful to have both a statement and the transcripts of an audio-recording because the latter can be very voluminous, easily amounting to several hundreds of pages per witness. These interviews are not organized per topic and sometimes can be quite dense and unstructured; many appear to the Defence to be contradictory, incoherent, and rather difficult to follow.⁴⁰ At least a summary of the anticipated testimony, structured topic-by-topic and chronologically, would be of great assistance to defence investigations.

Pursuant to Article 64(3)(c), all incriminating material must be disclosed ‘sufficiently in advance’ of the trial. The specific deadline is set by the Chamber with conduct of the case. The Prosecutor is, however, not prevented from disclosing further evidence after any deadline has passed. Indeed, pursuant to Rule 84, the Trial Chamber shall ‘make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence’. To

³⁷ Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled ‘Reasons for the Order on Translation of Witness Statements (ICC-02/05-03/09-199) and Additional Instructions on Translation’, *Banda and Jerbo, Situation in Darfur, Sudan*, ICC-02/05-03/09-295, AC, ICC, 17 February 2012, para. 23.

³⁸ Ibid., paras 26–8. This, of course, does not give the Prosecutor a right to withhold such a written statement if it in fact exists.

³⁹ See e.g. Decision on the ‘Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)’, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1336, TC II, ICC, 27 July 2009, paras 10–13.

⁴⁰ This is based on the authors’ personal experience.

avoid any delays to the start of the trial, ‘any such orders shall include strict time limits which shall be kept under review by the Trial Chamber’.

Rule 84 recognizes that disclosure is a continuing process. In this regard, the Appeals Chamber determined that the Prosecution is allowed to carry on investigating after the confirmation hearing and disclose any new evidence obtained.⁴¹ The Appeals Chamber nonetheless held that, ‘ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing’.⁴² It seems that perhaps firmer injunctions are needed to ensure that the prosecution starts taking its pre-trial disclosure obligations and pre-confirmation investigation responsibilities more seriously. Timely disclosure of the ‘meat’ of the Prosecution’s case should be the norm, not the exception. Regrettably, it seems that the prevailing norm is that the evidence most directly implicating a suspect is the very last to be disclosed to the Defence, usually no earlier than 30 days before the confirmation of charges hearing itself. It also seems that investigations conducted by the prosecution post-confirmation may render largely redundant investigations conducted by the defence pre-confirmation. This is because the case at trial can be based upon significantly new witnesses, whose accounts were never disclosed—never mind confronted and challenged by the defence—at the confirmation stage.⁴³

It goes without saying that the Defence suffers real prejudice from this shift in approach as a result of inadequate preparation time. It also means it has wasted considerable time and resources in preparing for the confirmation hearing and challenging evidence which will not be relied upon in the ultimate determination of the guilt or innocence of the accused persons.

The trial commencement dates of the *Kenya I* and *Kenya II* trials have been vacated numerous times because of late disclosure and new evidence on the eve of trial. In its last decision postponing the commencement of the *Kenya I* trial, the Chamber said it was ‘deeply concerned by both the significant volume of late disclosure in this case and the fact that at this late date, additional evidence still remains to be disclosed to the Defence’.⁴⁴ The Chamber recalled its previous decision postponing the earlier trial date, in which it found that ‘the disclosure of a large amount of materials close to

⁴¹ Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-568, AC, ICC, 13 October 2006, paras 49–57.

⁴² *Ibid.*, para. 54.

⁴³ Public Redacted Version of ‘Defence Application pursuant to Art 64(4) for an order to refer back to Pre-Trial Chamber II or a Judge of the Pre-Trial Division the Preliminary issue of the Validity of the Decision on the Confirmation of Charges or for an order striking out new facts alleged in the Prosecution’s Pre-Trial Brief and Request for an extension of the page limit pursuant to Regulation 37(2)’, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-628-Red, Defence for Francis Kirimi Muthaura, 7 February 2013, para. 1 (“The Pre-Trial Brief is based upon new and untested evidence obtained by the Office of the Prosecutor (“OTP”) post-confirmation. In tandem with this “new evidence”, the Pre-Trial Brief sees the OTP jettisoning much of its “core evidence” relied upon at the confirmation stage. On any view, the case now advanced by the OTP has undergone a metamorphosis from that confirmed by the PTC in January 2012”).

⁴⁴ Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-762, TC V(A), ICC, 3 June 2013, para. 90.

the scheduled commencement date of trial puts a significant burden on the Defence's preparation' and 'the Defence was in a position to start conducting its investigations relating to a significant part of the disclosed material only recently and for some of it the Defence is still unable to investigate'.⁴⁵

Thus, the pattern of significantly delayed disclosure continues at the trial stage. Even after the start of the trial, the Prosecutor may apply to add newly discovered incriminating evidence to its list even though the deadline to disclose all incriminating evidence on which the prosecutor intends to rely at trial has long passed. The Chamber will in principle allow late submission of evidence, but only if a timely and sufficiently motivated application for an extension of the time limit pursuant to Regulation 35(2) of the Regulations of the Court has been made.⁴⁶ This Regulation requires the prosecutor to demonstrate the existence of "exceptional circumstances", such as incapacitating illness, to demonstrate that there is a "reason outside his/her control".⁴⁷

In the *Katanga and Ngudjolo* case, the Chamber held that 'a persistent shortage of resources, let alone the fact that transcribing and translating video material is especially time consuming, cannot be considered as an "exceptional circumstance"'.⁴⁸ Indeed, the Chamber emphasized that, for the prosecution to be allowed to disclose newly discovered incriminating evidence after the deadline:

[i]t must convince the Chamber of the significance and relevance of the newly discovered evidence and the need for the Chamber to consider it in the interest of having a better understanding of the case and the establishment of the truth. It does not suffice, in this regard, for the Prosecution simply to argue that the evidence is new. Instead, the Prosecution must either show that the new evidence is more compelling than evidence already disclosed to the Defence, or that it brings to light previously unknown facts which have a significant bearing upon the case.

An additional condition for admissibility of new evidence, not previously disclosed, is that the 'late addition will not cause undue prejudice to the Defence in relation to the latter's right to have adequate time and facilities to prepare in accordance with article 67(1)(b) of the Statute'.⁴⁹ This has, however, barely prevented Chambers from

⁴⁵ Ibid., para. 90, citing Decision concerning the start date of trial, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-642, TC V, ICC, paras 13 and 15. See also Transcript of Status Conference, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-T-22-ENG ET WT, TC V, ICC, 14 February 2013, 18, lines 23–5 and 25, lines 18–25; Order Concerning the Start Date of Trial, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-677, TC V, ICC, 7 March 2013, para. 10.

⁴⁶ Decision on Prosecution requests ICC-01/04-01/07-1386 and ICC-01/04-01/07-1407 made pursuant to Regulation 35 of the Regulations, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1552, TC II, ICC, 23 October 2009, para. 14. See also Decision on Prosecution requests ICC-01/04-01/07-1726-Conf-Exp and ICC-01/04-01/07-1738-Conf-Exp made pursuant to Regulation 35 of the Regulations, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1869, TC II, ICC, 15 February 2010, para. 12.

⁴⁷ Decision on the 'Prosecution's Urgent Application to be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)', *Katanga and Ngudjolo* (n 39) para. 7.

⁴⁸ Ibid.

⁴⁹ Decision on Prosecution requests ICC-01/04-01/07-1386 and ICC-01/04-01/07-1407, *Katanga and Ngudjolo* (n 46) para. 14.

granting requests for late disclosure of evidence obtained after the commencement of the trial.⁵⁰

Accordingly, neither the Rome Statute nor the Rules of Procedure and Evidence impose a final disclosure deadline. Rather, it is for the Trial Chamber to set time limits, and allow them to be extended *post facto*, provided any ruling on disclosure or late disclosure is consistent with the Chamber's obligation to ensure the fairness and expeditiousness of the trial pursuant to Article 64(2). On the one hand, it is appropriate to allow for a level of flexibility, given that each case is different and has different demands. On the other hand, each case before the ICC is voluminous and highly demanding in light of the complexity of any charge of crimes against humanity, war crimes, or genocide. In light of these minimum complexities all cases have in common, and the frequency of late disclosure of incriminating information, inclusion of a final deadline applicable to all trials in the ICC Rules themselves would be warranted. This final deadline should be extended only in highly exceptional circumstances, and not with the same ease as such extensions are presently granted.

41.4 Information which is Exculpatory or Assists the Defence

In addition to incriminating material, the defence is entitled to disclosure, as soon as practicable, of evidence in the prosecutor's possession or control, which in her belief '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' (Article 67(2) of the Rome Statute). The ad hoc tribunals have referred to the duty of the Prosecutor to disclose exculpatory information as equally important as the duty to prosecute.⁵¹ Indeed, it has been emphasized that the prosecutor is like a minister of 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'.⁵² In light of the importance attached to the prosecutor's duty to disclose both incriminating and exonerating evidence, it is revealing that, as Professor Alex Whiting confirms, '[d]isclosure will be often viewed as a secondary obligation of prosecutors and investigators'.⁵³

In case of doubt relating to the exculpatory nature of the information, the Prosecutor may request an *ex parte* hearing before the judges, under Rule 83,⁵⁴ who will then

⁵⁰ See e.g. *ibid.*; Decision on Prosecution requests ICC-01/04-01/07-1726-Conf-Exp and ICC-01/04-01/07-1738-Conf-Exp, *Katanga and Ngudjolo* (n 46). See also Decision concerning the start date of trial, *Ruto and Sang* (n 45).

⁵¹ Decision on Motions to Extend for Filing Appellant's Briefs, *Kordić and Čerkez*, IT-95-14/2, TC, ICTY, 11 May 2001, para. 14; Judgment, *Kordić and Čerkez*, IT-95-14/2-A, AC, ICTY, 17 December 2004, paras 183 and 242; Judgment, *Blaškić*, IT-95-14-A, AC, ICTY, 29 July, 2004, para. 264; Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, *Karemera et al.*, ICTR-98-44-AR73.7, AC, ICTR, 30 June 2006, para. 9.

⁵² Decision on Communication between the Parties and their Witnesses, *Kupreškić et al.*, IT-95-16, TC, ICTY, 21 September 1998, para. (ii).

⁵³ See Whiting, Chapter 40, this volume.

⁵⁴ See Decision on Art 54(3)(e) Documents, *Katanga and Ngudjolo* (n 6) para. 2, explaining why such hearings are necessarily *ex parte*:

The rationale behind the *ex parte* nature of rule 83 is that the subject matter of such hearings is to determine whether the Defence should have access to some specific materials. The presence

decide whether the material in question is exculpatory and must be disclosed without undue delay.

The Prosecutor's obligation to disclose exonerating information is a continued obligation and a distinction is no longer made between the confirmation and trial stages. The Single Judge in the *Katanga and Ngudjolo* case held that, at the confirmation stage, it suffices for the prosecution to disclose the bulk of exonerating information within its possession or control.⁵⁵ Subsequent Pre-Trial Chambers have, however, taken a different—and, it is submitted, better—view and considered that there is no legal or practical reason as to why the prosecution would be unable to comply with its duty to disclose all exculpatory and relevant materials in its possession prior to the confirmation hearing.⁵⁶ However, the consequences of breaches of this obligation may be more severe when they occur closer, or in the course of trial, than during the confirmation stage.⁵⁷

Late disclosure of exonerating evidence to the defence is unfortunately rather prevalent and perhaps far too easily accepted as 'par for the course' in criminal trials. In practice, this is so even if no good cause for the delay has been shown in accordance with Regulation 35(2), provided that the Defence is given adequate time and facilities to analyse the late disclosure material.⁵⁸ This is because, on balance, it is in the interest of the defence to receive the material, even if served rather late in the day—and often after the trial has actually commenced.⁵⁹

Further, pursuant to Rule 77, the Defence is entitled to inspect 'any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, or were obtained from or belonged to the person'.

Rule 77 potentially has a wider ambit than Article 67(2), but is also more difficult to define. The Appeals Chamber held that the Prosecutor's obligation to make available to the Defence any information that is material to the defence preparation must be construed broadly so as to include 'all objects that are relevant for the preparation

of the Defence at this type of hearing would, in principle, defeat its very purpose because: (i) the Prosecution would be prevented from going into the details of the relevant materials, which have not yet been disclosed to the Defence; and (ii) the Defence would not be in a position to make meaningful submissions as it does not have access to such materials.

⁵⁵ This principle was referred to as the 'bulk' rule. See Decision on Art 54(3)(e) Documents, *Katanga and Ngudjolo* (n 6) paras 8, 45, and 109–18.

⁵⁶ Decision on the 'Prosecution's Application for Leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (ICC-01/09-01/11-44)', *Ruto, Henry and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-74, PTC II, ICC, 2 May 2011, paras 24–8.

⁵⁷ See Decision on Art 54(3)(e) Documents, *Katanga and Ngudjolo* (n 6) paras 8, 65–6, 70, and 124–5.

⁵⁸ Decision on the 'Prosecution's Urgent Application to be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)', *Katanga and Ngudjolo* (n 39) para. 29; Decision on the Prosecutor's request for late disclosure of exculpatory evidence (Witness P-387) (ICC-01/04-01/07-1296), *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1423, TC II, ICC, 25 August 2009, para. 10.

⁵⁹ Decision on the Prosecutor's request for late disclosure of exculpatory evidence (Witness P-387) (ICC-01/04-01/07-1296), *Katanga and Ngudjolo* (n 58) para. 9.

of the defence', irrespective of whether they are 'directly linked to incriminating or exonerating evidence'.⁶⁰ This interpretation has been derived from that given to 'material to the preparation of the defence' in the ICTY, namely material that is 'significantly helpful to an understanding of important inculpatory or exculpatory evidence; it is material if there is a strong indication that...it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal'.⁶¹ In a more recent case, the Appeals Chamber has held that the Defence needs to only establish *prima facie* relevance under Rule 77 and 'this places a low burden on the defence'.⁶²

Some may argue that this definition is 'too broad' because it may not be fair to blame the prosecution for failing to comply with its Rule 77 obligation when the defence is merely 'shopping for ideas'.⁶³ The authors respectfully disagree. It must, by necessity, be an open and flexible definition, as information can be 'material to the preparation of the defence' in a variety of ways—even if not immediately evident, or explicitly anticipated at the outset of proceedings. It is important that the Defence is given access to such material without placing unnecessary limitations, in order to 'neutralize any potential advantage to the Prosecutor over the defence' by virtue of her greater access to key information.⁶⁴ The ICTY definition, which is similar to the ICC definition, has been cited with approval by Senior Appeals Counsel at the ICTY.⁶⁵

The definition is wide enough to include any material which helps the Defence understand the context of the events, to understand certain aspects of the conflict, or to prepare submissions on sentencing issues.⁶⁶ Rule 77 material also includes any information relating to benefits enjoyed by the prosecution witnesses, including whether they have

⁶⁰ Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1433, AC, ICC, 11 July 2008, paras 77–8.

⁶¹ Decision on the motion by the accused Zejnil Delalić for the disclosure of evidence, *Delalić et al.*, IT-96-21-T, TC, ICTY, 26 September 1996.

⁶² Judgment on the Appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the Decision of Trial Chamber IV of 23 January 2013 entitled 'Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor', *Banda and Jerbo, Situation in Darfur, Sudan*, ICC-02/05-03/09-501, AC, ICC, 28 August 2013, para. 42.

⁶³ A Mura Muiruri, 'Disclosure of Evidence at the International Criminal Court: Taking Stock of Debates and Lessons Learnt', LLM Thesis Leiden University (16 July 2012) 18. See also Whiting, Chapter 40, this volume.

⁶⁴ Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 entitled 'Decision on the Modalities of Victim Participation at Trial', *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-2288, AC, ICC, 16 July 2010, fn. 125, citing the United Nations General Assembly, 'Draft Report of the Preparatory Committee', A/AC.249/L.15 (23 August 1996) 14.

⁶⁵ H Brady, 'Disclosure of Evidence' in R Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers 2001) 403, 411. See, however, the views of Professor Whiting in this volume. Professor Whiting states that, in determining that 'all objects that are relevant for the preparation of the defence' should be disclosed to the Defence pursuant to Rule 77, the ICC Appeals Chamber 'broadened considerably the scope of disclosure required by Rule 77' by comparison with the ICTY standard (Whiting, Chapter 40, this volume). With respect, we do not agree with that view, given that Rule 77 requires disclosable material to be relevant to the preparation of the Defence. Rule 77, therefore, does not cover all 'relevant' information without any qualification, as suggested by Professor Whiting, Chapter 40, this volume.

⁶⁶ Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, *Lubanga* (n 60) para. 82.

been relocated. Another limitation is that—though the prosecutor must disclose all information relating to the benefits enjoyed by the witness—the VWU has no such duty. It is, however, the VWU which covers most expenses for witnesses, in particular for those who are within the VWU's witness protection and support programme.⁶⁷

This was confirmed by a recent oral ruling in the *Kenya I* case on a defence request for disclosure from the VWU of all expenses made by the VWU for the purposes of relocation, maintenance, and/or support of the upcoming witnesses. The Chamber denied the request on the following ground:

In the Chamber's view, the probative value of granting the request... is outweighed by both the considerations of prejudice and efficiency, not only in relation to the witness but also the operations of the Victims and Witnesses Unit and the administration of justice in general. Witnesses who come to testify, it is presumed, will have to have sustenance in their lives, whether it is afforded to them on their own or through the instrumentality of the Victims and Witnesses Unit. It therefore does not afford a *prima facie* [indictum] of credibility that the Victims and Witnesses Unit has undertaken those reasonable tasks of providing reasonable support and maintenance to a witness rather than the witness doing it themselves.⁶⁸

The Chamber also agreed with the Prosecution and VWU that the latter 'is an independent unit tasked with making independent judgements on what is appropriate, in terms of costs to be expended on witnesses' sustenance or maintenance, witnesses that are within their care, and as such, all efforts are made to ensure that those costs are reasonable and not inordinate'.⁶⁹

Leave to appeal was denied,⁷⁰ and non-disclosure of such information by the VWU remains the practice to date. This has created a rather unfortunate situation for the defence. It makes no difference to the Defence which unit of the ICC provides support to a witness. What matters is that the witness benefits from testifying, which may be an inducement for a witness to give false testimony. Alternatively, it may be entirely benign and appropriate. However, it can hardly be denied that 'if the assistance places a witness or his or her family members in significantly improved material circumstances as compared to those prior to the VWU's intervention, it may *prima facie* impact on the credibility of the witness's evidence'.⁷¹

Indeed, in the eastern parts of the DRC, relocation and all the benefits that come with it was undoubtedly one of the tools which contributed to an emerging culture

⁶⁷ Urgent Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Art 67(2) of the Statute and Rule 77 of the Rules, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-428-Corr, PTC I, ICC, 25 April 2008.

⁶⁸ Transcript of hearing of 28 October 2013, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-T-60-RED-ENG, TC V(A), ICC, 44.

⁶⁹ *Ibid.*, 43, lines 24 to 44, line 4.

⁷⁰ Decision on Defence Applications for Leave to Appeal the Decision on Disclosure of Information on VWU Assistance, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1154, TC V(A), ICC, 21 January 2014.

⁷¹ Defence Application for Leave to Appeal the Trial Chamber's Oral Decision of 28 October 2013 on the Defence's request for disclosure of all costs expended by the VWU for relocation, maintenance and support of Witness P-268, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1080, Defence for Mr William Samoei Ruto, 4 November 2013, para. 22.

of corruption of the evidence in that part of the world.⁷² A significant number of witnesses in the *Lubanga* and *Katanga and Ngudjolo* cases alleged that part of their motive for giving false statements and testimony was that the intermediary who contacted them promised them money, education, and free re-housing.⁷³ For instance, relocated witness P-28 stated in the *Katanga and Ngudjolo* trial:

I will say this gentleman raised my hopes. He said this was something very confidential and that no one would get to know about it. That is what he said. However, nothing was made up with respect to the events that took place in Bogoro. I do confirm that with respect to that statement, the statement about schooling was made up by number 14. No, it is false.⁷⁴

Even Bernard Lavigne, a French magistrate who led the first investigative team in the case of *Lubanga*, acknowledged that the news went around in Bunia that a witness who claimed to have safety concerns may be relocated by the ICC, and that some persons saw this as an opportunity to secure free re-housing.⁷⁵ Most ironically, the intermediaries who have been the subject of severe criticism for corrupting witnesses have all been relocated.⁷⁶ The benefits accruing to them have not changed even after the judges in *Lubanga* suggested that the prosecutor should consider prosecuting these intermediaries under Article 70 of the Rome Statute.⁷⁷

These are not trivial matters. These examples demonstrate how essential it is for the Defence to explore such matters with the witnesses. Rewarding witnesses for their cooperation, even if inadvertently, has the potential to lead to corruption or otherwise infect the trial process. If there is nothing untoward in such payments, the question remains, why not disclose the payments and benefits received by witnesses?

In addition, until recently, there was a total lack of transparency about the nature of the relationship between the Prosecution and its intermediaries. No information about their payment, contract, or job description was disclosed to the defence.⁷⁸ Nonetheless, this information became particularly relevant when it became known that some intermediaries were suspected, including by the Prosecution's own investigators, of inventing financial claims as well as security threats to maximize economic and other support from the ICC.⁷⁹

⁷² See further C Buisman, 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (2013) 11 *Northwestern Journal of International Human Rights* 30, 60–1.

⁷³ Judgment Pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TCI, ICC, 14 March 2012, para. 293; Redacted Decision on Intermediaries, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2434-Red2, TC I, ICC, 31 May, 2010, paras 140 and 146; Second Corrigendum to the Defence Closing Brief, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3266-Corr2-Red, Defence for Mr Germain Katanga, 29 June 2012, paras 487, 488, 492, and 509–10 ('Katanga Defence Closing Brief').

⁷⁴ Transcript of hearing of 23 November 2010, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-T-221-Red, 39–40.

⁷⁵ Judgment Pursuant to Art 74 of the Statute, *Lubanga* (n 73) para. 147 (citing Lavigne Deposition).

⁷⁶ Katanga Defence Closing Brief (n 73) paras 484, 500, and 504.

⁷⁷ Judgment hearing, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-T-359-ENG, TC I, ICC, 14 March 2012, 5, lines 22 to 26, line 4.

⁷⁸ Katanga Defence Closing Brief (n 73) para. 476.

⁷⁹ Judgment Pursuant to Art 74 of the Statute, *Lubanga* (n 73) paras 289 and 371; Katanga Defence Closing Brief (n 73) paras 503–4. See also Buisman, 'Delegating Investigations' (n 72).

In the *Kenya I* case, the judges went further. Although a request for the disclosure of the identities of all intermediaries was rejected,⁸⁰ the Chamber accepted that the following information concerning intermediaries was material to the Defence, and thus disclosable pursuant to Rule 77:

- a list of all intermediaries (identified by pseudonym) who had contact with witnesses and indicating which witness they had contact with;⁸¹
- the general purpose, or purposes, for contact with a witness;⁸²
- dates of contact between an intermediary and witness;⁸³
- payments, benefits, or assistance (including non-financial assistance) provided to a witness because of their status as a witness;⁸⁴
- copies of receipts, but not the entity making the disbursement.⁸⁵

The Chamber rejected related requests for the disclosure of locations of meetings between intermediaries and witnesses;⁸⁶ topics discussed;⁸⁷ and copies of all correspondence between the prosecution and its intermediaries.⁸⁸ In respect of these requests, the Chamber held that the Defence had not provided sufficient detail as to their materiality to the defence.⁸⁹

It is also worth mentioning that the Chamber accepted a broad definition of ‘intermediary’, agreed by both parties,⁹⁰ namely:

any individual (whether acting in an individual capacity or on behalf of an organisation, agency or State) other than VWU staff members: (a) through whom initial contact was made on behalf of the Prosecution with any Prosecution trial witness; (b) who has had any contact (directly or indirectly) with any Prosecution trial witness at the request of the Prosecution; (c) [REDACTED].⁹¹

The chamber rejected, as overly broad,⁹² however, the proposition that intermediaries would include anyone ‘who has provided benefits, support, or assistance to a prosecution trial witness at any time—knowing or believing such individual to be either a prosecution trial witness for the Kenya Situation [REDACTED]’.⁹³ The Prosecution sought leave to appeal this decision, which was denied.⁹⁴

This represents a real improvement to the situation that previously prevailed. However, given that intermediaries still play a significant role in conducting investigations for the Prosecution and potentially play an influential role vis-à-vis prosecution witnesses, it would only be fair to disclose their identities to the Defence. Transparency in investigations is key, in particular when operating in countries where

⁸⁰ Decision on Disclosure of Information related to Prosecution Intermediaries, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-904-Red, TC V(A), ICC, 4 September 2013, para. 47.

⁸¹ Ibid., para. 49.

⁸² Ibid., para. 50.

⁸³ Ibid., para. 52.

⁸⁴ Ibid., para. 61.

⁸⁵ Ibid., para. 62.

⁸⁶ Ibid., para. 54.

⁸⁷ Ibid., para. 57.

⁸⁸ Ibid., para. 65.

⁸⁹ Ibid., para. 65.

⁹⁰ Ibid., para. 36.

⁹¹ Ibid., para. 35.

⁹² Ibid., paras 38–40.

⁹³ Ibid., para. 35.

⁹⁴ Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Disclosure of Information related to Prosecution Intermediaries’, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1018-Red, TC V(A), ICC, 8 October 2013.

many different interest groups appear to be active in seeking to influence the evidence which will eventually be presented to the court by either party.

41.4.1 Disclosure demands for strategic purposes?

Our esteemed colleague, Professor Whiting, suggests in his chapter that defence counsel may have a proclivity to complain about disclosure violations for tactical reasons. As an example, he refers to the *Karadžić* case, arguing that '[i]t can be inferred from the frequency and nature of the legal adviser's motions that they are designed primarily for their publicity value, with little expectation that they will succeed in court'.⁹⁵ A careful review of what transpired paints a somewhat different picture. Whilst it is correct that the Defence filed 92 motions alleging disclosure violations and consequent prejudice to the Defence, 73 of them were granted in part, finding that the Prosecution indeed violated its disclosure obligation, which 'reflect[s] badly on the Prosecution's disclosure practices'.⁹⁶ Most of them were nonetheless rejected because of lack of prejudice to the defence, either because the defence had received the disclosure material in time to make use of it, or it was cumulative to material already disclosed.⁹⁷

It may, of course, be that the accused filed such a high number of disclosure motions for strategic reasons, which would be fine if these reasons were valid and consistent with the applicable codes of deontology. For example, it may be the case that while each individual violation in and of itself may not prejudice the defence, the cumulative prejudice of such violations may be significant. In the *Karadžić* case, the numbers are revealing. The Prosecution failed to disclose 424 statements of its own witnesses in a timely fashion; this number represents an astonishing 25% of the total amount of statements in this case.⁹⁸ In addition, approximately 335,000 pages of exculpatory material appear to have been served tardily upon the Defence.⁹⁹ In a situation where disclosure violations have been so excessive, the accused may have had an obvious interest in documenting these violations in a systematic manner irrespective of the chances of

⁹⁵ Whiting, Chapter 40, this volume.

⁹⁶ Decision on Accused's Second Motion for New Trial for Disclosure Violations, *Karadžić*, IT-95-5/18-T, TC, ICTY, 14 August 2014, para. 15. See also Decision on Accused's Motion for a New Trial for Disclosure Violations, *Karadžić*, IT-95-5/18-T, TC, ICTY, 3 September 2012, para. 14. For the numbers (which appear not to be in dispute), see Second Motion for New Trial for Disclosure Violations, *Karadžić*, IT-95-5/18-T, Radovan Karadžić, 30 July 2014, para. 5.

⁹⁷ Decision on Accused's Second Motion, *Karadžić* (n 96) paras 11–17; Decision on Accused's Motion, *Karadžić* (n 96) para. 14.

⁹⁸ Second Motion for New Trial for Disclosure Violations, *Karadžić* (n 96) para. 5. Though the prosecution does not agree with all the figures raised by the accused (at para. 5 of its Response, the prosecution states that the accused exaggerates the number of Rule 68 violations during the defence case), it has not contested the number of prosecution witness statements disclosed late. See Prosecution Response to 'Second Motion for New Trial for Disclosure Violations', *Karadžić*, IT-95-5/18-T, OTP, ICTY, 7 August 2014.

⁹⁹ Second Motion for New Trial for Disclosure Violations, *Karadžić* (n 96) paras 3 and 5. The prosecution does not dispute the number of pages cited by the accused as being disclosed after the start of the trial, but it disputes that all disclosure after the start of the trial date amounts to late disclosure. See Prosecution Response to Motion for New Trial for Disclosure Violations, *Karadžić*, IT-95-5/18-T, OTP, ICTY, 27 August 2012, fn. 10. The Chamber has not explicitly ruled on this dispute, because it had already ruled on each disclosure motion separately. See Decision on Accused's Second Motion, *Karadžić* (n 96); Decision on Accused's Motion, *Karadžić* (n 96).

winning each individual complaint. The picture that such disclosure violations and disclosure related complaints portray would be of obvious importance to the Defence, since it impacts upon defence work and upon its ability to counter a Prosecution narrative and marshal its own case properly. In addition, public filings, seeking relief from the Chamber and highlighting any alleged systemic weaknesses in the prosecution, may be an efficient means to ensure remedial steps are taken and safeguards put in place to prevent such repeat breaches or inadequacies in the Prosecution's conduct of the case in the future. It is trite to say that sometimes arguments by the Defence may be poorly grounded and bothersome to the Prosecution; others will be compelling. If disclosure-related complaints are taken a little more seriously by the Prosecution with a view to how it can improve and ensure such disclosure breaches or shortcomings do not occur in the future, they would provide occasion for the Prosecution to put in place a system that will enable it to more readily discharge its statutory obligations.

41.5 Exemptions from Disclosure Obligations

41.5.1 Redactions

The Prosecutor's obligation to disclose both incriminating and exonerating materials is subject to limitations. Internal work documents are not subject to disclosure.¹⁰⁰ In addition, the prosecutor can apply to the Pre-Trial or Trial Chamber to be exempted from her duty to disclose materials to the defence on any of the grounds set forth in Rule 81(2) and (4). Under these provisions, such requests may be granted where disclosure prejudices further or ongoing investigations,¹⁰¹ or where disclosure would jeopardize the safety and security of victims or witnesses, or members of their families.¹⁰²

Non-disclosure to the Defence of relevant information, including identifying details of witnesses and their family members, can be authorized under these rules, but supposedly only on an exceptional basis. The Appeals Chamber referred to non-disclosure to the Defence as a measure of last resort, which must be balanced with the rights of the defendant. The 'overriding principle is that full disclosure should be made'.¹⁰³ Accordingly, protective measures may be granted, but not before exhausting the possibility of employing less extreme measures (principle of necessity). Protective measures must also be strictly limited to the exigencies of the situation (principle of proportionality), and not infringe the rights of the Defence.¹⁰⁴ More concretely, the Chamber

¹⁰⁰ See Rule 81(1) Rules of Procedure and Evidence.

¹⁰¹ See Rule 81(2) Rules of Procedure and Evidence.

¹⁰² See Rule 81(4) Rules of Procedure and Evidence. See Whiting, Chapter 40, this volume, for a more elaborate analysis of the exemptions from disclosure obligations including internal documents under Rule 81(1), confidential agreements under Art 54(3)(e) and national security under Art 72. Lack of space required the authors to focus only on the disclosure exemptions most frequently applied.

¹⁰³ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-475, AC, ICC, 13 May 2008, para. 63 ('Katanga Appeals Judgment on the First Decision on Redactions').

¹⁰⁴ Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-108-Corr, PTC I, ICC, 26 May 2006; Decision on the Final System of Disclosure

must determine on a case-by-case basis whether the disclosure of the person's identity generates an objectively justified security risk; whether less restrictive protective measures are reasonably available; and whether non-disclosure gravely prejudices the defence.¹⁰⁵ General security problems in the region alone do not justify redactions from the Defence.¹⁰⁶ For this, it must be shown that such security problems are prompted by the defendant.¹⁰⁷

In practice, however, this exceptional measure is routinely applied. Particularly by comparison with the ad hoc tribunals, the ICC has adopted a permissive approach in authorizing redactions from the public and defence, not infrequently on a permanent basis.¹⁰⁸ However, the Appeals Chamber held that 'non-disclosure must be kept under review and altered should changed circumstances make that appropriate'.¹⁰⁹

and the Establishment of a Timetable, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-102, PTC I, ICC, 15 May 2006; Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-773, AC, ICC, 14 December 2006, para. 34 (the Chamber must assess whether the redactions are 'prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial') ('Lubanga Appeals Judgment on the First Decision on Rule 81 Redactions').

¹⁰⁵ *Katanga Appeals Judgment on the First Decision on Redactions* (n 103) paras 59, 60, and 71–2; *Decision on the Defence Request to Redact the Identity Source of DRC-D03-0001-0707, Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3122, TC II, ICC, 22 August 2011, 5–7. See also *Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence'*, *Lubanga* (n 41) paras 36–7.

¹⁰⁶ *Lubanga Appeals Judgment on the First Decision on Rule 81 Redactions* (n 104) para. 21; *Public Redacted Version of the Decision on the Prosecutor's Application to Redact Information Falling under Art 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence (Witnesses 6, 83, 102, and 221) of 18 May 2009* (ICC-01/04-01/07-1145-Conf-Exp), *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1396-tENG, TC II, ICC, 23 December 2009, para. 9.

¹⁰⁷ *Katanga Appeals Judgment on the First Decision on Redactions* (n 103) para. 71.

¹⁰⁸ *Ibid.*, para. 63; *Public Redacted Version of the Decision on the Prosecutor's Application to Redact Information in the Second Statement of Prosecution Witness 249 of 18 May 2009* (ICC-01/04-01/07-1149-Conf-Exp), *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1395-Corr-tENG, TC II, ICC, 13 January 2010, para. 27; *Decision on the Prosecutor's Application to Redact Information under Art 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence* (ICC-01/04-01/07-971-Conf-Exp), *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1096-tENG, TC II, ICC, 18 November 2009, paras 26–7; *Decision on the Prosecutor's Application to Redact Information and to Maintain and Reinstate Redacted Passages in Certain Documents under Rule 77 of the Rules of Procedure and Evidence (Witnesses 26, 36, 158, and 180)* (ICC-01/04-01/07-981-Conf), *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1097-tENG, TC II, ICC, 18 November 2009, para. 21. See also *Decision on the Defence Request to Redact the Identity Source of DRC-D03-0001-0707* (n 105) 9, where the permanent redaction of a defence source was authorized for the first time in international justice. See, however, *Decision on the Prosecutor's Application to Redact Information from Certain Evidence under Art 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence* (ICC-01/04-01/07-957), *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1098-tENG, TC II, ICC, 30 December 2009, paras 13–18; *Decision on the Prosecutor's Application to Redact Information under Art 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence* (ICC-01/04-01/07-934), *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1101-tENG, TC II, ICC, 5 May 2009.

¹⁰⁹ *Katanga Appeals Judgment on the First Decision on Redactions* (n 103) paras 63 and 73; *Decision on the Prosecutor's Application to Redact Information Falling under Art 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence (Witnesses 6, 83, 102, and 221)*, *Katanga and Ngudjolo* (n 106) para. 4.

These provisions have been given a rather broad interpretation and allow the Prosecution to withhold the identities of most prosecution witnesses from the defence until shortly before the trial begins, and sometimes even later. As mentioned previously in this chapter, the identities of prosecution witnesses are rarely disclosed to the Defence or to the public at the confirmation stage.¹¹⁰ The Defence has a right, however, to know the identities of such witnesses prior to their testimonies at trial.¹¹¹

On the basis of these provisions, the Prosecution has been allowed to redact any identifying information, not only of witnesses, but also any members of their families, ‘innocent third parties’,¹¹² ‘potential witnesses’,¹¹³ or ‘others at risk on account of the activities of the Court’.¹¹⁴ These categories are wide and have allowed the Prosecution to redact identifying information of a large number of individuals. Accordingly, much of the evidence disclosed is heavily redacted and, thus, unintelligible because a great deal of related material is also redacted to prevent the persons whose protection is sought from being identified through indirect channels.¹¹⁵ Not infrequently, the result of such heavy redactions is that entire pages are blacked out. Not only does this render any proper analysis of the disclosed materials practically impossible, it also impacts on the Defence’s ability to adequately investigate. Indeed, whether as ‘innocent third party’, ‘potential witness’, ‘prosecution source’, or a person ‘at risk on account of the activities of the Court’, identifying information of any individual who has ever spoken to the prosecution, a prosecution witness, or a potential witness may be withheld from the defence. It is suggested that the redaction of such information from the defence needs to be approached with more circumspection. It is the view of the authors that simply too much material is redacted by the prosecution and too few justifications are given supporting such redactions.

The *Banda and Jerbo* case illustrates the genuine difficulties for the Defence that arise from this wide interpretation of Rule 81(2) and (4).¹¹⁶ In this case, all identifying details of persons who were present inside the AU base in Darfur in the period immediately prior to the attack on the base, which constitutes the core charge against the suspects, were withheld from the Defence for more than two years after the main disclosure was served. The information was highly relevant to the Defence, given its clear interest in speaking to the persons whose identifying details were withheld; the disclosure was only given to the Defence after several months’ effort was expended by the

¹¹⁰ Arts 61(5) and 68(5) Rome Statute of the ICC (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

¹¹¹ Such disclosure should be made as soon as is practicable. It appears that the latest that disclosure of the identity of witnesses has been authorized—upon exceptional circumstances being shown—has been 30 days before the date of anticipated testimony. This has been the experience of one of the authors in the *Katanga and Ngudjolo* case.

¹¹² *Katanga Appeals Judgment on the First Decision on Redactions* (n 103) para. 54.

¹¹³ Judgment on the appeal of Mr Germain Katanga against the Decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-476, AC, ICC, 13 May 2008.

¹¹⁴ *Katanga Appeals Judgment on the First Decision on Redactions* (n 103) para. 54.

¹¹⁵ See e.g. Transcript of Status Conference, *Muthaura and Kenyatta* (n 45) 25, lines 4-12.

¹¹⁶ See also Khan and Shah (n 10) 206–8.

Defence on securing the same.¹¹⁷ This very late disclosure of clearly relevant information seriously jeopardized the Defence's investigations, especially in light of the fact that the Defence had no opportunity to visit the situation country.¹¹⁸ Its opportunities to investigate properly were, thus, extremely limited from the outset, and such unnecessary additional limitations plainly did not help. Therefore, the proportionality test was clearly not applied appropriately in this instance, as the redactions were highly prejudicial to the fair trial rights of the suspects who were deprived of an opportunity to speak to potentially relevant sources.

Other redactions in the same case concerned identities of persons whom a prosecution witness had visited several years before in an area in Darfur which was geographically very remote from the crime scene of the case (an AU base in the town of Haskanita).¹¹⁹ The identities of international journalists and other individuals living outside Sudan have also been withheld from the Defence.¹²⁰ The justification for these redactions was that the persons in question needed protection as 'innocent third parties'.¹²¹ On similar grounds, the identities of two senior officials from an international organization, who had briefly interacted with a prosecution witness in Darfur, were also redacted.¹²²

Arguably, these types of redactions, which occur in every case, are excessive and do not reach the threshold of an 'objectively justifiable risk' to any individual as a result of disclosure to the Defence. The Prosecution and judges do not always realize the extent to which the defence is genuinely prejudiced by excessive redactions. Indeed, late disclosure of important information may require the defence to speak to their potential witnesses or sources again and ask specific questions about such material. This increases the burden on the limited defence investigation budget. But more importantly, witnesses who may have been able to comment on such material may no longer be available once the material has finally been received by the defence. This is particularly a genuine risk in circumstances such as those in the *Banda and Jerbo* case, where any encounter with witnesses must necessarily take place outside of the situation area, requiring witnesses from that area to travel to a third country.¹²³

Non-disclosure of the identities of family members of witnesses can also affect the rights of the Defence, most notably the right to have adequate time and facilities to prepare a defence. To verify the veracity of the testimony of witnesses, speaking to members of their families or persons in their close proximity has proved essential. It is particularly through such persons that the discovery can be made that certain parts of the testimony are not truthful.¹²⁴ Unfortunately, it frequently occurs that the Prosecution does not make

¹¹⁷ This statement is based on the first author's own experience and knowledge. See also *ibid*.

¹¹⁸ Defence Request for a Temporary Stay of Proceedings, *Banda and Jerbo* (n 15).

¹¹⁹ This statement is based on one of the authors' own experience and knowledge. See also Khan and Shah (n 10) 206–8.

¹²⁰ This statement is based on one of the authors' own experience and knowledge.

¹²¹ This statement is based on one of the authors' own experience and knowledge.

¹²² This statement is based on the authors' own experience and knowledge. See also Khan and Shah (n 10) 206–8.

¹²³ Defence Request for a Temporary Stay of Proceedings, *Banda and Jerbo* (n 15) paras 13 and 14.

¹²⁴ Order to the Prosecutor regarding the alleged false testimony of witness P-159, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3223, TC II, ICC, 13 January 2012.

these necessary enquiries. It is then even more important that the Defence be offered an opportunity to do so.

Another area of concern is the protection of sources. In order to safeguard ongoing prosecution investigations, not only witnesses, but also sources can be protected. While the Defence is entitled to receive eventually the identities of all incriminating witnesses, it is more cumbersome to receive the identities of prosecution sources. In some cases, their identities have even been withheld from the defence on a permanent basis.¹²⁵

The term ‘source’ has been interpreted widely. Sources may include persons, as well as organizations who act as intermediaries between the Court and potential witnesses.¹²⁶ The names of staff members of the prosecution, NGOs, or other intermediaries are regularly redacted at least until the start of the trial, if not longer.¹²⁷ By contrast, the ad hocs, particularly the ICTY, have been strict on disclosure of the identities of sources.¹²⁸

Both in the *Lubanga* and the *Ngudjolo and Katanga* cases, the Prosecutor relied excessively on intermediaries whose identities were unknown. The identities of these intermediaries were withheld from the defence for years and largely throughout the trial, notwithstanding various attempts on the part of the defence to have them disclosed;¹²⁹ some have never been disclosed.¹³⁰ The Chambers both in *Lubanga* and in *Ngudjolo and Katanga* ordered disclosure of the identities only of the intermediaries whose credibility was put in question.¹³¹ As a result of this late or non-disclosure of the identities of the intermediaries, the defence was not allowed to ask any questions that may have led to their identification. It was thus frustrated in its efforts to challenge their credibility, and in turn, the credibility of the witnesses introduced by these intermediaries.¹³²

¹²⁵ See, for instance, Decision on the Prosecutor’s Application to Redact Information in the Second Statement of Prosecution Witness 249 of 18 May 2009, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1395-Corr-tENG, TC II, ICC, 13 January 2010, para. 27.

¹²⁶ Decision on the Prosecutor’s Application to Redact Information under Art 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence (ICC-01/04-01/07-934), *Katanga and Ngudjolo* (n 108) paras 25–6.

¹²⁷ See also Decision on Three Prosecutor’s Applications to Maintain Redactions or Reinstate Redacted Passages (ICC-01/04-01/07-859, ICC-01/04-01/07-860, and ICC-01/04-01/07-862), *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1034-tENG, TC II, ICC, 18 November 2009, paras 50–1. The supervisor of investigations in Ituri testified under pseudonym: Transcript of hearing of 25 November 2009, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-T-81-Red-ENG, TC II, ICC.

¹²⁸ Decision on Motions on Behalf of Idriz Balaj and Lahi Brahimaj to Receive Ten Unredacted Witness Statements, *Haradinaj et al.*, IT-04-84-PT, TC II, ICTY, 3 May 2006; Order on Motion to Compel Compliance by the Prosecutor with Rules 66(A) and 68, *Kordić and Čerkez*, IT-95-14/2-PT, TC, ICTY, 26 February 1999; Decision on Fifth Motion by Prosecution for Protective Measures, *Brdanin and Talić*, IT-99-36-PT, TC II, ICTY, 15 November 2000; Decision on Prosecution’s Request for Variation of Third Protective Measures Decision, *Brdanin and Talić*, IT-99-36-PT, TC II, ICTY, 29 November 2000, para. 14.

¹²⁹ See e.g. Public Submissions and Decision, ICC-01/04-01/06-T-312-ENG, *Lubanga, Situation in the Democratic Republic of the Congo*, TC I, ICC, 7 July, 2010, 15–22; Redacted Decision on Intermediaries, *Lubanga* (n 73) paras 5, 6, 15–16, 34, 50, 56, 66–74, 81, 85–7, 112, and 115; Katanga Defence Closing Brief (n 73) para. 473, fn. 609.

¹³⁰ For instance, the identity of intermediary P-310 in the *Katanga and Ngudjolo* case has not been disclosed to the defence. In *Lubanga*, the defence is still unaware of the identities of intermediaries 81, 123, 154, 254, and 290. See Redacted Decision on Intermediaries, *Lubanga* (n 73) paras 139 and 145.

¹³¹ Redacted Decision on Intermediaries, *Lubanga* (n 73) paras 5, 6, 138–9, and 150.

¹³² Katanga Defence Closing Brief (n 73) para. 474.

In the case of one intermediary common to the *Lubanga* and *Katanga and Ngudjolo* cases (P-143), the defence unsuccessfully sought disclosure of his identity on more than one occasion.¹³³ Eventually, when his credibility had become a genuine issue of dispute in the case of *Lubanga*, the *Lubanga* Chamber, followed by the *Katanga and Ngudjolo* Chamber, ordered disclosure of his identity. However, even after an explicit and unambiguous disclosure order was made, the Prosecution refused to comply and disclose the identity of P-143 to the defence. The Prosecution insisted that security concerns prevented it from obeying this court order; in fact, negotiations were still ongoing regarding P-143's protective measures, the implementation of which were delayed by P-143 who wanted more protection and did not want his identity to be disclosed.¹³⁴

It is obviously not for the prosecution to make that ultimate decision and to simply ignore a disclosure order. The Court would have taken all factors, including security concerns, into consideration when it issued its order. Consequently, the Chamber stayed the proceedings on the ground that a fair trial could not be guaranteed if the Prosecutor refused to follow the Court's orders.¹³⁵ The Appeals Chamber overturned this decision considering that alternative, less drastic, measures, including sanctions on the Prosecution, were available to remedy the situation.¹³⁶ Three months after it was ordered to do so, the prosecution disclosed the identity to the defence teams concerned.¹³⁷

It is further suggested that protection of NGOs and prosecution personnel is excessive. Given the nature of their work, they should be expected to show greater fortitude and robustness in a criminal process than ordinary civilians, for example, victim witnesses.¹³⁸ The fact that several NGOs cooperate with the ICC is not in itself a confidential matter, and can easily be ascertained from the respective Internet sites of these NGOs. For example, in an *amicus* brief, submitted in the DRC situation, the Women's Institute for Gender Justice broadcasted to the entire world the fact that it had conducted interviews in the DRC, and transmitted its findings to the ICC prosecutor.¹³⁹

In the ICTY and ICTR context, with the exception of the ICRC, these types of redactions have generally been rejected by Trial Chambers. The defence is usually

¹³³ The defence had obtained this information in the field before the commencement of trial. This is based on one of the authors' own knowledge and experience.

¹³⁴ Public Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2517-Red, TC I, ICC, 8 July 2010, paras 2–17.

¹³⁵ Ibid., para. 31.

¹³⁶ 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 the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2582, AC, ICC, 8 October 2010, paras 45–61.

¹³⁷ On 13 September 2010, almost a year after the start of the trial (24 November 2009) and over three months after the Chamber ordered it to do so (7 June 2010), the OTP finally disclosed P-143's identity to the defence by email. This is based on one of the authors' own experience and knowledge.

¹³⁸ On similar grounds, the ECtHR has held that the protection of the identities of police officers was excessive. See Judgment of 20 November 1989, *Kostovski v The Netherlands*, 1989 ECHR (Ser. A) 166.

¹³⁹ Decision on the Request submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence, *Situation in the Democratic Republic of the Congo*, ICC-01/04-373, PTC I, ICC, 20 August 2007.

entitled to receive the identities of anyone involved in taking witness information, be it investigators, interpreters, prosecution staff members, and/or NGO members;¹⁴⁰ it has not been considered fair that the Defence is denied the opportunity to contest the methodology of the collection of witness statements.¹⁴¹ Given how often witnesses allege that interpreters or investigators have misunderstood them in cases of inconsistencies with their *viva voce* testimonies, it would also be helpful for the Defence to receive disclosure of their names, at least once trial commences and witnesses make such allegations.

Similarly, if redactions ordered pertain to the name of an organization or a person who has transmitted a document to the prosecution, or referred a victim or witness to prosecution investigators, then their identity is crucial to the ability of the Defence to analyse and challenge chain of custody issues, possible collusion, undue influence, as well as the existence of prior statements. Indeed, an efficient investigation commences with enquiries about such persons, which cannot be done unless their identities are known and given to the defence.¹⁴²

Therefore, claims of security concerns should not be accepted on face value. Many allegations of threats from the defendant or an associate have turned out to be false.¹⁴³ For any claims that are true, protective measures can and must be taken. No court can operate where witnesses are in danger; similarly, no witness should be placed at real risk on account of his or her testimony. Where anyone seeks to interfere or threaten a witness, Article 70 of the Rome Statute should be deployed and investigations and prosecutions commenced. No one—whether on the side of the Defence or on the prosecution side (including the gamut of intermediaries that are used)—should feel they may interfere with the administration of justice and get away with it. All that said, it must be remembered that the ICC often operates in less affluent countries. From experience and review of the ratio of failed asylum applications to successful ones, we can confidently state that a significant number of people assert a well-founded fear of persecution to use the 1951 Refugee Convention as a vehicle for economic migration. This is understandable in many ways when one is seeking to escape the poverty, lack of opportunity, and sometimes hopelessness that exist in too

¹⁴⁰ Decision on Ojdanic Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii), *Milutinović et al.*, IT-05-87-T, TC, ICTY, 29 September 2006, para. 14; and Decision on Prosecution Motion for Protective Measures (Concerning a Humanitarian Organisation), *Slobodan Milošević*, IT-02-54-T, TC, ICTY, 1 April 2003.

¹⁴¹ Décision relative à la Requête de la Défense en extreme urgence tenant au respect, par le Procureur, de la ‘Décision relative à la Requête de la Défense en Communication de preuves’ rendue le 1^{er} novembre 2000’, *Nyiramasuhuko et al.*, ICTR-97-21-T, TC II, ICTR, 8 June 2001; Decision on the Prosecutor’s Motion for, *inter alia*, Modification of the Decision of 8 June 2001, *Nyiramasuhuko et al.*, ICTR-97-21-T, TC II, ICTR, 25 September 2001, para. 19; Decision on the Defence Motion for Disclosure of Exculpatory Evidence, Rule 68 of the Rules of Procedure and Evidence, *Nzirorera*, ICTR-98-44-I, TC III, ICTR, 7 October 2003, para. 20.

¹⁴² This has been acknowledged by the judges. See *Katanga Appeals Judgment on the First Decision on Redactions (n 103)* para. 62. See also Decision on Third Defence Motion for Leave to Appeal, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-514, PTC I, ICC, 4 October 2006.

¹⁴³ For instance, in *Kenya I*, the victim representative claimed that some of her clients were threatened by Ruto or his associates. She did so in her closing arguments at the end of the confirmation hearing, thereby depriving Ruto of an opportunity to respond. See Transcript of hearing of 8 September 2011, *Ruto, Kosgey, and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-T-12-ENG, PTC II, ICC, 15–34.

many countries. It would, however, be naive to think that the same motivations may not induce individuals to embellish, exaggerate, or even tell untruths to benefit from relocation, health care, education allowances for children, subsistence allowance and the like in return for a narrative much sought after by a party to the litigation. At the very least, parties need to be alive to the risk that such factors may infect or colour the narratives given.

It has been alleged by at least one commentator that closed sessions, the need for redactions, and restrictions on disclosure are sometimes invoked, not to protect the safety of a witness, but for strategic reasons.¹⁴⁴ It may be tempting to blame evidential gaps and shortcomings in discharging the burden of proof on security threats coming from the accused, or his associates—instead of investigative shortcomings and a flawed case theory. Of course, such aspersions would be vigorously denied by the prosecution!¹⁴⁵

Even where fear is genuine, threats often do not come from the defendant, but may flow from societal pressures. Members of closed, often close-knit communities it seems frequently act on their own initiatives rather than on instructions from an accused. Where society is polarized, but an accused and his legal team are complying in full with orders of the court, non-disclosure to the Defence will not increase the safety of the witness concerned. The main fear is that the defendant will inform others within his community of the identities of witnesses. It should, however, be noted that, very often, the identities of those assisting the prosecution are already known in the communities before the accused is even aware of their identity. It may be the witness himself who speaks about his involvement with the tribunal or court, or his family. It may also be an officer of the court or tribunal who accidentally provides such information to people on the ground.¹⁴⁶

Accordingly, when authorizing the Prosecution to redact relevant information from the Defence, Chambers should assess very carefully the necessity thereof in light of an objectively justifiable risk.

41.5.2 Non-disclosure to the public

Naturally, and quite correctly, more common than non-disclosure to the Defence is non-disclosure to the public. Many of the exhibits tendered in cases are classified as confidential and many of the proceedings occur in private, rather than public sessions. As a result, it is very hard for the public to follow the proceedings in a way that make them intelligible.

In practice, at the ICC most witnesses enjoy in-court protective measures, which usually consist of the use of a pseudonym for the witness, voice and image distortion,

¹⁴⁴ See also T Waters, '[Redacted]: Writing and Reconciling in the Shadow of Secrecy at a War Crimes Tribunal', draft paper published in materials for *The ICTR Legacy from the Defence Perspective*, Conference held in Brussels, Belgium, 24 May 2010, Part V.

¹⁴⁵ Indeed, Whiting reacts strongly against this allegation, calling it 'unfounded'. See Whiting, Chapter 40, this volume, fn. 35.

¹⁴⁶ For instance, the *Katanga* defence team had discovered the identity of intermediary W-143 in the field long before the name was officially disclosed to it.

private sessions where needed to protect the witness's identity, as well as redactions of identifying information in the public transcript. In general, the Defence has full sight of the witness and is aware of all identifying information. Thus, it is merely the public which is excluded from having the information. Exceptionally, more drastic in-court protective measures could be granted, such as hearing the entire testimony *in camera* or preventing the witness from facing the accused by placing an extra curtain in the courtroom.¹⁴⁷

The test for in-court protective measures is the same as set out, i.e. they will be granted only if, on a case-by-case determination, they are considered necessary 'in light of an objectively justifiable risk' and proportional 'to the rights of the accused'.¹⁴⁸

Indeed, while an exceptional measure—pursuant to Article 68(1) and (2), read together with Article 64(2) and (6)(e) of the Rome Statute and Rule 87 of the Rules—the Trial Chamber is authorized to order protective measures 'to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses' and to hold 'any part of the proceedings *in camera*',¹⁴⁹ although such measures must be in compliance with Article 68(1) and 'shall' therefore not prejudice the fair trial rights of the accused.¹⁵⁰

Accordingly, in the *Lubanga* case, the Chamber held that applications for protective measures should not be 'routinely made in the expectation that they will be routinely granted'.¹⁵¹ Unfortunately, such applications *are* routinely made and granted.

The extent of private sessions has meant that interested third parties seeking to follow the proceedings are confronted with a disrupted and disjointed record. Attempts to monitor the proceedings remotely and in the public gallery are significantly hampered by the frequent movement into or out of closed sessions.

The IBA expressed concern about this excessive use of private sessions.¹⁵² The IBA held that 'to many observers, aspects of the [case] appear to be shrouded in secrecy'.¹⁵³ The IBA further noted that, from the reclassified transcripts disclosed much later, it was apparent that many of the private sessions had been unnecessary.¹⁵⁴ The Chamber in the case against *Katanga and Ngudjolo* acknowledged the 'superfluous' recourse

¹⁴⁷ See Rules 87 and 88 Rules of Procedure and Evidence.

¹⁴⁸ See Public redacted version of Order on protective measures for certain witnesses called by the Prosecutor and the Chamber (Rules 87 and 88 of the Rules of Procedure and Evidence), *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1667-Red-tENG, TC II, ICC, 9 December 2009, paras 8–9.

¹⁴⁹ Confidential redacted version of Decision on 'Prosecution's First Request for In-Court Protective Measures for Trial Witnesses', *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-902-Conf-Red, TC V(A), ICC, 4 September 2013, para. 11.

¹⁵⁰ Ibid.

¹⁵¹ Transcript of hearing on 24 March 2009, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-T-153-Red2-ENG, TC I, ICC, at 63, lines 15–17.

¹⁵² IBA, 'The ICC Trials: An Examination of Key Judicial Developments at the International Criminal Court between November 2009 and April 2010' (17 May 2010). See e.g. Transcript of hearing of 20 May 2010, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-T-144, TC II, ICC, 25–9.

¹⁵³ IBA (n 152) 39.

¹⁵⁴ Ibid.

to private session.¹⁵⁵ On several occasions, the Presiding Judges in the *Katanga* and *Lubanga* cases emphasized the importance of a public hearing.¹⁵⁶

The Prosecution, however, routinely asks for private sessions, even if the risk of identification is negligible. For instance, in the *Katanga and Ngudjolo* case the Prosecution requested for a closed session each time an NGO or a person who had cooperated with the Court was mentioned. Most of the time, the mere mention of such a person or NGO does not disclose the fact that the organization or the person had provided assistance to the Court. Their mention in public does not, therefore, put them at any risk. The Chamber agreed that such information can be discussed publicly.¹⁵⁷

The Chamber in *Kenya I* case has gone a step further. Despite repeated objections from the defence, all witnesses except four have been granted in-court protective measures;¹⁵⁸ these have been the only witnesses to testify publicly and using their own names.

The normal procedure is that the Prosecution first files an application for in-court protective measures, which is then followed by a report from the VWU after assessing the witness's security concerns, recommending which in-court protective measures, if any, are to be granted. In the *Kenya I* case, the bench ordered the VWU to disclose their reports to the parties in order to give them an opportunity to make oral submissions thereon. Based on the witnesses' alleged subjective fears as well as a general perception that any witness in Kenya is at risk, the VWU has recommended in-court protective measures for all Kenyan witnesses so far, and this looks unlikely to change. In making such recommendations, the VWU does not investigate the security claims, nor does it undertake a risk assessment independent of what the witnesses recount. Nonetheless, in practice, the bench relies heavily on the VWU's assessment and has adopted in-court protective measures for all Kenyan witnesses thus far. This appears to sit rather uneasily with the requirement identified by the Appeals Chamber, that protective measures should not be granted on the basis of a general assessment of the security in a region only, but rather on an individualized assessment of the witness's own safety and security.¹⁵⁹

While less obvious and less drastic than non-disclosure to the Defence, such non-disclosure to the public also has serious negative consequences for the defence. The right to a public hearing is one of the fundamental rights of the accused, as set out

¹⁵⁵ Transcript of hearing of 28 May 2010, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-T-149, TC II, ICC, 53–4.

¹⁵⁶ Transcript of hearing of 26 May 2010, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-T-147, TC II, ICC, 42; Transcript of hearing of 19 April 2010, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-T-129, 9; Transcript of hearing of 20 May 2010, *Katanga and Ngudjolo* (n 152) 4–5; Status conference of 16 January 2009, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-T-104, 3–4.

¹⁵⁷ Transcript of hearing of 24 March 2011, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-T-240-RED-ENG TC II, ICC, 33. See also Transcript of hearing of 20 May 2010, *Katanga and Ngudjolo* (Decision on the protective measures for W-11/279) (n 152) 4–5.

¹⁵⁸ The four witnesses who testified in public session were (i) a French expert living in France, (ii) a satellite expert living in the United States, (iii) a Commissioner of the Waki Commission living in New Zealand, and (iv) a Kenyan clerk in the same Commission.

¹⁵⁹ *Lubanga* Appeals Judgment on the First Decision on Rule 81 Redactions (n 104) para. 21; Decision on the Prosecutor's Application to Redact Information Falling under Art 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence (Witnesses 6, 83, 102, and 221), *Katanga and Ngudjolo* (n 106) para. 9.

in Article 67(1) of the Rome Statute. The principle of public hearings is also set out in Article 64(7) stating that the trial ‘shall be held in public’ except when ‘special circumstances require that certain proceedings be in closed session for the purposes set forth in Article 68, or to protect confidential or sensitive information to be given in evidence’. Regulation 20 of the Regulations of the Court similarly sets out the principle of public trials.

Accordingly, withholding information from the public where not strictly necessary, undermines the fundamental right of the accused to a public hearing and thus to a fair trial pursuant to Article 67(1) of the Rome Statute. A real advantage of public testimony is that there is a greater possibility that persons involved in the event in question will be in a position to identify false testimony and bring it to the attention of the other party. In addition, such members of the public who know that an account of a particular witness is false may be able to offer to testify as a witness for the other party. This will not happen if the public is unable to hear and see key information pertaining to the testimony of the witness¹⁶⁰

In this regard, the ECtHR has held that the public character of proceedings ‘protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial.’¹⁶¹ Thus, public trials are important, not only to protect the fairness of the proceedings, but also to allow the public to follow what is going on. The public nature of criminal proceedings ‘offers protection against arbitrary decisions and builds confidence by allowing the public to see justice administered’.¹⁶²

Former Vice-President and ICTY Appeals Judge Florence Mumba has underscored the point that while there may be a need for limited exception to the right of a public trial, public hearings ‘serve an important educational purpose, by helping people understand how the law is applied to facts that constitute crimes, acting as a check on “framed” trials, and giving the public a chance to suggest changes to the law or justice system’.¹⁶³

Protection—when not absolutely justified—may also work as an incentive to give false testimony because false witnesses, testifying before foreign judges, may feel they can comfortably invent and concoct, and not be found out. The light of publicity militates towards more truthful testimony. Only if a witness is in real fear and there is a real risk that such fear may impact upon truthful, candid, and complete testimony should protective measures be imposed.

¹⁶⁰ See also Waters (n 144) 28.

¹⁶¹ Judgment, *Werner v Austria*, ECHR (24 November 1997) para. 45. See also UN Human Rights Committee, CCPR General Comment No. 13: Art 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (13 April 1984) para. 6; W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press 2010) 768–9.

¹⁶² Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed ‘B’ through to ‘M’, *Delalić et al.*, IT-96-21, TC, ICTY, 28 April 1997, paras 33–4.

¹⁶³ F Mumba, ‘Ensuring a Fair Trial whilst Protecting Victims and Witnesses: Balancing of Interests’ in R May et al. (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (The Hague: Kluwer Law International 2001) 359, 365.

In addition, the argument can be made that hiding the identities of the potential witnesses from the public increases, rather than decreases security issues for them. People guess and gossip about who are witnesses in high-profile trials, something that is difficult to prevent. More pertinently, if the identities of witnesses are made public, anyone approaching such a witness in relation to his or her testimony—or the trial itself—will be at risk of prosecution under Article 70. Conversely, where people do not know that an individual is a witness, such prosecutions may be more difficult and the deterrent lessened. An obvious example is where a member of the public may say negative things about the ICC or the prosecution in the presence of a person who happens to be a prosecution witness, in a manner that dissuades him or her from testifying—and it cannot be proved that the person knew that the person spoken to was, in fact, a witness. This is relevant to the intent element of Article 70. If the identity had been made public, this risk may have been lessened. The point really is that no hard and fast rule can be adopted; everything depends upon the situation of the witness himself. But a one-size-fits-all approach, which extols withholding the identity of a witness in all circumstances as the best way of addressing security concerns that may exist, may be a little simplistic and ill considered.

Where witnesses are relocated to a third country, the justification for withholding the identity of the witness should lessen and proceedings should more easily be conducted in public. Where the witness remains in the country, however, the reality is that the Court is somewhat limited as to the support that can be given. It is the state's own security and law enforcement mechanisms that must be deployed. The Court can give financial support and counselling, and remove a witness if the risk factor increases, but that is it. The reality is that the Court must rely, in part at least, on the community for a witness's safety. If the community is excluded from knowing who a potential witness is and, accordingly, who is in danger, the witness is rather defenceless. It must be remembered that in many situations open before the court (all of which relate to Africa), the sense of community—at a local level—is strong. If communities can be engaged and trusted—and motivated to ensure that witnesses testify without pressure or interference—this will constitute the most tangible and effective protection that can be given to a witness and, in doing so, it will foster increased confidence in the court process itself.

In light of this reality, the protective scheme should be applied as intended, that is, as an exception to the rule that the proceedings are public and all relevant information is disclosed to the Defence. It should stop being applied as the rule, as it currently is in the ICC. Many witnesses ask for protection even if this is not strictly required. This is confirmed by the fact that a person who testified in the case of *Katanga and Ngudjolo* returned to his community after being relocated for security concerns. He has not reported any difficulties since being back, although people in his community know that he testified as a witness for the Prosecution.¹⁶⁴

¹⁶⁴ Version publique expurgée de la Décision relative à la requête du Bureau du Procureur aux fins de communiquer avec le témoin P-250 (ICC-01/04-01/07-2711-Conf, 18 février 2011), *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-2711-Red, TC II, ICC, 10 March 2011.

41.6 Concluding Remarks

It appears from the earlier examples that the disclosure regime, as is currently in place at the ICC, is far from ideal and is in need of improvement. The case of *Muthaura* does not stand alone, but it does stand out in the sense that it is the clearest example of direct and serious consequences of disclosure irregularities. In this case, it meant that the charges against Ambassador Muthaura were wrongly confirmed; in a future case, it could mean that the accused is wrongly convicted of the charges. In order to avoid repetition of the *Muthaura* scenario and make proposals for improvement, it is worth giving this case another careful look. The Defence maintained throughout confirmation proceedings and into the trial stage that the entire case theory of the Prosecution was flawed and that prosecution investigations had been wholly inadequate. Those defence complaints go beyond the ambit of the present chapter. But it still remains valid to ask ‘what went wrong with disclosure?’ Whilst that is a broad question, with the Defence alleging various serious systemic disclosure failings in that case, reference may be made to one complaint that entered the public domain in order to shed light on what is alleged to be a wider malaise in the OTP, in which disclosure obligations are apparently not properly understood by the Prosecution and/or in which processes are deficient or non-existent. Worryingly, far too often there appears to be a basic failure to even grasp the factual matrix of the case upon which so many disclosure decisions depend.

The Prosecution failed to disclose an asylum affidavit of its main witness (Witness 4) against Ambassador Muthaura. This affidavit contradicted the witness’s statement to the Prosecution in respect of one of the main allegations, which is that *he attended a meeting at the Nairobi Club, where Ambassador Muthaura, President Kenyatta, and others formulated and implemented the alleged common plan to commit the crimes charged*.¹⁶⁵

Significantly, in his affidavit, Witness 4 says someone else told him about the Nairobi Club meeting, but that he was in fact *not present*. The allegation about this meeting is one of the most important aspects of Witness 4’s testimony. Thus, it goes without saying that this information should have been given to the Defence without delay.

Yet, instead of disclosing it, the prosecution applied to the Single Judge of the Pre-Trial Chamber for authorization to withhold the entire affidavit from the Defence. In that application, the Prosecution failed to inform the Single Judge sufficiently about the exculpatory nature of the affidavit. The Single Judge, therefore, failed to appreciate the significance of the document to the Defence and granted the application.¹⁶⁶

¹⁶⁵ Prosecution Response to the Defence Applications under Art 64 of the Statute, *Muthaura and Kenyatta* (n 2) para. 9.

¹⁶⁶ The prosecution conceded that ‘the reasoning contained in its redactions application was insufficient in light of the potential significance of [the exculpatory information]’. See *ibid.*, paras 37–8. See also Public Redacted Version of ‘Defence Application pursuant to Article 64(4) for an order to refer back to Pre-Trial Chamber II or a Judge of the Pre-Trial Division the Preliminary issue of the Validity of the Decision on the Confirmation of Charges or for an order striking out new facts alleged in the Prosecution’s Pre-Trial Brief and Request for an extension of the page limit pursuant to Regulation 37(2), *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-628-Red, Defence for Francis Kirimi Muthaura, 7 February 2013, para. 18.

If the purpose of withholding the affidavit from the defence was to protect Witness 4's identity and place of residence, the Prosecution could easily have disclosed a redacted version to the defence, as it tends to do with other documents.

The Prosecution has expressed regret for its failure to disclose this document,¹⁶⁷ and insists that it was the result of an 'oversight'. It informed the Court that at least two prosecution staff members had reviewed the document on relevance and disclosure issues prior to the confirmation hearing and failed to appreciate the exculpatory nature of the statement, and the Prosecution explained this as follows: 'One must be familiar with Witness 4's statements that he attended the Nairobi Club meeting to spot the apparent inconsistency, and through an oversight, the inconsistency was not identified during the disclosure review.'¹⁶⁸ Accordingly, 'the potential significance of [the exculpatory information] was not discovered until after the confirmation hearing'.¹⁶⁹

Assuming this explanation is correct,¹⁷⁰ it reveals a serious systemic failure within the Prosecutor's office. Indeed, the fact that the staff members who reviewed the affidavit were not aware of Witness 4's main allegation speaks volumes. Combined with the fact that nobody, not even those who interviewed the witness and obtained the affidavit, within the Prosecutor's office corrected this mistake during the course of two years, this is evidence of a '*negligent attitude*' towards evidence review and a '*serious lack of proper oversight by senior Prosecution staff*'.¹⁷¹ Consequently, the Chamber reprimanded the Prosecutor and required her to conduct a complete review of the case file and certify before the Chamber that she had done so, as well as to make appropriate changes to the internal review process.¹⁷²

Indeed, this case, as well as all other described disclosure problems seriously prejudicing the Defence, demonstrates that a complete review of the current ICC disclosure regime would be warranted. In fact, it is long overdue.

41.7 Proposals for Reform

The authors make the following recommendations:

- Rule 121(3) should be amended to provide that all items of disclosure relied upon by the Prosecution to obtain a decision under Article 58 must be disclosed to the defence, at the latest, 30 days after the initial appearance of the suspect.

¹⁶⁷ Prosecution Response to the Defence Applications under Art 64 of the Statute, *Muthaura and Kenyatta* (n 2) para. 31.

¹⁶⁸ Ibid., paras 37–8.

¹⁶⁹ Ibid., paras 37–8.

¹⁷⁰ It should be noted that the defence alleged bad faith on the part of the prosecution, which the prosecution denies (ibid., paras 7–9, 41, and 44–6). The Chamber did not find that the prosecution acted with bad faith, but instead found that the failure to disclose this crucial information was the result of 'a grave mistake' and a deficient internal review system within the prosecution (Decision on defence application pursuant to Art 64(4) and related requests, *Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-728, TC (V), ICC, 26 April 2013, paras 93–4).

¹⁷¹ Concurring Opinion of Judge Christine Van den Wyngaert to Decision on defence application pursuant to Art 64(4) and related requests, *Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-728, TC V, ICC, 26 April 2013, para. 4.

¹⁷² Decision on defence application pursuant to Art 64(4) and related requests, *Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-728, TC V, ICC, 26 April 2013, paras 93–104.

- The Defence should be given at a minimum one month after the final prosecution disclosure deadline (as opposed to the current 15 days under Rule 121(6)) to review the totality of the disclosure material and the DCC, and finalize defence investigations before it must disclose the evidence it tends to rely on at the confirmation hearing.
- A three-month final prosecution pre-trial disclosure deadline should be incorporated into the Rules, which can be varied only on good cause being shown.
- A summary or witness statement should always be produced in addition to the transcripts of a witness's interview.
- Withholding information from the defence and/or the public should be allowed only as intended—that is as an exception to the rule that full disclosure must be made. The criteria adopted by the Appeals Chamber should be strictly applied and incorporated into the rules. The rules should indicate that general security concerns in a region do not suffice to establish an objectively justified risk. In addition, it should specify that information can only be withheld from the Defence if its disclosure to the suspect or accused, as opposed to the general public, would create a security risk.
- The Prosecution should be as transparent as possible about the reasons underlying its application for protective measures. In fairness to the accused who is often directly or indirectly accused of being involved in witness interference, he or she should be given an adequate opportunity to respond to such allegations. Accordingly, redactions in such applications should be limited to those absolutely necessary to protect the safety of a victim or witness.
- Full, unredacted disclosure of all material to be relied on at trial should be made at some point before the start of the trial. No permanent redactions in such material from the Defence should be allowed in any circumstances. This principle should be incorporated in the Rules.
- Rule 81(4) should be construed restrictively so as to ensure that the identities of 'innocent third parties', 'potential witnesses', and 'prosecution sources' can be withheld from the defence for a limited period of time only, if at all.
- The Prosecution must review its internal disclosure system. The prosecution should consider designating one disclosure officer of at least P-4 level in each trial team, who must certify that the disclosure obligations have been fulfilled and be available to answer questions that the Court may have. It is also suggested that consideration be given to appointing a senior trial attorney with responsibilities for implementing a functioning disclosure system and consistent disclosure practices across the Prosecutor's Office. This officer is to ensure that the systemic disclosure failings are fixed and improved over time.¹⁷³

¹⁷³ We respectfully agree with the suggestion of Professor Whiting that a senior person should be involved in disclosure management and that the OTP must 'focus on devising an adequate disclosure system to manage all of the disclosure challenges outlined in this chapter'. See Whiting, Chapter 40, this volume.

- The Prosecution should consider allowing the Defence access to an electronic disclosure program which stores all relevant investigative material. Both the ICTY and ICTR have developed an ‘Electronic Disclosure Suite’ (EDS) which stores millions of pages of investigative data and which is accessible to the Defence. Given the massive amounts of material available on such a database, it would not suffice for the Prosecution to place any potentially relevant materials in the database without at least indicating which documents these are. It would also be important to make such a database user-friendly. The experience with the ICTY and ICTR has shown that such a system can be cumbersome and difficult to access and use. Accordingly, while this is a great idea in principle, the Prosecution should learn from the mistakes made by their ICTR and ICTY colleagues and develop an improved system.¹⁷⁴

¹⁷⁴ K Gibson and C Lussiaá-Berdou, ‘Disclosure of Evidence’ in K Khan et al. (eds), *Principles of Evidence in International Criminal Justice* (New York: Oxford University Press 2010) 306, 313–15. See also Whiting, Chapter 40, this volume.

The Roads to Freedom—Interim Release in the Practice of the ICC

*Aiste Dumbryte**

42.1 Introduction

Individuals, arrested pursuant to a warrant issued by the ICC (or the Court), are detained in the Court's detention facilities in Scheveningen, the Netherlands, near the Court's headquarters in The Hague. The detention centre is housed within a Dutch prison, which has made 12 cells available for the use of the Court.¹ The first detainee, Thomas Lubanga, was arrested in March 2006. The longest-serving detainee, Germain Katanga, was in custody of the Court for nearly seven years, from his arrest in October 2007 until the conviction in March 2014.

The Rome Statute entitles detained individuals to apply for interim release pending trial.² Despite dozens of applications for interim release by the Court's detainees, the only two instances when an individual was allowed to leave the ICC detention centre were Jean-Pierre Bemba's heavily monitored transfers to Belgium to attend the funerals of his father and stepmother. In comparison, the ICTY has granted provisional release for various periods to over 60 individuals.³ Meanwhile the ICTR and the SCSL have not released any individuals from their custody.⁴

Pursuant to international human rights law, pre-trial detention should be an exception rather than the rule,⁵ and it should not continue beyond the period for which the state can provide appropriate justification.⁶ However, international

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¹ W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press 2010) 730.

² Art 60(2) of the Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute').

³ C Davidson, 'No Shortcuts on Human Rights: Bail and the International Criminal Trial' (2010) 60 *American University Law Review* 1, 36.

⁴ C Muller, 'The Law of Interim Release in the Jurisprudence of the International Criminal Tribunals' (2008) 8 *International Criminal Law Review* 589, 614 and 619.

⁵ General Comment No. 8: Right to Liberty and Security of Persons (Art 9), UN Doc HRI/GEN/1/Rev.1 (30 June 1982), 8, para. 3.

⁶ *McKay v UK* App. no. 543/03 (ECtHR, 3 October 2006) para. 30; *Assanidze v Georgia* App. No. 71503/01 (ECtHR, 8 April 2004) para. 170; *Torobekov v Kyrgyzstan* (2011) UN Doc CCPR/C/103/D/1547/2007, para. 6.3.

criminal tribunals differ from ordinary courts: they deal with individuals who bear the greatest responsibility for especially heinous crimes affecting numerous victims. With this consideration in mind, several scholars have questioned whether human rights standards should apply just as rigidly in international criminal trials as they do in domestic trials concerning ordinary crimes.⁷

Accordingly, the aim of this chapter is to examine whether the ICC has managed to achieve an appropriate balance between two competing values: the accused's right to liberty, and the effective administration of international criminal justice. It will analyse the existing case law on the allocation of the burden of proof in cases of interim release, as well as the three available avenues of interim release: first, failing to meet the grounds for detention under Article 60(2); second, unreasonable length of detention under Article 60(4); third, release due to exceptional humanitarian circumstances, developed in the Court's jurisprudence.

42.2 Burden of Proof

42.2.1 Allocation of burden of proof

The Trial Chamber in *Gbagbo* affirmed 'the fundamental principle that deprivation of liberty should be an exception and not the rule'.⁸ In accordance with this principle, human rights law places the burden on the state authorities to provide sufficient reasons in order to justify the necessity of detaining an individual; if they fail to do so, the individual in question must be released.⁹

In comparison, the ad hoc international criminal tribunals have created a system in which detention is considered the norm and release is an exception. The ICTY Rules of Procedure and Evidence (ICTY RPE), adopted in 1994, allowed provisional release only in exceptional circumstances.¹⁰ This placed the burden on the accused to prove that in his/her case there were indeed exceptional circumstances that warranted release.¹¹ According to the Trial Chamber in *Blaškić*, 'both the letter...and the spirit of the Statute require that the legal principle is detention of the accused and that release is the exception'.¹² Unsurprisingly, only four individuals were granted

⁷ W Schabas, *Introduction to the International Criminal Court* (Cambridge: Cambridge University Press 2004) 137; G McIntyre, 'Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY' in G Boas and W Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Leiden: Martinus Nijhoff Publishers 2003) 193–4.

⁸ Third Decision on the Review of Laurent Gbagbo's Detention Pursuant to Art 60(3) of the Rome Statute, *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-454, PTC I, ICC, 11 July 2013, para. 55.

⁹ *Iljikov v Bulgaria* App no 33977/96 (ECtHR, 26 July 2001) para. 85; *Israil v Kazakhstan* (2011) UN Doc CCPR/C/103/D/2024/2011, para. 9.2.

¹⁰ Rule 65(B) of the Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (adopted 11 February 1994) UN Doc IT/32 ('ICTY RPE 1994').

¹¹ Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, *Delalić*, IT-96-21-T, TC, ICTY, 25 September 1996, para. 19.

¹² Order Denying a Motion for Provisional Release, *Blaškić*, IT-95-14-T, TC, ICTY, 20 December 1996, 4.

provisional release under this regime.¹³ In December 1999 Rule 65(B) of the RPE was amended and the requirement of exceptional circumstances was removed, prompting some ICTY judges to argue that this meant shifting the burden to the prosecutor to prove that detention was necessary.¹⁴ However, the Trial Chamber in *Brđanin* held that ‘the wording of the Rule squarely places the onus at all times on the applicant to establish his entitlement to provisional release’.¹⁵ The ICTR and the SCSL likewise place the burden on the detainee to establish his/her right to provisional release.¹⁶

Does the ICC uphold the principle that liberty is the rule and detention is the exception, or is it following in the footsteps of the ad hoc tribunals? Neither the Rome Statute nor the RPE explicitly mentions the allocation of burden of proof in cases of interim release. The drafting history of the Statute may be seen as implying that the Court intended to move away from the practice of the ad hocs. The draft statute adopted by the Preparatory Committee on 3 April 1998 provided that ‘the person shall be detained *unless* [the Court] is satisfied that the person will voluntarily appear for trial and none of the other factors in [Article 59(1)(b)] are present’.¹⁷ This formulation clearly established detention as the rule and required the accused to satisfy the relevant organs of the Court that he/she will not abscond and will comply with other relevant conditions. However, the Rome Conference ultimately rejected this text. The current formulation of Article 60(2) therefore reads that ‘the person shall continue to be detained’ ‘if the Pre-Trial Chamber is satisfied that the conditions set forth in [Article 58(1)] are met’.¹⁸ This means that detention is only possible if certain conditions are fulfilled, and thus logic would seem to suggest that the side which seeks to keep the individual in detention must bear the burden of proving the existence of the necessary conditions. According to Article 60(3) and Rule 118(2), the Court must regularly review its ruling on detention,¹⁹ and within the scope of this review it must consider all relevant information and not only the arguments raised by the detained person.²⁰

¹³ M DeFrank, ‘ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change’ (2001–2) 80 *Texas Law Review* 1429, 1430.

¹⁴ Dissenting Opinion of Judge Patrick Robinson, Decision on Momčilo Krajišnik’s Notice of Motion for Provisional Release, *Krajišnik and Plavšić*, IT-00-39 & 40-PT, TC, ICTY, 8 October 2001, para. 18.

¹⁵ Decision on Motion by Radoslav for Provisional Release, *Brđanin and Talić*, IT-99-36-T TC II, ICTY, 25 July 2000, para. 13.

¹⁶ Decision on Defence Motion to Fix a Date for the Commencement of the Trial of Father Emmanuel Rukundo or, in the Alternative, to Request his Provisional Release, *Rukundo*, ICTR-2001-70-I, TC III, ICTR, 18 August 2003, para. 21; Decision on the Motion by Morris Kallon for Bail, *Sesay et al.*, SCSL-04-15-PT, TC, SCSL, 23 February 2004, para. 32.

¹⁷ Art 60(6) of the Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc A/CONF.183/2/Add.1 (14 April 1998)(emphasis added).

¹⁸ Art 60(2) ICC Statute (emphasis added).

¹⁹ Art 60(3) ICC Statute; Rule 118(2) of the Rules of Procedure and Evidence, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A (adopted and entered into force 9 September 2002) (‘ICC RPE’); the ruling on detention shall be reviewed every 120 days.

²⁰ Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 28 July 2010 entitled ‘Decision on the Review of the Detention of Mr Jean-Pierre Bemba Gombo Pursuant to Rule 118(2) of the Rules of Procedure and Evidence’, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1019, AC, ICC, 19 November 2010, para. 52.

However, in the Court's case law to date, the change of circumstances underlying the previous decision on detention, or the appearance of new facts which necessitate a modification of that decision, must in fact be proved by the accused. For example, the Trial Chamber in *Bemba* found that none of the arguments presented by the Defence, such as the accused's diminishing political status and shrinking finances, constituted a substantive change in circumstances, and thus declined to order interim release.²¹ Another Trial Chamber in *Gbagbo* rejected the Defence's claim that a Pre-Trial Chamber decision adjourning the confirmation hearing constituted a new fact, and held that this decision did not have any effect on the need to keep Gbagbo in detention.²² In none of the cases to date did the Chamber examine possible changed circumstances which had not been raised by the Defence. Placing the burden of proof on the accused was criticized by several judges of the Appeals Chamber, who argued that even when the detained person does not submit any arguments, the Chamber must nonetheless analyse, on the basis of evidence presented by the prosecution, whether the grounds for detention continue to be met.²³ However, the majority of the ICC judges have so far decided to the contrary and followed the model of the ad hoc tribunals.

42.2.2 Justification for shifting the burden of proof

Pursuant to Article 21(3) of the Rome Statute, the application and interpretation of law by the Chambers must be consistent with internationally recognized human rights. In the context of interim release, various Chambers have referred to human rights jurisprudence and held that deprivation of liberty must be considered an exception and not the rule,²⁴ and that the Defence must be able to effectively challenge the lawfulness of detention.²⁵ How, then, does the shifting of the burden of proof onto the accused and requiring him/her to justify his/her entitlement to interim release comply with Article 21(3)?

In this regard, the ICTY has offered two reasons to justify the departure from human rights standards: first, the 'extreme gravity' of the crimes charged by the Tribunal;²⁶ and second, the absence of any power in the Tribunal to execute its own arrest warrants.²⁷ Some scholars argue that international criminal courts are more akin to military tribunals than civilian courts, and thus they should be entitled to develop their own human rights standards.²⁸ Meanwhile, others claim that requiring

²¹ Decision on the Review of the Detention of Mr Jean-Pierre Bemba Gombo Pursuant to Rule 118(2) of the Rules of Procedure and Evidence, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-743, TC III, ICC, 1 April 2010, paras 28–9.

²² *Gbagbo* (n 8) paras 35–6.

²³ Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Dissenting Opinion of Judge Georgios M Pikis, Decision of Pre-Trial Chamber III entitled 'Decision on Application for Interim Release', *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-323, AC, ICC, 16 December 2008, para. 24; Dissenting Opinion of Judge Anita Ušacka, Judgment on the Appeal of Mr Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the "Requête de la Défense Demandant la Mise en Liberté Provisoire du Président Gbagbo"', *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-278-Red, AC, ICC, 26 October 2012, para. 22.

²⁴ *Gbagbo* (n 8) para. 55.

²⁵ *Bemba* (n 23) para. 32.

²⁶ *Delalić* (n 11) para. 19.

²⁷ *Brđanin* (n 15) para. 18.

²⁸ *McIntyre* (n 7) 193–4.

the accused to prove that he/she will not flee or interfere with the evidence is ‘neither just nor logical’,²⁹ and warn that reduced protection leads to such examples as that of Théoneste Bagosora, who was detained by the ICTR for 12 years before his conviction, without release.³⁰

Without prejudice to the importance of safeguarding the rights of the accused, the specific context in which international criminal tribunals operate may indeed require a different application of human rights standards in order to make interim release more difficult. As established in the Rome Statute, the ICC only exercises jurisdiction over the most serious crimes of international concern.³¹ In accordance with the jurisprudence of the ECtHR, the seriousness of charges is one of the factors that may justify prolonged detention,³² and many domestic jurisdictions deny interim release to individuals accused of murder and other serious crimes.³³ In addition, the ICC only deals with ‘big fish’—individuals who often maintain considerable political powers and have influential networks of support; states may be reluctant to arrest them, and victims are likely afraid to testify as long as they are at large.³⁴ Thus, there are valid grounds to assume that such individuals would flee or interfere with the court proceedings if released. In a case concerning a former high-ranking police official accused of drug trafficking, the ECtHR found that lengthy pre-trial detention without interim release was justified by the combined effect of the gravity of charges, the individual’s influential position, and his acquaintance with many witnesses in the case.³⁵ All these factors are typically present in the cases before the ICC. Therefore, shifting the burden on the accused to prove that the extreme gravity of charges against him/her does not preclude interim release may be deemed reasonable in the circumstances and is arguably in line with international human rights standards.

42.3 Interim Release under Article 60(2): Failing to Meet the Grounds for Detention

The test for granting interim release under the Rome Statute is significantly more complicated than the one adopted by the ad hoc criminal tribunals. The latter had established two conditions for the accused to meet: the Tribunal must be satisfied that the accused will appear for trial and that he/she will not pose any danger to victims and witnesses.³⁶ Meanwhile, Article 60(2) of the Rome Statute foresees a

²⁹ A Trotter, ‘Innocence, Liberty and Provisional Release at the ICTY: A Post-Mortem of “Compelling Humanitarian Grounds” in Context’ (2012) 12 *Human Rights Law Review* 353, 364.

³⁰ G Sluiter, ‘Human Rights Protection in the ICC Pre-Trial Phase’ in C Stahn and G Sluiter (eds), *Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff 2009), 461–2.

³¹ Arts 1 and 5 ICC Statute.

³² *Clooth v Belgium* App. no. 12718/87 (ECtHR, 12 December 1991) para. 40; *Tomasi v France* App. no. 12850/87 (ECtHR, 27 August 1992) para. 89.

³³ DeFrank (n 13) 145.

³⁴ K Doran, ‘Provisional Release in International Human Rights Law and International Criminal Law’ (2011) 11 *International Criminal Law Review* 707, 724–5.

³⁵ *Shikuta v Russia* App. no. 45373/05 (ECtHR, 11 April 2013) paras 46–7.

³⁶ Rule 65(B) of the Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (adopted 11 February 1994, as amended 22 May 2013) UN

two-prong test: in order for the continued detention to be justified, the requirement in Article 58(1)(a) (reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court) must be met cumulatively with at least one of the conditions set in Article 58(1)(b) (risk of flight; risk of interfering with the Court proceedings; risk of continuing commission of crimes).³⁷ If the accused proves the absence of all of the circumstances listed in Article 58(1)(a) and 58(1)(b), there is yet an additional condition: the Chamber must consult the state to which the accused seeks to be released³⁸—if such a state is not willing and able to accept the person concerned and to enforce the conditions imposed by the Court, interim release will be denied.³⁹

As established by the ICC Appeals Chamber in *Lubanga*, the decision pursuant to Article 60(2) is not of a discretionary nature: if the criteria for continuing detention are met, the person shall remain in detention, whereas if they are not met, the person shall be released.⁴⁰ In this respect, the Rome Statute again differs from the RPE of the ICTY, which gives the Tribunal discretion to continue detaining the accused even when the grounds for provisional release are met. Conversely, if these grounds are not met, the Tribunal has no discretion to grant release.⁴¹

42.3.1 Reasonable grounds under Article 58(1)(a)

Article 58(1)(a) of the Rome Statute sets the conditions that the Prosecutor must meet when applying for a warrant of arrest. When the Pre-Trial Chamber makes a decision on the arrest of an individual, it must assess and confirm the existence of reasonable grounds to believe that the said individual has committed a crime within the jurisdiction of the Court.⁴² In accordance with Article 60(2), these grounds must be considered anew when deciding on interim release. As established by the Appeals Chamber in *Gbagbo*, at that stage it is imperative to determine *de novo* whether the conditions of Article 58(1)(a) are met, because that is when the submissions of the Defence are heard for the first time.⁴³ Judge Pikis similarly argued in *Bemba* that relying on the

Doc IT/32/Rev. 49 ('ICTY RPE'); Rule 65(B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (adopted 29 June 1995, as amended 10 April 2013) UN Doc ITR/3/Rev.22 ('ICTR RPE'); Rule 65(B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (adopted 16 January 2002, as amended 31 May 2012) ('SCSL RPE').

³⁷ ICC-01/05-01/08-475, PTC II, ICC, 14 August 2009, para. 50.

³⁸ Regulation 51 of the Regulations of the Court, ICC-BD/01-01-04, 26 May 2004 (adopted by the judges of the Court during the Fifth Plenary Session) ('ICC Regulations').

³⁹ Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa', *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-631-Red, AC, ICC, 2 December 2009, paras 106–7.

⁴⁰ Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled 'Décision sur la Demande de Mise en Liberté Provisoire de Thomas Lubanga Dyilo', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-824, AC, ICC, 13 February 2007, para. 134.

⁴¹ *Brđanin* (n 15) para. 22; DeFrank (n 13) 1432.

⁴² C Hall, 'Article 58' in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (München: C H Beck 2008) 1137–9.

⁴³ *Gbagbo* (n 23) para. 23.

decision of another Pre-Trial Chamber, taken in the absence of the arrested individual, prevents the accused from effectively challenging his/her detention.⁴⁴ The Defence in *Gbagbo* has also noted that more information is available to the Chamber at the time of its decision on interim release than when the arrest warrant was issued, so the Chamber should consider whether the conditions of Article 58(1)(a) continue to be met in light of this new information.⁴⁵

However, in practice the Chambers have thus far chosen to confirm the reasoning of the arrest warrant and reject the Defence's submissions.⁴⁶ Single Judge Tarfusser in *Bemba* et al. expressed doubts as 'to what extent a Pre-Trial Chamber...can be meaningfully called upon reassessing the existence of reasonable grounds to believe that a crime has been committed in the context of an application for interim release'.⁴⁷ In *Gbagbo*, even after the Pre-Trial Chamber chose not to confirm any of the charges against Laurent Gbagbo and adjourned the hearing, ordering the prosecutor to submit additional evidence, the Appeals Chamber held that this did not eliminate the reasonable grounds under Article 58(1)(a) and declined to grant interim release.⁴⁸ Furthermore, the Trial Chamber found in *Bemba* that 'substantial grounds' under Article 61(7) imply a higher evidentiary threshold than 'reasonable grounds' under Article 58(1)(a).⁴⁹ Therefore, when the charges have been confirmed pursuant to Article 61 of the Statute, the threshold of Article 58(1)(a) will always be met as well.

Consequently, the ICC jurisprudence makes it evident that reasonable grounds to believe that an individual has committed a crime within the Court's jurisdiction remain as long as the proceedings against that individual continue. Thus, the chances for the Defence to successfully challenge the application of Article 58(1)(a) are extremely low. Furthermore, application of Article 58(1)(a) in determination of interim release raises conceptual problems as well: if the Chamber was unable to establish reasonable grounds to believe that an individual had committed crimes, this would require revoking the arrest warrant and terminating the proceedings against the accused, and not merely granting interim release.⁵⁰ For this reason some scholars

⁴⁴ Dissenting Opinion of Judge Georghios M Pikis, *Bemba* (n 23) paras 21–2, 32.

⁴⁵ Judgment on the Appeal of Mr Laurent Gbagbo against the Decision of Pre-Trial Chamber I of 11 July 2013 entitled 'Third Decision on the Review of Laurent Gbagbo's Detention Pursuant to Article 60(3) of the Rome Statute', *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-548-Red, AC, ICC, 29 October 2013, para. 30.

⁴⁶ Decision on Application for Interim Release, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-321, PTC III, ICC, 16 December 2008, para. 34; Decision on the Application for Interim Release of Mathieu Ngudjolo Chui, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-345, PTC I, ICC, 27 March 2008, 6; Decision on the 'Requête de la Défense Demandant la Mise en Liberté Provisoire du Président Gbagbo', *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-180-Red, PTC I, ICC, 13 July 2012, para. 53.

⁴⁷ Decision on the 'Requête Urgente de la Défense Sollicitant la Mise en Liberté Provisoire de Monsieur Fidèle Babala Wandu', *Bemba et al., Situation in the Central African Republic*, ICC-01/05-01/13-258, PTC II, 14 March 2014, para. 5.

⁴⁸ *Gbagbo* (n 45) para. 41.

⁴⁹ Public Redacted Version of the 'Decision on Applications for Provisional Release' of 27 June 2011, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1565-Red, TC III, ICC, 16 August 2011, para. 53.

⁵⁰ Schabas (n 1) 725.

speculate that the drafters of the Rome Statute must have intended to limit the analysis under Article 60(2) to the grounds set in Article 58(1)(b) and not to include Article 58(1)(a).⁵¹ Therefore, it is proposed here to amend the Rome Statute and exclude Article 58(1)(a) from the test under Article 60(2)—its analysis should be explicitly limited to the existence of the factors listed in Article 58(1)(b), similarly to the test adopted by the ad hoc tribunals.

42.3.2 Conditions under Article 58(1)(b)

Article 58(1)(b) of the Rome Statute lists three conditions under which detention can be justified: risk of flight; risk of interference with the proceedings; risk of continuing commission of crimes. Any one of them is sufficient to keep an individual in the Court's custody; thus, in order to be granted interim release, the accused must prove that none of the three risks can be established.⁵² As already noted, risk of flight and of interference with the proceedings are assessed by the ad hoc tribunals as well.⁵³ International human rights law also allows states to use such grounds to justify deprivation of liberty.⁵⁴

The standard of proof that must be met by the Prosecutor is that of appearance: detention must ‘appear to be necessary’.⁵⁵ As stated by the Appeals Chamber in *Katanga and Ngudjolo*, the question whether any of the three conditions under Article 58(1)(b) are met ‘revolves around the possibility, not the inevitability, of a future occurrence’.⁵⁶ The Appeals Chamber in *Lubanga* also found that such analysis ‘necessarily involves an element of prediction’.⁵⁷ In practice, this means that the prosecution does not need to show concrete actions taken by the accused to abscond or to interfere with the Court proceedings—the mere possibility of him/her engaging in such conduct will suffice to keep him/her in detention.⁵⁸

The Appeals Chamber in *Ntaganda* accepted that the prosecutor can meet this standard of proof by relying on information from external sources (in that case—a group of experts appointed by the UN Secretary General), as long as these sources employ a ‘rigorous methodology’ and are ‘sufficiently detailed’.⁵⁹ However, dissenting Judges Ušacka and Van den Wyngaert warned that such external experts often lack the specific expertise that is necessary for criminal investigations, and thus it is essential for the OTP to carry out its own independent investigation.⁶⁰

⁵¹ Ibid., 724.

⁵² *Lubanga* (n 40) para. 139.

⁵³ Rule 65(B) ICTY RPE, ICTR RPE, and SCSL RPE. See also (n 36).

⁵⁴ *Tiron v Romania* App. no. 17689/03 (ECtHR, 7 April 2009) para. 37; *WBE v Netherlands* (1992) UN Doc CCPR/C/46/D/432/1990, para. 6.3.

⁵⁵ Art 58(1)(b) ICC Statute; *Lubanga* (n 40) para. 135; *Bemba* (n 23) para. 51.

⁵⁶ Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-572, AC, ICC, 9 June 2008, para. 21.

⁵⁷ *Lubanga* (n 40) para. 137. ⁵⁸ *Bemba* (n 23) para. 67.

⁵⁹ Judgment on the Appeal of Mr Bosco Ntaganda against the Decision of Pre-Trial chamber II of 18 November 2013 entitled ‘Decision on the Defence’s Application for Interim Release’, *Ntaganda, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-271-Red, AC, ICC, 5 March 2014, paras 37–43.

⁶⁰ Ibid., Dissenting Opinion of Judge Anita Ušacka, ICC-01/04-02/06-271-Anx1, para. 23; ibid., Dissenting Opinion of Judge Christine Van den Wyngaert, ICC-01/04-02/06-271-Anx2, paras 1–4.

42.3.2.1 Risk of flight

The Appeals Chamber has established that the necessity of continued detention in order to ensure the person's appearance at trial cannot be decided on the basis of one factor taken in isolation—instead, all relevant factors must be taken together.⁶¹ The Court's jurisprudence permits to draw a distinction between three types of factors: (a) those related to the individual conduct, (b) to the court proceedings, and (c) to the cooperation of states.

42.3.2.1.1 Factors related to the conduct of the accused

Factors examined by the Court include the accused's political position, influence, and contacts;⁶² financial resources available to him/her;⁶³ his/her assurance to cooperate with the Court;⁶⁴ good behaviour in detention;⁶⁵ education, professional, or social status;⁶⁶ and family ties.⁶⁷ In assessing these factors, the Chambers seem to presume that the individual constitutes a risk of flight, unless there is sufficient proof to the contrary. For example, the Trial Chamber in *Bemba* stated that the accused's undertaking to voluntarily return and cooperate with the Court is insufficient to mitigate the risk of flight because there is no way of verifying the truth of such promises⁶⁸—irrespective of the fact that the accused had been temporarily released and complied with all the conditions,⁶⁹ a factor relied on by the ICTY.⁷⁰ In *Gbagbo*, the Pre-Trial Chamber found that the continuing political support for the accused increased the possibility of absconding,⁷¹ although Judge Ušacka of the Appeals Chamber criticized the failure to assess Laurent Gbagbo's character and whether he was still interested in returning to political office.⁷² In *Mbarushimana*, the Pre-Trial Chamber accepted the prosecutor's argument that releasing the accused to France would allow him to move freely within the Schengen area and thus increase the risk of flight, despite any evidence of his intentions or previous attempts to do so.⁷³ In comparison, the SCSL in *Fofana* established the risk of

⁶¹ *Ntaganda* (n 59) para. 55.

⁶² Decision on the Application for Interim Release of Thomas Lubanga Dyilo, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-586-tEN, PTC I, ICC, 18 October 2006, 6.

⁶³ Decision on the 'Défence Request for Interim Release', *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-163, PTC I, ICC, 19 May 2011, para. 46.

⁶⁴ *Bemba* (n 46) para. 37. ⁶⁵ *Bemba* (n 37) para. 64.

⁶⁶ Judgment on the Appeal of Mr Aimé Kilolo Musamba against the Decision of Pre-Trial Chamber II of 14 March 2014 entitled 'Decision on the "Demande de Mise en Liberté Provisoire de Maître Aimé Kilolo Musamba"', *Bemba et al., Situation in the Central African Republic*, ICC-01/05-01/13-558, AC, ICC, 11 July 2014, para. 111.

⁶⁷ *Ibid.*, para. 68.

⁶⁸ Public Redacted Version of the Decision on the 'Demande de Mise en Liberté Provisoire de M Jean-Pierre Bemba Gombo Afin d'Accomplir ses Devoirs Civiques en République Démocratique du Congo' of 2 September 2011, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1691, TC III, ICC, 2 September 2011, para. 22.

⁶⁹ *Bemba* (n 37) para. 65.

⁷⁰ Decision on the Motion for Provisional Release of the Accused Prlić, *Prlić et al.*, IT-04-74-T, TC III, ICTY, 11 June 2007, 3.

⁷¹ *Gbagbo* (n 46) para. 60.

⁷² Dissenting Opinion of Judge Anita Ušacka, *Gbagbo* (n 23) para. 25.

⁷³ *Mbarushimana* (n 63) para. 50.

absconding only on the basis of concrete evidence of the accused's previous visits to neighbouring countries.⁷⁴

The *Ntaganda* case provided the Court with its first opportunity to consider the weight of the accused's voluntary surrender in the assessment of the risk of flight. At the ICTY, voluntary surrender was a significant factor in favour of granting interim release.⁷⁵ Meanwhile, the ICC Pre-Trial Chamber concluded that Bosco Ntaganda's surrender was motivated not by 'good will to comply with international justice', but rather by the likelihood of him being killed by the armed groups operating in the DRC and Rwanda,⁷⁶ and thus denied the application for interim release. While this decision demonstrates the Court's ability to examine the individual's conduct in a broader context, it also raises concerns that the Court is willing to engage in a more contextual analysis only when this works to the detriment of the accused.

In several cases the ICC judges relied on the accused being part of a 'network' that may provide him/her with the means to abscond.⁷⁷ In *Bemba* et al., Single Judge Tarfusser held that Aimé Kilolo Musamba and Jean-Jacques Mangenda Kabongo belonged to the network of Jean-Pierre Bemba by virtue of serving as the lead counsel and the case manager, respectively, in Bemba's case at the Court.⁷⁸ Some scholars criticized this decision as contempt for defence lawyers, which the single judge found to be 'no different than Bemba's henchmen and enforcers'.⁷⁹ Kilolo in his appeal also argued that his relationship to Bemba was professional and not personal, and thus insufficient to make him part of Bemba's network.⁸⁰ However, the Appeals Chamber upheld the reasoning of the single judge.⁸¹ This demonstrates that the ICC is willing to apply a wide-reaching definition of a 'network' as a justification for the risk of flight. Without elaborating any criteria as to what type and level of relationship is necessary to make an individual part of a network, the Court risks unduly restricting the accused's ability to prove the absence of risks under Article 58(1)(b).

Contrary to these examples, Single Judge Trendafilova found in *Bemba* that the findings of the Pre-Trial Chamber cannot be built solely on a hypothetical argument. Relying on the cumulative effect of such factors as Jean-Pierre Bemba's good behaviour in detention, full cooperation during an earlier temporary release, and willingness to live as a public figure and not a fugitive, the single judge found that Article 58(1) (b)(i) was not satisfied.⁸² This decision goes in line with international human rights

⁷⁴ Fofana—Decision on Application for Bail Pursuant to Rule 65, *Norman* et al., SCSL-04-14-T, TC, SCSL, 5 August 2004, para. 79.

⁷⁵ *Brđanin* (n 15) para. 17; DeFrank (n 13) 1432–4.

⁷⁶ Decision on the Defence's Application for Interim Release', *Ntaganda, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-147, PTC II, PT Ch II (18 November 2013) paras 42–4.

⁷⁷ Decision on Application for Interim Release, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-80-Anx, PTC III, ICC, 20 August 2008, para. 24; *Gbagbo* (n 46) para. 60.

⁷⁸ Decision on the 'Demande de Mise en Liberté Provisoire de Maître Aimé Kilolo Musamba', *Bemba* et al., *Situation in the Central African Republic*, ICC-01/05-01/13-259, PTC II, ICC, 14 March 2014, para. 22; Decision on the 'Requête de Mise en Liberté' Submitted by the Defence for Jean-Jacques Mangenda, *Bemba* et al., *Situation in the Central African Republic*, ICC-01/05-01/13-261, PTC II, 17 March 2014, para. 29.

⁷⁹ K Heller, 'PTC II to Defence Attorneys: You Are All Criminals' (*Opinio Juris*, 28 April 2014) <<http://opiniojuris.org/2014/04/28/ptc-defence-attorneys-criminals/>> accessed 20 July 2014.

⁸⁰ *Bemba* et al. (n 66) para. 91.

⁸¹ Ibid., paras 104–5.

⁸² *Bemba* (n 37) paras 61–9.

jurisprudence, where it has been repeatedly stated that showing that it is easy or possible for the detainee to abscond is insufficient: concrete circumstances making his/her flight particularly likely must be demonstrated.⁸³ However, Judge Trendafilova's decision was reversed on appeal.⁸⁴

The approach taken by the single judge in *Bemba* deserves credit. The subsequent judgment of the Appeals Chamber failed to analyse all the relevant factors together, instead taking them separately and stating that none was sufficient to grant interim release.⁸⁵ The Appeals Chamber criticized the single judge for not justifying why any of these factors had considerable weight, while the Chamber itself failed to provide any explanation for why they did not.⁸⁶ For instance, it found that the accused's behaviour during a prior temporary release was irrelevant, since he had been 'left with no choice but to comply'⁸⁷—in fact, this shows the exact opposite: conditions imposed by the Chamber *can* remove the risk of flight.

Thus, the current state of the Court's practice in relation to the individual conduct relevant to the risk of flight is ambiguous: on one hand, the Appeals Chamber has emphasized the need to examine all the relevant circumstances taken together; on the other hand, in practice it has been more willing to accept hypothetical risks than analyse the cumulative effect of individual circumstances. However, a theoretical possibility of flight will always exist, and it would be unreasonable to require the Defence to completely deny it. Instead, in order to ensure that the accused has an actual opportunity to challenge his/her detention, the previous conduct of the accused should be given particularly great weight in determining future risks.

42.3.2.1.2 Factors related to the Court proceedings

In addition to the factors relating to personal circumstances, the Court has also considered the seriousness of the charges against the individual and the length of the potential sentence.⁸⁸ These grounds are commonly considered by the ICTY and the ECtHR as well.⁸⁹ However, international criminal tribunals are different from domestic courts: all the crimes within the jurisdiction of the former are very serious and envisage long sentences, as acknowledged by the ICTY in *Haradinaj*.⁹⁰ In this light, the Defence in *Gbagbo* argued that reliance on gravity creates a '*de facto* irrebuttable presumption' against the accused.⁹¹ The Appeals Chamber rejected this argument; however, its reasoning was unconvincing. The Chamber merely stated that the seriousness of charges in respect of some or all other suspects brought before the Court 'does not detract from the fact that the charges against Mr Gbagbo are serious'.⁹² However,

⁸³ *Stogmuller v Austria* App. no. 1602/62 (ECtHR, 10 November 1969) para. 15; *Hill v Spain* (1997) UN Doc CCPR/C/59/D/526/1993, para. 12.3.

⁸⁴ *Bemba* (n 39) paras 87–8.

⁸⁵ Ibid., para. 83.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ *Lubanga* (n 40) para. 136.

⁸⁹ Decision on Motion for Provisional Release Filed by Zoran Kupreškić, Mirjan Kupreškić, Drago Josipović, and Dragan Papić (Joined by Marinko Katava and Vladimir Šantić), *Kupreškić et al.*, IT-95-16-T, TC, ICTY, 15 December 1997, para. 15; *Panchenko v Russia* App. no. 45100/98 (ECtHR, 8 February 2005) para. 105.

⁹⁰ Decision on Ramush Haradinaj's Motion for Provisional Release, *Haradinaj et al.*, IT-04-84-PT, TC II, ICTY, 6 June 2005, para. 24.

⁹¹ *Gbagbo* (n 23) para. 34.

⁹² Ibid., para. 54.

allowing the prosecutor to prove the risk of flight *solely* on the basis of gravity of the charges creates an unfair disadvantage to the accused.

A different situation occurred in *Bemba et al.* where four individuals were accused of offences against the administration of justice under Article 70 of the Rome Statute. When deciding their applications for interim release, Single Judge Tarfusser held that the lesser gravity of these offences is not ‘per se suitable to diminish the risk of flight’.⁹³ The Appeals Chamber found this conclusion ‘problematic’; it emphasized that the offences under Article 70 cannot be considered as grave as the core crimes under Article 5, and thus the gravity of such offences should not be given undue weight in assessing the risk of flight.⁹⁴ Indeed, it is important to ensure that the criterion of gravity of charges is not applied selectively to the detriment of the accused. In addition, Judge Ušacka in her dissent questioned whether the principles developed in relation to Articles 58(1) and 60(2) in the context of core crimes can be simply transferred to the context of offences against the administration of justice, or whether there is a need to develop alternative principles.⁹⁵ It is regrettable that the majority of the Appeals Chamber did not find it necessary to examine this question. The stage of the proceedings is also considered relevant when assessing the risk of flight: several Pre-Trial and Trial Chambers found that such a risk increases after the person’s arrest;⁹⁶ it further increases after the confirmation of charges,⁹⁷ and increases even more after the start of the trial.⁹⁸ Such an approach deprives Article 58(1)(b)(i) of any actual meaning, since it allows the very fact of the ongoing investigation or trial to serve as a justification for detention. In such circumstances, the prosecution does not even need to present evidence related to the individual’s behaviour. No comparable approach can be found in the case law of the ICTY or ECtHR.⁹⁹ Reliance on the stage of the proceedings establishes a very low threshold for the prosecution and excessively restricts the accused’s ability to challenge his/her detention.

42.3.2.1.3 Factors related to the cooperation of states

In examining the risk of flight, the Court has looked at the availability of alternative means of restricting the individual’s liberty and keeping him/her under surveillance. As the ICC does not have a territory to which the defendants could be released, interim release cannot be implemented without a state that is willing and able to accept the accused and enforce the conditions imposed by the Court.¹⁰⁰ Accordingly, Regulation

⁹³ *Bemba et al.* (n 47) para. 22.

⁹⁴ Judgment on the Appeal of Mr Fidèle Babala Wandu against the Decision of Pre-Trial Chamber II of 14 March 2014 entitled ‘Decision on the “Requête Urgente de la Défense Sollicitant la Mise en Liberté Provisoire de Monsieur Fidèle Babala Wandu”, *Bemba et al., Situation in the Central African Republic*, ICC-01/05-01/13-559, AC, ICC, 11 July 2014, paras 88–9.

⁹⁵ Ibid., Dissenting Opinion of Judge Anita Ušacka, ICC-01/05-01/13-559-Anx2, para. 16.

⁹⁶ Decision on Application for Interim Release, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-403, PTC II, ICC, 14 April 2009, para. 47.

⁹⁷ *Bemba* (n 39) para. 70.

⁹⁸ Decision on the Review of Detention of Mr Jean-Pierre Bemba Gombo Pursuant to the Appeals Judgment of 19 November 2010, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1088, TC III, ICC, 17 December 2010, para. 32.

⁹⁹ V Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (Leiden: Martinus Nijhoff 2008) 598 and 611.

¹⁰⁰ *Bemba* (n 96) paras 49–50.

51 requires the Chamber to consult the state to which the accused seeks to be released, irrespective of the grounds on which interim release is sought. In this light, Single Judge Trendafilova in *Bemba* was willing to take a cautious approach to provisional release and deny such a possibility, absent clear guarantees by a state in which the accused may reside.¹⁰¹ A similar approach was taken by the ICTY in *Brđanin*¹⁰² and the ICTR in *Nsengimana*.¹⁰³ Nonetheless, in a subsequent decision, Judge Trendafilova emphasized that States Parties have a duty to cooperate with the Court and the lack of guarantees ‘cannot weigh heavily’ against the release of the accused.¹⁰⁴

This creates a dilemma. On one hand, the Rome Statute does not include an explicit obligation for States Parties to accept the accused individuals onto their territories,¹⁰⁵ and the reluctance of states to do so is understandable by their wish to protect their own security and public order. On the other hand, Article 21(3) of the Statute requires the Court to adhere to international human rights standards, and thus restricting the liberty of an individual, who would otherwise deserve to be released, should not be based on external factors outside his/her influence.¹⁰⁶ In order to ensure that individuals do not remain in detention merely because of logistical obstacles, the Court should attempt to enter into framework agreements on interim release, similar to agreements on witness relocation that have been signed with 12 States Parties.¹⁰⁷ Having such agreements before the actual need arises would help to avoid unjustified restrictions on the accused’s right to liberty.¹⁰⁸

Nonetheless, even when a state¹⁰⁹ was willing to accept Jean-Pierre Bemba on its territory and provided a detailed list of conditions that it was ready to impose, the ICC still refused to release him. The proposed conditions included round-the-clock monitoring of the accused’s place of residence, unannounced visits to his place of residence to verify his presence there, and monitoring all telephone calls made and received by the accused.¹¹⁰ In fact, they were more detailed than the conditions accepted by the ICTY in *Prlić*¹¹¹ and *Haradinaj*.¹¹² However, the Trial Chamber stated that although these measures may increase the difficulty of absconding, they were unable to reduce such a risk ‘to an acceptable degree’.¹¹³ As the proposed conditions seemed *prima facie* sufficient to diminish the risk of flight, the lack of any further explanation by the Trial Chamber in this regard is regrettable. Moreover, despite repeated requests by the

¹⁰¹ Id. ¹⁰² *Brđanin* (n 15) para. 18.

¹⁰³ Decision on Nsengimana’s Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the Commencement of Trial, and for Provisional Release, *Nsengimana*, ICTR-01-69-I, TC II, ICTR, 11 July 2005, para. 18.

¹⁰⁴ *Bemba* (n 37) paras 88–9. Although the Appeals Chamber subsequently overturned the decision, this particular point was not examined on appeal.

¹⁰⁵ Part IX ICC Statute.

¹⁰⁶ Trotter (n 29) 369: ‘There is no easy solution to this dilemma, except to say that administrative and diplomatic inconvenience is not an extremely good reason for the infringement of human rights.’

¹⁰⁷ D Chaikell and L Smith van Lin, ‘Witnesses before the International Criminal Court’, International Bar Association Report (2013), 35.

¹⁰⁸ Davidson (n 3) 69. ¹⁰⁹ The name of the state was redacted from the Court’s decision.

¹¹⁰ Public Redacted Version of the 26 September 2011 Decision on the Accused’s Application for Provisional Release in Light of the Appeals Chamber’s Judgment of 19 August 2011, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1789-Red, TC III, ICC, 27 September 2011, para. 13.

¹¹¹ *Prlić* (n 70) 4.

¹¹² *Haradinaj* (n 90) para. 42.

¹¹³ *Bemba* (n 110) paras 37–8.

Defence to clarify the conditions that would mitigate this risk, the Appeals Chamber refused to do that,¹¹⁴ thus leaving states without any guidance on how to cooperate with the Court in ensuring the accused's right to liberty. This can be contrasted with the jurisprudence of the ICTY, which was willing to accept detailed guarantees provided by states, unless they had a history of non-cooperation with the Tribunal¹¹⁵ or were likely to be reluctant to arrest a particular person due to his/her former political influence and valuable information in his/her possession.¹¹⁶

42.3.2.2 Risk of interference with the proceedings

In the Court's jurisprudence to date, Article 58(1)(b)(ii) has been primarily analysed in the light of the ability of the accused to interfere with victims and witnesses. In determining such risk, the Appeals Chamber in *Bemba* rejected the argument that it was necessary to establish 'current and concrete actions' of the accused in respect of witnesses; instead, the Chamber analysed the *potential* risks related to the accused's ability to influence victims and witnesses.¹¹⁷ In this respect the ICC differs from the ICTY, which has held that a heightened *ability* to interfere with victims and witnesses is insufficient to demonstrate that the accused *will* do so, and obstruction to the court proceedings in the event of provisional release cannot be presumed.¹¹⁸

Factors assessed under Article 58(1)(b)(ii) include the ability to identify and locate victims and witnesses;¹¹⁹ volatile situation on the ground;¹²⁰ *de jure* and *de facto* control maintained by the accused in the region where most of them reside;¹²¹ as well as his/her past attempts to intimidate them.¹²² Conversely, the ICTY and ECtHR give the greatest weight to previous actions of the accused in attempting to interfere with the witnesses or otherwise obstruct the proceedings.¹²³ According to the ECtHR, the risk of interference becomes less relevant as the proceedings progress and the collection of evidence nears completion.¹²⁴ However, the ICC in *Bemba* took a different stance and found the progress of the proceedings immaterial to the establishment of risk.¹²⁵

In the case concerning allegations of offences against the administration of justice (*Bemba* et al.), the Pre-Trial Chamber essentially concluded that if an individual is

¹¹⁴ Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 26 September 2011 entitled 'Decision on the Accused's Application for Provisional Release in Light of the Appeals Chamber's Judgment of 19 August 2011', *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1937-Red2, AC, ICC, 15 December 2011, para. 37.

¹¹⁵ *Brđanin* (n 15) para. 15; Decision on Defence Motion for Provisional Release, *Drljača and Kovačević*, IT-97-24-T, TC, ICTY, 20 January 1998, para. 27.

¹¹⁶ Decision on Provisional Release, *Simatović*, IT-03-69-T, TC, ICTY, 28 July 2004, para. 24.

¹¹⁷ *Bemba* (n 23) para. 67.

¹¹⁸ *Brđanin* (n 15) para. 19; *Haradinaj* (n 90) paras 47–8; *DeFrank* (n 13) 1437.

¹¹⁹ *Lubanga* (n 62) 6.

¹²⁰ Review of the 'Decision on the Application for the Interim Release of Thomas Lubanga Dyilo', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-826, PTC I, ICC, 14 February 2007, 6.

¹²¹ *Mbarushimana* (n 63) para. 65. ¹²² *Id.*

¹²³ Decision on Provisional Release, *Stanišić*, IT-03-69-T, TC, ICTY, 28 July 2004, para. 13; *Becciev v Moldova* App. no. 9190/03 (ECtHR, 4 October 2005) para. 59, Jovica.

¹²⁴ *Nevmerzhitsky v Ukraine* App. no. 54825/00 (ECtHR, 5 April 2005) para. 136.

¹²⁵ *Bemba* (n 49) para. 63.

accused of obstructing court proceedings, that in itself sufficiently demonstrates the existence of the risk under Article 58(1)(b)(ii).¹²⁶ Such reasoning is deeply problematic because it effectively denies interim release to any individual accused of offences against the administration of justice. In order to preserve the possibility of release in such cases, the Court should accord greater weight to the accused's actual ability and willingness to obstruct proceedings, rather than simply rely on the charges in the arrest warrant. In addition, the Pre-Trial Chamber in *Katanga and Ngudjolo* found that disclosure of the identities of prosecution witnesses increased the accused's ability to exert pressure on them in the event of release.¹²⁷ This position creates a tension between two rights of the accused: the right to prepare his/her defence on one hand and the right to liberty on the other. The existence of a link between disclosure of incriminating material and threat to victims and witnesses was rejected by the ICTY and SCSL.¹²⁸

Accordingly, to date the ICC has put more emphasis on the external facts, such as the influence of the accused's network and former soldiers in the region,¹²⁹ and less on the conduct of the individual, such as lack of previous attempts to intimidate victims and witnesses.¹³⁰ This approach was criticized by Judge Ušacka in her Dissenting Opinion in the Appeals Chamber judgment in *Gbagbo*.¹³¹ Despite the fact that former subordinates or partners of the accused continue to maintain their influence, the accused himself/herself may wish to sever any connections with them and refrain from obstructing court proceedings—lack of his/her attempts to interfere with witnesses could serve as a proof of that. Thus, although it is important that all relevant factors are considered together,¹³² the ICC should undertake a more thorough analysis of the individual motives and previous conduct in relation to victims and witnesses in determining the risk under Article 58(1)(b)(ii).

42.3.2.3 Risk of continuing commission of crimes

The Pre-Trial Chamber in *Bemba* found the third prong of Article 58(1)(b) inapplicable, since the situation in the CAR had changed and the peace process was under way.¹³³ Meanwhile in *Gbagbo*, Single Judge Fernandez de Gurmendi stated that a large and well-organized network of Laurent Gbagbo's supporters in Côte d'Ivoire was still active and aiming to restore his power—therefore, the accused could utilize this network to commit further crimes.¹³⁴ This is in line with the ECtHR jurisprudence,

¹²⁶ *Bemba et al.* (n 47) para. 27.

¹²⁷ Review of the 'Decision on the Application for Interim Release of Mathieu Ngudjolo Chui', *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-694, PTC I, ICC, 23 July 2008, 6.

¹²⁸ Muller (n 4) 623.

¹²⁹ *Bemba* (n 77) para. 24.

¹³⁰ *Bemba* (n 37) para. 74.

¹³¹ Dissenting Opinion of Judge Anita Ušacka, *Gbagbo* (n 23) para. 30.

¹³² *Bemba* (n 23) para. 55.

¹³³ *Bemba* (n 46) para. 42; *Bemba* (n 37) para. 76.

¹³⁴ *Gbagbo* (n 46) para. 69. In a later decision, the Pre-Trial Chamber found that the improving security situation in Côte d'Ivoire eliminated the risk that Laurent Gbagbo may commit further crimes upon his release; nonetheless, Gbagbo's detention was deemed necessary due to the two remaining prongs of Art 58(1)(b)—see Fourth Decision on the Review of Laurent Gbagbo's Detention Pursuant to Art 60(3) of the Rome Statute, *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-558, PTC I, ICC, 11 November 2013, para. 51.

which requires the danger of repeated offences to be plausible and not merely hypothetical.¹³⁵ In this regard, the accused's ability to commit further international crimes is heavily dependent upon the external context, such as the existence of an armed conflict, or the consolidation of power in the hands of certain groups or individuals. Therefore, in examining whether this requirement is met, the ICC, contrary to domestic and human rights courts, considers primarily external factors rather than individual intentions.

One instance where individual factors were considered to establish the risk of further commission of crimes was *Mbarushimana*. The Pre-Trial Chamber paid particular attention to the accused's experience in and access to information technology which would allow him to contribute to the commission of crimes without being easily monitored or controlled.¹³⁶ The Appeals Chamber further added that lack of Callixte Mbarushimana's previous contribution to the commission of crimes through information technology was immaterial, as long as there was a reasonable possibility that he may do so in the future.¹³⁷ Without concrete instances of the use of such technology for committing crimes by the accused, the Chamber's conclusion is purely speculative and unjustifiably restricts his/her right to liberty.

42.4 Interim Release under Article 60(4): Unreasonable Length of Detention

42.4.1 Two-tiered test under Article 60(4)

Article 60(4) of the Rome Statute foresees a two-tiered test: first, the overall period of the pre-trial detention must be found unreasonable; and second, this must be caused by an inexcusable delay on the part of the prosecutor.¹³⁸ For the purpose of this Article, only the periods of detention which are related to the ICC proceedings are to be taken into consideration—for example, the detention of Thomas Lubanga in the DRC awaiting trial for distinct crimes other than those charged by the Court was not considered.¹³⁹

In determining whether the length of detention is reasonable, the Appeals Chamber has stated that there cannot be a fixed period of time; instead, the length of detention must be examined in the light of the particular circumstances of each case.¹⁴⁰ Factors that have been found relevant in justifying prolonged detention include the volume of evidence and filings,¹⁴¹ difficulties in obtaining evidence,¹⁴² novel legal issues raised in the case,¹⁴³ and suspension of proceedings upon request by the Defence.¹⁴⁴

¹³⁵ *Clooth* (n 32) para. 40.

¹³⁶ *Mbarushimana* (n 63) para. 66.

¹³⁷ Judgment on the Appeal of Mr Callixte Mbarushimana against the Decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the "Defence Request for Interim Release"', *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-283, AC, ICC, 14 July 2011, para. 60.

¹³⁸ *Bemba* (n 46) para. 45.

¹³⁹ *Lubanga* (n 40) para. 121.

¹⁴⁰ *Ibid.*, para. 122.

¹⁴¹ *Bemba* (n 46) para. 47.

¹⁴² *Lubanga* (n 62) 7.

¹⁴³ Review of Detention and Decision on the 'Third Defence Request for Interim Release', *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-428, PTC I, ICC, 16 September 2011, para. 55.

¹⁴⁴ *Bemba* (n 98) para. 44.

Analogous factors are considered by the ECtHR¹⁴⁵ and ICTR.¹⁴⁶ On this basis, in several ICC cases detention of five,¹⁴⁷ seven,¹⁴⁸ and even 30 months¹⁴⁹ was found not to be *per se* unreasonable.

Although it is neither possible nor desirable to set a fixed time limit for the duration of detention, the practice of the ICC to date does not provide any specific guidance as to when detention becomes unreasonably long. Factors related to the complexity of the case are not really helpful, as all the cases before the Court include multiple crimes committed over long periods of time and affecting numerous victims, and thus they are inevitably complex. This was acknowledged by the Appeals Chamber in *Lubanga*; however, the Appellant's request to exclude these factors from consideration was dismissed without any reasoning.¹⁵⁰ The ad hoc tribunals have considered detention of two,¹⁵¹ six,¹⁵² and nine¹⁵³ years justifiable under the particular circumstances of each case, and have never granted interim release solely on the basis of the length of detention.¹⁵⁴

Pursuant to Article 60(4), the length of detention must not only be unreasonable, but also be caused by deliberate actions or gross negligence of the prosecutor.¹⁵⁵ In assessing the progress made by the OTP in *Bemba*, the Trial Chamber found that the prosecution had called over half of its witnesses and had not sought any significant adjournments, and thus there had been no inexcusable delay.¹⁵⁶ The main problem that this requirement creates is that delays caused by other factors (such as unreasonable delay in issuing the Trial Chamber judgment, disqualification of a judge, or budgetary and resource problems) will not permit granting interim release, although their effect on the detainee is exactly the same.¹⁵⁷

Consequently, it must be acknowledged that cases concerning international crimes will often take significantly longer to complete, and thus have a greater burden on the liberty of the accused, than those concerning ordinary crimes. Nonetheless, the prolonged detention of the accused should be considered reasonable only as long as the proceedings before the Court meet a due diligence standard, established in human rights law.¹⁵⁸ Meanwhile, if any of the organs of the Court—including the prosecutor, the Chambers, and the Registry—fails to act with due diligence, this should trigger the application of Article 60(4) and warrant interim release of the accused.

¹⁴⁵ *Mooren v Germany* App. no. 11364/03 (ECtHR, 9 July 2009) para. 106.

¹⁴⁶ Decision on the Defence Motion for the Provisional Release of the Accused, *Kanyabashi*, ICTR-96-15-T, TC II, ICTR, 21 February 2001, para. 12.

¹⁴⁷ *Katanga and Ngudjolo* (n 127) 11.

¹⁴⁸ *Lubanga* (n 40) para. 122.

¹⁴⁹ *Bemba* (n 98) para. 44.

¹⁵⁰ *Lubanga* (n 40) para. 123.

¹⁵¹ Decision on Motion for Provisional Release of Miroslav Kvočka, *Kvočka et al.*, IT-98-30-PT, TC, ICTY, 2 February 2000, 3–4.

¹⁵² Decision on the Defence Motion for Release, *Bagosora et al.*, ICTR-98-41-T, TC III, ICTR, 12 July 2002, para. 27.

¹⁵³ Decision on the Accused Vojislav Šešelj's Request for Provisional Release, *Šešelj*, IT-03-67-T, TC III, ICTY, 23 March 2012, para. 13.

¹⁵⁴ DeFrank (n 13) 1439.

¹⁵⁵ *Mbarushimana* (n 143) para. 59.

¹⁵⁶ *Bemba* (n 49) para. 67.

¹⁵⁷ K Khan, 'Article 60' in Triffterer (n 42) 1167.

¹⁵⁸ *Labita v Italy* App. no. 26772/95 (ECtHR, 6 April 2000) para. 153.

42.4.2 Relationship between Article 60(2) and 60(4)

The relationship between Article 60(2) and 60(4) is unclear. The Appeals Chamber in *Lubanga* noted that ruling against the applicant under Article 60(2) does not prevent him/her from being released under Article 60(4).¹⁵⁹ However, subsequent Pre-Trial Chambers in *Lubanga* and *Bemba* emphasized the need to ensure a balance between the accused's right to liberty on one hand, and the public interest to ensure his/her appearance at trial and protection of witnesses on the other.¹⁶⁰ The ICTY has likewise stated that provisional release could not be granted by reason of the length of detention where the accused was unable to establish that he/she will appear for trial.¹⁶¹ This is clearly in tension with the earlier Appeal Chamber's decision in *Lubanga*, as well as international human rights law.¹⁶²

In addition, this chapter has already discussed the difficulties of the application of Article 60(2), highlighting the limited chances for the accused to obtain interim release under that Article. With this in mind, there is a risk that the need to balance the length of detention with findings under Article 60(2) might effectively make Article 60(4) inoperative. Thus, in order to preserve the effectiveness of Article 60(4), this provision should be read independently of the findings under Article 60(2). This would not only contribute to preventing unreasonably long detention of individuals by the ICC, but would also provide an even stronger incentive for the prosecution (and potentially other organs of the Court) to act with due diligence and avoid unreasonable delays, ultimately ensuring a speedier conduct of ICC trials.

42.5 Interim Release in Exceptional Humanitarian Circumstances

The Rome Statute does not explicitly provide any other grounds for interim release than those listed in Article 60(2) and 60(4). However, it was found in *Bemba* that Article 64(6)(f) entails 'inherent powers' of the Chamber to grant provisional or temporary release in exceptional humanitarian circumstances.¹⁶³ Examples of such exceptional circumstances were the deaths of Jean-Pierre Bemba's father and step-mother, in the light of which he was temporarily released to participate in their funerals in Belgium, escorted by the police.¹⁶⁴ In addition, the Appeals Chamber in *Gbagbo* acknowledged that the medical condition of the accused may be a factor in

¹⁵⁹ *Lubanga* (n 40) para. 120.

¹⁶⁰ Second Review of the 'Decision on the Application for Interim Release of Thomas Lubanga Dyilo', *Lubanga*, ICC-01/04-01/06-924, PTC I, 11 June 2007, 7; *Bemba* (n 46) para. 47.

¹⁶¹ *Brđanin* (n 15) para. 25.

¹⁶² *Tochilovsky* (n 99) 599.

¹⁶³ *Bemba* (n 49) para. 51.

¹⁶⁴ Decision on the Defence's Urgent Request Concerning Mr Jean-Pierre Bemba's Attendance of his Father's Funeral, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-437-Red, PTC II, ICC, 3 July 2009, para. 9; Decision on the Defence Request for Mr Jean-Pierre Bemba to Attend his Stepmother's Funeral, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1099-Red, TC III, ICC, 12 January 2011, paras 13–15.

the exercise of the Chamber's discretion in granting interim release;¹⁶⁵ however, as long as the health risks can be addressed by the medical service at the ICC Detention Centre, release shall not be granted.¹⁶⁶ Meanwhile, the need to complete electoral registration in the home country was not considered by the Trial Chamber as the type of circumstance to warrant interim release.¹⁶⁷

The jurisprudence of the ICTY shows that humanitarian grounds play a significant role in granting provisional release. For example, Milan *Simić* was released due to serious medical problems which required intensive daily care by a qualified medical team,¹⁶⁸ and Jadranko *Prlić* was allowed to visit his ailing parents and brother.¹⁶⁹ Conversely, in *Kovačević* the Trial Chamber refused to grant provisional release, stating that the health condition of the accused was not terminal or immediately life-threatening and that he could be effectively treated in the Netherlands; the fact that the accused would be more receptive to medical treatment in his home country with the support of his family was found insufficient to warrant release from detention.¹⁷⁰

In the existing case law of the ICC, exceptional humanitarian circumstances have been the justification for the only two instances of temporary release from detention. As the existence of such circumstances is not necessarily linked to the complexity of the case, the charges against the individual, or his/her potential behaviour, the possibility for the accused to be granted interim release on these grounds is significantly higher than under Article 60(2) and 60(4). In this light it is rather paradoxical that this ground for interim release is not mentioned in the Rome Statute or any other legal documents of the ICC and is therefore left within the discretion of the judges. In order to ensure that the possibility to be released due to humanitarian reasons is not revoked by subsequent case law, the current stage of the jurisprudence should be codified in the ICC Statute and exceptional humanitarian circumstances should be included as an independent ground for interim release.

42.6 Conclusions and Recommendations

The context in which the ICC operates, as well as its lack of enforcement capabilities, determines that the possibilities for the accused to be released from detention pending the trial judgment are more restricted than in cases of ordinary criminals tried by domestic courts. Nonetheless, Article 21(3) of the Rome Statute obliges the Court to act in line with international human rights standards. Therefore, it is essential to establish an appropriate balance between the right of accused to liberty and the effective administration of justice. As argued in this chapter, the current legal regime fails to ensure such a balance.

¹⁶⁵ *Gbagbo* (n 23) para. 87.

¹⁶⁶ Decision on the Request for the Conditional Release of Laurent Gbagbo and on his Medical Treatment, *L. Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-362-Red, PTC I, ICC, 18 January 2013, paras 35–7.

¹⁶⁷ *Bemba* (n 49) para. 69.

¹⁶⁸ Decision on Provisional Release of the Accused, *Simić*, IT-95-9-T, TC, ICTY, 26 March 1998, 2.

¹⁶⁹ *Prlić et al.* (n 70) 3. ¹⁷⁰ *Kovačević* (n 115) para. 14.

Pursuant to the text of the Rome Statute and the Court's case law, there are three situations when the accused can be released from detention, pending the Trial Chamber judgment: first, when the accused proves that he/she will not abscond, interfere with the Court's proceedings, and commit further crimes (Article 60(2)); second, when detention is unreasonably long due to an inexcusable delay by the prosecution (Article 60(4)); and third, when release is justified by exceptional humanitarian circumstances (*Bemba* and *Gbagbo*). This chapter discussed the practical and conceptual problems related to each of these avenues, and has arrived at the conclusion that several amendments of the Rome Statute are necessary to rectify the shortcomings in the present regime of interim release.

First, Article 60(2) should not include Article 58(1)(a) in the consideration of interim release. The existence of reasonable grounds to believe that the accused has committed crimes within the Court's jurisdiction are confirmed by the Pre-Trial Chamber issuing the arrest warrant, and if such grounds cease to exist, then the appropriate course of action is to terminate the proceedings against the accused, and not merely grant him/her interim release.

Second, Article 60(4) should extend the application of the due diligence standard to all the organs of the Court. While at present only an inexcusable delay on the part of the prosecutor may trigger the application of Article 60(4), several other organs of the Court may, by their actions, also lead to delays in the Court's proceedings and thus prolong the detention of the accused.

Third, the Rome Statute should explicitly include a provision (most appropriately in a new paragraph of Article 60) that the accused may be granted interim release due to exceptional humanitarian circumstances, following the example of Rule 65(B) of the ICTY. While an amendment of the RPE or Regulations of the ICC would be easier, including exceptional humanitarian circumstances in the Rome Statute is necessary to put it on an equal footing with the other grounds for interim release, as well as to ensure that all the powers of the Chambers are listed in the Statute and not in subsidiary legal documents.

In addition to the proposed statutory amendments, there is also a need to ensure that the development of the Court's case law does not make interim release *de facto* impossible. First, when assessing the risk of flight, interference with the proceedings, or continuing commission of crimes under Articles 60(2) and 58(1)(b), the Chambers should place a greater emphasis on the conduct and personal circumstances of the accused, rather than factors which are beyond his/her control or which are likely to exist in all cases before the ICC, such as the advanced stage of the proceedings or the existence of potential supporters of the accused. This is necessary to ensure that the Court assesses real and not merely hypothetical risks, and to avoid undue restrictions to the liberty of the accused. Second, the Chambers should follow the position of the Appeals Chamber in *Lubanga* which held that the application of Article 60(4) is independent of Article 60(2), because this would prevent Article 60(4) from becoming inoperative and would provide an additional incentive for the Court to conduct the proceedings with due diligence and without inexcusable delays.

Finally, interim release will be impossible in practice without the willingness and ability of states to accept the accused onto their territory and enforce the conditions of release imposed by the Court. It is understandable that many states are reluctant to allow into their territory individuals accused of international crimes. Nonetheless, the Court should actively seek to sign framework agreements with states, in order to have them available before the need arises and to avoid situations where an individual cannot be released merely because of the lack of state cooperation.

Testifying behind Bars—Detained ICC Witnesses and Human Rights Protection

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43.1 Introduction

On 27 March 2011 three witnesses arrived in The Hague to testify before the ICC in the case against Katanga and Ngudjolo. The witnesses are former militia leaders who were detained in the DRC for their alleged involvement in the murder of nine UN peacekeepers and the preparation of a military coup.¹ Their transfer to The Hague was subject to an agreement between the ICC and the DRC stating, *inter alia*, that the witnesses remain in the ICC's Detention Centre during their stay in The Hague and return to the DRC immediately after having testified.

Before being transferred to The Hague, the witnesses expressed fears for their safety.² The ICC's Victims and Witnesses Unit (VWU) therefore entered into negotiations with the Congolese authorities and the witnesses to discuss the implementation of protective measures, e.g. that the witnesses' identities and testimonies would not be disclosed and that there would be extra surveillance (by specialized guards and cameras) in their Congolese prison.³ According to the witnesses' duty counsel, these measures, however, turned out to be inadequate to ensure their

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¹ J Easterday, 'Three Defense Witnesses Blame the DRC for Bogoro Attack, then Seek Asylum in the Netherlands', *International Justice Monitor*, 6 June 2011; Rechtbank Den Haag, 26 September 2012, para. 1.2.

² Decision on *Amicus Curiae* Application and on the 'Requête Tendant à Obtenir Présentations des Témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux Autorités Néerlandaises aux Fins d'Asile' (Articles 68 and 93(7) of the Statute), *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3003-tENG, TC II, ICC, 9 June 2011 ('Katanga and Ngudjolo decision of 9 June 2011'), paras 1–4.

³ Ibid., para. 3. Other protective measures that were proposed include, e.g., that the evidence be submitted *in camera*; that the transcript of the hearings be sealed; that the witnesses be detained in a secure prison facility, that their guards be trained according to international standards and selected in consultation with the VWU; that the VWU maintain direct and regular contact with the guards; that the VWU regularly visit the detained witnesses; and that the VWU monitor any legal proceedings against the detained witnesses. See Order to Provide Further Assurances Regarding the Security of DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-2952, TC II, ICC, 24 May 2011 ('Katanga and Ngudjolo order of 24 May 2011'), para. 7; Decision on the Security Situation of Witnesses DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3128, TC II, ICC, 24 August 2011 ('Katanga and Ngudjolo decision of 24 August 2011'), para. 13.

safety.⁴ In their testimonies before the ICC, the witnesses gave detailed information about the involvement of the incumbent political leadership of the DRC—including President Kabila—in the Ituri massacres.⁵ Counsel argued that because of these incriminating statements, the witnesses would face persecution, human rights violations, and possible execution upon their return to the DRC.⁶ He therefore proposed a different protective measure: allowing the witnesses to apply for asylum in the Netherlands.⁷ On 12 May 2011 the three witnesses filed an application for asylum with the Dutch authorities. In order to facilitate the Dutch asylum procedure, counsel requested that the ICC suspend the witnesses' return to the DRC⁸ and hand them over to the Dutch authorities.⁹

The witnesses' asylum applications have exposed the competing responsibilities of the ICC and the Dutch authorities in relation to detained witnesses.¹⁰ On the one hand, the Court is obliged to duly return detained witnesses to the requested state—typically their country of origin—'[w]hen the purposes of the transfer have been fulfilled'—i.e. after they have testified. On the other hand, the ICC and the Netherlands need to respect internationally recognized human rights—including the right to apply for asylum—and to protect persons from persecution. Attempts to address and reconcile these competing obligations have resulted in lengthy proceedings before the ICC and the Dutch courts.

⁴ *Katanga and Ngudjolo* decision of 9 June 2011 (n 2) para. 27. After all, the proposed protective measures are designed for people at liberty, not for detainees. As a consequence of their detention, the ICC will only have limited possibilities to ensure the witnesses' protection and safety. The VWU can only monitor the situation and hope that the Red Cross and the DRC government cooperate in protecting the detained witnesses. See also Easterday (n 1).

⁵ For more detailed information about the content of the witnesses' testimonies, see Easterday (n 1).

⁶ *Katanga and Ngudjolo* decision of 9 June 2011 (n 2) paras 28–30; *Katanga and Ngudjolo* order of 24 May 2011 (n 3) para. 24; Decision on the Security Situation of Three Detained Witnesses in Relation to their Testimony before the Court (Art 68 of the Statute) and Order to Request Cooperation from the Democratic Republic of the Congo to Provide Assistance in Ensuring their Protection in Accordance with Art 93(1)(j) of the Statute, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3033, TC II, ICC, 22 June 2011 ('*Katanga and Ngudjolo* decision and order of 22 June 2011'), paras 22–7. The witnesses allege that the Congolese authorities are concerned that they might be prosecuted by the ICC for their involvement in the commission of international crimes. This concern could prompt them to eliminate witnesses who may incriminate them. Furthermore, the Congolese authorities have a motive to silence the witnesses, as their testimony might affect the President's re-election.

⁷ *Katanga and Ngudjolo* order of 24 May 2011 (n 3) paras 18–19.

⁸ One reason it is impossible to give effect to the initially agreed return of the witnesses to the DRC is that the witnesses' testimonies 'were much more specific and detailed than what was previously known about its potential content. According to the [Katanga] defence, the fact that the witnesses have directly implicated the DRC government in the crimes committed at Bogoro is a new development which has profound political and personal consequences.' *Katanga and Ngudjolo* decision and order of 22 June 2011 (n 6) para. 28.

⁹ *Katanga and Ngudjolo* decision of 9 June 2011 (n 2) para. 55. In addition, the Duty Counsel requested the ICC to allow the witnesses to apply for asylum. Now that the witnesses' application for asylum had already been submitted to the Dutch authorities at the time the Counsel makes this request, the Court finds that a ruling on this specific point is no longer required. *Ibid.*, para. 57.

¹⁰ E.g. Decision on the Urgent Request for Convening a Status Conference on the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3254, TC II, ICC, 1 March 2012 ('*Katanga and Ngudjolo* decision of 1 March 2012'), para. 17.

In this chapter, we aim to assess the consequences of this issue for the functioning of the international criminal justice system. We will argue that the decisions taken by the ICC and the Dutch courts have a potentially negative effect on future state cooperation with the Court and on human rights protection of witnesses and defendants. Our argument is structured as follows. In section 43.2, we discuss the course of the legal proceedings, which have mainly addressed three questions: (i) do the witnesses have the right to apply for asylum in the Netherlands?; (ii) can the witnesses' asylum requests be granted?; (iii) can the witnesses be detained pending the asylum proceedings and, if so, who is responsible for their detention: the ICC or the Dutch government? In section 43.3 we proceed to set out potential future scenarios for the three witnesses. The broader implications of these scenarios and possible solutions to prevent similar situations in the future are assessed in sections 43.4 and 43.5. We conclude in section 43.6 that these solutions all come with considerable complications and reservations. As a result, the asylum issue can have serious implications for the future functioning of the international criminal justice system.

43.2 Legal Proceedings

43.2.1 Application for asylum

In responding to duty counsel's request to allow the witnesses to apply for asylum, the ICC confirmed that Article 68 of the Rome Statute¹¹ obliges the Court to 'take all protective measures necessary to prevent the risk witnesses incur *on account of their cooperation with the Court*'.¹² In the Court's view, this provision only requires it to protect witnesses from risks related to their cooperation with the ICC. It does not imply a broader duty to protect witnesses from the risk of persecution they may suffer in their country of origin.¹³ In particular, the Court does not have to put the principle of *non-refoulement* (prohibiting the expulsion of refugees to places where their lives could be threatened) into effect.¹⁴ After all, 'only a State which possesses territory is

¹¹ Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute').

¹² *Katanga and Ngudjolo* decision of 9 June 2011 (n 2) para. 61 (emphasis added).

¹³ Ibid., paras 59–63. For a critical evaluation of this approach, see G Sluiter, 'Shared Responsibility in International Criminal Justice, the ICC and Asylum' (2012) 10 *Journal of International Criminal Justice* 661, 670 and the arguments made by the Katanga Defence, *Katanga and Ngudjolo* decision of 9 June 2011 (n 2) para. 36. We agree that the Court's distinction may not be practically feasible. This also appears to be recognized by the Court when it somewhat incomprehensibly finds that 'in practice it will be impossible to determine whether any attempt to harm the detained witnesses will be linked to their testimony or indeed be made at the initiative of the DRC authorities. If the witnesses are to be returned to the DRC, they must therefore be protected against every potential source of danger that may be linked to their testimony before the Court'. *Katanga and Ngudjolo* decision and order of 22 June 2011 (n 6) para. 38.

¹⁴ In this sense, the ICC's evaluation differs from the evaluation states should make in response to an asylum application. '[T]he criteria for considering an asylum application, in particular those pertaining to the risk of persecution incurred by the applicants, are not identical to the criteria applied by the Court to assess the risks faced by witnesses on account of their testimony before the Court.' *Katanga and Ngudjolo* decision of 9 June 2011 (n 2) para. 63.

actually able to apply the *non-refoulement* rule.... In this case, it is therefore incumbent upon the Dutch authorities, and them alone, to assess the extent of their obligations under the *non-refoulement* principle.¹⁵

Having said that, the ICC cannot completely refrain from protecting witnesses from persecution. Article 21(3) of the Rome Statute compels it to interpret and apply its Statute consistently with internationally recognized human rights, including the right to apply for asylum and the *non-refoulement* principle.¹⁶ In this view, the Court determined that it must enable the witnesses to exercise their right to seek asylum¹⁷ and allow the Dutch authorities to evaluate the witnesses' asylum applications.¹⁸ For this reason, it delayed the return of the witnesses to the DRC.

The Dutch authorities were not pleased with the thus imposed responsibility for the ICC's witnesses, and have continuously sought to exempt the witnesses from the Dutch asylum procedure by arguing, *inter alia*, that the witnesses' applications are mere 'requests for protection'.¹⁹ These requests allegedly fall outside the scope of the Dutch Alien Act (Vreemdelingenwet) and should therefore be evaluated on the basis of a *sui generis* procedure. In this procedure, the authorities would only determine whether the *non-refoulement* principle obstructs the Netherlands from excluding the witnesses from asylum protection.²⁰

In its decision of 28 December 2011, the District Court of The Hague prevented the Dutch authorities from pursuing this course. The Court found that neither Dutch immigration law, nor the regulations concerning the relations between the States Parties (in particular the host state) and the ICC exempt the witnesses from the regular asylum procedure.²¹ The fact that the ICC exercises jurisdiction over the witnesses does not alter this finding, since the witnesses are present on Dutch territory and the ICC is willing to facilitate their asylum procedure.²² The Court therefore ordered the Dutch authorities to adjudicate the witnesses' asylum applications pursuant to the Alien Act before 28 June 2012.²³

On 31 October 2012—more than three months after the deadline expired—the Minister for Immigration, Integration, and Asylum excluded the witnesses from refugee protection on the basis of Article 1(f) of the Refugee Convention. This provision stipulates that refugee status cannot be granted when there are 'serious reasons for considering' that the applicant committed war crimes, crimes against humanity, or genocide. The 'serious reasons for considering' standard is a rather low evidentiary

¹⁵ Ibid., para. 64.

¹⁶ The Court thereby emphasized that 'Article 21(3) of the Statute does not place an obligation on the Court to ensure that States Parties properly apply internationally recognised human rights in their domestic proceedings. It only requires the Chambers to ensure that the Statute and other sources of law set forth in article 21(1) and 21(2) are applied in a manner which is not inconsistent with or in violation of internationally recognised human rights.' Ibid., para. 62.

¹⁷ This includes the witnesses' right to meet and correspond with their lawyers of choice so that they can get proper access to the asylum authorities.

¹⁸ *Katanga and Ngudjolo* decision of 9 June 2011 (n 2) para. 73.

¹⁹ J Easterday, 'Dutch Court Rules that Witnesses Must Be Allowed Asylum Procedure', *International Justice Monitor*, 10 January 2012; Rechtbank Amsterdam, 14 October 2013, paras 5.1–5.3.1.

²⁰ Rechtbank Den Haag, 28 December 2011, para. 8.2.

²¹ Ibid., para. 9.9.

²² Ibid., para. 9.8.

²³ Ibid., para. 9.10.

standard that does not require proof beyond reasonable doubt.²⁴ As one of the authors of this chapter previously noted,

[i]t is not exceptional that applicants in the Netherlands are excluded on the basis of their (high-level) position in a militia..., coupled with publicly available reports which state that (the particular unit within) the organization the applicant has worked for was responsible for committing international crimes at the time the applicant worked for the organization.²⁵

In the current case, human rights reports and ICC case law demonstrated that armed militia groups committed crimes against humanity in the Ituri region in the DRC between 2002 and 2003.²⁶ The witnesses' statements before the ICC and the Dutch authorities furthermore evidenced that each of the witnesses was somehow involved in these armed militias groups and facilitated the crimes committed.²⁷ It is therefore no great surprise that the Amsterdam District Court recently upheld the Minister's exclusion of the witnesses from refugee protection. According to the Court, there are serious reasons for considering that the witnesses knowingly and personally participated in crimes against humanity.²⁸ It found that the witnesses should have at least been aware that crimes were being committed given the large scale of the violence.²⁹ Moreover, the Court established that the witnesses participated in these crimes by, *inter alia*, exercising a presiding and coordinating function in the organization responsible for the commission of crimes and by assisting weapons transport.³⁰

The District Court also agreed with the Dutch authorities that Article 3 of the ECHR does not obstruct the witnesses' deportation to the DRC because of the risk that they will face ill-treatment. Referring to case law of the ECtHR, the District Court established that the ICC's protective measures generally offer a level of human rights protection that is equivalent to the protection ensured by the ECHR.³¹ The Court

²⁴ The Dutch authorities and Courts use the 'personal and knowing participation test'. It needs to be established that the accused contributed to the commission of an international crime—by, *inter alia*, personally committing, facilitating, or ordering the crime—while he knew or should have known that he was thus contributing to this crime.

²⁵ J van Wijk, 'When International Criminal Justice Collides with Principles of International Protection: Assessing the Consequences of ICC Witnesses Seeking Asylum, Defendants Being Acquitted and Convicted Being Released' (2013) 26 *Journal of International Criminal Justice* 173, 178–9.

²⁶ Rechtbank Amsterdam, 14 October 2013 (ECLI 6688), para. 10.6.3 and paras 10.7.2–10.7.3 (ECLI 6692) and paras 9.3.3–9.3.5, 9.4.3. (ECLI 6705).

²⁷ Rechtbank Amsterdam, 14 October 2013, paras 10.6.4. (ECLI 6688), 10.7.4 (ECLI 6692), and 9.3.6 (ECLI 6705).

²⁸ Rechtbank Amsterdam, 14 October 2013 (ECLI 6688), para. 10.6.4. The Court critically assesses the substantiation of the Minister's decision to exclude the witnesses on the basis of Article 1f. It finds that several of the arguments and documents put forward by the Minister are insufficient to support its decision. The Court, for example, considers the mere fact that the witness knew that the FNI—the organisation of which he was the President—committed serious crimes an insufficient basis for his exclusion. This finding does not ensure that the witness also personally responsible for planning the attacks, directing the troops, supplying weapons, and the commission of crimes. Rechtbank Amsterdam, 14 October 2013, para. 10.5.

²⁹ Rechtbank Amsterdam, 14 October 2013 (ECLI 6688), paras 10.6.4 and 10.7.4 (ECLI 6692), and para. 9.3.6 (ECLI 6705).

³⁰ Rechtbank Amsterdam, 14 October 2013 (ECLI 6688), paras 10.6.4 and 10.7.4 (ECLI 6692), and paras 9.3.6 and 9.4.5 (ECLI 6705).

³¹ Ibid., para. 11.2.

seems to presume that the imposition of such protective measures may also benefit the state—in this case the DRC—implementing these measures, since the DRC thus effectively acts as a member of an international organization that offers a human rights protection that is comparable to the ECHR.³² According to the District Court, it may therefore be assumed that the DRC will not violate Article 3 of the ECHR.

However, this does not mean that the District Court allowed the deportation of the witnesses to the DRC. The Court established that the DRC has kept the witnesses in unlawful detention since June 2007 (when the order for their pre-trial detention expired). Furthermore, the Congolese authorities have failed to ensure that the death penalty will not be imposed on the witnesses. According to the District Court, these circumstances constitute a flagrant denial of justice pursuant to Article 6 of the ECHR, impeding the witnesses' expulsion to the DRC.³³ The fact that the Dutch authorities—in cooperation with the ICC and the DRC—are working on a standard procedure to establish additional safeguards in this respect does not change this finding.³⁴ As long as the diplomatic consultations are ongoing, the witnesses cannot be returned.

With this decision, the District Court effectively put the witnesses in a 'legal limbo':³⁵ they may neither reside legally in the Netherlands, nor be deported to their country of origin. The Dutch authorities have appealed the decision,³⁶ and it is still unclear how the Court of Appeal will decide on this issue.

43.2.2 Detention situation

The witnesses' detention situation has been controversial since 24 August 2011. That day, the ICC confirmed that it had received explicit guarantees from the DRC that no harm would be done to the witnesses on account of their testimony.³⁷ Furthermore, the Court was satisfied that the Congolese authorities implemented measures that offer sufficient protection against the security risks to which the witnesses might be exposed as a consequence of their testimonies before the Court.³⁸ It therefore decided

³² Id.

³³ Rechtbank Amsterdam, 14 October 2013 (ECLI 6688 and 6692), paras 11.4–11.5 and para. 10.5 ECLI (6705). Like the Minister, the Court concludes that there is no risk that the witnesses will be exposed to treatment contrary to Art 3 of the ECHR. Rechtbank Amsterdam, 14 October 2013 (ECLI 6688), para. 11.2 and J Easterday, 'Lawyers Brief ICC on Dutch Asylum Cases', *International Justice Monitor*, 19 March 2013. The Court in this respect refers to the protective measures the ICC required—i.e. because of the implementation of the ICC's protective measures, there is no risk of an Art 3 violation in the DRC. This is an interesting approach considering that the ICC explicitly distinguished its obligations in relation to the implementation of protective measures from the State's more encompassing obligation for human rights protection. *Katanga and Ngudjolo* decision of 9 June 2011 (n 2) para. 61.

³⁴ Rechtbank Amsterdam, 14 October 2013 (ECLI 6688 and 6692), paras 11.5 and 10.5 (ECLI 6705).

³⁵ Van Wijk (25) 180.

³⁶ 'Detentie Congolese Getuigen door ICC Opgeheven, Nederland Aan Zet', *Prakken d'Oliveira Press Release*, 21 January 2014.

³⁷ *Katanga and Ngudjolo* decision of 24 August 2011 (n 3) para. 13.

³⁸ Id. The ICC and the DRC agreed on the following protective measures: (i) the witnesses will be detained in a secure prison facility where they will be protected from aggression by other inmates; (ii) the guards who will guard the witnesses are trained according to international standards and will be selected in consultation between the VWU and the Congolese authorities; (iii) the VWU will, through the prison authorities, maintain regular and direct contact with the guards in order to anticipate any change in the

that its obligation to maintain custody over the witnesses has, in principle, come to an end.³⁹ Accordingly, there were ‘no further grounds to delay the return of the three detained witnesses to the DRC’.⁴⁰

At the same time, the ICC acknowledged that requesting the Dutch authorities to cooperate with the witnesses’ return to the DRC pending the asylum procedure would violate the witnesses’ right to apply for asylum and contravene with the Dutch authorities’ obligation to evaluate the asylum application. In this view, it found that the asylum proceedings make the return of the witnesses ‘temporarily impossible from a legal point of view’.⁴¹ The Court therefore suspended the return of the witnesses to the DRC until the final outcome of their asylum claims.⁴² The witnesses were to remain in custody of the ICC on the basis of Article 93(7) of the Rome Statute.⁴³ The Court in this respect emphasized that it cannot indefinitely prolong the witnesses’ detention.⁴⁴

According to the witnesses’ Dutch asylum counsel, the ICC thus created a Kafkaesque situation that violates the witnesses’ right to liberty and to an effective remedy (Articles 5 and 13 of the ECHR, respectively).⁴⁵ They argued that Article 93(7) of the Rome Statute does not provide a valid legal basis for the witnesses’ prolonged detention, since this provision only applies to the period of time that witnesses testify before the ICC. Now that the current witnesses have completed their testimonies, their prolonged detention, without any proper charges, is unlawful. Counsel accordingly made various requests to the ICC and the Netherlands to end the witnesses’ unlawful detention.

At first, the ICC evasively responded to these requests. It alleged that it was ‘an extraordinary situation’ in which there was ‘very little room for manoeuvre’.⁴⁶ Because the Rome Statute did not address the issue, ‘a solution must be sought as soon as possible in consultations between the Court, the host State and the DRC’.⁴⁷ Until that time, Article 93(7) of the Rome Statute prohibits the Court from releasing the witnesses.⁴⁸

security situation of the detained witnesses; (iv) the VWU will regularly visit the detained witnesses to assess their security situation; (v) the VWU will be able to monitor any legal proceedings against the detained witnesses.

³⁹ Ibid., para. 17. ⁴⁰ Ibid., para. 14. ⁴¹ Ibid., para. 15.

⁴² *Katanga and Ngudjolo* decision of 1 March 2012 (n 10) para. 11.

⁴³ Ibid., para. 17. The Court clarifies that the witnesses’ detention by the ICC is linked to their detention in the DRC and to the pending asylum procedure.

⁴⁴ Ibid., para. 20.

⁴⁵ J Easterday, ‘Lawyers Bring Petition against the Dutch State for Unlawful Detention of Congolese Witnesses in ICC Trial’, *International Justice Monitor*, 7 September 2012.

⁴⁶ *Katanga and Ngudjolo* decision of 1 March 2012 (n 10) para. 20.

⁴⁷ *Katanga and Ngudjolo* decision of 24 August 2011 (n 3). See also *Katanga and Ngudjolo* decision of 9 June 2011 (n 2) para. 85. The Lubanga Trial Chamber in a similar situation seems to take a somewhat stricter approach when it ‘reiterates its instructions to the Registry to prepare for the return of defence Witness 19 once he is fit to travel, pursuant to Art 93(7)(b) of the Statute and Rule 192(4) of the Rules. It is for the Dutch authorities to determine whether it necessary to intervene in order to take control of him for the purposes of conducting any extant national proceedings’. Decision on the Observations Submitted by Counsel Representing Defence Witness 19 in the Dutch Asylum Proceedings, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2835, TC I, ICC, 15 December 2001, para. 19.

⁴⁸ Decision on the Application for the Interim Release of Detained Witnesses DRC-D02- P-0236, DRC-D02-P-0228, and DRC-D02-P-0350, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3405-tENG, TC II, ICC, 1 October 2013 (‘Lubanga decision of 1 October 2013’), paras 25–6. Judge Van den Wyngaert wrote a strong dissenting opinion to this decision.

After all, despite being in *custody* of the ICC, the witnesses' *detention* is based on the Congolese restriction of liberty. The Court cannot rule on the merits of this Congolese detention, since this would undermine the essence of the cooperation regime, violate the fundamental principle of state sovereignty, and unjustly turn the ICC into a human rights court.⁴⁹ The witnesses should therefore request the Congolese authorities to review their detention—it is up to them to decide on the witnesses' release.⁵⁰ The ICC also emphasized its dependence of the Netherlands. It held that—irrespective of the Congolese authorization—the Court would be required to release the witnesses if the Dutch courts determine that the witnesses' continued detention violates their international obligations to protect the freedom of persons on Dutch territory.⁵¹ The ICC, however, cannot decide to release the witnesses on Dutch soil without the consent of the national authorities. The witnesses' fate thus lies in the hands of the Dutch authorities.

Almost three years after the witnesses testified, the ICC changed its course. Acting on a *proprio motu* basis, the Appeals Chamber considered it appropriate and necessary to bring the detention of the Congolese witnesses to an end.⁵² According to the Appeals Chamber, the witnesses' detention—entailing the non-implementation of Article 93(7) of the Rome Statute—is problematic for at least two reasons. First, the Court's obligation under Article 21(3) of the Rome Statute to apply the Statute in conformity with internationally recognized human rights standards does imply that it can violate Article 93(7). In particular,

such an interpretation [of Article 21(3)] would seriously damage the Court's ability to enter into future cooperation agreements with States, which would undermine the Court's ability to obtain needed testimony and evidence and render it more difficult to establish the truth in the cases before it.⁵³

Second, the ICC is not and cannot be 'an administrative detention unit for asylum seekers' or persons who are otherwise involved in judicial proceedings before domestic courts.⁵⁴ The Court's detention authority is rather limited to 'situations where the detention is related to judicial proceedings before the Court'.⁵⁵

In order to reconcile Article 93(7) of the Rome Statute with the witness' right to apply for asylum, the Appeals Chamber turned to Rule 192 of the ICC's Rules of Procedure and Evidence and Article 44 of the Headquarters Agreement between the ICC and the Netherlands. These provisions stipulate that witnesses will be 'under the control and in the physical custody' of the Dutch authorities when they are transported from the Detention Centre to the airport.⁵⁶ During this transport, the authorities thus have the

⁴⁹ Ibid., para. 27. The different application of Art 21(3) in relation to the asylum requests and the detention situation (whereas an assessment on the basis of this Art does apply to the former, it does not apply to the latter) results from the fact that the right to apply for asylum and the prohibition of *non-refoulement* are *jus cogens* norms, whereas the right to liberty is not an intransgressible rule of international law and is therefore subject to numerous derogations.

⁵⁰ Ibid., para. 31.

⁵¹ Ibid., para. 35.

⁵² Order on the Implementation of the Cooperation Agreement between the Court and the Democratic Republic of the Congo Concluded Pursuant Art 93(7) of the Statute, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-158, AC, ICC, 20 January 2014, para. 21.

⁵³ Ibid., para. 26.

⁵⁴ Ibid., para. 27.

⁵⁵ Id.

⁵⁶ Ibid., para. 29.

possibility to intervene and to obviate the witnesses' return to the DRC until there is a final decision on their asylum application.

[T]he Appeals Chamber acknowledges that The Netherlands may be faced with conflicting obligations, namely those with the Court, pursuant to the Headquarters Agreement, and those pursuant to The Netherland's international and domestic legal obligations in relation to the pending asylum claims. However, the Appeals Chamber is firmly of the view that the resolution of these conflicting obligations lies with The Netherlands.⁵⁷

The Appeals Chamber therefore proceeded to order the Registrar to prepare the witnesses' return to the DRC.⁵⁸ The Registrar should consult with the Dutch authorities to determine the procedure that will be followed in this respect. This procedure must enable the Dutch authorities to decide whether they need to intervene in the witnesses' return in light of their own human rights obligations.⁵⁹

The witnesses' Duty Counsel asserted that the order of the Appeals Chamber prevents the Dutch authorities from hiding behind the ICC. They therefore urged the authorities to give proper effect to the Chamber's order and to prevent the witnesses from being returned to the DRC. It remains unclear whether the authorities have met this request and have taken custody over the witnesses. However, looking at the position that the Dutch authorities have taken so far, not much can be expected from them. The authorities have persistently rejected taking custody of the witnesses, maintaining that—pending the asylum procedure—the witnesses should remain detained in the ICC's Detention Centre.⁶⁰ Moreover, the authorities argued that the Netherlands cannot evaluate the legitimacy of the ICC's detention of the witnesses.⁶¹ In addition, the Dutch courts have disassociated themselves from the witnesses' detention. Although The Hague District Court initially asserted that the Netherlands should be concerned about the witnesses' fate⁶² and ordered the Dutch authorities to assume control over them,⁶³ soon after this decision the ECtHR judgment in the case of *Longa* raised questions about its future validity and effect.⁶⁴

Like the three witnesses under consideration, Longa is a Congolese national and a detained ICC defence witness who applied for asylum in the Netherlands.⁶⁵ Pending

⁵⁷ Id. ⁵⁸ Ibid., para. 30. ⁵⁹ Id.

⁶⁰ See *Katanga and Ngudjolo* decision of 1 March 2012 (n 10). In a different case concerning a similar situation, the Netherlands Ministry for Foreign Affairs sent a *note verbale* to the ICC which gives further insights into the government's position. The *note verbale* was cited in *Longa v the Netherlands* App. no. 33917/12 (ECtHR, 9 October 2012) ('*Longa v the Netherlands*') para. 22.

⁶¹ Raad van State, 22 March 2012, para. 2.1.7.

⁶² Rechtbank Den Haag, 26 September 2012, para. 3.8. ⁶³ Ibid., para. 3.9.

⁶⁴ On 29 October 2012 the Court of Appeal of The Hague already decided to suspend the immediate enforceability of the District Court's decision. Considering the judgment of the ECtHR, the Dutch judges are confronted with a legal question—should the state take control over the witnesses?—that has no obvious answer. In such a situation, a lack of restraint could lead to an irreversible situation that cannot be solved easily. Acknowledging that the detention situation of the witnesses requires the Court's attention, the Court of Appeal finds that the State's interests necessitate a preservation of the current situation in which the witnesses are detained by the ICC. Gerechtshof 's-Gravenhage, 29 October 2012 (ECLI 1393), paras 6–9.

⁶⁵ *Longa v the Netherlands* (n 60) paras 1–26.

the decision on his asylum application, he remained detained by the ICC. Longa contested the lawfulness of his detention before the ECtHR.⁶⁶ He argued that the Dutch refusal to review and end his illegal detention situation constitutes a violation of Articles 5 and 13 of the ECHR. The ECtHR, however, dismissed Longa's complaints. The Court assumed that, '[t]he exercise of jurisdiction is a necessary condition for a Contracting State (*in casu* the Netherlands) to be able to be held responsible for acts or omissions imputable to it'.⁶⁷ Jurisdiction is primarily based on territoriality—i.e. states exercise jurisdiction over persons who are physically present on their territory.⁶⁸ Exceptions to the principle of territoriality may, however, arise when 'States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities'.⁶⁹ This is also true in Longa's case. The fact that Longa 'is deprived of his liberty on Netherlands soil does not of itself suffice to bring questions touching on the lawfulness of his detention' within the Dutch jurisdiction.⁷⁰ As long as he is neither returned to the DRC, nor handed over to the Dutch authorities, his detention remains based on an agreement between the ICC and the DRC.⁷¹ Being grounded on an arrangement that was lawfully concluded between an international criminal tribunal and a state not party to the ECHR, the Netherlands—as the ICC's host state—is not obliged to review the lawfulness of Longa's detention.⁷² The Dutch consideration of Longa's asylum request does not alter this conclusion.⁷³

Considering the ECtHR's findings and conclusions in *Longa*, The Hague Court of Appeal quashed the earlier decision of the District Court. The Court of Appeal determined that the witnesses' detention is not unlawful, but is based on, and is derived from, their detention in the DRC. As such, neither the Dutch courts nor the ICC are competent to evaluate the lawfulness of the DRC's detention.⁷⁴ The witnesses should rather turn to the DRC for assistance.⁷⁵ The fact that the witnesses are present on Dutch soil and have applied for asylum in the Netherlands cannot alter this finding. The witnesses have appealed this judgment before the Supreme Court which is yet to render judgment.⁷⁶ It will be interesting to see whether and how the Supreme Court's decision is influenced by the ICC's order that the witnesses be returned to the DRC subject to the intervention by the Netherlands.

⁶⁶ Ibid., paras 51–4. Longa argues that whereas the Congolese title for his detention expired on 2 July 2007, the ICC has no legal ground to keep him detained after he gave evidence. Furthermore, the Dutch authorities never even claimed that there was a basis for the applicant's detention under their domestic law.

⁶⁷ Ibid., para. 61.

⁶⁸ Ibid., para. 69.

⁶⁹ Id.

⁷⁰ Ibid., para. 73.

⁷¹ Ibid., para. 75.

⁷² Ibid., para. 80.

⁷³ Ibid., paras 82–3.

⁷⁴ Gerechtshof 's-Gravenhage, 18 December 2012 (ECLI 6075), para. 2.2.

⁷⁵ Id. This, interestingly, leads to the Courts' paradoxical suggestion to let the witnesses seek legal remedies in the very same (Congolese) legal system that the Court believes to be responsible for a 'flagrant denial of justice'.

⁷⁶ According to the witnesses' counsel, this decision could take until March 2014, possibly longer. See also Easterday (n 33).

43.3 Taking Stock

43.3.1 Where are we now?

The previous outline of the proceedings in the situation of the Congolese witnesses has shown that the regulations concerning the position and responsibilities of the ICC and the Netherlands vis-à-vis detained witnesses are inconclusive.⁷⁷ The drafters of the Rome Statute have failed to regulate situations where detained witnesses ask for protection from the host state by applying for asylum. When this situation presented itself in practice, it prompted sensitive diplomatic consultations and complex legal proceedings.

The diplomatic consultations between the ICC, the Netherlands, and the DRC have had a negative effect on their mutual relations. The ICC and the Netherlands have both tried to absolve themselves of responsibility for the protection and detention of the witnesses. Frustrated by the resulting impasse, the ICC accused the Dutch authorities of taking an ‘unwavering stance’⁷⁸ and an ‘intransigent position’.⁷⁹ For the DRC, the consultations have been even more unsatisfactory. The Congolese authorities have expressed great dissatisfaction with the witnesses’ delayed return. The issue may even withhold the DRC from adopting legislation implementing the Rome Statute.⁸⁰ A solution to this diplomatic conflict does not seem to be within reach. When the responsible Dutch State Secretary of Security and Justice was in the summer of 2013 asked what solutions he was working on, he could only answer that the Dutch authorities and the ICC were trying to come to ‘structural agreements’.⁸¹

The legal proceedings have provided only a little more clarity on the witnesses’ position and rights. The Dutch authorities have excluded the witnesses from asylum protection on the basis of Article 1(f) of the 1951 Refugee Convention. At the same time, the Netherlands cannot deport the witnesses to the DRC because of the risk that their right to a fair trial will be violated. They are thus put in a ‘legal limbo’ in which they may neither legally stay in the Netherlands, nor be deported to their country of origin. Although there are reasons to believe that the Dutch authorities give priority

⁷⁷ Sluiter (n 13) 666–7. Sluiter, however, doubts whether the possibility of asylum applications by detained witnesses was completely unforeseen by the Dutch authorities. He points out that there were concerns about this issue with the Dutch delegation during the deliberations in Rome. Moreover, Sluiter refers to correspondence from the Dutch parliament that seems to foresee and allow the possibility of asylum application by detained ICC witnesses. On this issue see also J van Wijk, ‘Asielzoekende Getuigen bij het Internationaal Strafhof, een Steeds Nederlandser Probleem’ (2012) 9 *Nederlands Juristenblad* 527, 530.

⁷⁸ Order on Duty Counsel’s Requests Concerning the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3303-tENG, TC II, ICC, 1 June 2012, para. 14; Decision on the Request for Release of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350, *Katanga, Situation in the Democratic Republic of the Congo*, TC II, ICC, 8 February 2013 (‘Katanga decision of 8 February 2013’) para. 14.

⁷⁹ *Katanga* decision of 8 February 2013 (n 78) para. 22.

⁸⁰ S Kendall, ‘Defense Witnesses Claim Asylum in the Netherlands: Implications for State Cooperation’, *International Justice Monitor*, 29 August 2011.

⁸¹ Kamerbrief 2013Z08919, ‘Beantwoording Kamervragen over door het Internationaal Strafhof vrijgesproken verdachten’, 17 June 2013.

to processing the pending appeals of this decision, it is not expected that a definite decision on the asylum applications will be available at short notice. In the meantime, the witnesses' detention position remains uncertain. With the ICC ordering the return of the witnesses to the DRC, only the Dutch authorities can prevent them from being sent back to the Congolese prison. However, considering the past position of the Dutch authorities, it can be reasonably expected that they will continue trying to expel the witnesses.

43.3.2 What's next?

The Dutch authorities will only be allowed to send the witnesses back to Congo if they can convince Dutch courts that enough safeguards have been put in place to guarantee that Article 6 ECHR will not be violated upon their return. However, even if they succeed in doing so, it would not mean that the witnesses can be returned to Congo without further ado. The witnesses still have the right to request a so-called Rule 39 Interim Measure at the ECtHR, an urgent measure that applies when there is an imminent risk of irreparable harm and grants temporary protection against expulsion. Although the ECtHR grants such requests only on an exceptional basis,⁸² the Congolese witnesses seem to stand a relatively good chance to be granted such protection and frustrate immediate deportation. A number of 1(f) excluded asylum seekers in, for example, the Netherlands have in recent times successfully filed requests for interim measures.⁸³ Since ECtHR procedures are not known for their expeditiousness—procedures of up to three years are no exception⁸⁴—the witnesses' prompt expulsion to the DRC is not to be expected any time soon.

The asylum application of the Congolese witnesses clearly creates a Catch-22 situation. It is unlikely that the ICC, the Netherlands, and the DRC will, in the near future, come to a solution, which is acceptable to all. As such, the situation depicts the practical and political problems that result from a lack of harmonization between (the execution of) international criminal law and (upholding) the principles of international protection deriving from international refugee and human rights law. When taken on their own, the rules and principles underlying each of these legal regimes may form a sufficiently consistent and coherent framework. The Congolese case, however, shows that problems arise when they are applied at the same time.⁸⁵

Considering the fundamental problem underlying the difficulties of the Congolese case, one wonders about the future implications of this case. One can also ask whether there are any viable strategies available that would grant detainees the opportunity to testify at the ICC, without hampering the relationship between the ICC and its States Parties.

⁸² ECHR, Factsheet; Interim Measures, January 2013 <http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf> accessed 10 November 2013.

⁸³ E.g. District Court The Hague, 18 May 2010, ECLI (BN1020); District Court The Hague, 8 May 2013, ECLI (CA 2650).

⁸⁴ See e.g. *Othman v the United Kingdom* App. no. 8139/09 (ECtHR, 17 January 2012). The interim measure was granted on 19 February 2009, while the decision was taken on 17 January 2012.

⁸⁵ Van Wijk (n 25) 183.

43.4 Future Implications

43.4.1 Knowing the past...

Although the asylum applications of the Congolese witnesses are often presented as a *novum*, they were actually not the first detained witnesses who applied for asylum after having testified at an international criminal court. Former Rwandan Justice Minister Agnes Ntamabyariro was awaiting her genocide trial before the Rwandan national courts in detention when, in 2006, the ICTR ordered her transfer to the Tribunal to testify in the Government II case.⁸⁶ While giving testimony, she complained about the treatment of the Rwandan authorities.⁸⁷ After testifying, Ntamabyariro delivered a written asylum request to the ICTR President and communicated this to the Deputy Registrar. She cited her fear of torture and the imposition of the death penalty. Without regard to the asylum application, the ICTR transferred her to the Rwandan authorities using a specially chartered flight.⁸⁸ The case has rarely been addressed by the media, politicians, or academics.

Years before, in 1997, a similar ‘hasty’ approach was taken when Dragan Opačić—a detained ICTY witness—filed an asylum request in the Netherlands. Opačić was a former member of the Bosnian-Serb Army. In 1995—when he was only 19 years old—a Bosnian court convicted him to ten years’ imprisonment for having committed war crimes against Bosnian Muslims when he was working as a guard at the Trnopolje ‘concentration camp’. During his cross-examination as a witness in the case against Duško Tadić, Opačić claimed that the Bosnian authorities abused and pressured him to falsely testify against Tadić. Moreover, he asserted that he had never been a camp guard and that his conviction in Bosnia was based on lies. Opačić feared that, because of these allegations, his life was in danger or that he would face other forms of ill-treatment upon his return to Bosnia. He therefore requested that he remain in the Tribunal’s custody until the relevant authorities of Bosnia and Herzegovina (B&H) had decided upon the revision of his judgment. The Trial Chamber, however, rejected Opačić’s request and ordered that he be remanded to B&H.⁸⁹ After all, the ICTY had ensured B&H that Opačić would be returned to its custody upon completion of any proceedings before the Tribunal. The Chamber also expressed its ‘full confidence’ that B&H would observe the principle that ‘no person under any form of detention or

⁸⁶ The Rwandan government for months refused to cooperate in the transfer of the witness to Arusha. The deputy prosecutor argued that the trial in Rwanda was set to start soon and releasing her to ICTR custody could interfere with this process. The Trial Chamber ordered her to be transferred, threatening that a refusal to cooperate would be reported to the Security Council. ‘Former Minister Ntamabyariro Will Not Testify at ICTR as Set’, *The Arusha Times*, 29 April 2006.

⁸⁷ Minutes of Proceedings, *Bizimungu et al.*, ICTR-99-50-T, TC II, ICTR, 23 August 2006.

⁸⁸ ‘United Nations Illegally Transfers Asylum Seeker’, *Press Release Philippe Larochelle & Avi Singh Lawyers*, 13 September 2006 (copy with authors).

⁸⁹ Order for the Return of a Detained Witness, *Tadić*, IT-94-1-ST—IT-95-7-Misc. 1, TC II, ICTY, 27 May 1997.

imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.⁹⁰

Opačić also requested the Dutch authorities to bar his expulsion. He started a summary proceeding before the District Court in The Hague to block his expulsion to B&H.⁹¹ Opačić's counsel argued that the Netherlands would violate Articles 2, 3, 5, and/or 6 of the ECHR if it facilitated his return by transferring him from the UN Detention Facility to an airport. The District Court, however, pointed to the binding character of ICTY orders and found no reasons to review the ICTY decision. It argued that the Tribunal had assessed Opačić's request in light of the International Covenant on Civil and Political Rights (ICCPR).⁹² Considering that the ICCPR provides as much protection as the ECHR, the ICTY procedure provided sufficient due process guarantees and used the same assessment criteria as Dutch courts.⁹³

Following his unsuccessful summary proceedings, Opačić—as a final solution—applied for asylum in the Netherlands. The Dutch Immigration and Naturalization Services (IND) in The Hague and at Schiphol Airport, as well as the State Attorney, were notified. According to Opačić's asylum counsel, the Immigration Services, however, never even took his request into consideration.⁹⁴ Days after the request was filed, Opačić was flown to Sarajevo to serve his sentence. The Dutch media paid particular attention to the transfer.⁹⁵

43.4.2 ...to understand the future

Although few detained witnesses have filed asylum requests, this demonstrates that the ICC as well as the Dutch government could have foreseen that the matter would come up again sooner or later. Perhaps it was never considered to be a real issue, because such requests had never seriously frustrated or hampered the relationship between the tribunals on the one hand, and the host state or other cooperating states on the other. A possible explanation for the very different course of events in the case of the three Congolese witnesses is that they applied for asylum in the host state—in *casu* the Netherlands—before requesting the Court to bar expulsion. This enabled the *Katanga* Trial Chamber—after having recognized the principle of *non-refoulement*—to publicly urge the Dutch authorities to proceed in investigating the already pending asylum claims.⁹⁶ In contrast, because Opačić applied for asylum

⁹⁰ This principle has been laid down in Principle 6 of the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, UNGA Res 43/173 (9 December 1988) UN Doc A/RES/43/173.

⁹¹ *Dragan Opačić v The Netherlands*, Kort Geding, 30 mei 1997, KG97/742, para. 3.4.

⁹² This, in itself, is a remarkable line of argumentation, since the Chamber did not refer to the ICPP but, instead, the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment (n 90).

⁹³ J d'Aspremont and C Bröllman, 'Challenging International Criminal Tribunals before Domestic Courts' in A Reinisch (ed.), *Challenges of Acts of International Organizations before National Courts* (Oxford: Oxford University Press 2010) 113.

⁹⁴ Personal correspondence with legal counsel.

⁹⁵ See e.g. 'Dragan Opačić—Getuige 'L' in Zaak Tadić—Loog', VPRO Argos, 10 September 1999 <http://www.domovina.net/archive/1999/19990910_vpro_ned.php> accessed 10 November 2013 (full transcript in Dutch).

⁹⁶ Van Wijk (n 25) 175. As already discussed, the Trial Chamber in a later stage also considered that the pending asylum proceedings make the return of the witnesses 'temporarily impossible from a legal point

after the ICTY had ordered his return, the Tribunal could not openly pressure the Dutch authorities to assess his pending asylum request. This arguably provided the Dutch authorities with a window of opportunity to surreptitiously ignore Opačić's asylum claim, facilitate his expulsion, and thereby 'save' the relationship between the ICTY, the Netherlands, and B&H.

Thus, the 'recipe for success' for filing an asylum request in case detained witnesses fear violations of their human rights upon return to their country of origin seems clear now. Witnesses should first apply for asylum in the Netherlands, and only at a later stage inform the Court. Future ICC witnesses may profit from this knowledge when they choose to apply for asylum in the Netherlands. This does not imply that the Netherlands can expect a 'sudden wave' of new asylum applications by detained witnesses.⁹⁷ Only under very particular circumstances can witnesses make a viable claim for refugee status. Successful claims are most likely for (defence) witnesses who (i) stay in (pre-trial) detention in their country of origin, (ii) stay in a detention facility governed by a (former) adversary, or (iii) can make a credible claim that their human rights will be violated upon their return. The latter requirement only applies to witnesses who stay in remand or prison facilities which are governed by (former) adversaries who are not known to take good care of the accused and prisoners.

In this view, ICC witnesses who are in (pre-)trial detention under the auspices of an international tribunal or of a country with a decent human rights record will not benefit much from applying for asylum in the Netherlands. However, insofar as it concerns detained witnesses from, for example, the Côte d'Ivoire or Congo—countries which are not known for respecting human rights⁹⁸—things might look different. To make it more concrete, if the legal counsel of Laurent Gbagbo—the former President of the Côte d'Ivoire—were to request former Police Chief Jean-Noel Abehi or former Student Union leader Jean-Yves Dibopieuin to testify in The Hague, these men would stand a reasonable chance of (successfully) applying for asylum. They currently await prosecution in a Côte d'Ivoire detention facility in relation to their role in the Côte d'Ivoire's post-election violence and could object to deportation by claiming that the Côte d'Ivoire will violate their human rights upon their return.⁹⁹

It is difficult to foretell if such witnesses are interested in making asylum claims. The Congolese case demonstrates that applying for asylum comes at a price. The Congolese witnesses have remained in ICC detention for almost three years; they are also caught up in many legal procedures and have a bleak chance of being granted asylum. At the

of view' and suspended the return of the witnesses to the DRC until the final outcome of their asylum claim. See (n 41).

⁹⁷ D Yabasun and M Holvoet, 'Seeking Asylum before the International Criminal Court. Another Challenge for a Court in Need of Credibility' (2013) 12 *International Criminal Law Review* 725, 744–5. See also Sluiter (n 13) 16: '[t]he application for asylum by detained witnesses is quite unique and unlikely to arise in the future'.

⁹⁸ The human rights situation in relation to prisoners in Congo has already been discussed extensively. For a recent critical account of the human rights situation in the Côte d'Ivoire, see 'A Long Way from Reconciliation; Abusive Military Crackdown in Response to Security Threats in Côte d'Ivoire', Human Rights Watch (2012).

⁹⁹ See C Stein, 'Is Ivory Coast Zeal to Prosecute Former Bad Guys Setting Up War in West Africa?', *The Christian Science Monitor*, 12 March 2013.

same time they are—at least for the time being—safe and have access to good medical facilities. Furthermore, they have both the ICC and the Netherlands pushing the Congolese government to guarantee good treatment and a fair trial.

43.5 Possible Solutions

The previous account has shown that the asylum issue seriously impacts on the relationship between the ICC and the Netherlands on the one hand, and the ICC and the sending state on the other. The perception alone that more asylum requests might follow could thwart a sending state's willingness to transfer witnesses to The Hague. This could seriously delay—or even frustrate—court proceedings. When thinking about solutions for this legal and political 'Gordian knot', two approaches come to the fore. First, there is the option of imposing preliminary safeguards to protect the human rights of detained witnesses. Second, there is the option to limit their access to human rights protection. Both options have serious shortcomings and, for the following reasons, may not be regarded as viable alternatives.

43.5.1 Preliminary safeguards for human rights protection

The Congolese case shows that the ICC can order protective measures for detained witnesses in their home countries. Such measures can, for example, consist of extra surveillance by specialized guards and cameras in the witnesses' prison (cells). Once these measures are successfully installed, they will ensure a sufficient level of human rights protection. It can therefore be presumed that Article 3 of the ECHR will not be violated.¹⁰⁰ At the same time, the Congolese case demonstrates that expulsion of witnesses can be impeded if the witnesses face a flagrant denial of justice pursuant to Article 6 of the ECHR. This can, for example, be the case if persons have been kept in unlawful detention for a long time, or if the death penalty might be imposed.¹⁰¹ To prevent this in future cases, the ICC could—apart from taking measures which offer the witness Article 3 ECHR protection—take measures that offer Article 6 ECHR protection and safeguard the witness's right to a fair trial upon return. Such preliminary safeguards could reduce the reluctance of both the Netherlands and the sending state to cooperate in transferring the witness. There are, however, at least three important reservations to be made in this respect.

First, installing fair trial measures could create an incentive for detainees in post-conflict countries to testify at the ICC. Indeed, if testifying would mean that the ICC pushes for domestic criminal proceedings which fit Article 6 of the ECHR criteria, this may entice detainees to fabricate stories in order to be called as a witness.

Second, such an approach would make the ICC and/or the Netherlands *de facto* human rights lobbyists. By installing measures to protect detained witnesses against

¹⁰⁰ Rechtbank Amsterdam, 14 October 2013 (ECLI 6688), para. 11.2.

¹⁰¹ Rechtbank Amsterdam, 14 October 2013 (ECLI 6688 and 6692), paras 11.4–11.5 and para. 10.5 ECLI (6705).

Article 3 violations—as it did in the case of the Congolese witnesses—the ICC stays within its mandate. After all, these protective measures are directly linked to the mandate of the Victims and Witness Unit as expressed in Article 68 of the ICC’s Rules of Procedure and Evidence. By contrast, the Court’s engagement with fair trial standards of national criminal proceedings on behalf of detained witnesses goes beyond its mandate to conduct proceedings against alleged perpetrators of international crimes. It effectively allows the Court to interfere in domestic proceedings. Such interference would be remarkable in light of the Court’s explicit intention not to be a human rights court.¹⁰² Instead of the ICC, the Netherlands could therefore do the lobbying. It is, however, questionable if this is feasible. Although the Dutch government regularly calls for fair trial standards in general, preventively demanding diplomatic ‘fair trial assurances’ for individuals would imply a very significant burden on Dutch diplomatic efforts.

Third, and most importantly, such anticipatory measures still cannot exclude the possibility of witnesses applying for asylum in the Netherlands after having testified. Even when the ICC, the sending state, and Dutch government all agree that the necessary conditions have been created to guarantee good treatment and a fair trial upon return, the case law in the Congo case confirms that witnesses retain the right to an independent and impartial judicial evaluation. As long as the witnesses have access to the Dutch asylum procedure, the ICC cannot guarantee any sending state a swift return of its detainees.

43.5.2 Limiting witnesses’ access to human rights protection

Another possible solution in dealing with future detained witnesses is either to virtually or physically transfer part of the court proceedings to the country in which the witness is detained. Both these measures seek to exclude witnesses from requesting protection against, for example, alleged torture, unlawful detention, or the death penalty in the Netherlands. Therefore, we refer to them as limitations of human rights protection.

43.5.2.1 Virtual transfer of court proceedings

A virtual transfer of court proceedings could be created by letting detained witnesses testify by means of a video-link. As a general rule, Article 69 (2) of the Rome Statute requires in-person testimony. However, ‘[t]he Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology’. Rule 68 of the ICC’s Rules of Procedure and Evidence regulates this. So far, witness testimony through video-links has generally been used to

¹⁰² See (n 47). One could, on the other hand, argue that any promotion of fair domestic proceedings coincides with the ICC’s positive complementarity goal to ensure that states themselves are willing and able to carry out criminal prosecutions, but if the Court were to go this way, it would definitely stretch its mandate. This would be the case, in particular, if such domestic prosecutions were not related to any of the crimes which fell under the Court’s jurisdiction.

protect prosecution witnesses. Referring to a decision of the Bemba Trial Chamber, Yabasun and Holvoet argue that this protection of witnesses seems to be the exact purpose of witness testimonies from a remote location.¹⁰³ Careful reading of this decision, however, suggests that a less strict interpretation is certainly possible. The Trial Chamber stated:

[o]ne of the relevant criteria for determining whether or not a witness may be allowed to give *viva voce* (oral) testimony by means of video technology relates to the witness's personal circumstances, which have **thus far** been interpreted as being linked to, *inter alia*, the well-being of a witness.¹⁰⁴

Thus, the Chamber does not exclude the possibility of allowing the use of video-links for other reasons but the well-being of a witness. In a more recent decision, the same Chamber accordingly held that 'logistical difficulties in arranging a witness's travel to testify at the seat of the Court in The Hague, which would seriously impact upon the expeditious conduct of the proceedings', can justify hearing a witness's testimony by means of video technology.¹⁰⁵ This decision indicates a tendency to gradually expand the criteria under which video-testimonies are possible. It remains as yet uncertain whether the Court will also allow video testimony for the purpose of safeguarding state cooperation by preventing a detained witness from applying for asylum in the Netherlands.

If the Court proceeds to do so, the question arises of how to implement this in practice. Rule 67(3) of the ICC's Rule of Procedure and Evidence requires that the video-link testimony is conducted from a 'venue ... conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness'. Applying this rule in relation to *detained* witnesses, the following question arises: to what extent would the Court consider a cell in a detention facility in the Northern Côte d'Ivoire or Kinshasa—no matter what elaborate protective measures the Registry may have taken and no matter which monitoring mechanisms

¹⁰³ Yabasun and Holvoet (n 97) 744.

¹⁰⁴ Public Redacted Decision on the 'Prosecution Request to Hear Witness CAR-OTP-PPPP-0036's Testimony via Video-Link', *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2101, TC III, ICC, 3 February 2012, para. 7.

¹⁰⁵ Decision on 'Defence Motion for Authorization to Hear the Testimony of Witness D-45 via Video-Link' of 6 March 2013, ICC-01/05-01/08-2525-Conf, a public redacted version of this decision was filed on 7 March 2013; Public Redacted Version of 'Decision on "Defence Motion for Authorization to Hear the Testimony of Witness D-45 via Video-Link"' of 6 March 2013, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2525-Red, TC III, ICC, 7 March 2013, para. 7; Decision on the 'Submissions on the Remaining Defence Evidence' and the Appearance of Witnesses D04-23, D04-26, D04-25, D04-36, D04-29, and D04-30 via Video-Link, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2740, TC III, ICC, 15 August 2013, para. 10; and Decision on the Defence's 'Submission on the Anticipated Witness Schedule and the Testimony of Witness D04-54' (ICC-01/05-01/08-2806-Conf), *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2818, TC III, ICC, 17 September 2013, para. 10. This position was confirmed in November 2013, when the Trial Chamber held that defence witness CHM-01 should in principle testify in person at the seat of the Court in The Hague, but that 'in light of the Registry's enquiry, in case logistical difficulties prevent the witness from travelling to the seat of the Court and starting his testimony...the Chamber will hear his testimony *viva voce* by means of video technology'. Public Redacted Version of Decision on the Presentation of Additional Testimony Pursuant to Articles 64(6)(b) and (d) and 69(3) of the Rome Statute, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2863-Red, TC III, ICC, para. 6.

may have been set in place—such a venue? It seems hard to imagine that a former Gbagbo supporter or Ouatarra defector would regard his prison cell as an encouraging environment in which he could speak freely and possibly critique the government regime that is also responsible for his (safety in) custody. The ICC's protective measures in Côte d'Ivoire prisons are likely to be more temporary in nature than the memory of its prison wardens.

Another option would be to take the testimony in an ICC Field Office or another more neutral venue. But whatever venue is selected, it will always be a challenge to create an atmosphere which is truly 'conducive to giving a truthful and open testimony'.¹⁰⁶ It seems that as long as all roads from the chosen venue by definition lead back to a detention centre which is operated by a former adversary who is perceived to violate human rights, *any* alternative venue might be problematic from the perspective of the witness. But then, if this line of reasoning were followed to the extreme, it would even mean that the ICC courtroom could not be considered a suitable venue as long as watertight agreements on the witnesses' return to the country of detention are in place. The ICC may just have to accept that the witness testimonies on which it relies have been taken under circumstances that are not ideal.

Although far from perfect, this demonstrates that remote testimonies of detained witnesses by video-link could in theory offer an alternative to in-person testimony. Yet, it remains to be seen if this is, in practice, a viable alternative. According to the International Bar Association (IBA), video-link testimony is particularly suitable for situations where there are security concerns; the witness's credibility is not in contention; and only factual information is provided.¹⁰⁷ In any other situation, the IBA's first choice is that witnesses come to The Hague and testify in person before the Court. The OTP takes a similar position.¹⁰⁸ If, in addition, the detained witness insists on testifying in person in The Hague—for example, if he does not deem any venue in the country of detention to be safe enough—this puts the Court in a moral quandary. If the defence, the prosecutor, as well as the witness's first choice were to let the testimony take place in The Hague, one could argue that the Court should have very strong arguments not to cater to this. Would the perceived threat of an asylum application be such a reason? To make it concrete, imagine Laurent Gbagbo requested his former Côte d'Ivoire Police Chief Jean-Noel Abehi to testify on his behalf, and imagine Abehi insisted on testifying in person in The Hague, could in that case *the mere possibility* of Abehi expressing his/her rights under the Refugee Convention—to which all States Parties of the Rome Statute, the Côte d'Ivoire included, are signatories—be considered sufficient reason not to allow him to do so, but instead to issue an order to organize a video-conference? Even if this could entail the risk that this material witness would under those circumstances not testify at all?

¹⁰⁶ As required by Rule 67(3) of the Rules of Procedure and Evidence, Official Records of the ASP to the Rome Statute of the ICC, First session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A (adopted and entered into force 9 September 2002) ('ICC RPE').

¹⁰⁷ D Chaikell and L Smith van Lin, 'Witnesses before the International Criminal Court', International Bar Association Report (2013), 18.

¹⁰⁸ Id.

43.5.2.2 Physical transfer of court proceedings

The problems outlined in the previous section could to a certain extent be solved by physically transferring parts of court proceedings to third countries. There would be no need for the witness to come to the Court if the Court comes to the witness. One could in this respect think of introducing ICC investigating judges who can issue ‘rogatory commissions’ to take witness testimonies under oath and present written transcripts of these testimonies in court. Countries like Canada and the Netherlands, for example, already use such commissions to gather evidence in universal jurisdiction cases against Rwandan *génocidaires*.¹⁰⁹

Also, this alternative entails certain challenges and limitations. Where a video-link testimony is possible under the current Rules of Procedure and Evidence, the introduction of rogatory commissions would entail a major revision of the existing rules, regulations, and practice. It would require a complete paradigm shift in the present legal culture of international criminal law. Moreover, the introduction of rogatory commissions does not tackle all of the challenges discussed. For example, it will still be difficult to find a venue which is truly conducive to truthful testimonies. Therefore, we do not foresee that this alternative will be implemented in the near future. The challenges to implement a system of rogatory commissions may simply not outweigh the solutions it provides.

43.6 Concluding Remarks

In this chapter we described how three detained Congolese ICC witnesses applied for asylum in the Netherlands. After long and complex proceedings, the Dutch courts excluded the witnesses from refugee protection on the basis of Article 1(f) of the Refugee Convention. Their deportation to the DRC was, however, hampered by Article 6 of the ECHR. Now that the ICC has ordered the return of the witnesses to their home country, it remains to be seen whether the Netherlands will take over custody until the decision on the witnesses’ asylum application becomes final.

We have argued that this particular case has had a negative effect on the mutual relations between the ICC, the Netherlands, and the DRC. Moreover, we argued that the threat of more asylum applications could have serious implications for the future functioning of the international criminal justice system. Although it is unlikely that the ICC will be overwhelmed by detained witnesses applying for asylum in the Netherlands, the perceived threat alone will hamper the relationship between the ICC, States Parties, and the Netherlands as a host state. This dilemma demonstrates the practical and political problems that result from a lack of harmonization between (the execution of) international criminal law and (upholding) protective principles derived from international refugee and human rights law. It is difficult to conceive a solution that reduces the reluctance of sending states to cooperate with the ICC and at the same

¹⁰⁹ For Canada, see e.g. R Currie and I Stancu, ‘R. v Munyaneza: Pondering Canada’s First Core Crimes Conviction’ (2010) 10 *International Criminal Law Review* 829, 832. For the Netherlands, see e.g. Judgment of the District Court of The Hague in the case against Yvonne Basebya, LJN: BZ4292, 1 March 2013.

time guarantees access to the highest standards of human rights protection for detained witnesses and the accused. The three possible solutions we explored—anticipatory Article 6 measures, video-link testimony, and rogatory commissions—all come with complications and reservations. In particular, they all entail the risk that detained witnesses do not testify, because their human rights (protection) cannot be fully ensured. This begs the question to what extent the ICC as an institute intending to do justice according to the highest legal standards would, in that case, lose prestige. Because intuitively, it seems that something is not right if the Court were to simply accept that material witnesses cannot testify in person for the mere reason that it may put them in a rightful position to request protection against persecution, acts of torture, illegal detention, or the death penalty.

External Support and Internal Coordination— The ICC and the Protection of Witnesses

*Markus Eikel**

44.1 Introduction

44.1.1 Topic

In April 2013 the OTP of the ICC issued a statement in relation to the situation in Kenya, in which it reaffirmed that ‘witness protection remains one of our highest priorities’.¹ The same month, the departing Registrar, Ms Silvana Arbia, in summarizing her work, described the protection of witnesses as ‘a sensitive issue and arguably the most important function of the Registry’.² In August and November 2013, in two different situations, the Court issued arrest warrants³ against individuals for the commission of crimes against the administration of justice under Article 70 of the Rome Statute.⁴ These attempts to punish witness tampering and intimidation can be seen as one further means to enhance witness protection. Why has the protection of witnesses become a crucial issue for both the prosecution and the Registry of the ICC? What guidance does the statutory framework of the Court provide on the role of the organs, and how has the jurisprudence developed in that regard? What practical problems in relation to protective measures have occurred in the early work of the Court, and how have they been solved? These are some of the questions the present chapter would like to address.

Protective measures have become an essential issue for the early practice of the ICC because most evidence presented during ICC proceedings so far has been witness testimony. The ICC also conducts investigations and prosecutions in situations

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¹ Statement by the OTP, 5 April 2013: <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-04-2013.aspx> accessed 3 May 2013.

² S Arbia, *The Registrar’s Legacy. Reflections on the Work of the Registry of the International Criminal Court 2008–2013* (April 2013) 4.

³ Warrant of Arrest for Walter Osapiri Barasa, *Barasa, Situation in the Republic of Kenya*, ICC-01/09-01/13-11-US-Exp, PTC II, ICC, 2 August 2013; Warrant of Arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido, *Bemba et al., Situation in the Central African Republic*, ICC-01/05-01/13-1-Red2-tENG, PTC II, ICC, 20 November 2013.

⁴ Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute').

of ongoing conflict or immediate post-conflict, which increases the demands on the Court's limited witness protection capacities. Importantly, the legal framework at the ICC, in contrast to the ICTY, the ICTR, and the SCSL, splits responsibilities between the different organs of the Court, thereby creating uncertainty and even confusion as to the practical responsibilities within the Court.

While there is no lack of academic attention for the work of the Court, scholarly contributions have so far largely ignored the aspect of the Court's work dealing with protective measures. If covered, legal literature has focused on specific aspects of protective measures at the ICC, i.e. the relationship between anonymous witness testimony and protective measures;⁵ or a comparison of judicial protective measures between the different international criminal tribunals.⁶ Some publications have described the work of the Court's Registry, including its efforts in relation to witness protection.⁷ A comprehensive study has focused on the protection of witnesses in the African context, including a chapter on the ICC.⁸

In contrast to these previous approaches, this chapter will view protective measures primarily as an example of how the ICC, in its infant years, transfers statutory responsibilities into the practical work of the Court. This chapter identifies two main weaknesses in the Court's protection system: 1) a lack of internal coordination, especially in its early years, and 2) a lack of external support, leaving the Court to struggle with limitations of state cooperation and budgetary constraints. This chapter suggests enhancing the implementation of a comprehensive inter-organ approach towards protective measures. By promoting this model, this chapter intends to contribute to ongoing efforts to achieve a better governance of the Court.

44.1.2 Structure

This chapter will first analyse the various provisions in the Rome Statute and Rules of Procedure and Evidence of the ICC⁹ dealing with protective measures. The Pre-Trial Chamber and Trial Chamber (44.2.1), the prosecutor (44.2.2), and the Registrar (44.2.3) are all assigned specific responsibilities in relation to protective measures. An analysis of the *travaux préparatoires* of the Rome Statute and the Rules in relation to relevant provisions will be undertaken in order to clarify some of the ambiguities

⁵ M Kurth, 'Anonymous Witnesses before the International Criminal Court: Due Process in Dire Straits' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff 2009) 615.

⁶ C McLaughlin, 'Victim and Witness Measures of the International Criminal Court: A Comparative Analysis' (2007) 6 *The Law and Practice of International Courts and Tribunals* 189.

⁷ S Arbia, 'The International Criminal Court: Witness and Victim Protection and Support, Legal Aid and Family Visits' (2010) 36 *Commonwealth Law Bulletin* 519; M Dubuisson et al., 'Contribution of the Registry to Greater Respect for the Principles of Fairness and Expeditious Proceedings before the International Criminal Court' in Stahn and Sluiter (n 5) 565–84.

⁸ C Mahony, *The Justice Sector Afterthought: Witness Protection in Africa* (Pretoria: Institute for Security Studies 2010) especially 15–58.

⁹ Rules of Procedure and Evidence, Official Records of the ASP to the Rome Statute of the ICC, First session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A (adopted and entered into force 9 September 2002) ('ICC RPE').

inherent in the current drafting (44.2.4). In section 44.3, this chapter will closely examine two case studies (44.3.1.1 *Lubanga* 2008 and 44.3.1.2 *Katanga and Ngudjolo* 2008) that reflect the inherent tensions between Article 43(6) and Article 68(1) of the Rome Statute. In relation to procedural protective measures, as early as 2006 the question arose in the *Lubanga* case if the prosecution mandatorily needed to seek advice from the VWU before applying for exceptions from its general obligation to disclose the identity of witnesses (44.3.2).

Subsequently, this chapter will present agreed practices for protective measures of the Court that have consensually been developed between the different organs within the first years of the Court's existence (section 44.4). These established practices illustrate the dedicated efforts of all organs to overcome the difficulties of the early days of the Court, but also demonstrate the limitations of the Court in its protection capacities. The chapter will include protective measures of procedural and non-judicial nature. Examples for the latter are the Security Risk Assessment (SRA) and Individual Risk Assessment (IRA) (44.4.1), the Initial Response System (IRS) (44.4.2), and the Court's Witness Protection Programme (ICCPP) (44.4.3); an example of the former is the system of rolling disclosure (44.4.4).

In the conclusion (section 44.5), this chapter provides a short summary of its legal analysis and outlines the model of a comprehensive inter-organ approach. It recommends implementing the model in the framework of other ongoing efforts to achieve better efficiency within the Court. It stresses at the same time that, beyond improving internal coordination, the Court needs intensified support from external actors, both in terms of capacity and finances, if it truly wants to extend its protection capabilities.

As protective measures at the ICC offer a wide range of potential sub-topics, it is deemed necessary to determine at the outset of this chapter that the focus will be on protective measures for *witnesses*, not *victims*, although the Rome Statute and the Rules of Procedure and Evidence often refer to the protection of both groups at the same time.¹⁰ In addition, the analysis in this article focuses on protective measures during the time period prior to the in-court testimony of a witness. In a previous publication, the author has suggested a model of phased lead responsibilities for Court organs covering the whole period from the beginning of the investigation in a situation until the time after in-court testimony.¹¹

44.2 Legal Framework

The statutory framework of the ICC is significantly different from the ad hoc Tribunals, as it distributes responsibility for witness protection between the different organs of the Court. There is no equivalent for these elaborate provisions in the Statutes or Rules of the ICTY, ICTR, or SCSL. The provisions reflect the importance attributed to the

¹⁰ See e.g. in Arts 64(2) and 68(1) ICC Statute and Rule 81(4) ICC RPE.

¹¹ M Eikel, 'Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice' (2012) 23 *Criminal Law Forum* 97, 130–2.

protection of witnesses in the Statute. However, the statutory framework leaves the Court with ambiguity as to their practical implementation.

Similar to the general references in the ICTY and ICTR Statutes,¹² Article 68(1) of the Rome Statute assigns responsibility for witness protection to the Court as a whole:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In doing so, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.¹³

44.2.1 Chambers

Three statutory provisions specifically deal with the responsibilities of the Chambers for the protection of witnesses.

According to Article 57(3)(c), the Pre-Trial Chamber may ‘where necessary, provide for the protection and privacy of victims and witnesses’. The reference mainly serves the purpose of clarifying the competence of the Chamber to provide applicable measures at the pre-trial stage.¹⁴ ICC Rule of Procedure and Evidence 86 further establishes as a general principle that the Pre-Trial Chamber, in making any decision or order, ‘shall take into account the needs of all victims and witnesses in accordance with article 68’.

According to Article 64(2), ‘the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses’. In essence, the Chamber has to apply a balancing test between fair trial rights of the accused and the protection of witnesses.¹⁵ It has been judged that this ‘will be a difficult balance to reach especially for the disclosure to the accused of names and addresses of the witnesses in order to allow preparing their defence’.¹⁶ The rights of the accused are broadly defined in Article 67.

¹² Art 22 of the Statute of the ICTY, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, Annex ('ICTY Statute'); Art 22 of the Statute of the ICTR, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Annex ('ICTR Statute').

¹³ According to Art 34 ICC Statute, the term *Court* refers to all judicial organs of the ICC (i.e. Presidency, Chambers, Prosecution, and Registry). Other provisions of the Statute further describe the responsibilities of these organs.

¹⁴ F Guariglia et al., ‘Article 57’ in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* (München: C H Beck 2008) 1126.

¹⁵ For the treatment of due process rights in the jurisprudence of the ICC, see more generally M Kurth, ‘Anonymous Witnesses before the International Criminal Court: Due Process in Dire Straits’ in Stahn and Sluiter (n 5) 615; McLaughlin (n 6) 207.

¹⁶ G Bitti, ‘Article 64’ in O Triffterer (n 14) 1203–4. The Defence in the *Muthaura and Kenyatta* case has rather unconvincingly argued that the drafting of Art 64(2) clearly gives priority to the fair trial rights of the accused. See Defence Response to the Public Redacted Version of the 5 November 2012 ‘Prosecution Application for Delayed Disclosure of Witness Identities’ (ICC-01/09-02/11-519-Conf-Exp), *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-561, TC V, ICC, 7 December 2012, para. 24, with reference to ICTY jurisprudence in footnote 26.

Article 64(6)(e) provides that ‘in performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary...provide for the protection of the accused, witnesses and victims’. It has been argued that this provision imposes a duty rather than a discretionary power for the Trial Chamber.¹⁷ In the same sense, Trial Chamber I has stated that ‘once constituted, [it had] a statutory responsibility for the protection of victims and witnesses throughout the entirety of the period it is seized of the case’.¹⁸

Following equivalent rules at ICTY and ICTR,¹⁹ Rule 81(4) and Rule 87 give Chambers the authority to grant procedural measures of witness protection, either related to limitations of disclosure, or as in-court protective measures, such as image and voice distortion or testimony in closed session.

44.2.2 Prosecutor

Articles 54(3)(f) and 68(1) indicate that the prosecutor *takes* protective measures, thereby emphasizing that the Prosecutor has a mandate to decide on *and* implement protective measures in relation to his witnesses.

According to Article 54(3)(f), the Prosecutor ‘may take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence’. It has been argued that Article 54(3)(f) gives the Prosecutor discretionary power in the area of witness protection, and that he or she therefore has a witness protection authority alongside that of the Court and the VWU.²⁰

The second statutory provision is Article 68(1) (in part already quoted):

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. *The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes.* These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.²¹

The language of Article 68(1) indicates that it is a mandatory duty of the prosecutor to take protective measures, and that this power is not subordinate to that of any other

¹⁷ W Schabas, *The International Criminal Court. A Commentary on the Rome Statute* (Oxford: Oxford University Press 2010) 768.

¹⁸ Decision on Consequences of Non-Disclosure of Exculpatory Materials Covered by Art 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, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1401, TC I, ICC, 13 June 2008, para. 41.

¹⁹ Rules 69 and 75 of the Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (adopted 11 February 1994, as amended 8 December 2010) UN Doc IT/32/Rev. 45 ('ICTY RPE'); Rules 69 and 75 of the Rules of Procedure and Evidence of the ICTR (adopted 29 June 1995, as amended 10 April 2013) UN Doc ITR/3/Rev.22.

²⁰ M Bergsma and P Kruger, 'Article 54' in O Triffterer (n 14) 1086–7.

²¹ Emphasis added.

organ of the Court.²² The last sentence of paragraph 1 appears to provide a caveat intended to ensure that a decision by the prosecution to provide protective measures to a witness must be undertaken in an impartial and objective manner.²³ This rationale is supported by the fact that certain protective measures are provided by the VWU, so that they cannot be construed as an incentive for the witness to provide evidence in favour of the prosecution's case.

44.2.2.1 Prosecution's disclosure obligation and exemptions

Rule 76(1) obliges the Prosecutor to disclose to the Defence the identity and the statements of any witnesses he intends to call to testify, 'sufficiently in advance to enable the adequate preparation of the defence'.²⁴ This obligation, however, is not absolute. The Prosecutor can request an exemption if the protection of victims and witnesses is of concern, in accordance with Rules 76(4), 81(4), or 87(3). Rule 81(4) allows that, at pre-trial stage, witnesses' names and identifying information may be redacted (i.e. anonymous witnesses are authorized) 'to protect the safety of witnesses and victims and members of their families'.²⁵ Article 68(5) further provides for the possibility to submit the summary of a witness statement prior to the commencement of the trial in cases 'where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family'. All these scenarios are exemptions from the general disclosure obligation of the Prosecutor, and they therefore need to be authorized by Chambers before being implemented.²⁶

44.2.3 Registrar

Whereas the Statute is clear that the Prosecutor takes protective measures, the function of the VWU is two-fold. The unit *provides* protective measures,²⁷ and it *advises* on or *recommends* these measures.²⁸

According to Article 43(6), 'the Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the OTP, protective

²² Dissenting Opinion of Judge Georghis M Pikis and Judge Daniel David Ntanda Nsereko, Judgment on the appeal of the Prosecutor against the 'Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 67 of the Rules' of Pre-Trial Chamber I, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-776, AC, ICC, 26 November 2008, para. 15 ('Katanga and Ngudjolo appeals judgment on preventive relocation').

²³ Mahony (n 8) 35.

²⁴ For the drafting history of this rule, see H Brady, 'Disclosure of Evidence' in R Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers 2001) 408–10.

²⁵ Rule 81(4) ICC RPE.

²⁶ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-475, AC, ICC, 13 May 2008, para. 44 ('Katanga appeals judgment on authorisation to redact witness statements').

²⁷ Art 43(6) ICC Statute and Rule 17(2)(a)(i) ICC RPE.

²⁸ Art 68(4) ICC Statute and Rule 17(2)(a)(i) ICC RPE. See also Rules 87(1) and 88(1) ICC RPE.

measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses'. Through Article 43(6), the VWU becomes a statutory organ of the Registry, and therefore its budget is part of the Court's regular budget.²⁹

According to Article 68(4), '[t]he Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6'.

Article 68(4) makes an explicit link to Article 43(6), but the content of both articles are not consistent. Article 68(4) provides that the VWU *may* advise the prosecutor and the Court on protective measures. To the contrary, Article 43(6) stipulates that the VWU *shall provide, in consultation with the Office of the Prosecutor*, protective measures and security arrangements. Read together, these provisions make it difficult to determine who in the end is in charge of implementing protective measures.

In November 2008 the Appeals Chamber concluded that the VWU 'is responsible not merely for giving advice on protective measures, but for the actual provision of protective measures and security arrangements',³⁰ thereby emphasizing the importance of Article 43(6). In the dissenting opinion of Judges Pikis and Nsereko³¹ as well as in legal literature³² it has been argued that Article 43(6) must be read *in pari materiae* with Article 68(4). The role of the VWU with respect to protection measures 'must be an advisory one', as it is simply not within the power of the VWU to order protection measures for witnesses, because the VWU does not have the means to issue such orders or to enforce them.

Rule 17(2)(a) further contributes to the existing ambiguity, as the functions of the VWU in relation to witnesses are described as both *providing* witnesses with adequate protective and security measures and, at the same time, *recommending* to the organs of the Court the adoption of protection measures. In light of the early criticism about the lack of clarity in the Rome Statute, it is somewhat surprising that the Rules, finalized in September 2002, have contributed little to clarify the position of the VWU as created by the Statute.³³

The matter is further complicated by different conceptions of how the VWU is supposed to provide protective measures. One view would consider the VWU as a mere service provider, implementing requests of prosecution and Defence, and thereby complementing the authority of the prosecution to request measures in accordance with Article 54(3)(f). Alternatively, one could view the VWU as a statutory organ providing neutral services to both prosecution and Defence. When accepting that second view, the wording of Article 43(6), asking the VWU to consult solely with the OTP,

²⁹ T Ingadottir et al., 'The International Criminal Court. The Victims and Witnesses Unit (Article 43.6 of the Rome Statute). A Discussion Paper' (2000) 8 *ICC Discussion Paper No. 1*, 8.

³⁰ *Katanga and Ngudjolo* appeals judgment on preventive relocation (n 22) para. 89.

³¹ Dissenting Opinion of Judge Georghis M Pikis and Judge Daniel David Nsereko, *ibid.*, paras 14 and 22.

³² D Tolbert, 'Article 43' in Triffterer (n 14) 989.

³³ G Dive, 'The Registry' in Lee (n 24) 267. Most of the recommendations in the paper of Ingadottir et al. (n 29) about the role of VWU seem to have been ignored when finalizing the RPE.

remains ambivalent. In sum, the VWU not only has the double-function of advising and providing, but the latter function is based on different conceptions of how the unit fits into the overall institutional structure of the Court.

The ambiguities of the drafting of Statute and Rules cannot be solved if one looks solely at the criteria of context, object, and purpose, as outlined in Article 31(1) of the VCLT.³⁴ As a supplementary means of interpretation, in accordance with Article 32 of the Convention, the *travaux préparatoires* of the Rome Statute will be analysed in the subsequent section.³⁵

44.2.4 *Travaux préparatoires* Article 43(6) and Article 68(1)

Between 1994 and 1996 various drafts of the Statute of the ICC were submitted by the ILC, the ad hoc Committee on the Establishment of a Permanent ICC and the Preparatory Committee on an ICC.³⁶ Discussions at the Rome Conference in relation to Article 68 were framed by a draft proposal of the Canadian delegation.³⁷ This draft merged the first three paragraphs of the Preparatory Committee draft into only two.³⁸ As one result, the responsibility of the Court as a whole moved to the beginning of the article, as in the statutory provisions of the ICTY and ICTR. As a second important consequence, the responsibilities of the prosecutor moved more prominently to paragraph 1 of Article 68, directly following the responsibilities of the Court as a whole (see the quote in section 44.2.2). As a third important consequence, the language in relation to the VWU changed to a less-obliging ‘may’: the VWU ‘may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance referred to in article 44, paragraph 4’. Article 68 therefore emphasized the important role of the prosecutor for taking protective measures.

The draft article that ultimately became Article 43 also underwent a significant re-wording. This change in wording first appeared on 30 June 1998 in the text of the

³⁴ ‘Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.’ See Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber 1’s 31 March 2006 Decision Denying Leave to Appeal, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, AC, ICC, 13 July 2006, para. 33. Following this definition, the purpose of both articles is the same. In relation to the objects, Art 43 is placed in Part IV of the Statute, covering the composition of the Court, whereas Art 68 is in Part VI, which covers ‘The Trial’. Ultimately, these criteria do not solve the ambiguities between the two articles.

³⁵ Art 32 of the VCLT (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331: ‘Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.’

³⁶ For a detailed analysis of these proposals in relation to witness protection, see Eikel (n 11) 108–9.

³⁷ W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press 2010) 823.

³⁸ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Proposal Submitted by Canada, Art 68, UN Doc A/CONF.183/C.1/WGPM/L.58 and UN Doc A/CONF.183/C.1/WGPM/L.58/Rev.1 (6 July 1998); Report of the Working Group on Procedural Matters, UN Doc A/CONF.183/C.1/WGMP/L.2 (24 June 1998).

Conference Coordinator responsible for Articles 43 and 44,³⁹ and was transferred from there to all further drafts up to the final version of Article 43.⁴⁰ According to the amended wording, the VWU '*shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and for others who are at risk on account of testimony given by such witness*'.

From optionally advising the other organs, the role of the VWU in Article 43 was suddenly enhanced to being responsible for carrying out protective measures. The redrafting of Article 43 was now completely inconsistent with the provisions of Article 68. In the recommendations of the working group's coordinator, a footnote demonstrates the awareness of the drafters that the provisions of draft Articles 68 and 44 had to be brought in line.⁴¹ On 7 July 1998 the Chairman of the Committee of the Whole asked the Chairman of the Drafting Committee to bring the text of draft Article 44 in line with draft Article 68(5) (later Article 68(4)), thereby fully aware that there was a discrepancy.⁴² The adjustment of both articles obviously did not take place.

In sum, the drafting at the Conference changed the system of responsibilities for protective measures to an incoherent framework: on the one hand, Article 68(1) gave the prosecutor a decisive role in the field of protective measures, while the VWU was confined to an advisory function. On the other hand, Article 43(6) put the VWU in charge of providing protective measures, in consultation with the OTP. Here lies the starting point of all further confusions about the role of the respective organs. The following section (44.3) will show what controversies resulted from the drafting ambiguities of the two articles in the early practice of the Court. The larger part (44.3.1) will focus on physical protective measures, as disagreements primarily arose in this area. Section 44.3.2 will cover an aspect of procedural protective measures where different opinions were less contentious.

44.3 Disagreements about Responsibilities for Protective Measures

44.3.1 Physical protective measures

44.3.1.1 Admittance into the witness protection programme (Lubanga 2008)

Prior to the scheduled beginning of the *Lubanga* trial, in early October 2007, the prosecution informed the Chamber that 35 of its 37 trial witnesses 'require the protection

³⁹ Committee of the Whole, Coordinator's Text on Articles 43 and 44, UN Doc A/CONF.183/C.1/L.36 (30 June 1998).

⁴⁰ Recommendation of the Coordinator, UN Doc A/CONF.183/C.1/L.45 (4 July 1998); Drafting Committee, Texts Adopted on First Reading (7 July 1998), UN Doc A/CONF.183/DC/R.98 (7 July 1998); Report of the Drafting Committee to the Committee of the Whole, Part 4. Composition and Administration of the Court, UN Doc A/CONF.183/C.1/L.67 (13 July 1998).

⁴¹ Recommendation of the Coordinator, UN Doc A/CONF.183/C.1/L.45 (4 July 1998), footnote 89: 'The language of this paragraph should be brought in line with that of article 68, paragraph 5.'

⁴² Note regarding Arts 37, 43, 44, and 49 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee, 7 July 1998.

of the Registry's Victims and Witnesses Unit.⁴³ In view of the Trial Chamber, the prosecution had referred 11 witnesses to the VWU ahead of time; however, 'the process for the outstanding 24 witnesses was commenced significantly and unjustifiably late'.⁴⁴ As will be explained in section 44.4.3 of this chapter, a protection referral application is an inter-organ procedure, during which the OTP refers a matter to the Registry.

During status conferences on 12 and 13 February 2008, the OTP contended that the VWU was obliged by Article 43(6) to provide protective measures for all witnesses 'who are at risk'. Whereas the OTP asked that 'all foreseeable risks' should be eliminated, the VWU determined a different threshold, identified as 'a high likelihood that the witness will be harmed or killed unless action is taken'.⁴⁵

At the same status conference, the VWU revealed 'that a fundamental difference of approach had emerged between the prosecution and the Unit during the preceding year that has impeded the progress of this case'.⁴⁶ The Prosecution and the VWU had previously operated on an agreed-upon set of four criteria, which the VWU then 'abandoned'.⁴⁷ The VWU admitted that it had modified the approach originally applied, which granted entry into the programme when a certain number of these criteria were met. The criteria were now seen 'as no more than one of the available tools' in 'an organic and developing area'.⁴⁸

In its April 2008 decision, Trial Chamber I abstained from any comments on 'the respective roles of the VWU and the prosecution...in any wider sense'.⁴⁹ The Chamber stressed that its decision was 'fact-specific', and that it would intervene into the decision-making process of the Registrar only if she would have clearly applied the wrong criteria. Without further explanation, the Trial Chamber then simply stated that the criticism towards the VWU was 'without sustainable foundation',⁵⁰ and it complimented the VWU for an assessment on a 'fact sensitive rather than a mechanical or formulistic basis'.⁵¹ In terms of the timing of the OTP protection referrals, it qualified the activities of the OTP as 'excessively late'.⁵² The Trial Chamber further pointed out that the OTP and the VWU 'regrettably have been unable to agree on the extent of their respective responsibilities for witnesses who may be at risk of harm'.⁵³

In its decision, the Trial Chamber stressed the need for a comprehensive inter-organ approach towards all protective measures available. As a result of the decision, the

⁴³ Hearing Transcript, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-T-52-ENG, TC I, ICC, 1 October 2007, 27, lines 15–20.

⁴⁴ Decision regarding the Timing and Manner of Disclosure and the Date of Trial, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1019, TC I, ICC, 9 November 2007, para. 20.

⁴⁵ Hearing Transcript, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-T-74-Conf-Exp-ENG, TC I, ICC, 12 February 2008 as quoted in Decision on Responsibilities for Protective Measures, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1311-Anx2, 24 April 2008, para. 56 ('Lubanga decision on responsibilities for protective measures').

⁴⁶ *Ibid.*, para. 35.

⁴⁷ *Lubanga* decision on responsibilities for protective measures (n 45) para. 34, referring to criticism of the OTP towards VWU.

⁴⁸ *Ibid.*, para. 41.

⁴⁹ *Ibid.*, para. 77.

⁵⁰ *Ibid.*, para. 77.

⁵¹ *Ibid.*, paras 79 and 82.

⁵² *Ibid.*, para. 81.

⁵³ *Ibid.*, para. 77.

prosecution was not in a position to timely disclose the identity and statements of the witnesses whose applications to the programme had been refused. The Trial Chamber saw no other choice than to postpone the beginning of the trial to the end of June 2008 (from where it was again delayed to early 2009).

The difficulties that arose in this incident had their origin in the contradictory provisions of Articles 43(6) and 68(4). Whereas both parties agreed upon the issue that the VWU *administers* the Court's witness protection programme (as the protective measure in question), they disagreed on the criteria that determined access to the programme and thereby on the question who *decides* on these criteria. The controversy was further rooted in the two different concepts of the role of the VWU. The OTP, based on Articles 54(3)(f) and 68(1), viewed the referral application to the VWU as a service request, in nature similar to a translation or an IT request. Contrary to that, the VWU emphasized its role neutral to both Prosecution and Defence, based on the incorporation of the Unit into the Registry in accordance with Article 43(6).

44.3.1.2 Preventive relocation (*Katanga and Ngudjolo 2008*)

In the *Katanga and Ngudjolo* proceedings, the OTP submitted referral applications for the inclusion of several witnesses into the ICCPP. After the Registrar turned these referral applications down, the OTP, on its own initiative, relocated four witnesses which it deemed at risk due to their interaction with the Court.⁵⁴ Pre-Trial Chamber I concluded that the Prosecutor had no power to preventively relocate witnesses.⁵⁵ Based on Article 43(6), in view of the single judge, the Registrar is responsible for running the ICCPP, and the role of both Prosecution and Defence is limited to making applications for the inclusion of witnesses into the programme. In relation to protective measures, the judge observed that, by implementing the practice of preventive relocation, the Prosecution was 'misusing its mandate in order to *de facto* shift the power to decide on the relocation of a given witness from the Registry to the Prosecution'.⁵⁶

The Pre-Trial Chamber's argumentation became less convincing when it resorted to a 'contextual interpretation' of Article 68(1), which led the single judge to make findings on the responsibilities of the prosecutor for protection. It is questionable to narrow the prosecution's mandate for protection under Article 68(1) to the following functions: (i) advising the witnesses as to what they can expect from the Court in terms of protection, as well as the competent organ of the Court for the adoption and implementation of the different protective measures; (ii) requesting the inclusion of

⁵⁴ Prosecution's Submission of Information on the Preventive Relocation of Witnesses 132, 163, 238, and 287, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-398, PTC I, ICC, 3.

⁵⁵ Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Art 67(2) of the Statute and Rule 77 of the Rules, *Katanga and Ngudjolo*, ICC-01/04-01/07-428-Corr, 25 April 2008, para. 23 ('*Katanga and Ngudjolo* decision on preventive relocation').

⁵⁶ Ibid., para. 32.

witnesses in the ICCPP, as well as providing the Registrar with the necessary information to facilitate the assessment process; and (iii) requesting procedural protective measures such as redactions of identifying information from the Chamber.⁵⁷

In its analysis, the Pre-Trial Chamber limited its contextual interpretation of Article 68(1) to Article 43(6), but did not pay attention to the equally relevant Articles 54(3)(f) and 68(4).⁵⁸

Following its argumentation, the Pre-Trial Chamber decided that ‘the Prosecution shall immediately put an end to the practice of preventive relocation’.⁵⁹ As a remedial action, the Pre-Trial Chamber initially excluded the use of statements, interview notes, and interview transcripts of two witnesses that had been relocated.⁶⁰ As a consequence, the Prosecutor withdrew the charge of sexual slavery that appeared in the arrest warrants for *Katanga* and *Ngudjolo*, apparently unable to support the charge without those witnesses. The Registry then agreed to admit the two witnesses into the ICCPP, not out of reconsideration of the original risk assessment but rather due to new security concerns incurred following the prosecutor’s preventive relocations.⁶¹

On the same issue, in October 2008 the Appeals Chamber undertook an analysis of the drafting of Article 43(6) and came to the conclusion that ‘the role of VWU in relation to protective measures was... not limited to the provision of giving advice alone’.⁶² It thereby stressed the double-function of the VWU of providing *and* recommending protective measures. The Appeals Chamber, similarly to what Pre-Trial Chamber I had done in its April 2008 decision, explored the drafting of only one of the key statutory provisions (Article 43), but did not look at the drafting history of Articles 54 and 68. In that context, the Appeals Chamber could have further elaborated on what it understood to be the ‘significant role’ that the prosecutor plays in relation to measures of relocation.⁶³

Explicitly, the Appeals Chamber emphasized the need for cooperation between the organs, which it deemed ‘essential’ and of ‘vital importance’ for the success of witness protection.⁶⁴ The ‘more general mandate’ of the OTP enables the prosecutor to take charge of protective measures for its witnesses, prior to testimony in court, with the exceptions as mentioned in the judgment. In cases of disagreement, the Chamber saw itself as the ‘ultimate arbiter’.⁶⁵

⁵⁷ *Ibid.*, para. 25.

⁵⁸ As pointed out by the Prosecution in Prosecution’s Document in Support of Appeal Against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation, *Katanga and Ngudjolo*, ICC-01/04-01/07-541, AC, ICC, 2 June 2008, paras 26–7.

⁵⁹ *Katanga and Ngudjolo* decision on preventive relocation (n 55) para. 54.

⁶⁰ *Ibid.*, para. 39.

⁶¹ VWU’s Considerations on the System of Witness Protection and the Practice of ‘Preventive Relocation’, *Katanga and Ngudjolo*, ICC-01/04-01/07-585, AC, ICC, 12 June 2008, paras 39–42. For a concise summary of the preventive relocation episode, see also ‘Courting History. The Landmark International Criminal Court’s First Years’, Human Rights Watch (2008), 171 (‘HRW, Courting History’).

⁶² *Katanga and Ngudjolo* appeals judgment on preventive relocation (n 22) para. 90.

⁶³ *Ibid.*, para. 100.

⁶⁴ *Ibid.*, para. 101. The dissenting opinion goes as far as to say that cooperation is envisioned by the provisions of Art 43(6) and Art 68(4). See Dissenting Opinion of Judges Pikis and Nsereko, *ibid.*, para. 23.

⁶⁵ *Katanga and Ngudjolo* appeals judgment on preventive relocation (n 22) para. 97.

In contrast, the dissenting judges of the Appeals Chamber gave decisive power to Article 68, which, in their view, ‘is the main statutory provision definitive of the powers, authority and responsibilities for providing protection to victims and witnesses’.⁶⁶ According to the dissenting judges, a decision to grant the Registrar exclusive responsibility to approve and implement protective measures ‘flies in the face of the unequivocal provisions of article 68(1) and article 54(3)(f).’⁶⁷

44.3.2 Limitations to disclosure of witness identities (October 2006)

An early disagreement in relation to procedural protective measures arose when the Pre-Trial Chamber in the *Lubanga* proceedings ruled that, before requesting non-disclosure of a witness’ identity in accordance with Rule 81(4), the OTP needed to mandatorily refer the matter to the VWU to seek advice on options for less restrictive protective measures.⁶⁸ The Appeals Chamber overturned the decision, indicating that a mandatory application to the VWU was prescribed neither in the Statute nor the Rules nor the Regulations of the Court; that such an application could in many cases be ‘useful’, but it would be ‘overly formalistic’ to make it mandatory; and that redaction applications were to be approved by the Chamber on a ‘case-by-case basis’, on application by the prosecution.⁶⁹ In subsequent decisions, the Appeals Chamber established a set of criteria to justify redactions. These criteria include:

1. The existence of an ‘objectively justifiable risk’ to the safety of the person concerned (in difference to a subjective feeling of insecurity);⁷⁰
2. The risk must arise from disclosing the particular information to the accused (in difference to disclosing the information to the public);⁷¹
3. The infeasibility or insufficiency of less restrictive protective measures;⁷²
4. An assessment as to whether the redactions sought are ‘prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’;⁷³

⁶⁶ Dissenting Opinion of Judges Pikis and Nsereko, *ibid.*, para. 15.

⁶⁷ *Ibid.*, para. 7.

⁶⁸ Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-108-Corr, PTC I, ICC, 19 May 2006, para. 31.

⁶⁹ Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-568, AC, ICC, 13 October 2006, paras 33–40 (hereafter ‘*Lubanga* appeals judgment on general principles’). See for the context of this decision D Scheffer, ‘A Review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence’, in Stahn and Sluiter (n 5) 585, at 593.

⁷⁰ *Katanga* appeals judgment on authorization to redact witness statements (n 26) para. 71.

⁷¹ *Ibid.*, para. 71 (b).

⁷² *Lubanga* appeals judgment on general principles (n 69) para. 37; Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-773, AC, ICC, 14 December 2006, para. 33.

⁷³ *Ibid.*, para. 34.

5. The obligation to periodically review the decision authorizing the redactions should circumstances change.⁷⁴

While applying these criteria, the Court subsequently succeeded in establishing practices for procedural protective measures, which in turn supported general efforts to achieve better judicial efficiency. In this context, the principle of a rolling disclosure established in the *Kenya* cases will be described in section 44.4.3.

44.4 Developed Practices

By overcoming some of the initial difficulties, the Court as a whole has managed to achieve substantive results in developing more satisfactory protective tools. One positive—and immediately obvious—indicator for the effectiveness of the protective measures is the fact that, in the first seven years after starting its operations, none of the more than 500 ICC witnesses seems to have suffered serious harm due to his or her interaction with the Court.⁷⁵ As a significant internal achievement, in March 2011 the prosecutor and the Registrar concluded a ‘Joint Protocol on the Mandate, Standards and Procedure for Protection’.⁷⁶

However, the protection capacities of the Court are hampered by insufficient cooperation from external partners, in particular States Parties, and budgetary constraints.⁷⁷ Protective measures are part of the cooperation regime established by the ICC Statute, which is premised around the duty assumed by States Parties to act as the enforcement arm of the Court.⁷⁸ Article 93(1)(j) obliges States Parties to provide assistance to the Court in relation to the protection of victims and witnesses. The provision does not specify what form of protective measures may be requested by the Court.⁷⁹

All organs of the Court have to rely on some form of domestic support to implement protective measures. The Registry is confronted with a low level of states’ cooperation when it tries to conclude relocation agreements for witnesses.

While Chambers cannot compel states to render routine enforcement nor directly impose penalties in the face of non-compliance,⁸⁰ they can issue court orders to instruct States Parties to implement protective measures. As an example, when the security situation in Ituri (DRC) significantly deteriorated in 2006, the Pre-Trial Chamber in the *Lubanga* proceedings ordered the Registrar to conclude agreements with the DRC Government and the UN ‘to enhance (a) national capacity to protect witnesses and (b) cooperation with the Court in order to protect witnesses working within their

⁷⁴ *Katanga* appeals judgment on authorization to redact witness statements (n 26) para. 73(c).

⁷⁵ Mahony (n 8) 16.

⁷⁶ The Protocol is not public, but reference is made in court filings. See e.g. Prosecution’s Response to ‘Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal’, *Muthaura et al., Situation in the Republic of Kenya*, ICC-01/09-02/11-59, PTC II, ICC, 15 April 2011, para. 8.

⁷⁷ See for the funding of the Court in general Ford, Chapter 5, this volume.

⁷⁸ R Rastan, ‘The Responsibility to Enforce—Connecting Justice with Unity’ in Stahn and Sluiter (n 5) 163.

⁷⁹ C Kress and K Prost, ‘Article 93’ in Triffterer (n 14) 1578.

⁸⁰ Rastan (n 78) 181.

structures or accepted within their national witness protection programmes (which could include *inter alia* redeployment outside risk areas).⁸¹

In recent reports, the Court has identified witness protection as an area where shared expertise could lead to capacity building on the domestic level.⁸² Seminars held in 2013 in Dakar and Arusha, attended by high-ranking representatives of the ICC and of African states, have stressed the need of the Court for further relocation agreements, which at the same time could provide for broader domestic capacity and technical assistance.⁸³ The OTP has consistently asked that states in their cooperation programmes give particular attention to the setting up of national witness protection programmes.⁸⁴ In Kenya, one of the ICC situation countries, international support has helped to make the national witness protection unit operational.⁸⁵

However, one has to be careful not to over-emphasize the potential of domestic protection programmes; they are largely non-existent in most of the countries where the ICC investigates. While there is without a doubt a need to strengthen domestic witness protection capacities, setting up protection programmes also faces significant challenges, which primarily relate to lack of domestic capacity (i.e. control over territory, poor infrastructure, lack of personnel with expertise),⁸⁶ and actual or perceived lack of neutrality (i.e. when state officials or the state apparatus were themselves involved in the commission of crimes).⁸⁷ For the signing of relocation agreements, the Court does not require a state to have its own national witness protection programme.⁸⁸

44.4.1 SRA and IRA

At various times before the Chambers, the VWU has outlined its approach to protective measures as follows:

The very foundation of the Court's protection system lies on the application of good practises by any representative of the Court who interacts with

⁸¹ Decision on a General Framework Concerning Protective Measures for Prosecution and Defence Witnesses, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-447, PTC I, ICC, 19 September 2006, 5–6.

⁸² Report of the Court on Complementarity, ICC-ASP/11/39, 16 October 2012 (Eleventh Session of the ASP), paras 23–6; Report of the Court on Cooperation, ICC-ASP/12/35, 9 October 2013 (Twelfth Session of the ASP), para. 32.

⁸³ Report of the Bureau on Cooperation, ICC-ASP/12/36, 21 October 2013 (Twelfth Session of the ASP), Annex III: Summary of the Dakar seminar on witness protection (25–6 June 2013); Summary of the Arusha seminar on Witness Protection (29–30 October 2013), ICC-ASP/12/36/Add. 1, 7 November 2013 (Twelfth Session of the ASP).

⁸⁴ Prosecutorial Strategy 2009–12, OTP, 1 February 2010, para. 64; Report of the Bureau on Cooperation, ICC-ASP/8/44, 15 November 2009 (Eighth Session of the ASP), para. 95.

⁸⁵ Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes, RC/ST/CM/INF.2, 30 May 2010 (Kampala Review Conference of the Rome Statute), Example C: Support to Kenya in order to Operationalize a Witness Protection Programme, United Nations Office on Drugs and Crime, 6–7. For the problematic aspect of the domestic witness protection programme in Kenya, see C Alai and N Mue, 'Complementarity and the Impact of the Rome Statute and the International Criminal Court in Kenya' in C Stahn and M El Zeidy (eds), *The International Criminal Court and Complementarity. From Theory to Practice* vol. II (Cambridge: Cambridge University Press 2011) 1232–3.

⁸⁶ Ending Threats and Reprisals against Victims of Torture and related international crimes: A Call to Action, Redress (2009) 62–3.

⁸⁷ Ibid., 64–5.

⁸⁸ Report of the Court on Cooperation, ICC-ASP/12/35, 9 October 2013 (Twelfth Session of the ASP), para. 31.

witnesses. These practices are aimed at hiding a witness's interaction with the Court from the community where the witness resides, from potential threats and the public. These practices are enhanced by an Initial Response System (IRS) which enables the Court to extract witnesses who are afraid of being immediately targeted or who have been targeted to a safe location in the field. A protective measure of last resort is the entry to the ICCPP and subsequent relocation of the witness and his or her close relations away from the source of the threat.⁸⁹

Beyond these general principles, more in-depth public information in relation to the protective measures of the Court is scarce. In particular, the VWU does not specify or provide examples of what it considers to be 'good practices' beyond the fact that 'these are based on the premise that prevention is the best protection'.⁹⁰ In the view of the OTP, good practices are appropriate to avoid creating or exacerbating risks, but have limited utility in reducing existing risks.⁹¹ They are 'always necessary', but 'may not always be sufficient'.⁹²

One important aspect of applying good practices is the continuous conduct of risk assessments. In its Regulations, the OTP has committed itself to develop an 'Area-Specific Threat and Risk Assessment' for each area of operation related to an investigation; to ensure direct and secure contact with witnesses; and to regularly update general and individual security risk assessments.⁹³ By now, SRA and IRA have been accepted by judges as a proper tool to evaluate the security situation of a witness.⁹⁴

More recently, the VWU has also conducted security risk assessments for defence witnesses.⁹⁵ As the defence has no capacity to conduct risk assessments on its own, it needs to rely on the support that the VWU can provide. As an example, in the early stages of the Kenya cases, the defence had to communicate the name and the contact details of a witness to the VWU, which was to advise the defence within two weeks' time if the contact would put the person at risk, and which security arrangements the defence should adopt. While the defence deemed this system to be 'unworkable', the prosecution pointed out that

⁸⁹ VWU's Considerations on the System of Witness Protection and the Practice of 'Preventive Relocation', *Katanga and Ngudjolo*, ICC-01/04-01/07-585, AC, ICC, 12 June 2008, paras 9–10; see also Arbia (n 7); Summary Report on the Seminar on Protection of Victims and Witnesses Appearing before the International Criminal Court (24 November 2010).

⁹⁰ Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing before the International Criminal Court (29–30 January 2009).

⁹¹ Prosecution's Response to 'Victims and Witnesses Unit's considerations on the system of witness protection and the practice of "preventive relocation"', *Katanga and Ngudjolo*, ICC-01/04-01/07-664, AC, ICC, 7 July 2008, note 70.

⁹² Prosecution's Document in Support of Appeal against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation, *Katanga and Ngudjolo*, ICC-01/04-01/07-541, AC, ICC, 2 June 2008, para. 19.

⁹³ Regulation 44 and Regulation 45(c) and (e), Regulations of the OTP, ICC-BD/05-01-09, 23 April 2009.

⁹⁴ Eikel (n 11) 123.

⁹⁵ Decision on the 'Defence Motion for Disclosure of VWU Security Assessments of Defence Witnesses', *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2588, TC III, ICC, 19 April 2013.

the same system also applied to OTP witnesses as well as defence witnesses in other cases.⁹⁶

The VWU has also taken on the task of conducting IRAs of prosecution witnesses in cases where their identities are disclosed during the investigation of the defence.⁹⁷ For such scenarios, Chambers have asked the VWU and defence teams to conclude a Joint Protocol, including that the defence must request an IRA from the VWU before contacting prosecution witnesses.⁹⁸ With all these activities, the awareness that the VWU is a neutral entity that serves both Prosecution and defence has grown.

44.4.2 IRS

In the words of the former ICC Registrar, the IRS is ‘a 24/7 emergency response system which enables the Court to extract to a safe location in the field witnesses who are afraid of being imminently targeted or who have in fact been targeted’.⁹⁹ A call to the ‘emergency hotline’ activates a network of local partners with the capacity to intervene and extract an individual to a safe location in case of an urgent threat.¹⁰⁰ The threat is subsequently assessed by VWU protection officers in order to determine if further protective measures are required.

An IRS functions only in defined geographic areas where multiple witnesses are residing. It is therefore more difficult for the OTP to access witnesses residing outside of the IRS areas, which might affect the evidence that the Prosecution is able to collect and to present in court. Local partners implementing the IRS are well-remunerated personnel from the security sector or have previous security sector experience.¹⁰¹ They do not know about the identities of potential users of the IRS hotline; their involvement is for the most part limited to following a pre-established protocol to bring a threatened individual to a safe location.¹⁰² As an example, in Uganda, the domestic police force has assisted with the implementation of the IRS.¹⁰³ Effective maintenance of the system requires training of the local police, regular contact with local

⁹⁶ Prosecution’s Response to ‘Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal’ (ICC-01/09-01/11-47-Corr2), *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-61, PTC II, ICC, 18 April 2011, para. 11; Instructions on Approaching Third Parties’ Material to the Defence’s Investigations, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1734-tENG, TC II, ICC, 18 December 2009, paras 15–20.

⁹⁷ Prosecution’s Response to ‘Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal’, *Muthaura et al., Situation in the Republic of Kenya*, ICC-01/09-02/11-59, PTC II, ICC, 15 April 2011, para. 10.

⁹⁸ Instructions on Approaching Third Parties Material to the Defence’s Investigations, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1734-tENG, TC II, ICC, 18 December 2009, paras 13, 15, and 17.

⁹⁹ Arbia (n 7) 522; see also Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing before the International Criminal Court (29 and 30 January 2009); Regulation 95 (Protection arrangements) of the Regulations of the Registry, ICC-BD/03-01-06-Rev.1 (entered into force 6 March 2006, revised 25 September 2006).

¹⁰⁰ HRW, *Courting History* (n 61) 152.

¹⁰¹ Mahony (n 8) 41.

¹⁰² HRW, *Courting History* (n 61) 153; all information is based on interviews of Human Rights Watch with ICC Staff in May 2007 and March 2008; Mahony (n 8) 36–7.

¹⁰³ Report of the Court on the Kampala Field Office: activities, challenges, and review of staffing levels; and on memoranda of understanding with situation countries, ICC-ASP/9/11, 30 July 2010 (Ninth Session of the ASP), 2.

authorities, and frequent testing of its efficacy and responsiveness. The IRS is managed and financed by the VWU.¹⁰⁴

Over the years, judges have accepted that the IRS is one of the protection tools genuinely offered by the Court. In evaluating the protective measures available to individuals, in their decisions, judges now make reference to the question of whether a person has access to the IRS,¹⁰⁵ or they might refer to the IRS in relation to other available protective measures.¹⁰⁶

An IRS has financial implications and is therefore also of concern to the States Parties. When the Court entered the trial stage of its first proceedings, in 2007, the Bureau of the ASP foresaw ‘the increase in expenditure to provide satisfactory protection for witnesses’, which is ‘particularly relevant for the implementation and maintenance of the initial response systems for witnesses under threat’.¹⁰⁷ In the budget for 2009, the ‘expansion of initial response systems in the field’ was a relevant factor.¹⁰⁸ In 2013 an IRS was operational in the DRC, CAR, Kenya, and Côte d’Ivoire.¹⁰⁹ The IRS in Uganda is no longer in place.¹¹⁰ With respect to the DRC, the Court has indicated that, for 2013, it ‘will continue to maintain the IRS...with a view to gradually reducing the number of IRS established there in view of reduced activities and ongoing implementation of exit strategies for witnesses’.¹¹¹ The recent downsizing of functional IRS is mainly due to financial limitations. However, as the surrender of Bosco Ntaganda—one of the targets in the DRC—to the Court has shown, protection needs can only be forecasted to a certain degree, while some level of unpredictability remains. Due to primarily financial implications, the Court faces difficult decisions with the inherent danger that protection capacities might not be available when they are needed at short notice.

¹⁰⁴ Proposed Programme Budget for 2011 of the International Criminal Court, ICC-ASP/9/10, 2 August 2010 (Ninth Session of the ASP), 115; Proposed Programme Budget for 2010 of the International Criminal Court, ICC-ASP/8/10, 30 July 2009 (Eighth Session of the ASP), 109; see also the reference to acquisition of new vehicles for the Initial Response Systems in Report of the Court on Capital Investment Replacements, ASP/8/27, 29 October 2009 (Eighth Session of the ASP), 3, Table 1. See also the reference to the IRS in the amended Draft Regulation 92(2) for the Regulations of the Registry.

¹⁰⁵ See, for example, Prosecution’s Request for Protective Measures for one Prosecution Witness, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1643, TC I, ICC, 23 January 2009, 3; Decision on the ‘Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information’ of 5 December 2008 and ‘Prosecution’s Request for Non-Disclosure of Information in One Witness Statement Containing Rule 77 Information’ of 12 March 2009, ICC-01/04-01/07-1980-Anx2, TC I, ICC, 24 June 2009, para. 14.

¹⁰⁶ Decision on the Prosecutor’s Application to Redact Information under Art 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1101-tENG, TC II, ICC, 4 May 2009, para. 43.

¹⁰⁷ Report of the Bureau on Cooperation, ICC-ASP/6/21, 19 October 2007 (Sixth Session of the ASP), 12.

¹⁰⁸ Proposed Programme Budget for 2009 of the International Criminal Court, ICC-ASP/7/9, 29 July 2008 (Seventh Session of the ASP), 7–8.

¹⁰⁹ Proposed Programme Budget for 2013 of the International Criminal Court, ICC-ASP/11/10, 16 August 2012 (Eleventh Session of the ASP), para. 425.

¹¹⁰ Report of the Court on the Kampala Field Office: activities, challenges, and review of staffing levels; and on memoranda of understanding with situation countries, ICC-ASP/9/11, 30 July 2010 (Ninth Session of the ASP), para. 8.

¹¹¹ Proposed Programme Budget for 2013 of the International Criminal Court, ICC-ASP/11/10, 16 August 2012 (Eleventh Session of the ASP), para. 425.

44.4.3 The ICCPP

Out of all protective tools available to the Court, the ICCPP serves as a prime example to show how the limitations of external support significantly weaken the Court's protection capabilities.

In the statutory rules of the ICC, Rule 16(4) makes the only direct reference to the ICCPP.¹¹² According to this rule, agreements on relocation of victims and witnesses may be negotiated with states by the Registrar on behalf of the Court. Rule 16(4) thereby refers to two important features of the ICCPP: the programme is administered by the Registrar, and its capacities are based on the cooperation of States Parties.

The mechanisms for the witness protection programme are further elaborated in the Regulations of the Registry. Regulation 96 provides, *inter alia*, that 'an application for inclusion in the protection programme may be filed by the prosecutor or by counsel'.¹¹³ In essence, a referral application for acceptance into the ICCPP becomes an inter-organ procedure. The prosecution has no control over the timing of the decision-making process within the Registry.¹¹⁴ The VWU conducts 'a careful and independent evaluation and assessment of the information provided', which includes an extensive interview of the witness and the family members as well as an analysis of other information available to the VWU.¹¹⁵ The VWU has claimed that, 'given the difficult situations in the field, the VWU's assessment necessarily takes some time'.¹¹⁶ The assessment process is lengthy; in 2008 it became evident that it would take an average of at least two to three months.¹¹⁷ One of the reasons for the long processing time is what Human Rights Watch has qualified as 'inadequate resources'¹¹⁸ of the VWU. In 2008 the VWU employed 38 permanent staff (including 13 psychosocial personnel).¹¹⁹

¹¹² At the STL, a protection programme is defined for the first time within the system of an international criminal court; see Rule 166 of the Rules of Procedure and Evidence of the SCSL (adopted 16 January 2002, as amended 30 October 2009): 'The Registrar shall establish a protection programme within the Victims and Witnesses Unit for the purpose of protecting individuals through relocation to Third States. The Registrar shall take all necessary measures to arrange relocation to Third States of individuals and their close relations who, following the determination of the Registrar, are at risk of imminent serious harm or death as a result of their interaction with the Tribunal. All procedures and administrative functions in relation to the Protection Programme shall remain confidential.'

¹¹³ Regulation 96 of the Regulations of the Registry. The draft for amended Regulation 96 specifies that the duration of the ICCPP is initially for one year, but can be extended for another year and then exceptionally on a case-by-case basis. It also makes specific references to the termination of the programme. See <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/790.aspx> accessed 3 May 2013.

¹¹⁴ At a status conference in December 2007, the Prosecution was 'not in a position to provide... information on how much time it will take the Victims and Witnesses Unit to assess the referrals and, where applicable, to implement the protective measures'. See Hearing Transcript, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-T-52-ENG, TC I, ICC, 1 October 2007, 28, lines 4–11.

¹¹⁵ VWU's observations on the protection measures available in relation to the individuals concerned by the Prosecutor's proposal for redaction, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-72-Red, PTC III, ICC, 18 August 2008, para. 25.

¹¹⁶ Dubuisson et al. (n 7) 574.

¹¹⁷ *Katanga and Ngudjolo* decision on preventive relocation (n 55) para. 61.

¹¹⁸ HRW, Courting History (n 61) 150.

¹¹⁹ Mahony (n 8) 20–1; HRW, Courting History (n 61) 151.

For 2013, 50 staff members were projected, 17 of which hold professional positions (with 33 in general service posts).¹²⁰ These staff members are divided over three different sub-units: Operations (in charge of logistics, specifically those related to travel by witnesses for the purpose of testimony before the Court); Protection (in charge of protection matters, including the ICCPP); and Support (dealing with psycho-social support to victims and witnesses).¹²¹ The budget for the VWU has risen from around €1 million in 2004 to about €6 million for the years 2010 to 2013.¹²² The stagnation in the last few years is in large part due to the increasing pressure of States Parties for the Court to present a ‘zero-nominal growth’ budget. Nevertheless, Human Rights Watch has recommended that ‘particular attention should be paid to increasing the staff levels within the VWU to address the protection and support needs of victims’.¹²³

In its Court filings, the VWU has elaborated on its views of the ICCPP. It considers the ICCPP a ‘protective measure of last resort’, as ‘it significantly impacts and disrupts the life of the individual’.¹²⁴ As a key requirement, the VWU ‘can only recommend participation in the ICCPP … if the threshold in relation to the level of risk has been met’.¹²⁵ In the ICC context, the precise content of all criteria relevant for the admission into the witness protection programme remains confidential;¹²⁶ the criteria are, as such, redacted from the public versions of the relevant court filings.

However, it appears that the condition of essential or crucial testimony is amongst these criteria,¹²⁷ which means that ‘crucial testimony cannot be replaced by another because it is unique. The persecutor therefore knows that by ‘eliminating’ that person, the participant in the proceedings will no longer be able to give evidence about an event’.¹²⁸ In addition, ‘there must be a clearly documented and serious protection need for the person’.¹²⁹ The informed consent of the person is also required.¹³⁰ The ICTY, less secretive about the applied criteria for its protection programme, has stated that a

¹²⁰ Proposed Programme Budget for 2013 of the International Criminal Court, ICC-ASP/11/10, 16 August 2012 (Eleventh Session of the ASP), Table 83, 122.

¹²¹ Ibid., para. 409.

¹²² The development of resources of VWU can be traced through the following documents: *ibid.*; Proposed Programme Budget for 2012 of the International Criminal Court, ICC-ASP/10/10, 21 July 2011 (Tenth Session of the ASP), Table 96, 128; Proposed Programme Budget for 2010 of the International Criminal Court, ICC-ASP/8/10, 30 July 2009 (Eighth Session of the ASP), Table 76, 110; Proposed Programme Budget for 2008, ICC-ASP/6/8, 25 July 2007 (Sixth Session of the ASP), Table 78, 105; Proposed Programme Budget for 2007, ICC-ASP/5/9, 22 August 2006 (Fifth Session of the ASP), Table 83, 127.

¹²³ HRW, *Courting History* (n 61) 176.

¹²⁴ Arbia (n 7) 522.

¹²⁵ VWU’s observations on the protection measures available in relation to the individuals concerned by the Prosecutor’s proposal for redaction, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-72-Red, PTC III, ICC, 18 August 2008, para. 8.

¹²⁶ HRW, *Courting History* (n 61) 170.

¹²⁷ Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing before the International Criminal Court (29–30 January 2009) 6.

¹²⁸ *Ibid.*, 2.

¹²⁹ Ending Threats and Reprisals against Victims of Torture and Related International Crimes: A Call to Action, Redress (2009), 55.

¹³⁰ Victims and Witnesses Unit’s observations on the protection measures available in relation to the individuals concerned by the Prosecutor’s proposal for redaction, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-72-Red, PTC III, ICC, 18 August 2008, para. 26.

real threat and suitability for the programme are the key criteria for admittance into the programme.¹³¹

Since 2008 both the OTP and the Registry have made a dedicated effort to consult each other as early as possible on the situation of individual witnesses. The OTP has committed itself to share much earlier the scope of its investigations with the VWU. In the case of referral applications, the VWU is therefore less likely to be confronted with the case of an unknown individual in an undefined situational context. However, the VWU does know about the overall security situation of the investigation earlier on and can therefore better assess the individual security situation.

The VWU is confronted with capacity deficits in several ways. Apart from the limited staff resources, the VWU has only a limited number of slots in the ICCPP available, as it relies on support from States Parties and other international organizations. Therefore, the Court and the ASP have repeatedly made appeals to States Parties to enter into agreements with the Court on the relocation of witnesses.¹³² In 2009, from the 210 *notes-verbales* sent to the States Parties requesting cooperation and assistance in reaching relocation agreements, the Court received only 31 responses. Out of those, ten States Parties signed a ‘framework agreement’, while two others entered an ad hoc agreement on specific cases.¹³³ In the course of 2009, the VWU had accepted eight witnesses for relocation, but by November, four applications were still pending with States Parties.¹³⁴

Since 2009 the Registrar has also developed a ‘Special Fund Model’, by which member states can donate to a Special Fund for Relocations to move witnesses to third countries ‘through a cost-neutral arrangement’.¹³⁵ Donations can be undertaken by way of ‘earmarking’ them for specific states. This model differentiates between a ‘donor state’ and a ‘host state’. A State Party can thereby, as donor state, donate funds to assist relocating a witness to a host state, without hosting the witness himself/herself, and vice versa.¹³⁶ As of now, the Special Fund has collected €1 million from at least five states.¹³⁷ However, by November 2011, no State Party from Africa had accepted to relocate witnesses under the terms of the Special Fund.¹³⁸

¹³¹ ICTY Manual on Developed Practices. Developed in Conjunction with UNICRI as Part of the Project to Preserve the Legacy of the ICTY, UNICRI (2009) 202.

¹³² Report of the Bureau on Cooperation, ICC-ASP/6/21, 19 October 2007 (Sixth Session of the ASP), para. 47; Report on the Activities of the Court, ICC-ASP/7/25, 29 October 2008 (Seventh Session of the ASP), para. 80.

¹³³ Report of the Bureau on Cooperation, ICC-ASP/8/44, 15 November 2009 (Eighth Session of the ASP), para. 91.

¹³⁴ Ibid., para. 92.

¹³⁵ Arbia (n 7) 523; Summary Report on the Seminar on Protection of Victims and Witnesses Appearing before the International Criminal Court (24 November 2010) 6; Report of the Bureau on Cooperation, ICC-ASP/8/44, 15 November 2009 (Eighth Session of the ASP), para. 93.

¹³⁶ During the VWU symposium in November 2010, the Special Fund Model was criticized, as it would prevent host states from effectively integrating protected persons into their societies, considering that they would not have to bear any financial burden. See for the comments of the Belgium representative, Summary Report on the Seminar on Protection of Victims and Witnesses Appearing before the International Criminal Court (24 November 2010) 6.

¹³⁷ Report on programme performance of the International Criminal Court for the year 2010, ICC-ASP/10/16, 5 July 2011 (Tenth Session of the ASP), para. 97; Report on activities and programme performance of the International Criminal Court for the year 2011, ICC-ASP/11/8, 4 May 2012 (Eleventh Session of the ASP), para. 138.

¹³⁸ Report of the Court on Cooperation, ICC-ASP/10/40, 18 November 2011 (Tenth Session of the ASP), para. 42.

The general problems of receiving state support in the area of witness protection were highlighted in the Court's recent Reports on cooperation. In 2011 the Court reported as follows:

The Court currently faces a critical challenge in terms of witness protection. Faced with an urgent and unforeseen situation at the beginning of 2011, the Court requested States Parties to temporarily accept witnesses on their territory. Out of the nine requests for cooperation sent to that effect, none received a positive reply. The Registry needs to be able to urgently evacuate witnesses to a 'safe haven' country when a life threatening situation for the witness materialises. It is paramount that States carefully consider their respective legal parameters with regard to the protection of witnesses....Should the Court not be able to find a State willing to accept witnesses on its territory on very short notice, there is a serious and imminent risk of having a witness in grave danger.¹³⁹

The ASP noted this development with concern and encouraged all States Parties 'to consider strengthening their cooperation with the Court by entering into agreements or arrangements with the Court or any other means concerning, inter alia, protective measures for witnesses, their families and others'.¹⁴⁰ In 2013, however, the Court still stressed the 'critical need for witness protection related agreements'. While 13 relocation agreements had been concluded, it was assessed that the overall shortage of agreements could become 'critical for the proper functioning of the Court' and already had 'an impact on the proceedings and on the wellbeing of witnesses'.¹⁴¹

As admittance to the ICCPP could be both cost-intensive and intrusive to the witness' life, discussions have been ongoing about alternative protective measures. The Court has reacted to previous criticism 'to adapt the court's protection programs to the diversity of existing protection needs'.¹⁴² Measures that have been suggested and implemented in this context include the use of safe houses, increased police patrolling, closed protection for governmental officials, enhanced surveillance of witnesses' homes, or the investigation of security-related incidents by national authorities.¹⁴³ In the CAR, the OTP and the VWU have set up a 'neighbourhood watch', which is a form of local system of civilian guards that is supposed to patrol in areas where a high density of witnesses is located. The OTP and the VWU have also worked on an 'assisted move' scheme. This scheme supports a witness who has not been exposed to an imminent, life-threatening incident to move with his family to a third country and provides him or her with support for a limited period of time, so that he or she

¹³⁹ Ibid., paras. 45–6.

¹⁴⁰ Resolution on cooperation adopted at the Eleventh session of the ASP, ICC-ASP/11/Res. 5, 21 November 2011 (Eleventh Session of the ASP), paras 16–17.

¹⁴¹ Report of the Court on Cooperation, ICC-ASP/12/35, 9 October 2013 (Twelfth Session of the ASP), paras 27–30; in a similar tone Summary of the Arusha seminar on witness protection (29–30 October 2013), ICC-ASP/12/36/Add. 1, 7 November 2013 (Twelfth Session of the ASP).

¹⁴² HRW, *Courting History* (n 61) 174.

¹⁴³ Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing before the International Criminal Court (29–30 January 2009) 3; Summary Report on the Seminar on Protection of Victims and Witnesses Appearing before the International Criminal Court (24 November 2010) 3; Prosecution's Submissions on the Agenda for Status Conference, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-417, TCI V, ICC, 28 May 2012, para. 12.

can settle in his new location and eventually become self-sustainable. The assisted move scheme has also been included in the proposed amendments of the Regulations of the Registry.¹⁴⁴

44.4.4 Rolling disclosure

As a procedural practice generally established, the prosecution has to complete the disclosure of its evidence three months before the beginning of the trial.¹⁴⁵ In the *Kenya* cases in May 2012, the prosecution proposed a system of ‘rolling disclosure’, suggesting exceptions from the disclosure deadline of three months, due to security reasons of individual witnesses. In particular, it asked to 1) disclose the identity of witnesses in the ICCPP 60 days prior to the commencement of the trial; 2) disclose the identity of other witnesses with specific security concerns 30 days before the start of the trial; and 3) ‘in exceptional circumstances and when justified by security concerns particular to an individual witness’, disclose the identity of a witness 30 days prior to the beginning of his/her anticipated testimony.¹⁴⁶

Rolling disclosure as a practice had already been put in place at other international criminal tribunals, especially at the ICTY and SCSL.¹⁴⁷ At the ICTY, the Milošević Trial Chamber went as far as authorizing delayed disclosure to the Accused of witness identities until ten days before testimony.¹⁴⁸ In the *Katanga and Ngudjolo* proceedings, Trial Chamber II had granted the delayed disclosure of two trial witnesses.¹⁴⁹

After hearing the parties,¹⁵⁰ in July 2012, the Trial Chamber agreed with the first two proposals, but stayed away from determining any specific deadline for the third

¹⁴⁴ See Call for Comments on Amendments to the Regulations of the Registry, 27 April 2012, Draft Regulation 95 <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/790.aspx> accessed 3 May 2013.

¹⁴⁵ Decision regarding the Timing and Manner of Disclosure and the Date of Trial, *Lubanga, Situation in the Democratic Republic of the Congo*, (ICC-01/04-01/06-1019), TC I, ICC, 9 November 2007, para. 21.

¹⁴⁶ Prosecution’s Submissions on the Agenda for Status Conference, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-417, TC V, ICC, 28 May 2012, para. 16. See for the relationship between disclosure obligation and witness protection Whiting, Chapter 40, this volume.

¹⁴⁷ Victims’ Rights before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs, FIDH (2007), Chapter VI.

¹⁴⁸ First decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, Milošević, IT-02-54-T, TC, ICTY, 3 May 2002, para. 13.

¹⁴⁹ Public redacted version of the Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009 (ICC-01/04-01/07-1156-Conf-Exp), *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1179-tENG, TC II, ICC, 28 May 2009, 23. The un-redacted interview transcripts of witness 267 were to be disclosed 45 days prior to the commencement of the trial; and the transcripts of witness 353 45 days prior to the testimony of the witness.

¹⁵⁰ The defence teams for *Ruto and Sang* had no objections to the first two proposals, but suggested for the third category a deadline no later than 45 days prior to testimony. See Hearing Transcript, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-T-15-ENG, TC V, ICC, 11 June 2012, 6, lines 7 to 8, line 21. While the defence for Mr Kenyatta had no objections to rolling disclosure either, the defence for Mr Muthaura called it ‘a recipe for disaster’, referring to negative experiences with a witness in the ICTY Tadić Trial. See Hearing Transcript, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-T18, TC V, ICC, 12 June 2012, 16, lines 10 to 22, line 5. However, the identity of witness L in the Tadić case who later admitted that he gave false testimony was protected from the public, not the accused. See Y Featherstone, ‘Constitutional and Institutional Developments: The International Tribunal for the Former Yugoslavia: Recent Developments in Witness Protection’ (1997) 10 *Leiden Journal of International Law* 179, 195–6.

deadline, adhering to a case-by-case basis assessment.¹⁵¹ In the same decision, it asked the prosecution to provide a provisional list of witnesses to the VWU six months before the beginning of the trial. The Chamber further stressed that the system of rolling disclosure was not automatic, but only applied following a ruling by the Chamber on a specific application made to that effect.

In November 2012 the OTP started to make applications for the system to individual witnesses; extensive litigation followed. In the *Ruto and Sang* case, in November and December 2012 the prosecution made three applications for delayed disclosure of a total of 21 witnesses. Redacted interview transcripts were disclosed to the defence in the interim. In the first of those applications, it referred to nine witnesses.¹⁵² Details of the security situation of all witnesses are to a large extent redacted from the public version of the application. However, by the time of addressing the Trial Chamber, the Prosecution had already referred all nine witnesses for a security and protection assessment to the VWU.¹⁵³ The prosecution thereby clearly demonstrated that it followed the comprehensive inter-organ approach as had been promoted in previous jurisprudence.

In December 2012 the OTP made two additional applications for delayed disclosure, one covering seven¹⁵⁴ and another five witnesses.¹⁵⁵ The defence deemed these applications as untimely and therefore objected to them.¹⁵⁶ The situation of most witnesses was not discussed in the public domain; the only partial exception is witness P-524, for whom the Trial Chamber initially rejected that his identity would be disclosed not earlier than 45 days prior to his anticipated testimony.¹⁵⁷ The OTP subsequently submitted additional security-related information for this particular witness, and indicated that it had already formally referred the situation of the witness to the VWU.¹⁵⁸ While details of the individual security situation remained

¹⁵¹ Decision on the schedule leading up to trial, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-440, TC V, ICC, 9 July 2012, paras 8, 16, and 19; Decision on the schedule leading up to trial, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-451, TC V, ICC, 9 July 2012, paras 13, 21, and 24.

¹⁵² Public Redacted Version of the 5 November 2012 ‘Prosecution’s application for delayed disclosure of the identities of certain witnesses and authorisation of redactions pursuant to Decision ICC-01/09-01/11-458’, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-468-Red, TC V, ICC, 7 November 2012, paras 3–10.

¹⁵³ Ibid., paras 15 and 61.

¹⁵⁴ Public redacted version Second application for delayed disclosure of witness identities and application for variation of the 5 November 2012 deadline with respect to Witnesses 15, 16, and 32, *Prosecutor v Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-515-Red2, TC V, ICC, 20 December 2012, para. 2. For two witnesses (P-15 and P-16), the OTP applied for disclosure 30 days prior to the beginning of the trial; for five other witnesses (P-0032, P-0144, P-0481, P-0495, and P-0524), the OTP applied for disclosure 45 days prior to their anticipated testimony.

¹⁵⁵ ICC-01/09-01/11-521-Conf-Exp, 27 December 2012 as quoted in Public with Confidential *Ex parte* Prosecution and VWU Annexes 1 and 2, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-523, TC V, ICC, 2 January 2013, para. 3.

¹⁵⁶ ICC-01/09-01/11-526-Conf, 3 January 2013 as quoted in Decision on prosecution’s ‘Urgent request for reconsideration pursuant to Trial Chamber V’s “Decision on the second and third Prosecution requests for delayed disclosure of witness identities”’, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-578-Red, TC V, ICC, 30 January 2013, para. 4.

¹⁵⁷ ICC-01/09-01/11-564-Conf-Exp, 23 January 2013 as quoted in ibid., para. 5.

¹⁵⁸ ICC-01/09-01/11-569-Conf-Exp, 24 January 2013 as quoted in ibid., para. 6.

confidential, the Chamber decided that ‘the recent developments in P-524’s security situation justify the further temporary non-disclosure of his identity in order to give the VWU sufficient time to finalise its security assessment and to put in place any required measures’.¹⁵⁹

In March 2013 the Trial Chamber determined that the number of witnesses subject to delayed disclosure represented ‘a significant proportion’ of all trial witnesses and that the situation had been caused by ‘delays on the part of the Prosecution’ in referring the witnesses to the VWU.¹⁶⁰ Amongst other factors, this specific delay led the judges to order a postponement of the trial date, as had been requested by the defence.¹⁶¹

In the *Muthaura and Kenyatta* case, in November 2012 the prosecution applied for delayed disclosure of six witnesses, while providing redacted interview transcripts in the interim. For one of those (P-118), it asked for disclosure 30 days prior to his testimony.¹⁶² The Prosecution provided details of the individual security situations, arguing, in line with the list of criteria established by the Appeals Chamber, that for insider witnesses an objectively justifiable risk existed because there was a high risk of interference before testimony and a history of targeting certain groups of insiders; that less restrictive protective measures were infeasible or insufficient, as the security concerns mainly originated from the suspects and their supporters; and that the disclosure caused no undue prejudice to the fair trial rights of the accused, as the number of witnesses were limited and the redacted transcripts provided the defence already with most of the substance of the evidence.¹⁶³ Witness P-118 is described as having ‘unique knowledge regarding the organisation’s operations in the PEV and the Accuseds’ roles therein’; and his situation therefore characterized as ‘truly exceptional’ warranting a delayed disclosure beyond the established deadlines.¹⁶⁴

The defence disagreed, insisting primarily that the fair trial rights of the accused were affected. It stressed that delayed disclosure before trial prevents the defence to adequately carry out its own investigations, especially in relation to the credibility of prosecution witnesses. It objected in particular to delayed disclosure after the beginning of the trial, indicating that this scheme would force the defence to conduct investigations and trial activities at the same time and would hamper the defence’s ability to adequately prepare cross-examination of witnesses testifying early on in the trial schedule.

In December 2012 the OTP requested delayed disclosure of seven additional witnesses. All had already been referred to the VWU ‘promptly after the interviews’, and the prosecution ‘is working with the VWU to implement protection solutions in the

¹⁵⁹ Ibid., para. 9.

¹⁶⁰ Decision concerning the start date of trial, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-642, TC V, ICC, 8 March 2013, para. 14.

¹⁶¹ Ibid., para. 18.

¹⁶² Public Redacted Version of the 5 November 2012 ‘Prosecution Application for delayed disclosure of witness identities’ (ICC-01/09-02/11-519-Conf-Exp), *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-519-Red, TC V, ICC, 7 November 2012, paras 1–3.

¹⁶³ Ibid., paras 13 and 19.

¹⁶⁴ Ibid., paras 31–6.

shortest possible time'.¹⁶⁵ It was indicated that some witnesses would be the target of bribery, which would in turn lead to them not testifying in court.¹⁶⁶

The redacted version of the prosecution filing includes certain indicia why the situation of three of the witnesses was deemed 'exceptional', warranting in the view of the Prosecution disclosure only prior to their anticipated date of testimony. One witness resided, amongst other factors, in an area where the accused enjoyed broad support; another had received direct threats and warnings that he should not testify; and a third one needed to stay in his current location in order to maintain his business to support his family, whereas his 'protection plan' would have required him to leave his business, adversely affecting his ability to support himself as well as his dependents.¹⁶⁷

The decisions of Trial Chamber V on all the OTP applications are not in the public domain. Some indication is provided in a decision of 8 January 2013, in which the judges authorized the prosecution to temporarily withhold the disclosure of two of the witnesses, as the VWU assessment was pending.¹⁶⁸ Again, an assessment of individual security situations by VWU had become an essential pre-requisite for the Chamber's decision. Nevertheless, it remains difficult to fully assess the graveness of the security situation of these individual witnesses, as most of the details are redacted.

As the prosecution stressed 'the unprecedented security challenges'¹⁶⁹ in Kenya, it has, in the *Kenyatta and Muthaura* case, sought delayed disclosure for a third (12 out of 35)¹⁷⁰ of its trial witnesses, in its view 'a manageable and reasonable number'.¹⁷¹ The 2006 Appeals Chamber decision had indicated that it would not limit delayed disclosure of witness identities to a 'very small number' prior to the Confirmation Hearing.¹⁷² At trial stage, however, the number of witnesses falling under the rolling scheme should be more limited, in particular for those witnesses who are to be disclosed only after the commencement of trial. It is therefore questionable if a third of the trial witnesses really is 'manageable' and does not adversely affect the preparation of the defence. In March 2013 the Trial Chamber decided also in the *Kenyatta and Muthaura* case to postpone the beginning of the trial, citing as one of the reasons the need to provide the defence with more preparation time as a response to delayed disclosure.¹⁷³

¹⁶⁵ Public Redacted Version of the 7 December 2012 'Second Prosecution application for delayed disclosure of witness identities and application for variation of the 5 November 2012 deadline with respect to Witness 334', *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-562-Red, TC V, ICC, 10 December 2012, para. 2.

¹⁶⁶ *Ibid.*, para. 20.

¹⁶⁷ *Ibid.*, paras 34–44.

¹⁶⁸ ICC-01/09-02/11-593-Conf-Exp as quoted in Public, with Confidential, *ex parte*, Prosecution and VWU only Annexes A and B fourth provision of additional information to the Prosecution's second application for delayed disclosure of witness identities (ICC-01/09-02/11-562), *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-616, TC V, ICC, 31 January 2013, para. 2.

¹⁶⁹ *Ibid.*, para. 31.

¹⁷⁰ See also Withdrawal of request for the delayed disclosure of the identity of Witness 7, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-543, TC V, ICC, 28 November 2012.

¹⁷¹ Public, with Confidential, *ex parte*, Prosecution and VWU only Annexes A and B fourth provision of additional information to the Prosecution's second application for delayed disclosure of witness identities (ICC-01/09-02/11-562), *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-616, TC V, ICC, 31 January 2013, para. 31.

¹⁷² Lubanga appeals judgment on general principles (n 69) para. 36.

¹⁷³ Order concerning the start date of trial, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-677, TC V, ICC, 7 March 2013, para. 10.

In sum, the recent example of the rolling disclosure system in the Kenya cases has demonstrated that the Court has strengthened its ability to develop standard practices in the area of procedural protective measures. The example has further shown that the Court has moved away from primarily fighting over inter-organ responsibilities in the area of witness protection, while at the same time introducing protective practices that are designed to enhance judicial efficiency. The interaction between the prosecution and the VWU in this case can be characterized as smooth, as the Prosecution pro-actively consulted with the VWU; reported on these consultations to the Chamber; no apparent disagreements between the organs were detectable in the public domain; and the Chamber did not need to intervene as an arbiter.

Instead, litigation has concentrated on different views of prosecution and defence in relation to the principles underlying the rolling disclosure system. One might argue that the implementation of procedural protection measures, in comparison to non-judicial protective measures, is less burdensome on the protection capacities of the Court and therefore less controversial. However, procedural protection measures are inevitably interlinked with protective measures of a non-judicial nature. The precise timing of delayed disclosure, for example, is in large part determined by the implementation of physical protection measures, which in turn are based on inter-organ coordination, starting with a shared risk assessment. In general, the focus on disagreements in the case of rolling disclosure between the prosecution and the defence (and not between the prosecution and the Registry) should be viewed as an indicator that the Court has moved away from the internal disagreements of its earlier years and towards a more mature state of its judicial functioning.

44.5 Conclusion

This chapter has undertaken an analysis of the system of protective measures currently at practice at the ICC. It has analysed the existing legal framework and concluded that this framework results in divided, even contradictory internal responsibilities for protective measures (section 44.2). Subsequently, the chapter has followed how this framework has translated itself into the early practice of the ICC by closely examining two case studies that are based on inherent tensions between Article 43(6) and Article 68(1) (section 44.3); and by describing how the Court has undertaken significant steps to overcome some of the difficulties by developing established practices for protective measures in the area of procedural (rolling disclosure) and non-judicial (IRS and ICCPP) protective measures (section 44.4).

This chapter has focused on protective measures prior to in-court testimony. It recommends implementing a model that is based on a comprehensive inter-organ approach, translated into practice as a maximum of cooperation, coordination, and information exchange. The relevant jurisprudence, focusing on the particular protective measure of relocation (see section 44.3), has emphasized this need to evaluate protective measures comprehensively between organs. In this context, relocation is just one option within the wide range of protective measures available to the Court, and can only be assessed in close relation with other protective measures.

In the case study from the *Lubanga* proceedings (see section 44.3.1.1), the OTP and the Registry were unable to agree on the appropriate risk assessment and therefore also on the appropriate protective measures. The judges concluded that acceptance into the ICCPP was not the appropriate protective measure for most of the witnesses concerned. In the case study from the *Katanga and Ngudjolo* proceedings (see section 44.3.1.2), the Appeals Chamber decided that responsibility for *any* form of relocation, beyond the mere inclusion into the ICCPP, remains in the hands of the VWU. The overarching motivation behind the existing jurisprudence is to acknowledge a significant role for the prosecution *and* to give the VWU certain clearly defined areas of providing protective measures *at the same time*, thereby translating the statutory compromise into an intensified need for inter-organ cooperation, coordination, and information exchange.

Less controversial was the decision of the Appeals Chamber in the *Lubanga* proceedings to clearly give the prosecution the initiative to apply for limitations to its disclosure obligation in relation to witnesses' identity (section 44.3.2). While the Pre-Trial Chamber initially ordered a mandatory referral to the VWU, the Appeals Chamber stressed a case-by-case assessment and subsequently developed a set of criteria to conduct such an assessment justifying redactions.

The analysis conducted in this article has focused on interpreting witness protection as an aspect of governance of the Court, i.e. to view protection as part of various attempts within the Court to develop the ICC into a more efficient institution.¹⁷⁴ This article has argued that these efforts should appropriately recognize the model of a comprehensive inter-organ approach for protective measures.¹⁷⁵

Beyond internal coordination, however, the Court is in need of increased support from States Parties and other external actors, in terms of both enhanced capacity and financial means for protective tools, such as the IRS (44.4.2) and the ICCPP (44.4.3), if one wants to significantly enhance its protection capabilities. The promotion of domestic capacity in the field of protective measures is a possible way of improvement, but it needs to take into account the potential lack of expertise as well as neutrality on the domestic level. In sum, internal coordination and external support are both indispensably needed in order to further enhance the system of witness protection measures at the ICC.

¹⁷⁴ A study group on governance within the Hague Working Group of the ASP Bureau refers to witness protection as an area where discussions on the relationship between Chambers, the OTP, and the VWU would be beneficial in the framework of a lessons learned exercise conducted by the Court and ASP. See Study Group on Governance: First Report of the Court to the ASP, ICC-ASP/11/31/Add.1, 23 October 2012 (Eleventh Session of the ASP), Annex, para. 7.

¹⁷⁵ The interpretation of witness protection as an issue of governance of the Court is in line with the main argumentation of a previously article published by the author; see Eikel (n 11) 99–100.

Victim Participation Revisited— What the ICC is Learning about Itself

*Sergey Vasiliev**

45.1 Introduction

The maturity of international criminal justice institutions is not measured in years but by their accomplishments in the implementation of their core judicial mandates and by how formidable and impactful their jurisprudence is. The experience of the ICC's predecessors, the UN ad hoc tribunals, attests that performance of these courts essentially depends on their ability to quickly devise and effectively apply innovative procedural solutions that make the best of their legal framework, whatever its quality, and the resources available to them, however limited. If the achievements of the ICC in organizing an effective and sustainable victim participation system are any benchmark, the Court's 'effective age' can be said to lag behind its 'actual age'. As compared to the progress made by the ICTY and ICTR in the course of their first 12 years, the ICC is still a teenager that is discovering itself and afflicted by an 'identity anxiety'.

Well into its second decade, the ICC has made significant strides in enabling victims to participate in the proceedings. But it is still struggling to find the 'holy grail' scheme for structuring the victim participation process. This can in part be attributed to the generally slow pace of its adjudication. The Court has completed only three cases in the first instance to date,¹ and in two of them the judicial proceedings have run the full cycle (including appeals against decisions pursuant to Articles 74 and 76).² A critique of the ICC's performance couched in exclusively quantitative terms with no attention to the unique challenges the Court has been facing during its somewhat prolonged start-up phase would be unfair.³ This does not mean, of course, that political,

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¹ Judgment pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012 ('Lubanga trial judgment'); Judgment pursuant to Art 74 of the Statute, *Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/12-3-tENG, TC II, ICC, 18 December 2012 ('Ngudjolo trial judgment'); Jugement rendu en application de l'article 74 du Statut, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436, TC II, ICC, 7 March 2014 ('Katanga trial judgment').

² On 25 June 2014 the parties discontinued their appeals against the *Katanga* trial judgment (n 1), as a result of which it became the first ICC's final judgment pursuant to Art. 74.

³ See Speech by Ms Silvana Arbia, the ICC Registrar, during the conference 'Justice for All? The International Criminal Court—10 years review of the ICC', University of New South Wales (UNSW), Sydney, Australia (14 February 2012), 2 (responding to the critique that 'the Court is operating less

operational, or logistical hurdles are unique to the ICC and automatically justify inefficiency. Regardless, the fact is that the judicial record of the ICC's first 12 years leaves us with the experiential data that are provisional at best. This should be taken into consideration when evaluating the approaches the ICC has developed in operationalizing its legal framework on victim participation.⁴ By the same token, it may be too early to attempt a definitive assessment of the Court's legal and administrative practices, let alone draw far-reaching conclusions as to whether the ICC's experiment with victim participation has been a success or failure on the grandiose scale.

Nevertheless, it is not only opportune but also necessary at this juncture to draw lessons from the last decade of the ICC's experience with regard to victim participation. Based on what has been learnt by now about the ICC's strengths and limitations in this regard, it is urgent to consider the need for and best avenues of corrective action in order to help the teenager court make its 'life choices' in the near future. This may consist in giving clearer directions for reforms that the Court should be pursuing or, instead, in agreeing to give it more time and space for growing up and for ploughing its way. Given the growing sense of urgency, the importance for the ICC to make cogent strategic choices, and to do so at some point soon, leaves no doubt.

The Court organs and principals as well as the representatives of States Parties have repeatedly recognized victims' rights as 'the cornerstone of the Statute' and victims as the main beneficiaries of the ICC's existence.⁵ It comes as no surprise that NGOs and victim rights groups in particular have considered victims and their procedural participation and representation as the banner of the ICC's innovative 'reparative' mandate.⁶ This rhetoric views victims and affected communities as a principal source of the ICC's legitimacy and its *raison d'être*, with their level of 'customer satisfaction'

efficiently than the special tribunals' by pointing out that it 'operates within a unique international setting' and 'implements its judicial mandate in a political environment, with ongoing conflicts, which are very fresh in the people's minds and are all linked to national or regional political issues').

⁴ In a similar vein, see Report of the Bureau on Victims and Affected Communities and the Trust Fund for Victims, including Reparations and Intermediaries, ICC-ASP/12/38, 15 October 2013 (Twelfth Session of the ASP), para. 4.

⁵ Victims and Affected Communities, Reparations and Trust Fund for Victims, Preamble, Resolution ICC-ASP/12/Res.5, 27 November 2013 (Twelfth Session of the ASP) ('Determined to ensure the effective implementation of victims' rights, which constitute a cornerstone of the Rome Statute system'); Report of the Bureau on Victims and Affected Communities, ICC-ASP/12/38 (n 4) para. 5. See also Speech by the ICC Registrar, Ms Silvana Arbia (n 3) 2; Policy Paper on Victims' Participation under Art 68 (3) of the ICC Statute, ICC-OTP, 1 April 2010 ('OTP Policy Paper on Victim Participation'), 5 ('an essential feature of the Rome system and an important contribution to international justice'); Stocktaking of international criminal justice: The impact of the Rome Statute system on victims and affected communities. Final report by the focal points (Chile and Finland) ('Report: Stocktaking of International Criminal Justice'), annex V(a), RC/11 <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.V.a-ENG.pdf> accessed 17 March 2014, para. 32 ('victims are the main beneficiaries of justice').

⁶ E.g. Recommendations to the 12th Session of the ASP, 20–8 November 2013, The Hague, Victims' Rights Working Group <<http://www.vrwg.org/downloads/20131113vrwgasp12final.pdf>> accessed 17 March 2014 ('VRWG recommendations to ASP-12') 4 (calling upon States Parties and the Court 'to recognise the benefits that victims' participation in the proceedings bring for victims themselves, but also for the legitimacy of the Court, the fulfilment of the ultimate object and purpose of the Rome Statute and its centrality to international justice as a whole.); Making Victim Participation Effective and Meaningful, Victims' Rights Working Group, June 2014 <[http://www.vrwg.org/downloads/englishvrwgpapermakingvictimparticipationeffectiveandmeaningful-june2014-\(2\).pdf](http://www.vrwg.org/downloads/englishvrwgpapermakingvictimparticipationeffectiveandmeaningful-june2014-(2).pdf)> accessed 24 June 2014, 1 ('The participation of victims in proceedings is a unique feature of the ICC and an essential part of its reparative mandate').

with the Court serving as the litmus of its effectiveness.⁷ Over and above other widely used yardsticks—fair trials, enforceability of decisions (most importantly, arrest warrants), even-handedness and geographic distribution of investigations and prosecutions, and relationships with certain blocs of states—the ICC’s engagement with victims and affected communities serves as a principal metric of its relevance and validity. The degree of contentment on the part of victims—however calculated—has come to be the basis on which value judgments are passed on the Court and its benchmark of success in achieving the socio-political goals in the conflict and post-conflict settings.⁸

The benefits promised by the ICC to victims of international crimes, especially as a result of the more expansive interpretations of the provisions of its Statute,⁹ are unprecedented. They encompass a panoply of rights or opportunities, including participation, representation, protection, general assistance, and reparations. Having set the bar so high, the stakes vested in victim participation are enormous for the Rome Statute system as a whole. Whilst the institutional credibility of the ICC is certainly one of them, what seems to be at stake ultimately is the very idea of international justice.¹⁰ The risks of leaving promises unfulfilled and frustrating the hopes created with the victims are enormous.¹¹ With their expectations already being sky-high, what the Court actually offers and is capable of delivering can too easily be misunderstood. The effective expectation-management and correction of any misperceptions left by gaps in outreach are a priority task.¹² The Bureau on Victims and Affected Communities

⁷ On the problematic premises and effects of the victim representation rhetoric and the invocation of ‘victims’ as a *telos* of the ICC’s work, see S Kendall and S Nouwen, ‘Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood’ (2013) 76 *Law and Contemporary Problems* 235.

⁸ E.g. D Tolbert, ‘Taking Stock of the Impact of the Rome Statute and the International Criminal Court on Victims and Affected Communities’, Stocktaking of International Criminal Justice: The Impact of the Rome Statute System on Victims and Affected Communities, Review Conference of the Rome Statute of the ICC, 2 June 2010, Kampala, Uganda <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/DavidTolbert-ReviewConferencePaper-on-victims.pdf> accessed 17 March 2014, 1 (‘Ultimately, the success of the Court will hinge on whether it is perceived as an effective option in terms of delivering justice for the victims of the world’s worst crimes.’).

⁹ Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (‘ICC Statute’).

¹⁰ REDRESS, ‘The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future’, October 2012 <http://www.redress.org/downloads/publications/121030participation_report.pdf> accessed on 17 March 2014, 9 (‘This daunting challenge is the grand beacon of international justice, and not the thread which will unravel it and cause its ultimate demise.’).

¹¹ E Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press 2007) 150 (‘if the ICC is not thoughtful, prudent, and practical about how it manages these expectations, it could end up digging its own grave with the spade of good intentions.’); E Haslam, ‘Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?’ in D McGoldrick et al. (eds), *The Permanent International Criminal Court—Legal and Policy Issues* (Oxford: Hart Publishing 2004) 319; H Friman, ‘Participation of Victims in the ICC Criminal Proceedings and the Early Jurisprudence of the Court’ in G Sluiter and S Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (London: Cameron May 2009) 204; C Van den Wyngaert, ‘Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge’ (2011) 44 *Case Western Reserve Journal of International Law* 475, 494–5.

¹² Report: Stocktaking of International Criminal Justice (n 5) 80. On expectations towards the ICC in the affected communities, see Public Redacted Version of Report Concerning Victims’ Representations (ICC-01/09-6-Conf-Exp) and annexes 2 to 10, *Situation in the Republic of Kenya*, ICC-01/09-6-Red,

of the ASP has acknowledged the urgency of this concern in connection with limited resources and negative financial prospects:

there is a need to close the gap between expectations, rights and resources. In other words, whilst stakeholders should bear in mind that victims' rights are a cornerstone of the Statute and, therefore, the debate on victims cannot be reduced to a cost-driver, they should be aware that the world is still facing a financial crisis that has consequences in terms of the allocation of resources. As a result, finding that balance is a matter of priority.¹³

In the wake of the initial avalanche of literature on the importance of victims' rights and interpreting the open-ended ICC legal framework on its own terms, a significant body of critical scholarship has emerged assessing the Court's first practice in implementing the victim participation scheme.¹⁴ Building upon the second-wave debates, this chapter takes a panoramic view on the ICC's victim participation system and evaluates the progress made by the Court organs and States Parties in enhancing its sustainability and effectiveness.¹⁵ A significant part of the problem lies in the persisting ambiguities about the fundamental purpose and rationales of the participation by victims in the ICC proceedings. This is a corollary of the well-intentioned but misconceived rhetoric promising 'restorative justice' through victim participation and advocating that the Court should provide victims with procedural opportunities for participation that comport with this ideology. However, there is a profound conceptual and practical disconnect between the processes of victim-friendly yet essentially retributive criminal justice that the Court is mandated and able to deliver and the ideal of restorative justice, which remains unattainable in its context.

This chapter posits that this disconnect cannot effectively be bridged and, in order to address it, the Court must be prepared to free itself from the 'restorative' complex because this rhetoric has no place in the fashioning of the victim participation system. The restorative ambition may attach and must be limited to reparations

PTC II, ICC, 29 March 2010, paras 16–20; Turning the Lens: Victims and Affected Communities on the Court and the Rome Statute System, RC/ST/V/INF.2, 30 May 2010, Review Conference of the Rome Statute, Kampala, 31 May–11 June 2010 <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-V-INF.2-ENG.pdf> accessed 17 March 2014; Tolbert (n 8) 1 and 6–7.

¹³ Report of the Bureau on Victims and Affected Communities, ICC-ASP/12/38 (n 4) para. 5.

¹⁴ E.g. H Friman, 'The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?' (2009) 22 *Leiden Journal of International Law* 485; S Zappalà, 'The Rights of Victims v the Rights of the Accused' (2010) 8 *Journal of International Criminal Justice* 137; E Haslam and R Edmunds, 'Common Legal Representation at the International Criminal Court: More Symbolic than Real?' (2012) 12 *International Criminal Law Review* 871; F Eckelmanns, 'The ICC's Practice on Victim Participation' in T Bonacker and C Safferling (eds), *Victims of International Crimes: An Interdisciplinary Discourse* (The Hague: TMC Asser Press 2013) 189–221; M Pena, 'Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying Ahead' (2010) 16 *ILSA Journal of International and Comparative Law* 987; M Pena and G Carayon, 'Is the ICC Making the Most of Victim Participation?' (2013) 7 *International Journal of Transitional Justice* 518.

¹⁵ Protection of and general assistance to victims participating in the proceedings are not covered. The issues of victim reparations (Arts 75, 79, and 82(4) ICC Statute) are also excluded; see e.g. McCarthy, Chapter 46, this volume.

ordered by the Court and/or administered by the Trust Fund for Victims.¹⁶ But further optimization and harmonization of standards and practices regarding the application process, representation, and participation of victims in the ICC proceedings across Chambers should proceed on the lowest common denominator of procedural pragmatism. Individual and direct participation by victims should be tied, to the extent possible, to the accepted rationales of criminal process and the expected contribution by the participating victims to the goals of effective and efficient operation of the ICC as a criminal court. Reflecting on the way forward, the current trends towards predominantly collective forms of application, representation, and participation will continue and should be embraced. The shift to procedural pragmatism could erroneously be seen as emasculating the ‘Victim’s Court’ project of its idealism. But a more sober and moderate approach is ultimately more conducive to increasing the degree of victims’ satisfaction, preventing ‘secondary victimization’ at the hands of the ICC, and bolstering its credibility and viability in the long run.

The chapter starts by unpacking the root causes of the difficulties the ICC is facing in developing a uniform and stable system of victim participation (section 45.2). The next section provides a *tour d’horizon* of key turns in the jurisprudence and administrative practices relating to participation of victims under the regime of Article 68(3) as complemented by Rules 89–92. Without attempting a comprehensive overview, section 45.3 addresses the hurdles faced by the Court and evaluates the solutions developed by the Chambers and the Registry in operationalizing the Article 68(3) participatory regime, with a focus on the application process, participatory modalities, and representation. The chapter then illustrates that over time, victim participation emerged as a top-priority governance matter within the ICC system. It is currently a source of preoccupation for States Parties who have viewed the Court’s struggles with increasing concern. In reflecting on the optimal future strategies, section 45.4 turns to the process of consultations between the Court and the ASP that took place in the past few years and traces the evolution of the ASP’s thinking on, and approach to, this matter based on its yearly resolutions. Juxtaposed against the Court’s continuous efforts to develop workable ad hoc solutions and a court-wide strategy, the ASP’s recent policy push for simplified and harmonized procedures may be questioned. The diversity of situations before the Court and the distinct challenges each of them poses render the asserted goal of formulating a comprehensive one-size-fits-all approach unrealistic. The nature of the difficulties facing the Court makes its practices only susceptible to well-calculated, gradual, and ‘soft’ harmonization. Premature consolidation would not solve the problems with victim participation. The optimal approach must allow a reasonable variation across different situations and cases, and reserve a necessary degree of ‘manual control’ to the Court. The scaling down of the grand restorative ambitions in developing the participatory scheme is the most affordable of the sacrifices for the Court; this is a key lesson that the ICC must have learnt after the protracted journey of rediscovering itself as a primarily retributive justice institution.

¹⁶ Arts 75, 79, and 82(4) ICC Statute.

45.2 Challenges of Victim Participation at the ICC: A Bird's-Eye View

The idea of allowing victims to participate in the proceedings in their own capacity (as opposed to the traditional role of witnesses) was one of the most controversial issues about the ICC procedure from the outset. It was debated during the Rome Conference and subsequently in the Preparatory Commission when developing the Rules of Procedure and Evidence (RPE)¹⁷ governing the specifics of victim participation.¹⁸ The provision of victims' participatory rights was hailed by many as the most significant innovation of the ICC law and the greatest victory for victims of international crimes in the international legal domain; nevertheless, sceptical voices were heard from early on.¹⁹ Those critiques concerned, among other things, the uncertain procedural rationales of victim participation, its unfeasibility in the ICC context, and its potentially detrimental effects on the Court's ability to deliver a fair trial.

More than one decade into the ICC's operations, vigorous debates on victim participation continue both within and outside of the Court. The court-wide strategy in relation to victims (2009) and its revised version (2012) reflect the internal consensus on general issues that the ICC has been able to produce.²⁰ However, with regard to detail, a uniform vision shared by key organs and figures of the Court is yet to emerge.²¹ Victim participation is a divisive issue that has led to no less than ideological controversies and a split within the Court:

Those who were in favour of the system and those within the Registry with the task of trying to make it work have been slowly pushed into a corner. With ever

¹⁷ Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, 3–10 September 2002 (First Session of the ASP), part II.A (adopted and entered into force 9 September 2002) ('ICC RPE').

¹⁸ For an account of negotiations on the relevant Rules, see G Bitti and H Friman, 'Participation of Victims in the Proceedings' in R Lee et al. (eds), *The International Criminal Court—Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational 2001) 456–74.

¹⁹ For moderately positive accounts, see Haslam (n 11); C Jordà and J de Hemptinne, 'The Status and Role of the Victim' in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press 2002) 1388–9 and 1416. For a critical view, see A Zahar and G Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press 2008) 75–6 ('a potentially harmful experiment' in 'still a highly fragile system that should stay clear of experiments until the system has been put in order').

²⁰ Report of the Court on the Strategy in Relation to Victims, ICC-ASP/8/45, 10 November 2009 (Eighth Session of the ASP) <http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf> accessed 17 March 2014; Court's Revised Strategy in Relation to Victims, ICC-ASP/11/38, 5 November 2012 (Eleventh Session of the ASP) <http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf> accessed 17 March 2014.

²¹ A Ušacka, 'Promises Fulfilled? Some Reflections on the International Criminal Court in its First Decade' (2011) 22 *Criminal Law Forum* 473, 484; J Wemmers, 'Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate' (2010) 23 *Leiden Journal of International Law* 629, 638 (providing empirical data on the different perceptions of the ICC employees). See e.g. OTP Policy Paper on Victim Participation (n 5) 15 (contrary to the established jurisprudence stating that 'other than for reparation purposes, it should be the rare exception where victims are allowed to present evidence to prove the innocence or guilt of the accused' and that 'when victims are in the possession of meaningful evidence necessary to establish the truth there are numerous opportunities to contact the Prosecution directly').

shrinking budgets, ever expanding tasks dictated by the different and often inconsistent Chamber rulings and little remit of their own to re-structure the work more efficiently, Registry officials are put in a position where they are destined to fail, which simply fuels the sceptics and contributes to the calls to further shrink the budget.²²

Outside the Court, the commentators and court observers' attention towards the topic of victim participation has steadily been on the rise. The proponents and milder critics hoped that the ICC would be able to develop a fair and workable regime sooner, but the task turned out to be more complex than expected. The assessments of the Court's progress in ensuring sustainable practice have varied substantially, including among the ICC judges.²³ Several years down the line, alarmed accounts outweigh by far the more positive and hopeful ones.²⁴

The optimal policy the ICC was expected to devise in accommodating victims as actors in the proceedings must allow reconciling several competing objectives. The Court's revised strategy formulates this as the task to '[e]nsure that victims are able to fully exercise their right to effectively participate in the ICC proceedings with effective legal representation in a manner that is consistent with their rights and personal interests as well as with the rights of the accused to a fair, expeditious and impartial trial'.²⁵ Thus, on the one hand, the victims must be able to realize participatory rights fully and meaningfully in accordance with the legal framework. Under the Article 68(3) regime, whereby victims' 'views and concerns' may be allowed by the Court to be presented and considered at appropriate stages of proceedings if their 'personal interests' are affected,²⁶ participation may not be prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial. On the other hand, victim participation must also be efficient. This is not only about judicial economy but also the prudent allocation of resources in light of the goals of grafting victim participation onto the procedural system (which, as noted, are far from clear). Such participation should neither lead to the overburdening and collapse of the system, nor result in the impossibility for the victims to enjoy the rights and procedural opportunities provided to them under the Statute. For example, victims may suffer prejudice as a result of a failure by

²² REDRESS (n 10) 7. See also Independent Panel of experts report on victim participation at the ICC, July 2013 <http://www.iccnow.org/documents/Independent_Panel_of_Experts_Report_on_Victim_Participation_at_the_ICC.pdf> accessed 17 March 2014, para. 5 ('The system is significantly affected by divergent visions of the participation system within the ICC... [D]ifferent efforts aimed at addressing the current challenges are disjointed and risk further undermining the system of participation').

²³ A Fulford, 'The Reflections of a Trial Judge' (2011) 22 *Criminal Law Forum* 215, 222 (being 'cautiously optimistic', from the *Lubanga* experience, that victim participation can be accommodated without adding greatly to the length of the proceedings). Cf. Van den Wyngaert (n 11) 493 ('During the trials, victims take up an important proportion of the time... [T]ime spent during the hearings is considerable because questions by the victims will often trigger new questions by the Defence. In addition, the "victims' case" is taking a lot of time.... Whatever the actual average number of hours, it is clearly significant').

²⁴ E.g. W Schabas, 'The International Criminal Court at Ten' (2011) 22 *Criminal Law Forum* 493, 500; C Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?' (2008) 6 *Northwestern Journal of International Human Rights* 459, 461.

²⁵ Court's Revised strategy in relation to victims, ICC-ASP/11/38 (n 20) para. 20.

²⁶ See further S Vasiliev, 'Article 68(3) of the ICC Statute and Personal Interests of Victims in the Emerging Practice of the ICC' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden/Boston: Brill 2009) 638–58.

the Court to process, in a timely fashion, their applications for participation or procedural requests submitted by legal representatives and to ensure meaningful participation. ‘Meaningful participation’ is a formula dominating the discourse on victim participation at the ICC, but its procedural content has remained undetermined so long as there is no consensus on what ‘meaning’ it refers to. Arguably, such participation should be more than a pointless—and unaffordable—symbolism. It must benefit victims by enabling them to promote, individually or collectively, their legally recognized interests in the manner consistent with the Statute while contributing tangibly to the discharge of the core functions of the Court’s criminal process.

The experience of the past decade demonstrates that striking the balance between these objectives in practice is easier said than done; the ICC’s performance has raised the spectre of failing them all, depending on the angle of critique. First, despite the clear prioritization of rights of the accused in Article 68(3), the victim participation practice has been deemed to put a strain on fair trial principles. The victims’ presence in the wings of adjudication has raised suspicion of undermining the judges’ ability to focus on the delivery of a fair and expeditious trial for defendants.²⁷ That said, in the trials completed thus far, victim participation did not take the largest share of blame for endangering due process. Recalcitrance or negligence on the part of the prosecution was seen as the main threat to fair trial and a source of prejudice to be kept in check by the Chambers.²⁸ However, concerns about the impact of victim participation on fair trial rights have never been fully extinguished and the ‘conflict rhetoric’ endures.²⁹

Second, questions are still being raised about the ability of the Court to deliver on the promise of ‘meaningful’ participation. According to some accounts, the victims’ involvement in the proceedings is more symbolic than effectual, as a result of resource-saving pressure and practical impossibility to ensure genuine and individualized representation of thousands of victims.³⁰ The system of common legal representation of victims appears not only justifiable but also indispensable given the nature of the ICC cases. But it has also been seen as legitimizing surrogate participation and allowing the ‘managerial impetus’ to displace the principled—value-based and goal-inspired—considerations. Critics have pointed to the tendency of the Court’s discourse to put an excessive emphasis on efficiency concerns, which has led to the ‘progressive marginalization of the system’, whereas the question should have rather been how the goals of victim participation can be realized given the massive nature

²⁷ E.g. Zahar and Sluiter (n 19) 76; M Jouet, ‘Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court’ (2007) 26 *Saint Louis University Public Law Review* 249, 250, and 271–4.

²⁸ Lubanga trial judgment (n 1) paras 120–3; Decision on the consequences of non-disclosure of exculpatory materials covered by Art 54(3)(e) agreements and the application to stay the prosecution for the accused, together with certain other issues raised at the Status Conference on 10 June 2008, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1401, TC I, ICC, 13 June 2008, paras 75–7 and 90–5; Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2517-Red, TC I, ICC, 8 July 2010, para. 31.

²⁹ E.g. Zappalà (n 14) 143; Van den Wyngaert (n 11) 488 (on ‘the paradox’ between the rights of the accused and interests of victims).

³⁰ Haslam and Edmunds (n 14) 872; Van den Wyngaert (n 11) 489 and 495.

of victimization.³¹ The criticism, however, falls short of specifying what evident ways to realize those goals, other than through what it refers to as ‘marginalization’, are realistically available.³² The need to ensure sustainability sets fetters on the extent to which the quantitative growth of the current scheme can be afforded, if it is to be retained, and informs the tenor and scope of possible reforms. Despite the thin consensus that the rights provided to victims under the ICC law should not be alienated or constrained by budgetary considerations, the lack of agreement on the appropriate contours of participation is the crux of the matter and the reason the controversies persist.³³ It is also conceivable that the Court’s experimentation and efforts in fashioning the system are more than mere cost-saving measures motivated by budgetary constraints. They can actually reflect a substantive shift in the understanding of the rationales of victim participation and be a sign of the agreement on its purposes emerging.³⁴

Third, perhaps the hardest battle for the Court in running the victim participation scheme relates to its effectiveness. The system as it has existed until now has consumed inordinate amounts of time and financial resources.³⁵ The Sisyphean efforts the Chambers, Registry, and the parties invested in devising, workable solutions through consultations and experimentation appear to have been a helter-skelter crisis management rather than a routine and sustainable operation. Yet, as principals of the Court have acknowledged, this dedicated work did not help against recurrent delays in processing victim applications and making judicial decisions thereupon, due to insufficient resources.³⁶ It was not uncommon for the applicants to have to wait for two years before their status could be determined and to therefore miss procedural opportunities to exercise their rights.³⁷ The magnitude of resources consumed by the system—paid out as court personnel salaries, counsel fees, costs of maintaining the infrastructure, etc.—has led to questions whether such allocation of funds was justifiable or made any sense in light of the supposed goal of promoting social restoration.³⁸ The enterprise absorbed a considerable budget that could instead be utilized for reparations or the Trust Fund’s general assistance projects.

As can be gleaned from this bird’s-eye view, the challenges faced by the ICC in administering and fine-tuning its victim participation scheme have been inordinate. The following section discusses the specific solutions devised by the Court in addressing them. Before proceeding further, it is necessary to pause upon principal factors encumbering its efforts. In the ICC context, the difficulty of striking a balance

³¹ REDRESS (n 10) 8.

³² Report of the Bureau on Victims and Affected Communities and the Trust Fund for Victims and Reparations, ICC-ASP/11/32, 23 October 2012 (Eleventh Session of the ASP), para. 19 (*‘with current resources, it was not possible to grant all victims the right to participate. The Court’s conclusion was that consideration should be given to the possibility of revising the application system, or the resources for victims’ participation be increased. As regards the budgetary aspect, the need to establish a system that worked within existing resources was stressed’*, emphases added).

³³ Tolbert (n 8) 2. ³⁴ Cf. Haslam and Edmunds (n 14) 872.

³⁵ Eckelmans (n 14) 190; Chung (n 24) 461. See also Van den Wyngaert (n 11) 492–3 (the 2012 ICC budget earmarked €7,000,000 for victim-related tasks, excluding resources consumed by the parties; no less than one-third of the TC’s legal support staff was fully dedicated to working on victim applications in the first months of the *Katanga* trial proceedings).

³⁶ Speech by Ms Silvana Arbia (n 3) 4. ³⁷ Chung (n 24) 460; Pena (n 14) 512.

³⁸ E.g. Schabas (n 24) 500–1; Van den Wyngaert (n 11) 495.

between meaningful and workable participation lay in several circumstances. The first and obvious reason is the nature and dimension of cases coming before the Court. Most of them involve mass victimization, and, depending on the types and scale of violence, ongoing security risks, political context, and the quality of the Court's outreach, are apt to result in thousands of applicants wishing to be granted a victim status and participate at various stages of the proceedings.³⁹

In early 2012 the Registrar reported that the total number of persons who had applied for participation in the proceedings as victims exceeded 11,000, of which 4,350 applications for participation had been granted.⁴⁰ These numbers attest to the growing effectiveness of the outreach programmes through which the Court accesses the affected communities and the increasing interest to the ICC on the part of victims. It has been suggested that this is 'important for the broader success of the Court as a credible, effective and relevant justice institution'.⁴¹ But paradoxically, those numbers also expose the risk for the Court to fall victim to its own success.⁴² As will be discussed, the applications need to be received by the Registry's VPRS, checked for completeness, redacted, circulated to the parties for observations, and decided upon.⁴³ This protocol has proven highly time-consuming to implement.

With respect to the statistics of victim participation in the ICC cases, the number of victims admitted in the first two trials in the *Situation in the DRC* did not exceed several hundred (129 persons in *Lubanga* and 366 persons in *Katanga and Ngudjolo*).⁴⁴ Further, 103 victims were admitted to participate in the *Banda* case (pre-trial) proceedings in the *Situation in Darfur*.⁴⁵ In the *Situation in Kenya*, 628 persons were admitted to participate as victims in the *Ruto and Sang* trial and 725 in the *Kenyatta* post-confirmation proceedings.⁴⁶ In the *Laurent Gbagbo* case (*Situation in Côte d'Ivoire*), the

³⁹ REDRESS (n 10) 8 n 22 ('Mass victimization is not a "problem" or "constraint" that can justify the failure of the system: it is the basis upon which the system must be developed.); Report of the Bureau on Victims and Affected Communities, ICC-ASP/11/32 (n 32) para. 20 ('Rome Statute crimes tended to have mass victims and therefore there was a need to look at the totality of the victims. It was suggested that the collective approach should be the basic approach, given the mass nature of the crimes under the Court's jurisdiction, but this should not exclude the possibility of allowing for individual applications or participation when circumstances so warrant it').

⁴⁰ Speech by Ms Silvana Arbia (n 3) 3. ⁴¹ REDRESS (n 10) 10.

⁴² Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings, ICC-ASP/11/22, 5 November 2012 (Eleventh Session of the ASP) ('ICC Report on the Review of Application System'), para. 6 ('While these numbers are testimony to the interest of victims in the ICC, such numbers have, however, also put a strain on the Court').

⁴³ See section 45.3.1. Application process.

⁴⁴ In the *Lubanga* trial, the TC ultimately withdrew the status of six victims: *Lubanga* trial judgment (n 1) paras 15, 484, and 1362. In *Katanga and Ngudjolo*, the victim status of two victims was withdrawn after the legal representative doubted the truthfulness of their statements to the Court: *Ngudjolo* trial judgment (n 1) para. 32; *Katanga* trial judgment (n 1) para. 36; Decision on the Maintenance of Participating Victim Status of Victims a/0381/09 and a/0363/09 and Mr Nsita Luvengika's Request for Leave to Terminate his Mandate as Said Victims' Legal Representative, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3064-tENG, TC II, ICC, 7 July 2011, para. 48.

⁴⁵ Case information sheet, Information on the case *The Prosecutor v Abdallah Banda Abakaer Nourain* <<http://www.icc-cpi.int/iccdocs/PIDS/publications/BandaEng.pdf>> accessed 3 March 2015.

⁴⁶ Case information sheet, Information on the case *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* <<http://www.icc-cpi.int/iccdocs/PIDS/publications/RutoKosgeySangEng.pdf>> accessed 3 March 2015, 3; Case information sheet, Information on the case *The Prosecutor v Uhuru Muigai Kenyatta* <<http://www.icc-cpi.int/iccdocs/PIDS/publications/KenyattaEng.pdf>> accessed 3 March 2015, 3.

Pre-Trial Chamber granted 199 victims the right to participate in the pre-trial process.⁴⁷ However, in the *Bemba* trial, the number of admitted victims is of a different order of magnitude and amounts to no fewer than 5,229 victims.⁴⁸ According to the Court's 2012 report,

[t]he rate at which the Court received applications has increased by 300 per cent, from 187 applications received on average per month in 2010, to 564 in 2011. As at the end of April 2012, 19,422 applications for participation and for reparations have been submitted, and 4,107 victims have been accepted to participate in proceedings before the Court. In the future, while the number of victims who decide to apply to the Court may fluctuate, it can be predicted that they will continue to involve the same high numbers as currently received.⁴⁹

Hence it cannot be excluded that the numbers of victims applying and admitted for participation will continue to rise, for a number of reasons. First, with the improved outreach, the information about the Court will reach more potential applicants. Second, the growth in the number of eligible victims can be expected as the 'natural consequence of the proliferation of proceedings', at least until the Court reaches the balance between new and concluded proceedings.⁵⁰

The active use by victims of procedural avenues, even in an organized manner and through common legal representatives, by definition contributes to lengthier proceedings. In addition to optimizing the system for processing the applications for participation, the Court must find a way of accommodating the significant numbers of admitted victims in the proceedings in order to guarantee them effective participation and representation. Without tailored solutions and vigilant control by the judges over the implementation of the scheme, the exercise of rights by victims that is formally in keeping with the legal framework does not in itself ensure effectiveness and sustainability of the system.

Second, the complications that the Chambers have faced in arriving at a workable system of victim participation in the initial stages are attributable to the limitations of the ICC's legal framework itself. Despite being a comprehensive codification previously unseen in international criminal law, the ICC Statute, Rules, and Regulations of the Court⁵¹ do not provide 'thick' regulation because it was impossible for the drafters to anticipate all issues and secure consensus on every important detail. When drafting the procedural provisions, state delegations had recourse to the legal drafting technique that could accommodate uneasy diplomatic compromises and masked their inability to agree on more specific provisions.⁵² On key

⁴⁷ Case information sheet, Information on the case *The Prosecutor v Laurent Gbagbo* <<http://www.icc-cpi.int/iccdocs/PIDS/publications/GbagboEng.pdf>> accessed 3 March 2015, 3.

⁴⁸ Case information sheet, Information on the case *The Prosecutor v Jean-Pierre Bemba Gombo* <<http://www.icc-cpi.int/iccdocs/PIDS/publications/BembaEng.pdf>> accessed 3 March 2015, 3.

⁴⁹ ICC Report on the Review of Application System (n 42) para. 5.

⁵⁰ Report of the Court on the Revised Strategy in Relation to Victims: Past, Present and Future, ICC-ASP/11/40, 5 November 2012 (Eleventh Session of the ASP), para. 75.

⁵¹ Regulations of the Court, ICC-BD/01-01-04, 26 May 2004 (adopted by the judges of the Court during the Fifth Plenary Sessions).

⁵² C Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' (2003) 1 *Journal of International Criminal Justice* 603, 604–6.

issues, including the parameters of victim participation, the approaches existing in domestic systems could not be reconciled other than through the adoption of ‘constructively ambiguous’—and, dropping the euphemistic language, ‘frustratingly vague’—formulas.⁵³

The Rome Conference created a unique law-making momentum. State delegations wished to seize this opportunity to rectify what they saw as a gaping omission in the ad hoc tribunals’ procedure—the problem of procedurally disempowered victims, which was to be solved by ensuring that the ICC’s procedural justice is more ‘victim-friendly’.⁵⁴ This conception was reinforced by the advocacy of victim rights groups and human rights NGOs, which exerted a strong influence on state delegations through the provision of legal advice and drafting assistance, public campaigning, and direct pressure.⁵⁵ The combined effect of these factors catered for a powerful ‘victim lobby’ in Rome and led to the promulgation of an innovative and progressive set of victims’ rights as part of the compromises embodied in the Statute. The bold and experimental *sui generis* regime of victim participation was unparalleled in ambition and vocabulary, and had a proven track record neither in national jurisdictions nor in the previous international criminal tribunals. Although the ICC framework and domestic regimes have sometimes been compared in terms of ‘higher’ and ‘lower’ standards of victim participation,⁵⁶ such comparison is not particularly helpful, at least as far as the Article 68(3) regime is concerned. This is due to the vague character of the Statute and the novelty of the participation model, which is different from any domestic approach.⁵⁷ When devising the ICC model, states were not restrained by the same degree of caution and conservatism that would have inhibited such far-reaching experimentation with criminal justice had it been attempted in their own domestic systems.

Therefore, the ICC legal framework for victim participation is essentially a result of diplomatic compromises and NGO advocacy. Although ably facilitated by input from legal experts, this legislative process was barely an optimal means to ensure the required degree of legal certainty and coherence that would make that framework ready for use on the day when the Court opened its doors. The ICC Statute and subordinate Rules are both ambitious in accommodating the involvement by victims in the proceedings and inconclusive when it comes to the indispensable detail. First and foremost this applies to Article 68(3), a key provision governing victim participation at the various stages of the proceedings. The language of that article was copied almost

⁵³ C Trumbull IV, ‘The Victims of Victim Participation in International Criminal Proceedings’ (2008) 29 *Michigan Journal of International Law* 777, 793.

⁵⁴ Jorda and de Hemptinne (n 19) 1387–9; D Donat-Cattin, ‘Article 68’ in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court—Observers’ Notes, Article by Article* 2nd edn (München: CH Beck 2008) 1277.

⁵⁵ D Donat-Cattin, ‘The Role of Victims in ICC Proceedings’ in F Lattanzi and W Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* vol. I (Rome: Editrice Il Sirente 2000) 268.

⁵⁶ Donat-Cattin (n 54) 1278.

⁵⁷ For a comparative analysis, see Vasiliev (n 26) 679–87. See also Separate opinion of Judge Georghios M Pikis, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/105/06 concerning the ‘Directions and Decision of the Appeals Chamber’ of 2 February 2007, ICC-01/04-01/06-925, AC, ICC, 13 June 2007 (‘Lubanga appeal decision on joint application of victims’), para. 11.

verbatim from the relevant provision of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which was never meant to operate as a self-executing norm.⁵⁸ The Declaration expressly left it to states to define technicalities of the presentation by victims of ‘views and concerns’ in the way ‘consistent with the relevant national criminal justice system’.⁵⁹ When borrowing its text for what was to become Article 68(3), the ICC Statute negotiators neither deciphered this important qualification nor fleshed it out in the context of the Court’s procedural system.⁶⁰ Further, because the drafters of the ICC Rules did not feel authorized to fill in the gaps left open by the diplomatic exercise by going beyond the Statute’s provisions, many of the fundamental questions about the rationales and appropriate forms of participation under Article 68(3) remained unanswered.

As a result, the challenging task of working out the procedural scheme by means of trial-and-error fell to the judges, and the cogency of this solution has been questioned.⁶¹ The approach under which the legislator makes a policy choice considering the possible options and indicates clearly the nature and admissible modes of victim participation would have arguably led to the quicker identification of sustainable solutions and consolidation of practice at the ICC, with a possibility of making further adjustments as necessary.⁶² No definite and institution-wide answers to the questions of procedural rationales and technicalities were apt to emerge from the adjudication by different Chambers in individual cases. While leaving these issues for judicial determination has been a regular way of legislating in international criminal procedure, the ad hoc tribunals’ experience attests that this is bound to result in experimentalism, incremental development of the law, and inconsistencies over time and across different Chambers.

Procedural law-making through jurisprudence and the use of judicial quasi-legislative powers tends to unfold in a piecemeal fashion; it enables achieving the adequate degree of certainty and stability after the critical mass of accreted experience, if at all. It was foreseeable that ‘it may take the Court some years of cut-and-try before it arrives at solid principles for the balanced and cogent application of th[e] obscure norm’ of Article 68(3).⁶³ While it is unfortunate that this prediction has materialized, the primary reason for that is known, and the fault does not necessarily lie with the Court. If any failures are to be attributed to it, those can only be its own. Although the question of ‘whom to blame’ is not nearly as pressing as ‘what to do’, the misperceptions about the root causes of the problem are distracting in the search of proper solutions. These cannot endlessly be sought in ‘what drafters had in mind’,

⁵⁸ Vasiliev (n 26) 652–3.

⁵⁹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34 (29 November 1985) UN Doc A/RES/40/34, para. 6(b).

⁶⁰ Vasiliev (n 26) 688–9 (‘a perfect mantra of the Victim Rights Movement but... apparently ill-suited to serve as a legal formula establishing prerequisites to granting victims participatory rights’).

⁶¹ E.g. Zappalà (n 14) 141–3.

⁶² Cf. Rule 23(1) of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (adopted 12 June 2007, as amended 3 August 2011) (‘The purpose of Civil Party action before the ECCC is to: (a) Participate in criminal proceedings... by supporting the prosecution; and (b) Seek collective and moral reparations, as provided in Rule 23*quinquies*’).

⁶³ Vasiliev (n 26) 688.

which is of little practical relevance and impossible to establish with specificity in any event. Instead, the optimal solutions must be pursued on the basis of ‘what works’. The strategic goals of the Court and the modalities employed in achieving them are bound to evolve. In steering the Court, its governing body (ASP) should be able to articulate the objectives clearly and enable the institution to reach them by providing the necessary support and timely guidance, building on the Court’s accumulated experience.

45.3 Implementation of Victim Participation: Problems and Solutions

This section highlights the challenges faced by the Court in realizing the key aspects of victim participation and discusses the procedural and administrative responses it has developed in dealing with them. The overview of practice is not exhaustive but limited to issues that have acquired greatest urgency in the past few years, with a focus on the areas which shed light on the role of victims as procedural participants and in respect of which the approaches adopted by different Chambers have varied. Although the ICC has gained experience with regimes other than Article 68(3), in particular the ‘Part II regime’,⁶⁴ this section only reviews practice under the former Article, as supplemented by Rules 89–92 and Regulation 86. It addresses the following aspects of participation: (i) the process by which applicants acquire victim status; (ii) participation of victims in the trial process; and (iii) legal representation. The bulk of discussion is devoted to the system for victims to apply for participation, which largely predetermines the Court’s approach to representation and participation and has therefore been the focus of experiments by the Chambers. The further review of the Court’s approaches to defining the modalities of participation at trial (in particular, expressing ‘views and concerns’, presenting and challenging the admissibility of evidence regarding the guilt or innocence, and examining witnesses) provides valuable insights into the judges’ perceptions of the overarching purpose of victim participation. This jurisprudence is a source of important judicial clarifications about the victims’ procedural role. While their involvement in the pre-trial stage of case proceedings essentially relates to the confirmation of charges, the limited nature and function of that procedure impact on the scope and character of participation allowed at that stage. This renders such participation less representative of the broader rationales and explains the current focus on the trial process.

⁶⁴ Arts 15(3) and 19(3) ICC Statute. See e.g. Public Redacted Version of Report Concerning Victims’ Representations, *Situation in the Republic of Kenya*, ICC-01/09-6-Conf-Exp, Registry, ICC, 29 March 2010; Report on Victims’ Representations, *Situation in the Republic of Côte d’Ivoire*, ICC-02/11-11-Red, Registry, ICC, 29 August 2011; Observations on behalf of victims on the ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-353-Red, OPCV, ICC, 17 June 2013; Observations on behalf of victims on the Government of Libya’s Application pursuant to Art 19 of the Rome Statute, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-166-Red-Corr, OPCV, ICC, 4 June 2012; Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Art 19 of the Statute), *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1213-tENG, TC II, ICC, 16 June 2009, nn 14 and 17 (with further references).

45.3.1 Application process

45.3.1.1 Formal requirements

Under Article 68(3), victim applications are to be submitted to the Registrar who transmits them to the Chamber.⁶⁵ After the applications are translated and redacted, they are circulated to the parties for observations. Upon receiving the same, each application should be considered and decided upon individually by the judges who are to determine whether the applicant (i) is eligible for the victim status under Rule 85⁶⁶ and (ii) fulfils the criteria set forth in Article 68(3), and, if so, (iii) shall specify the proceedings and manner in which participation is deemed appropriate, i.e. set out the procedural rights allowed at respective stages.⁶⁷ In order to appreciate the logistical implications of this procedure, its complexity and resource intensity should be considered in the context of the thousands of applications received in most ICC cases. Each application must be verified for completeness, redacted, sent for observations, and decided upon in a timely fashion. In addition, for some forms of participation tied to Article 68(3)—e.g. the questioning of witnesses by the legal representatives and the submission of evidence on the guilt or innocence of the defendant—a distinct application is required, with a new round of observations by the parties and a separate ruling by the Chamber.⁶⁸

The ICC jurisprudence regarding the vetting of applications has attained a reasonable degree of consolidation, including the issue of who may formally qualify as a victim under Rule 85.⁶⁹ The Rule requires applicants to show that: (i) they are a natural person or an organization or institution within the meaning of the Rule; (ii) a crime within the jurisdiction of the Court appears to have been committed; (iii) they have suffered harm; and (iv) such harm arose ‘as a result’ of the alleged crime within the jurisdiction of the ICC.⁷⁰ The test applied by various Chambers hinges upon the following parameters:⁷¹ (i) the required proof of identity (with variations demanded by

⁶⁵ Rule 89(1) ICC RPE.

⁶⁶ Rule 85 ICC RPE ('natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court [or] ... organisations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, art, or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes').

⁶⁷ Rule 89(2) ICC RPE ('The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled').

⁶⁸ Rule 91(3) ICC RPE. See *infra* section 45.3.2. Participation at trial: Key modalities.

⁶⁹ Eckelmans (n 14) 197; ICC Report on the Review of Application System (n 42) para. 26.

⁷⁰ See e.g. Fourth Decision on Victims' Participation, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-320, PTC III, ICC, 12 December 2008, para. 30; Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-24, PTC II, ICC, 3 November 2010, para. 19; Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, *Muthaura et al., Situation in the Republic of Kenya*, ICC-01/09-02/11-267, PTC II, ICC, 26 August 2011, para. 40.

⁷¹ See e.g. Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, *Ntaganda, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-211, PTC II, ICC, 15 January 2014, para. 18; Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-579, PTC I, ICC, 10 June 2008, para. 65; *Bemba*, Fourth Decision on Victims' Participation (n 70) para. 30.

the situation in a specific country);⁷² (ii) the link between the events described in the application and crimes within the ICC's jurisdiction (within the temporal and territorial limits of the 'situation')⁷³ and to the crimes charged against the accused (for participation in a specific case);⁷⁴ and (iii) the need for a causal link between the 'harm' suffered and the crimes charged,⁷⁵ with clarifications as to the nature of the 'harm'.⁷⁶ There have been variations with respect to the eligibility of certain categories of victims. In particular, some Chambers have held that child applicants might apply without a guardian,⁷⁷ while others have treated such applications as incomplete.⁷⁸ Similarly,

⁷² Decision on Victims' Applications for Participation, *Situation in Uganda*, ICC-02/04-101, PTC II, ICC, 10 August 2007, para. 16 ('it would be inappropriate to expect applicants to be able to provide proof of identity of the same type as would be required of individuals living in areas not experiencing the same types of difficulties'); Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, *Situation in the Democratic Republic of the Congo*, ICC-01/04-374, PTC I, ICC, 17 August 2007, paras 14–15; Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II, ICC-02/04-179, AC, ICC, 23 February 2009, para. 38; Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-02/11-01/11-138, PTC I, ICC, 4 June 2012, para. 21; Decision on Victims' Participation, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1119, TC I, ICC, 18 January 2008 ('Lubanga decision on victim participation at trial'), paras 87–9; *Ntaganda*, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings (n 71) paras 19 and 21.

⁷³ *Kenya* Decision on Victims' Participation in Proceedings (n 70) para. 19.

⁷⁴ Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, AC, ICC, 11 July 2008 ('Lubanga appeal judgment on victim participation at trial'), para. 58. See e.g. Decision on 8 Applications for Victims' Participation in the Proceedings, *Al Bashir*, *Situation in Darfur, Sudan*, ICC-02/05-01/09-93, PTC I, ICC, 9 July 2010.

⁷⁵ Requiring that a 'sufficient causal link' between the crimes and the harm be established by 'sufficient evidence', see Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case *The Prosecutor v Thomas Lubanga Dyilo, Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-172-tEN, PTC I, ICC, 29 June 2006, at 6–9; *Lubanga* appeal judgment on victim participation at trial (n 74) para. 62; Decision on the 138 applications for victims' participation in the proceedings, *Mbarushimana*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-351, PTC, ICC, 11 August 2011, paras 21–2; *Katanga and Ngudjolo*, Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case (n 71) paras 65–7; *Bemba*, Fourth Decision on Victims' Participation (n 70) paras 74–7. See also Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, *L Gbagbo*, *Situation in the Republic of Côte d'Ivoire*, ICC-01/09-01/11-138, PTC I, ICC, 4 June 2012, para. 31.

⁷⁶ The harm sustained by natural persons may be both direct and indirect, but it must necessarily be personal: *Lubanga* appeal judgment on victim participation at trial (n 74) paras 32–8.

⁷⁷ Allowing such applications on a case-by-case basis, see Decision on the treatment of applications for participation, *Katanga and Ngudjolo*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-933, TC II, ICC, 26 February 2009, para. 36; Decision on the applications by victims to participate in the proceedings, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1556, TC I, ICC, 15 December 2008, paras 95–6.

⁷⁸ Decision on Victims' Applications for Participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07, *Situation in Uganda*, ICC-02/04-172, PTC II, ICC, 21 November 2008, paras 19–20; Decision on victims' applications for participation a/0192/07 to a/0194/07, a/0196/07, a/0200/07, a/0204/07, a/0206/07, a/0209/07, a/0212/07, a/0216/07, a/0217/07, a/0219/07 to a/0221/07, a/02228/07 to a/0230/07, a/0234/07, a/0235/07, a/0237/07, a/0324/07, and a/0326/07 under Rule 89, *Situation in Uganda*, ICC-02/04-180, PTC II, ICC, 10 March 2009; Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, *Situation in Darfur, Sudan*, ICC-02/05-111-Corr, PTC I, ICC, 14 December 2007.

the Chambers' rulings as to whether applications may be made or participation continued on behalf of deceased victims have diverged.⁷⁹

45.3.1.2 Sustainability: the resources black hole

Although the formal requirements used in assessing applications have gradually taken clearer contours, the implementation of the system has been fraught with severe burdens for the victims, the VPRS, the Chambers, and the parties. The victims' experience with the application process under Rule 89(1) has often been negative. Part of the problem is that the applicants are expected to complete a shortened—but still rather lengthy—standard application form,⁸⁰ these forms are developed by the Registry (VPRS), approved by the Presidency,⁸¹ and distributed locally through interlocutors who have direct access to victims.⁸² The degree of detail of the personal information the applicants are required to provide is substantial,⁸³ and arguably, it is incommensurate in relation to the scope of eventual participation through a common legal

⁷⁹ Holding that only living persons may apply to participate: Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, *Muthaura et al., Situation in the Republic of Kenya*, ICC-01/09-02/11-267, PTC II, ICC, 26 August 2011, para. 47. Cf. Dispositif de la deuxième décision relative aux demandes de participation de victimes à la procédure, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1669, TC II, ICC, 23 November 2009, para. 4 and at 8; Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1737, TC II, ICC, 22 December 2009, paras 30–2 (close family members of the deceased victim may not apply in his name but may continue participation on his behalf within the limits of the views and concerns expressed by the victim in his or her initial application); Decision on the application to resume action, submitted by a family member of deceased Victim a/0253/09, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3383-tENG, TC II, ICC, 10 June 2013, paras 6–8. Cf. *Bemba*, Fourth Decision on Victims' Participation (n 69) para. 44 (the deceased victim can be represented by the successor that has been recognized as a participant) and Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-807, TC III, ICC, 30 June 2010, para. 80; Annex 2 (ICC-01/04-01/06-2065-Anx2), Order issuing confidential and public redacted versions of Annex A to the 'Decision on the applications by 7 victims to participate in the proceedings of 10 July 2009', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2035, TCI, ICC, 23 July 2009, 15 (permitting the deceased victim's uncle to act on his behalf). For discussion, see T Bachvarova, 'Victims' Eligibility before the International Criminal Court in Historical and Comparative Context' (2011) 11 *International Criminal Law Review* 665, 672–82; Eckelmans (n 14) 199.

⁸⁰ Pena and Carayon (n 14) 10; Kendall and Nouwen (n 7) 245–6.

⁸¹ Regulations 23(2) and 86(1) and (2) Regulations of the Court. In 2010 the standard application form developed in 2005 was reduced from 17 to 7 pages.

⁸² Eckelmans (n 14) 193–4.

⁸³ Regulation 86(2) Regulations of the Court. See further Decision on the Requests of the Legal Representatives of Applicants on Application Process for Victims' Participation and Legal Representation, *Situation in the Democratic Republic of the Congo*, ICC-01/04-374, PTC I, ICC, 17 August 2007, para. 12 ('(i) the identity of the applicant; (ii) the date of the crime(s); (iii) the location of the crime(s); (iv) a description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court; (v) proof of identity; (vi) if the application is made by a person acting with the consent of the victim, the express consent of that victim; (vii) if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship; (viii) a signature or thumb-print of the Applicant on the document, at the very least, on the last page of the application'); *Bemba* Fourth Decision on Victims' Participation (n 70) para. 81.

representative.⁸⁴ For many victims, it was impossible to supply proper identity documents and birth certificates in support of the applications due to the unavailability of, or the lack of access to, civil records in the areas of conflict, which has led the Chambers to accepting alternative proofs of identity.⁸⁵ The frequent misunderstanding of formal requirements by the applicants has routinely resulted in deficient applications,⁸⁶ and the VPRS then had to invest extra work in following up with the applicants in order to obtain the missing information.⁸⁷

Victims who are illiterate or do not speak the language used in the application forms require assistance in completing them; the VPRS has relied heavily on local intermediaries rather than the Court staff or lawyers for that.⁸⁸ The Chambers have acknowledged the crucial role intermediaries play in assisting victims with their applications despite related controversies and, most notably, defence objections regarding possible abuse.⁸⁹ However, due to its neutral status the Registry has been in a position neither to reimburse the intermediaries' expenses incurred in connection with these services nor to provide legal aid to the applicants prior to the judicial recognition of their status.⁹⁰

The time-consuming job of ensuring the completeness of applications falls to the severely under-resourced VPRS, and the section has laboured under tremendous work pressure.⁹¹ In dealing with its growing workload, it could rely on the limited staff in the ICC's few field offices, local intermediaries, and legal representatives, if appointed.⁹² Still, this was no panacea against the significant backlog of incomplete applications, which has been the true challenge to the system.⁹³ The Court reported in 2012 that it was:

⁸⁴ REDRESS (n 8) 16 (observing that the emphasis on eligibility, rather than meaningful participation, adds to the frustration of victims). See also Eckelmans (n 14) 194.

⁸⁵ Eckelmans (n 14) 198. See *supra* n 72 and Decision on the Registry Report on Six Applications to Participate in the Proceedings, *Banda and Jerbo, Situation in Darfur, Sudan*, ICC-02/05-03/09-231, TC IV, ICC, 17 October 2011, para. 23 (admitting a signed declaration from two witnesses able to provide a proof of their identity, attesting of the identity of the applicant or relationship with the person acting on his behalf).

⁸⁶ Report on Activities and Programme Performance of the ICC for the Year 2011, ICC-ASP/11/8, 4 May 2012 (Eleventh Session of the ASP), 51 (only 40% of applications received in 2011 from the DRC and 50% of applications from Kenya were complete).

⁸⁷ Regulation 86(4) Regulations of the Court. See e.g. Decision on Victim's Participation in Proceedings Related to the Situation in Uganda, *Situation in Uganda*, ICC-02/04-191, PTC II, ICC, 9 March 2012, para. 24.

⁸⁸ Report of the Court on the Revised Strategy in Relation to Victims, ICC-ASP/11/40 (n 50) para. 39.

⁸⁹ Decision on 772 Applications by Victims to Participate in the Proceedings, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1017, TC III, ICC, 18 November 2010, para. 34; Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1491-Red-tENG, TC II, ICC, 23 September 2009, paras 40–3.

⁹⁰ REDRESS (n 8) 17–8 and 26.

⁹¹ Proposed Programme Budget for 2013 of the ICC, ICC-ASP-11/10, 16 August 2012 (Eleventh Session of the ASP), para. 434 ('There has been no increase in VPRS staff at headquarters since 2006, in spite of the workload increasing many times over. This has put very high pressure on the section each year. The scale of these increases is such that they can no longer be absorbed within existing staff resources if the section is to be in a position to respond to demands of Chambers, maintain control in the field and respect the rights of victims').

⁹² REDRESS (n 8) 18 and 26–7.

⁹³ Ibid., 26; Proposed Programme Budget for 2013 of the ICC (n 91) para. 434.

experiencing difficulties processing applications in a timely manner so as to keep pace with the proceedings and enable victims to effectively exercise their rights under the Statute. One of the main reasons for this difficulty is the lack of appropriate resources in the Registry, parties, legal representatives of applicants and Chambers to deal with the volume of applications.⁹⁴

The VPRS is juggling multiple responsibilities.⁹⁵ Over and above ensuring the completeness of applications, it is also charged with conducting consultations with victims regarding the appointment of common legal representatives, preparing a confidential report summarizing and grouping the applications for the Chamber,⁹⁶ and discussing redactions with legal representatives.⁹⁷ While the VPRS has a general duty to assist victims and groups of victims,⁹⁸ it was only able to provide assistance indirectly by organizing trainings for intermediaries and providing support to lawyers.⁹⁹ The deficit of resources and multi-tasking prevented the section from directly helping victims to complete application forms, as a result of which it had to expend time in procuring the information missing from the applications *ex post facto*. In 2012 the VPRS attempted to alleviate the backlog of business by recruiting additional temporary staff and by prioritizing case proceedings over situation proceedings, but these quick-fix solutions proved inadequate.¹⁰⁰

As a result of this backlog, the Registry was systematically unable to comply with Chambers' orders to transmit applications to the relevant Chamber within a set time-frame, citing the lack of resources.¹⁰¹ Because the Court was not in a position to decide on their status, victims were precluded from exercising their rights and missed out on important hearings. In the *Bemba* and *Lubanga* trials and in the *Mbarushimana* confirmation process, the Registry informed the judges of its failure to comply with its filing obligations.¹⁰² Victims who applied for participation prior to the expiry of deadlines set by the Chambers were deprived of the opportunity to have their views and concerns heard.¹⁰³

⁹⁴ ICC Report on the Review of Application System (n 42) para. 6.

⁹⁵ See e.g. ICC Report on the Review of Application System (n 42) paras 8–9.

⁹⁶ The Chambers have started requesting the VPRS to include preliminary assessments of and basic information from individual applications in light of each of the requirements of Rule 85 in its Regulation 86(5) reports. See e.g. *Uganda*, Decision on Victim's Participation in Proceedings Related to the Situation in Uganda (n 87) para. 27.

⁹⁷ Regulation 86(5) and (6) Regulations of the Court.

⁹⁸ Regulation 86(9) Regulations of the Court. ⁹⁹ REDRESS (n 10) 18 and 26.

¹⁰⁰ Report of the Court on the Revised Strategy in relation to victims, ICC-ASP/11/40 (n 50) para. 40.

¹⁰¹ ICC Report on the Review of Application System (n 42) para. 12 ('Despite having done its utmost to avoid causing delays in the proceedings or preventing victims from exercising their rights, at several times during 2011 the Registry was obliged to inform Chambers that it was not in a position to comply with orders by the deadlines imposed. At present, the Registry is unable to keep pace and a sizeable backlog of applications exists'); Report of the Court on the Revised Strategy in Relation to Victims, ICC-ASP/11/40 (n 50) para. 40.

¹⁰² Proposal on Victim Participation in the Confirmation Hearing, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10, Registry, ICC, 6 June 2011; Request for Instructions on Victims' Applications for Participation and Reparations Received by the Registry, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2817, Registry, ICC, 2 November 2011, para. 1.

¹⁰³ REDRESS (n 10) 18 and 20–1; Pena and Carayon (n 14) 11.

The application system has become a true ‘black hole’ for the Court’s judicial and administrative resources and for those of the parties. Before circulating the applications among the parties in order to obtain their views as required by Rule 89, the Chamber is to decide on protective measures and necessary redactions.¹⁰⁴ Without access to confidential VPRS reports, parties often have to make observations on the stacks of applications that are incomplete and heavily redacted; understandably, in such cases their observations tend to be unspecific.¹⁰⁵ In turn, the Chambers have had to individually examine each application and corroborating evidence, the relevant VPRS reports, and parties’ observations before issuing a reasoned decision on each applicant’s request. This domain of responsibility has been the consistent drain of the Chambers’ limited resources.¹⁰⁶ Plagued with unavoidable delays in transmitting and processing victims’ applications, the individualized vetting system has proven unworkable with the steadily growing workload of the Court.

With the application process being the gateway through which victims enter into the ICC system, the bottlenecks associated with this stage expose the general tension between the ‘individual’ and ‘collective’ dimensions of procedural participation by victims. On the one hand, the individualized approach to processing and deciding on the applications offers victims the benefit of the first, albeit provisional, official recognition of their status and guarantees a sufficient substantive connection between applicants and the case.¹⁰⁷ On the other hand, the sheer number of applicants renders the individualized application-vetting impracticable. The system under which victims have to wait for two years before they can obtain the first judicial determination of their standing and participate through a common legal representative, while being deprived of the opportunities to exercise rights in the meantime, has clearly discredited itself. The scheme is unsustainable and in need of reform, although there is no agreement on the nature and extent of the same. Recommendations towards improving the system have ranged from requiring the optimization falling short of major restructuring¹⁰⁸ to advocating far-reaching amendments.¹⁰⁹ The Court itself has experimented with a number of ad hoc solutions in individual cases, next to undertaking an institution-wide review of the system.

¹⁰⁴ ICC Report on the Review of Application System (n 42) para. 10; Eckelmans (n 14) 196; Van den Wyngaert (n 11) 482.

¹⁰⁵ Van den Wyngaert (n 11) 482; REDRESS (n 10) 22–3; Eckelmans (n 14) 196.

¹⁰⁶ Van den Wyngaert (n 11) 482–4.

¹⁰⁷ REDRESS (n 10) 10.

¹⁰⁸ REDRESS (n 10) 24–33 (the existing system can be strengthened without changing its structure but by strengthening outreach, improving the quality of initial applications, enabling parties to see the Registry’s reports on applications; setting clear timeframes, avoiding duplicative decision-making, and separating the participation-oriented from reparation-oriented application process); Independent Panel of Experts report (n 22) 44–5.

¹⁰⁹ War Crimes Research Office, ‘Obtaining Victim Status for Purposes of Participating in Proceedings at the International Criminal Court’, ICC Legal Analysis and Education Project, December 2013 (‘WCRO Report on application system’) 49.

45.3.1.3 Judicial experimentation and review of the system

The nature and scale of problems plaguing the application system prodded the Court into action. From 2012 Pre-Trial and Trial Chambers have taken a series of initiatives in individual cases towards making it more manageable and less resource-consuming. The promising judicial experiments in *Gbagbo, Kenya I and II*, and *Ntaganda* are landmarked by creative and strategic thinking on the part of the judges in the ICC's quest for system-wide solutions. However, these ad hoc solutions did not avoid controversy: first, they reinforced the cross-chamber pluralism in the treatment of victim applications; second, some of them were inconsistent with the individualized vetting procedure provided for by Rule 89; and third, some Chambers have failed to consult with parties and victims before adopting a specific solution, with such unilateralism being objectionable.

45.3.1.3.1 *Gbagbo*: partly collective approach

The first experiment meant to address the inefficiencies of the application system within the resources available was that pioneered by Single Judge Férnandez de Gurmendi in the lead-up to the *Laurent Gbagbo* confirmation process. With reference to the duty to ensure fair and expeditious proceedings and 'to guarantee the rights of victims to express their views and concerns in a meaningful manner' in accordance with Article 68(3), the judge deemed it imperative 'to enhance the efficiency and the substantive value of victims' participation by envisaging a system that takes into account the particular circumstances of the Case' and can adequately cope with numerous applicants.¹¹⁰ After consultations with the Registry regarding the viability of a collective approach and, in line with its recommendations, the judge issued a decision that generally favoured the collective application scheme. But for the purpose of the case, a 'mixed approach' was adopted, which allowed victims to apply either as individuals or as a group.¹¹¹ This approach was to be implemented by the Registry in three phases: (i) producing an initial mapping report on the victim population in Côte d'Ivoire identifying groups of victims and persons that could act on behalf of multiple victims with their consent, in accordance with Rule 89(3), and encouraging applicants to join with others and consent to a single application form (without it being possible to impose a collective process);¹¹² (ii) collection and processing of victims' applications; and (iii) the organization of common legal representation.¹¹³

¹¹⁰ Decision on Issues Related to the Victims' Application Process, *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-33, PTC III, ICC, 6 February 2012 ('Gbagbo application process decision'), paras 5–6.

¹¹¹ *Gbagbo* application process decision (n 110) para. 7 ('the system for the Case should encourage a collective approach to victims' applications. Such a system, tailored to the specific needs of the Case, would be without prejudice to continuing the long-term consideration of a collective system that could eventually be applied by the Court as a whole and could, in fact, serve as a valuable experience which may be beneficial to such a long-term project'); Organization of the Participation of Victims, *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-29-Red, Registry, ICC, 20 January 2012.

¹¹² Rule 89(3) ICC RPE ('An application...may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled'). See *Gbagbo* application process decision' (n 111) para. 8.

¹¹³ *Gbagbo* application process decision' (n 110) paras 3 and 10.

In accordance with the judge's order, the Registry developed a collective application form consisting of a 'group form' that allows describing the elements common to the group (e.g. harm suffered and alleged crimes), and a one-page individual declaration meant for information on specific events and individual harm.¹¹⁴ The Registry reiterated in its report that a 'wholly collective approach' would be inconsistent with the ICC's legal framework and that the proposed approach merely introduced 'a measure of collective management of the process in the interests of efficiency and effectiveness' while still allowing individual presentation and treatment of applications.¹¹⁵ In response to the defence and the OPCV challenges that the 'partly collective' solution is inefficient and incompatible with the legal framework, the single judge held that collective applications are not inconsistent with Regulation 86 and allow obtaining the sufficient amount of information from the applicants.¹¹⁶ Subject to limited alterations to the form, the judge proceeded with this approach and allowed the VPRS to assist the applicants in completing collective forms.¹¹⁷

The *Gbagbo* solution has since been replicated by other Chambers¹¹⁸ and was identified by the Court as valuable didactic material for future cases, provided that 'it proves to be efficient for the Court, satisfying for victims, and in compliance with Court's legal framework'.¹¹⁹ However, court monitors' assessments were mixed and echoed some of the defence and OPCV submissions in pointing out the problems and risks the scheme posed.¹²⁰ They criticized this approach on the following grounds: insufficiency of personal detail in collective forms (indicating neither the date of birth nor gender);¹²¹ ongoing uncertainty about its consistency with the ICC Statute and Rules;¹²² difficulties inherent in grouping victims and the risk of muting the voices of victims with distinct interests (in particular, children and victims of sexual violence);¹²³ risk of

¹¹⁴ Annex B: Proposed partly collective application form, Proposal on a partly collective application form for victims' participation, *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-45-AnxB, Registry, ICC, 29 February 2012.

¹¹⁵ *L Gbagbo*, Annex B: proposed partly collective application form (n 114) 7; Annex A: Report on the Registry's Proposed Collective Application, Proposal on a partly collective application form for victims' participation, *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-45-AnxB, Registry, ICC, 29 February 2012, paras 10 and 17; *Gbagbo Organization of the Participation of Victims* (n 111) paras 25–6.

¹¹⁶ Second decision on issues related to the victims' application process, *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-86, PTC III, ICC, 5 April 2012 ('*Gbagbo* second application process decision'), paras 16 *et seq.*

¹¹⁷ *Gbagbo* second application process decision (n 116) para. 27.

¹¹⁸ See *Uganda* Decision on Victim's Participation in Proceedings Related to the Situation in Uganda (n 87) para. 22 (with reference to *Gbagbo* encouraging a collective approach to victims' applications and requesting the VPRS to prepare a similar standard form for collective applications).

¹¹⁹ Report of the Court on the Revised Strategy in Relation to Victims (n 50) para. 44.

¹²⁰ One of them, REDRESS, was allowed to file an amicus curiae brief: REDRESS Trust Observations to Pre-Trial Chamber I of the ICC Pursuant to Rule 103 of the Rules of Procedure and Evidence, *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-62, Amicus Curiae, ICC, 16 March 2012.

¹²¹ Cf. REDRESS (n 8) 35 (this is not a fatal flaw because the information provided is sufficient to determine eligibility to participate and does not serve to define the nature and modalities of eventual participation, while the required degree of detail in the context of individualized process exceeds the needs of the essentially collective participation). See also *Gbagbo* second application process decision (n 116) para. 20.

¹²² REDRESS (n 8) 35.

¹²³ *Ibid.*, 36–7.

manipulation and difficulties with identifying ‘representatives’ of a group;¹²⁴ and security risks involved in the collective process.¹²⁵

45.3.1.3.2 *Kenya I and II*: differentiated approach

Ahead of trial in the two *Kenya* cases, Trial Chamber V introduced an innovative ‘differentiated procedure’ for organizing the application process, which it found to be more appropriate for giving effect to Article 68(3) ‘in the particular circumstances of the case’.¹²⁶ In essence, this approach not merely combines the individual and collective modes of completing and processing applications, but also links these modes to the nature of participation sought by the applicants. The Chamber held that (i) only those victims who intend to appear before the Chamber in person or via video-link are supposed to submit individual applications to be processed in accordance with Rule 89; whereas (ii) other victims, who wish to participate by expressing views and concerns through a common legal representative and without appearing before the Chamber do not have to apply in accordance with Rule 98.¹²⁷ Next to submitting a standard application, the applicants in the first category are expected to explain, through a common legal representative, ‘why they are considered to be best placed to reflect the interests of the victims’ and to provide ‘a detailed summary of the aspects to be covered if the victim is allowed to present her views and concerns’.¹²⁸ By contrast, the second category of victims could choose to ‘register’ as ‘victim participants’ in a simplified procedure administered by the Registry, without individual assessment by the judges of their eligibility.¹²⁹ Common legal representative would be given access to a database with registration details (names, contact information, and information about the harm suffered).¹³⁰

In explaining the rationale for this categorization of applicants, the Chamber held that the Rule 89(1) procedure was only appropriate and necessary for victims intending to present views and concerns individually by appearing before the Chamber.¹³¹ In addition, it could work in cases with small numbers of victims where a common legal representative could present their individual views and concerns. In the Chamber’s view, the differentiation between the applicants seeking personal participation and those seeking to participate through a common legal representative enabled it to strike ‘the correct balance between the need to allow for the presentation and consideration of victims’ views and concerns, on the one hand, and to safeguard the rights of the accused and a fair and impartial trial, on the other’.¹³² It also assured that no victim would be excluded from participation only due to administrative difficulty in complying with the requirements of Rule 89 and Regulation 86.¹³³

¹²⁴ Ibid., 37. ¹²⁵ Ibid., 37–8.

¹²⁶ Decision on victims’ representation and participation, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-460, TC V, ICC, 3 October 2012 (*Ruto and Sang* victim participation decision), paras 23 and 24 (referring to ‘a large number of victims involved and also unprecedented security concerns and other difficulties that may be associated with the completion of a detailed application form’); Decision on victims’ representation and participation, *Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-498, TC V, ICC, 3 October 2012 (*Muthaura and Kenyatta* victim participation decision). As the two decisions are identical, this chapter only refers to the *Ruto and Sang* decision.

¹²⁷ *Ruto and Sang* victim participation decision (126) para. 25.

¹²⁸ Ibid., para. 56.

¹²⁹ Ibid., para. 25.

¹³⁰ Ibid., 49.

¹³¹ Ibid., paras 27–8.

¹³² Ibid., para. 29.

¹³³ Ibid., para. 32.

On its own merits, the approach developed by the Trial Chamber is appealing, as it allows addressing the efficiency problems of the application system while not entailing the transition to a fully or partially collective process.¹³⁴ The differentiated scheme removes the need for individual consideration of numerous applications by victims not seeking to appear before the Chamber in person. The Chamber suggested that the procedure is better aligned with the interests of victims; reportedly the simplified application procedure was indeed welcomed in the affected communities.¹³⁵ The procedure would relieve victims and intermediaries from the onerous task of filling in lengthy application forms, unless the applicants wish to participate individually, and help reduce safety risks.¹³⁶ It would minimize delays in processing the applications of victims who seek personal participation and enable them to exercise their rights.¹³⁷ This system also allows sparing the resources of the Chamber and the parties, and promotes the right of the accused to be tried without undue delay and to have adequate time to prepare the defence.¹³⁸ Finally, it enables a more prudent allocation of resources, being more pragmatic and participation-oriented: the emphasis here is placed on the substance of participation sought rather than on the determination of eligibility for its own sake. Hence this is not only the more efficient but also the more effective approach apt to improve the victims' experience with the Court.¹³⁹

Regardless of the evident benefits of this approach, the way in which the Chamber introduced it was not without problems. First, it did not consult with the parties and victims. This is regrettable given that the victims ought to be allowed an opportunity to be heard on matters affecting their interests, as opposed to the situation in which an abstract interpretation of such interests is being taken as a point of departure.¹⁴⁰ Although the Chamber is not duty bound to request the views of the parties, the Registry, and the legal representatives, it should have done so in this case, not least because the decision fundamentally affected the interests of all sides involved.¹⁴¹ Consultation was warranted given the importance of the issue and the innovative character of the Chamber's approach, as a matter of good practice (for example, as discussed, the Gbagbo Chamber did not fail to hold consultations).

Second, the enactment of the *Kenya* procedure rested on a serious legal flaw. The Chamber admitted that its solution conflicts with the plain text of Rule 89(1), which

¹³⁴ See also REDRESS (n 8) 38.

¹³⁵ Periodic Report on the General Situation of Victims in *The Prosecutor v William Samoei Ruto and Joshua Arap Sang and the Activities of the VPRS and the Common Legal Representative, Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-566-Anx, Registry, ICC, 23 January 2013, para. 11; Report of the Court on the Implementation in 2013 of the Revised Strategy in relation to victims, ICC-ASP/12/41, 11 October 2013 (Twelfth Session of the ASP) ('ICC Report on the Implementation of the Revised Victim Strategy'), para. 31; *Amicus Curiae Observations of Kituo Cha Sheria Pursuant to Rule 103 of the Rules of Procedure and Evidence, Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01-11-478, Amicus Curiae, ICC, 23 November 2012, para. 26.

¹³⁶ *Ruto and Sang* victim participation decision (n 126) para. 31.

¹³⁷ Ibid., para. 30.

¹³⁸ Ibid., para. 36.

¹³⁹ Ibid., para. 37. Accordingly, see REDRESS (n 8) 38; WCRO Report on application system (n 109) 55.

¹⁴⁰ WCRO Report on application system (n 109) 33; Pena and Carayon (n 14) 15–16.

¹⁴¹ See also Request pursuant to Rule 103 of the Rules of Procedure and Evidence for leave to submit observation as amicus curiae, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-519, Amicus Curiae, ICC, 24 December 2012, para. 8.

requires individualized treatment of each and every application.¹⁴² That Rule does not make the vetting procedure dependent upon the intended nature of participation and does not envisage the categorization of victims along these lines for the purpose of the application procedure. As a way to bypass, that is, to ignore, this provision, inconvenient as it were, the Chamber engaged in precarious legal acrobatics. With reference to Article 51(4) and (5), which establishes that the Rules are subordinate to the Statute and that any collisions shall be resolved in favour of the latter, the bench suggested that the Rule *conflicts* with Article 68(3) and that it would therefore apply the Rule ‘in the manner that it considers to be most consistent with the norms indicated in Article 68(3) of the Statute’.¹⁴³

This reasoning is unconvincing. The suggested manner of ‘applying the Rule’ would in fact amount to ‘misapplying’ it, while there is nothing in the text of Rule 89 that is *inconsistent* with Article 68(3) and that would justify its misapplication. It is quite another thing that the Rule was inconsistent with the interpretation the Chamber wished to give to Article 68(3), as it expressly admitted.¹⁴⁴ However sound the judicial policy considerations are behind this interpretation, Article 51 does not authorize judges to set a Rule aside in such scenarios. A legal collision between the Statute and the RPE should not be conflated with the impossibility to interpret the rule—that is formally consistent with the Statute and has been widely relied upon in all previous cases—in the way ensuring, in the Chamber’s view, the optimal operation of the Statute. While it is true that Rule 89 gives effect to Article 68(3),¹⁴⁵ the specific manner in which it does so has been agreed upon by the Preparatory Commission which negotiated and drafted the RPE and is therefore binding on the judges, even if they disagree with it.

Hence the Chamber’s approach was *ultra vires* Article 21(1)(a) of the Statute, which provides that the Court ‘shall’ apply the Rules of Procedure and Evidence ‘in the first place’, along with the Statute and Elements of Crimes. Where the judges are of the view that a certain Rule stands in the way of the optimal functioning of the statutory regime, the proper way of dealing with this problem is the amendment of the Rule by the ASP in accordance with Article 51(2), and judges may propose amendments by an absolute majority. Alternatively, Article 51(3) authorizes the judges, ‘in urgent cases where the Rules do not provide for a specific situation before the Court’, to draw up provisional rules by a two-thirds majority, to be effective until adopted, amended, or rejected at the next ordinary or special session of the ASP. Presumably, the judges did not resort to this avenue because it is burdensome and time-consuming—or because Rule 89 in fact does ‘provide for a specific situation before the Court’ in which case the Article 51(3) prerogatives cannot be invoked. However, the unavailability of such a fix is no justification for violating the Statute and the Rules: in this case, the implementation of

¹⁴² *Ruto and Sang* victim participation decision (n 126) para. 22.

¹⁴³ *Ibid.*, para. 22.

¹⁴⁴ *Ibid.*, para. 28 (‘due to the large number of expected victim participants, it is not feasible to apply the Rule 89(1) procedure to all victims in this case whilst at the same time respecting the letter, object and purpose of Article 68(3) of the Statute’).

¹⁴⁵ *Ruto and Sang* victim participation decision (n 126) para. 20.

the Chamber's approach must have been preceded by the rule-amendment by the Assembly.¹⁴⁶

Third, there have been other, more practical objections to the *Kenya* procedure. For example, it was feared that this approach could lead to divisions among the victim population into the first and second classes of victims, engendering frustration and resentment.¹⁴⁷ Another set of objections related to the issue of whether the differentiated approach indeed saves court resources because the Registry still needed to put in place the new registration system, process the registration requests, and liaise with common legal representatives. It would not be relieved from reporting obligations, which require considerable efforts in obtaining the detailed information from the common legal representative.¹⁴⁸ The VPRS must remain on a stand-by in view of the Chamber's possible requests for information under Rule 89 and Regulation 86 in case the victim decides to appear in person; this ad hoc mode of filling in the information gaps may engender delays during the ongoing proceedings, rather than in the lead-up to the trial.¹⁴⁹ If the views and concerns expressed on behalf of the victims are to reflect their actual and personal views and concerns, the major burden of liaising with the registered applicants and obtaining the necessary information shifts to the common legal representative, who is also to pass the details on to the VPRS for the purpose of reporting to the Chamber.¹⁵⁰ Finally, the differentiated system does not help to solve the efficiency problem, but allows avoiding it. It might not work as expected where a significant number of victims wish to appear in person; in that scenario the application procedure would return to the Rule 89(1) track and the same issue the differentiated system was meant to obviate will resurface.¹⁵¹ That said, the chance of this materializing needs to be assessed in light of experience—thus far, only a limited number of victims have chosen to appear in person: three victims in the *Lubanga* trial, two in *Katanga*, and five in *Bemba*.¹⁵²

45.3.1.3.3 *Ntaganda*: simplified approach

The *Ntaganda* (pre-trial) Single Judge experimented with the simplified application approach after having consulted the Registry about the performance of the *Gbagbo* model and having decided to depart from it in accordance with the Registry's recommendation.¹⁵³ Given the reported difficulty in *Gbagbo* with appointing a single contact person for the group, the single judge favoured the option of developing 'a concise and

¹⁴⁶ See also WCRO Report on application system (n 109) 60.

¹⁴⁷ See e.g. *Ruto and Sang, Amicus Curiae Observations of Kituo Cha Sheria Pursuant to Rule 103* (n 135) para. 30; Request to Present Views and Concerns of Legal Representation at the Trial Phase, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-469, Legal Representative of Victims, 6 November 2012, para. 16(a).

¹⁴⁸ *Ruto and Sang* victim participation decision (n 126) para. 55 (VPRS will be directed to periodically provide 'detailed statistics about the victims' population... appended to a comprehensive report on the general situation of the victims as a whole, including registered and non-registered victims [and] ... prepared in cooperation with the Common Legal Representative').

¹⁴⁹ REDRESS (n 8) 39.

¹⁵⁰ *Ruto and Sang* victim participation decision (n 126) para. 55.

¹⁵¹ REDRESS (n 8) 39.

¹⁵² See section 45.3.2. Participation at trial: Key modalities.

¹⁵³ Decision Establishing Principles on the Victims' Application Process, *Ntaganda, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-67, PTC II, ICC, 28 May 2013, para. 18; Registry Observations in Compliance with the Decision ICC-01/04-02/06-54, *Ntaganda, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-57, Registry, ICC, 6 May 2013, paras 5–10. The same approach was subsequently adopted in the *Ongwen* case: Decision Establishing Principles on the Victims' Application Process, *Ongwen, Situation in Uganda*, ICC-02/04-01/15-205, PTC II, ICC, 4 March 2015, paras 15–7.

simplified individual form'.¹⁵⁴ The 'simplified' form would essentially be the same as the 'individual declaration' used in *Gbagbo* and in addition enable the information to be provided about the events and the harm suffered.¹⁵⁵ Being a one-page document, it would be limited to particulars strictly required by Rule 85: the identity of the applicant; a link between the victim and the crimes with which the suspect is charged; and information regarding harm suffered as a result of those crimes.¹⁵⁶ Thus, victims would submit applications separately, but the VPRS would be able to group them together and process them collectively. In turn, this would enhance the efficiency and streamline the process of redactions, while making it possible for the parties to make meaningful observations on the applications.¹⁵⁷

45.3.1.4 Court's review of the system and possible avenues

As noted, the determination of the optimal ways to make the application system sustainable has been a two-track endeavour. Besides the Chambers' initiatives taken in individual cases, the Court has conducted an institution-wide review of the system, pursuant to the request the ASP made in 2011.¹⁵⁸ The assessment was concluded in 2012 and led to the submission to the 11th session of the ASP of the Report on the review of the system for victims to apply for participation.¹⁵⁹ The Court presented six options for improving the application process that could be used in combination.¹⁶⁰ The bulk of the report provided an analysis of those options in terms of sustainability, effectiveness, and efficiency.¹⁶¹ The following avenues were identified: (i) continued implementation of the current system; (ii) Partly collective application process; (iii) fully collective application process leading to collective participation; (iv) providing the Registry report as the basis for observations by the parties and decision-making; (v) decision-making on the status of victims performed by judges, not litigated between the parties; and (vi) dealing with victims' applications only at the pre-trial stage.¹⁶²

The first avenue would require the investment of additional resources and providing the Court organs, parties, and participants with additional capacities to ensure that the system is sustainable; no amendments to the legal framework would be imperative.¹⁶³ In any event, the current system was deemed in need of fine-tuning and, in particular, the splitting of the participation-oriented and reparation-oriented

¹⁵⁴ *Ntaganda* Decision Establishing Principles on the Victims' Application Process (n 153) para. 18.

¹⁵⁵ *Ntaganda* Registry Observations in Compliance with the Decision ICC-01/04-02/06-54 (n 153) paras 8 and 9.

¹⁵⁶ *Ntaganda* Decision Establishing Principles on the Victims' Application Process (n 153) paras 21–2; Ongwen Decision Establishing Principles on the Victims' Applications Process (n 153) paras 19–21.

¹⁵⁷ Ibid., paras 22–3. While this book was in final production, the new admission procedure was developed for the *Ntaganda* trial. It differs from the Kenya system in that it provides for a greater degree of judicial oversight over application process for victims participating solely through the legal representative: Decision on victims' participation in trial proceedings, *Ntaganda, Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-449, TC VI, ICC, 6 February 2015, para. 24.

¹⁵⁸ Strengthening the ICC and the ASP, ICC-ASP/10/Res.5, 21 December 2011 (Tenth Session of the ASP), para. 49 (requesting the ICC 'to review the system for victims' applications to ensure its sustainability, effectiveness and efficiency, and to report thereon to the Assembly').

¹⁵⁹ ICC Report on the Review of Application System (n 42). ¹⁶⁰ Ibid., paras 20 and 73.

¹⁶¹ Defining these parameters, see *ibid.*, paras 17–19.

¹⁶² *Ibid.*, para. 21.

¹⁶³ *Ibid.*, paras 22–5 and 31–2.

application process. Even with this possibility in mind, the Court's discussion of this option reveals pessimism as to its acceptability for States Parties, given the budgetary constraints.¹⁶⁴

The 'partly collective' system draws upon the *Gbagbo* experience, which, as outlined, complies with the legal framework in place. The Court pointed out that this model spared it some time and paperwork in practice, but underperformed in efficiency terms—it required the Registry sections operating in the field and legal representatives of the victims to expend greater resources.¹⁶⁵ Similarly, the defence and legal representatives expressed a concern that the partly collective process did not provide them with sufficient information for the effective exercise of their functions (review of the applications and representation of victims, respectively).¹⁶⁶ The OPCV pointed to the risk of discrepancies between the information contained in collective application forms and in individual declarations, while the OPCD doubted its efficiency in light of the need for the defence to spot inconsistencies. Accordingly, the Court did not take a definitive position on the adequacy of the *Gbagbo* approach until the end of the pre-trial phase, but expressed the preliminary view that it may be unsuitable in situations where no natural or pre-existing groups of victims could be discerned or where victims were scattered over a wide geographic area.¹⁶⁷

The third avenue appears to be the most 'radical' option among those identified: it would 'represent a major shift' of 'not only moving away from the individualized approach to dealing with victims' applications...but also a shift from individual to collective participation'.¹⁶⁸ Applications would be filed by a representative of the group of victims or the community or by a victim association. Otherwise, the participation would be pursued by a (general) legal representative of victims tasked with defining who he or she represents; the detailed application process could be done away with altogether, similarly to the approach in the *Kenya* cases.¹⁶⁹ This avenue would require the recognition of victim groups, communities, or associations as eligible applicants and participants by Rule 85. In all likelihood, any of these sub-options would require amendments to Rules 85 and 89 and Regulation 86, which reflect, by default, the individualized application and participation scheme.¹⁷⁰ Since participation would become fully collective, with the 'personal interests' of victims being absorbed or replaced by 'group interests',¹⁷¹ Article 68(3) might also be in need of amendment.¹⁷² The fully collective approach was found to be potentially promising in terms of saving the resources of all organs and parties, although legal and practical challenges were anticipated for the Registry in the process of selection of community representatives and the constitution of victim associations.¹⁷³ The fundamental concern, raised by the OPCV, was that the collective approach might not be able to accommodate the distinct interests of victims of 'hidden crimes', such as sexual violence, and might deprive them of

¹⁶⁴ Ibid., paras 28 and 30.

¹⁶⁵ Ibid., paras 33–5.

¹⁶⁶ Ibid., paras 36–7.

¹⁶⁷ Ibid., para. 38.

¹⁶⁸ Ibid., para. 39.

¹⁶⁹ Ibid., paras 39(1)–(3).

¹⁷⁰ Ibid., paras 41–2.

¹⁷¹ Ibid., para. 39(1) and n 29.

¹⁷² Ibid., para. 41 (considering this uncertain since the 'fully collective application options are untested').

¹⁷³ Ibid., para. 44.

the access to the Court and the possibility of expressing their views and concerns meaningfully.¹⁷⁴ While the fully collective approach might enhance efficiency of victim participation and save considerable resources, it is an uncharted territory, in particular in terms of impact on the victims and the role of the Registry on the ground. Due to the lack of experience, the Court's ability to assess its implications credibly was rather limited.¹⁷⁵

The remaining three options identified in the report are more modest and present loose variations on the first avenue, seeking to deal with the perceived inefficiencies of the current system. The fourth avenue envisaged that the Registry would provide the Chamber and the parties with a *prima facie* report on the applications, possibly in the form of a table with unified entries highlighting 'borderline cases' for observations and adjudication.¹⁷⁶ As noted, at present such reports are prepared in accordance with Regulation 86(5) and submitted to the Chamber alone, although more recently the VPRS was also allowed to communicate them to the parties, which allows anticipating some of the practical implications of this model.¹⁷⁷ While this option might save the resources of the Chambers, legal representatives, and the parties, it would not result in efficiency gains for the Registry; furthermore, the VPRS's disclosure of views on the merits of the applications could be seen as compromising its neutrality.¹⁷⁸

The fifth approach proposed by the Court entails removing or limiting the opportunity for the parties to make observations on the applications; the determination of eligibility for 'victim status' would be an exclusive or to a large extent unilateral judicial responsibility. The Chamber could (i) provide the parties with partial information for observations but not with the applications themselves; (ii) seek submissions on relevant legal issues, without sharing the applications; or (iii) give the parties no opportunity to make observations at all.¹⁷⁹ This solution would require amendment of Rule 89(1), which makes the transmission of applications to the parties mandatory. It would impact neither on the application process as experienced by the victims nor on the judicial workload, but the Registry would be relieved from the burdensome job of redacting the applications.¹⁸⁰ The major objection to this option, expressed by the OPCD, related to the fact that the parties would be deprived of the right to be heard and to the negative impact on the defence rights.¹⁸¹ Furthermore, this solution might not result in time-saving in the long term, as it merely defers the possibility for the parties to make submissions on the applications until after the start of the trial. This also means that the status of victims would be uncertain throughout the proceedings, which could cause distress for the victims in case their 'provisional' status is withdrawn along the way.¹⁸²

Finally, the sixth avenue envisions keeping the application process within the timeframe of the pre-confirmation process and establishing a firm deadline after

¹⁷⁴ Ibid., para. 46.

¹⁷⁵ Ibid., paras 48–9.

¹⁷⁶ Ibid., paras 50–1.

¹⁷⁷ ICC Report on the Implementation of the Revised Victim Strategy (n 135) para. 32 (in Lubanga appeal process and in Ntaganda pre-trial the VPRS notified its reports on victim applications to the parties). Cf. ICC Report of the Review of Application System (n 42) para. 56.

¹⁷⁸ ICC Report of the Review of Application System (n 42) paras 53–60.

¹⁸¹ Ibid., para. 61.

¹⁸² Ibid., paras 62–3.

which no applications could be received and taken into consideration, unless the scope of charges is broadened.¹⁸³ This approach is meant to address defence complaints that a large number of applications coming in during the trial impacts on the right of the accused to have adequate time and facilities to prepare.¹⁸⁴ The problem is of a general character, but it took a particularly disturbing dimension in *Bemba*.¹⁸⁵ Pre-Trial Chambers could be given the role of sole decision-makers with regard to the status of victims at all stages of process, even after the case proceeds to trial. The Court deemed the amendment of Rule 89(1) and Regulation 86 necessary to provide authority for the imposition of a global deadline for the submission of the applications, with the amendment of Article 68(3) possibly being necessary. In addition, it had to be explored whether the delegation of full responsibility for handling applications to Pre-Trial Chambers was possible under Articles 39, 57, 61, and 64. The expected consequences of instituting a deadline for receipt of applications for the sustainability and efficiency of the system are that the considerable resources would be spared by the Trial Chamber and by the parties (only during the trial phase), but the capacities of the Pre-Trial Chambers would have to be increased. Sufficient time would be needed prior to the confirmation hearing for processing the applications, which might conflict with the right of the accused to be tried without undue delay.¹⁸⁶ Finally, the solution could also severely limit the number of incoming applications, depending on the length of the pre-confirmation phase.

It can be inferred from the report that the Court is keenly aware of the fact that the current application system is not sustainable with the resources at its disposal.¹⁸⁷ However, the report did not recommend the immediate adoption of any of the options identified; instead, the ICC indicated that '[i]t is unlikely that one option would suit all situations and cases' and, before the legal, financial, and practical implications of those options are evaluated, it would be 'premature to recommend a specific option at this stage'.¹⁸⁸ At the same time, the solutions suggesting that the Court's capacities should be increased were considered unattractive or not viable, considering the likely opposition by States Parties. The Court paid relatively little attention to the bifurcated solution tested by the Trial Chamber in the *Kenya* cases, which was due to its novelty at the time the report was finalized. The *Kenya* approach was not included qua a separate option, but its 'collective aspect' was mentioned under the third option ('fully collective approach'), which means that it can be classified as one of the possible combinations the Court proposed to experiment with. Arguably, the report implicitly confirms that the *Kenya* Trial Chamber

¹⁸³ Ibid., paras 65–6.

¹⁸⁴ Ibid., para. 66. See e.g. Defence Response to the Third Transmission of Victims' Applications for Participation in the Proceedings, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-945, Defence, ICC, 11 October 2010, paras 7–12; Defence Observations on the 'Fourth Transmission to the parties and legal representatives of redacted versions of applications for participation in the proceedings', *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-968, Defence, ICC, 22 October 2010, para. 5.

¹⁸⁵ See e.g. WCRO Report on application system (n 109) 19. The same problem, occurring on a lesser scale, was reported in the *Lubanga* trial: Chung (n 24) 490–1.

¹⁸⁶ ICC Report of the Review of Application System (n 42) paras 69 and 70.

¹⁸⁷ Ibid., para. 72. ¹⁸⁸ Ibid., paras 20 and 74.

went beyond what was allowed under the Rules by introducing the ‘registration’ process.¹⁸⁹

The Court’s balanced and cautious approach to defining the optimal avenue corresponds to the position adopted by respectable victim rights organizations and court monitors. For example, REDRESS expressed a view that ‘none of the proposals are easy solutions that would provide a quick fix to any of the efficiency challenges noted in relation to ongoing proceedings’.¹⁹⁰ Similarly, the Victims’ Rights Working Group (VWRG) pointed out the need for ‘careful scrutiny of the far-reaching consequences potential changes may have on the rights of victims as set out in the Rome Statute’; it acknowledged that none of the approaches is perfect and urged the Court ‘to further assess [the] impact for each of the options put forward’.¹⁹¹ Further, REDRESS considered that the ‘fully collective approach’ is the one that ‘would appear to significantly deviate from the current statutory framework and, in the context of conflict situations and diverging victim affiliations and identities, may further alienate certain victims from the Court and detract from the overall goal of victim participation’.¹⁹² The VWRG also echoed concerns registered by the Court about the fully collective approach.¹⁹³ Court monitors have viewed the ‘tiered approach’ introduced in the *Kenya* cases as most promising, although they recognized that it might have downsides and that its implications had to be carefully assessed, considering the feedback from the parties and stakeholders.¹⁹⁴ Among the more comprehensive solutions that were employed in *Gbagbo* and in *Kenya*, the WCRO firmly endorsed the latter approach as actually ‘the only feasible solution’.¹⁹⁵ It considered the optimization measures identified by the Court as half-hearted and incapable of addressing the efficiency problem on their own.¹⁹⁶ The independent panel of experts expressed a preference for the *Ntaganda* solution (a one-page form) and opined that there should be a possibility for victims to add any other relevant information.¹⁹⁷ While the use of a shortened form would, in the panel’s view, spare victims the effort and economize court resources,¹⁹⁸ the panel did not envisage providing collective applications forms under the ‘partly collective’ approach. Nor did it clarify how it expected a one-page form to be sufficient for obtaining all the information required for smooth operation of the individualized vetting process under current Rule 89.

¹⁸⁹ Ibid., paras 39(3) n 30 (comparing the third sub-option under the ‘fully collective approach’ to decisions in the *Kenya* cases) and 41–2 (on the possibly necessary amendments to Art 68(3), Rule 89(1), and Regulation 86).

¹⁹⁰ REDRESS (n 8) 40.

¹⁹¹ ICC at 10: The Implementation of Victims Right. Issues and Concerns presented on the Occasion of the 11th Session of the ASP, Victims’ Rights Working Group, 14–22 November 2012 (‘VWRG Report’) <http://www.vrwg.org/VRWG%20Documents/201114_VRWG.asp11-ENGLISH-VERSION.pdf> accessed 17 March 2014, 7.

¹⁹² REDRESS (n 8) 40. ¹⁹³ VWRG Report (n 191) 8.

¹⁹⁴ REDRESS (n 8) 40. See also VWRG Report (n 191) 8–9 (opposing ‘attempts at discouraging victims to apply to appear in person or register.’).

¹⁹⁵ WCRO Report on Application System (n 109) 50 and 54.

¹⁹⁶ Ibid., 51–60.

¹⁹⁷ Independent Panel of Experts (n 22) paras 65–6 (e.g. narrative responses relating to the requirements of Rule 85, possible protection concerns, choice of legal representation, and events).

¹⁹⁸ Ibid., paras 65–6.

45.3.2 Participation at trial: key modalities

Under the Article 68(3) regime, victim participants enjoy a broad range of procedural rights and opportunities that may be exercised through their (common) legal representative during the trial stage. The ICC's legal framework and jurisprudence recognize a range of forms of direct and indirect participation, some of which may be used both during the confirmation and trial. These include the attendance of and participation in hearings (Rule 91(2)); right to access and receive notification of all public filings and those confidential filings which concern them (as identified by the parties); the right to consult trial records of the proceedings, subject to any restrictions concerning confidentiality and the protection of national security information (Rule 131(2)); making opening and closing statements (Rule 89(1)); advancing oral and written submissions upon leave (Rule 91(2)); presentation of views and concerns upon leave (Article 68(3)); questioning witnesses through legal representatives, subject to the Chamber's authorization (Rule 91(3)); providing testimonial evidence (dual status); calling evidence relating to reparations during the trial under Regulation 56 Regulations of the Court; leading and challenging the admissibility evidence to guilt or innocence and challenging the admissibility of such evidence. This section will discuss the three modalities that best illustrate what rationales the victim participation has served in practice and how the Chambers have construed the victims' procedural role.

45.3.2.1 Views and concerns

The expression of 'views and concerns' is a mode of victim participation that is expressly mentioned in Article 68(3). It may be allowed, provided that (i) the victims' personal interests are affected; (ii) the stage of the proceedings is appropriate for such participation; and (iii) it would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The ICC's legal framework does not define what 'views and concerns' mean. Although it could imply a default, catch-all mode of participation under Article 68(3), it is uncertain how it correlates with the modalities foreseen in the Rules detailing that Article. For instance, are the possibilities for the legal representatives to deliver opening and closing statements, to question witnesses and experts, and to make an application for that end to be considered as the ways of expressing 'views and concerns', or are these distinct participation modalities?¹⁹⁹

As noted elsewhere, the language 'views and concerns' was drawn directly from the 1985 UN Declaration, without a meaningful attempt to decipher the term.²⁰⁰ In the early *Lubanga* jurisprudence, Judge Pikis of the Appeals Chamber expressed the opinion that 'views and concerns' should be interpreted as 'highly qualified participation' intrinsically linked to 'personal interests', i.e. not going to the prerogatives of the *parties*.²⁰¹

¹⁹⁹ Rule 89(1) ICC RPE ('the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements'); Rule 91(3)(a) ICC RPE.

²⁰⁰ On the meaning of 'views and concerns', see Vasiliev (n 26) 653–4.

²⁰¹ Separate opinion of Judge Georghios M Pikis, *Lubanga* appeal decision on joint application of victims (n 57) para. 15 ('Victims are not made parties to the proceedings nor can they proffer or advance anything other than their "views and concerns"').

In later jurisprudence, Trial Chambers have distinguished ‘views and concerns’ from testimony and have given the former a narrow interpretation, but along different lines than Judge Pikis.

The *Lubanga* Trial Chamber held that Article 68(3) makes it clear that ‘victims have the right to participate directly in the proceedings’, since it also provides that the views and concerns may otherwise be presented by a legal representative.²⁰² But it also admitted that ‘the personal appearance of a large number of victims could affect the expeditiousness and fairness of the proceedings, and...that the victims’ common views and concerns may sometimes be better presented by a common legal representative (i.e. for reasons of language, security or expediency).²⁰³ The Chamber ruled that it would decide in due course whether to allow joint representation and joint presentation of views and concerns by legal representatives at any particular stage in the proceedings.²⁰⁴ During the trial, the legal representative requested the Chamber to permit three participants to appear in person to present ‘views and concerns’ and to give testimony under oath.²⁰⁵ The Chamber observed that the personal participation must not have a negative impact on the trial, and allowed victims to testify and decide after testimony whether they still wished to present their ‘views and concerns’.²⁰⁶ It considered that there is a ‘critical distinction’ between ‘views and concerns’ and testimony as ‘possible means of placing material before the Chamber’. The former is equivalent to presenting submissions that might assist the Chamber in its approach to evidence but do not amount to evidence, unlike testimony which does contribute to the evidentiary record and may only be given by victims under oath from the witness box.²⁰⁷ The choice between the expression of views and concerns, in person or through a legal representative, and giving evidence must be carefully considered, whereas in the case of presenting both, any repetition must be avoided. The choice between the two modes is case-specific and informed by the circumstances of the trial.²⁰⁸ The role of legal representatives is crucial in assisting victims to decide on the ‘most appropriate form of participation’.²⁰⁹ Implicitly, the Chamber showed a preference for receiving the victims’ submissions qua evidence rather than qua ‘views and concerns’; presumably, the latter have no probative value and cannot be used for the purpose of the decision under Article 74.²¹⁰ In the trial, as the victims concerned were allowed to give evidence, their applications to present ‘views and concerns’ were adjourned and not renewed.²¹¹

The *Katanga and Ngudjolo* Chamber held that ‘[e]xcept for provisions such as those of rule 91 of the Rules, which provide for certain modalities of participation, the founding texts do not provide an exhaustive definition of the terms “views and

²⁰² *Lubanga* decision on victim participation at trial (n 72) para. 115.

²⁰³ Ibid., para. 116.

²⁰⁴ Ibid., para. 116.

²⁰⁵ Decision on the request by victims a/0225/06, a/0229/06, and a/0270/07 to express their views and concerns in person and to present evidence during the trial, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2032-Anx, TC I, ICC, 26 June 2009, paras 1 and 4.

²⁰⁶ Ibid., paras 39–40.

²⁰⁷ Ibid., para. 25.

²⁰⁸ Ibid., paras 26–7.

²⁰⁹ Ibid., para. 40.

²¹⁰ Art 74(2) ICC Statute (‘The Court may base its decision only on *evidence* submitted and discussed before it at the trial’, Emphasis added).

²¹¹ *Lubanga* trial judgment (n 1) para. 485.

concerns”, and each Chamber has the discretion to define their content according to the specific circumstances of the case before it.²¹² According to the Chamber, the factors relevant to its determination of the most appropriate modalities of participation included, for example, ‘the nature and scope of the charges, the number of victims taking part in the proceedings and the degree of similarity between their respective interests, as well as the manner in which they are represented’.²¹³ The Trial Chamber refrained from drawing a line between ‘views and concerns’ and victim testimony, but it ruled that requesting the submission of incriminating or exculpatory evidence and challenging the admissibility of such evidence are ‘a means for the victims to express their “views and concerns” within the meaning of Article 68(3).²¹⁴ No ‘views and concerns’, as a *sui generis* form of victim participation that could pursue other purposes, were contemplated for the purpose of the *Katanga and Ngudjolo* trial. Unlike the *Lubanga* Chamber, Trial Chamber II did not authorize the expression of ‘views and concerns’ as a self-standing, non-adjectival procedural action. Hence, this modality had no autonomous function or content and merely served as a vehicle for the victims to request the submission of evidence on the guilt or innocence of the defendant.

By contrast, in *Bemba*, Trial Chamber III did distinguish the presentation of ‘views and ‘concerns’ as an autonomous modality and set the procedure to be followed in case the legal representatives wished the victims to be allowed to participate in this manner. The Chamber held that this mode of participation might take the form of unsworn statements. In order for the participants to be allowed to present their views and concerns to the Chamber, the legal representatives were to file written applications setting out (i) the manner in which the victims’ views and concerns are to be presented (e.g. in person pursuant to Rule 89 of the Rules or in writing); (ii) the estimated time needed; (iii) how the personal interests of the participating victims would be affected by the presentation of their views and concerns to the Chamber; (iv) the request for public presentation or presentation with in-court protective measures; and (v) whether the victims are persons authorized to participate in the trial, and if so, the application numbers under which those persons are registered.²¹⁵ After the legal representatives requested to allow 17 victims to appear for the presentation of evidence and/or views and concerns, the *Bemba* Chamber ordered them to select a maximum of 8 ‘relevant victims’. The ‘relevance’ is to be determined based on whether the victims are:

- (i) best-placed to assist the Chamber in the determination of the truth in this case; (ii) able to present evidence and/or views and concerns that affect the personal interests of the greatest number of participating victims; (iii) best-placed to present testimony that will not be cumulative of that which has already been presented in this case; and

²¹² Decision on the Modalities of Victim Participation at Trial, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1788-tENG, TC II, ICC, 22 January 2010 ('*Katanga and Ngudjolo* decision on victim participation at trial'), para. 53.

²¹³ Ibid., para. 54.

²¹⁴ Ibid., para. 82.

²¹⁵ Order regarding applications by victims to present their views and concerns or to present evidence, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1935, TC III, ICC, 21 November 2011, para. 3(c).

(iv) willing for their identity to be disclosed to the parties in the event that they are permitted to testify and/or present their views and concerns.²¹⁶

Notably, these criteria emphasize that, in order to appear in person, the victims are expected to make a contribution to the effective and efficient establishment of the truth in the case and to provide relevant evidence and/or views and concerns that are sufficiently reflective of the personal interests of broader classes of victims.

The subsequent decisions of the *Bemba* Chamber clarified further the meaning and scope of ‘views and concerns’. In line with the *Lubanga* Decision, Trial Chamber III held that individual victims are not precluded from submitting an application to present their views and concerns in person.²¹⁷ It adopted Trial Chamber I’s distinction between the expression of ‘views and concerns’ and giving evidence. In elaborating on it, the *Bemba* Chamber found that the threshold to be met by a victim wishing to testify is ‘significantly higher’ than that applicable to requests to express their views and concerns in person.²¹⁸ Hence, victims whose application to testify was declined might still be allowed to express ‘views and concerns’.²¹⁹ The need to ensure expeditious proceedings requires the Chamber to ‘determine which victims shall be authorised to present their views and concerns in person’, which is, as the *Lubanga* Chamber ruled, a fact-specific decision that is to take into account ‘the circumstances of the trial as a whole’.²²⁰ The legal test to be applied in considering a victim’s application to present views and concerns is then ‘whether the personal interests of the individual victims are affected and whether the accounts expected to be provided are representative of a larger number of victims’, considering ‘the nature of the harm suffered and the location of the events alleged by the victims who were proposed to express their views and concerns’.²²¹ On this basis, the Chamber ultimately authorized three victims to present their views and concerns in person, out of five victims who were allowed to appear.²²² The relevant victims were to express their views and concerns not under oath and they were not to be questioned on the detail, but only to be guided by their legal representative. The Chamber requested the victims to focus on the harm suffered and on the impact of the alleged crimes on their lives.²²³

In the *Kenya* cases, the Chamber interpreted ‘views and concerns’ both as an umbrella or catch-all term encompassing any mode of participation pursuant to Article 68(3) and a distinct form of oral submissions. As noted, the framework decision on victim participation that introduced the novel application system categorized victims based on the type of participation sought: those who wished to present their ‘views and concerns’ in person and those participating through a common legal

²¹⁶ Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2027, TC III, ICC, 21 December 2011, para. 12.

²¹⁷ Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2138, TC III, ICC, 22 February 2012 (*Bemba* decision on supplemented applications), para. 17.

²¹⁸ Ibid., para. 20.

²¹⁹ Ibid., para. 20.

²²⁰ Ibid., para. 22.

²²¹ Ibid., para. 22.

²²² Ibid., para. 55(b).

²²³ Transcript, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-T-227-Red, TC III, ICC, 25 June 2010, 21–2; Transcript, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-T-228-Red, TC III, ICC, 26 June 2010, 10.

representative.²²⁴ This categorization reflects a broader understanding of the term. As for the victims ‘wishing to present their views individually by appearing directly before the Chamber, in person or via video-link’, the Chamber held that it would be allowed to do so at certain stages of trial and in the manner determined by the Court, which might include opening and closing statements.²²⁵ In that case, the common legal representative is to submit a request on their behalf ‘explaining why they are considered to be best placed to reflect the interests of the victims, together with a detailed summary of the aspects that will be addressed by each victim if authorised to present his or her views and concerns’.²²⁶ If the application is granted, the victim may be allowed to present his or her ‘views and concerns’ (in a narrow sense) next to oral submissions by the common legal representative at ‘critical junctures’, for example, during opening and closing statements.²²⁷ Importantly, the Chamber required the legal representative to justify why, besides showing that ‘personal interests’ of the victim are at stake, the victim is also able to represent the general ‘interests of the victims’. As shown previously, this qualification was also advanced by the *Bemba* Chamber.²²⁸ Effectively, this reads an additional requirement into the Article 68(3) test—namely, that the expected expression of views and concerns by an individual victim should reflect the interests of a broader victim group or community—and is a step away from the individualized participation towards a more representative, collectivized participation.

Hence, in the trial practice thus far, the nature and scope of ‘views and concerns’—a general and default mode of participation, whether through a legal representative or in person—have been subject to divergent interpretations across the Chambers. Most Chambers construed it as personal participation by a victim in the form of making oral submissions in Court and a modality independent from the presentation of evidence. But some Chambers gave it a narrow interpretation for the purpose of the trial process and limited it to requests to submit evidence under Article 69(3). Overall, this form of participation has not played a prominent role in practice and has been but a secondary way for victims to contribute to the proceedings. It has been overshadowed by the manners of participation such as leading and challenging the admissibility of evidence, which judges have regarded as more effective for establishing the truth because, unlike with testimony, views and concerns may not serve as a basis for the judgment. Furthermore, the opportunity to express ‘views and concerns’ was in any event made contingent on the ability of such views to contribute to truth-finding and to represent the personal interests of the ‘greatest number of participating victims’.

45.3.2.2 Leading and challenging the admissibility of evidence

Neither Article 68(3) nor other provisions in the Statute authorize victims to call and challenge the admissibility of evidence on the guilt or innocence of the defendant, and ‘views and concerns’ as the default mode of participation does not lend itself to the interpretation that the victims have this right. However, in all cases to date, the ICC

²²⁴ *Ruto and Sang* victim participation decision (n 126) para. 25.

²²⁵ See e.g. *ibid.*, para. 56 and n 30.

²²⁶ *Ibid.*, para. 56.

²²⁷ *Ibid.*, para. 73.

²²⁸ See text accompanying *supra* n 216.

Trial Chambers have allowed the legal representatives to present such evidence and to challenge its admissibility, subject to the Chamber's authorization and the Article 68(3) requirements.²²⁹ The Trial Chambers have uniformly done so with reference to their power to require the submission of all evidence considered necessary for the determination of the truth pursuant to Article 69(3).

The anchorage of victims' evidentiary role to the Trial Chamber's truth-finding competences amounts to an expansive and inventive interpretation of the ICC's legal framework, but it is also rather controversial.²³⁰ This sudden turn in the ICC's case law must have perplexed commentators at the time.²³¹ First, Articles 69(3) and 64(8) (b) provide that the parties—i.e. the prosecution and the defence—may submit evidence. The second sentence of Article 69(3) explicitly authorizes the parties to submit evidence and does not mention victims. Arguably, the Chamber's power to request the submission of evidence in addition to that already presented must be subject to the provisions establishing who is competent to submit evidence. Furthermore, Article 64(6)(d) authorizes the Chamber to '[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial *by the parties*'. Second, the pre-2008 appellate jurisprudence was moving in an opposite direction, as some of the earlier judgments and individual opinions sought to draw a clearer distinction between the 'personal interests' of victims and those pursued by the prosecution. In 2007 the Appeals Chamber held that

any determination by the Appeals Chamber of whether the personal interests of victims are affected in relation to a particular appeal will require careful consideration on a case-by-case basis. Clear examples of where the personal interests of victims are affected are when their protection is in issue and in relation to proceedings for reparations. More generally, an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor.²³²

In a separate opinion from that decision, which conceptualized 'views and concerns' as 'highly qualified participation', Judge Pikis drew a clear line between the personal interests of victims and the interests of the prosecution:

In relation to what can victims express their views and concerns? Not in relation to the proof of the case or the advancement of the defence. The burden of proof of

²²⁹ *Lubanga* decision on victim participation at trial (n 72) para. 108, upheld in *Lubanga* appeal judgment on victim participation at trial (n 74) paras 93–105; *Katanga and Ngudjolo* decision on victim participation at trial (n 212) paras 81–101, upheld in Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 entitled 'Decision on the Modalities of Victim Participation at Trial', *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-2288, AC, ICC, 16 July 2010, paras 37–40; Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-807-Corr, TC III, ICC, 12 July 2010 ('Bemba victim participation decision'), paras 29 and 36; *Bemba*, Order regarding applications by victims to present their views and concerns or to present evidence (n 215) para. 17; *Bemba* decision on supplemented applications (n 217) paras 10–18; *Ruto and Sang* victim participation decision (n 126) para. 77.

²³⁰ See also Friman (n 14) 494 ('a clever construct, but one that prompts a number of questions').

²³¹ Cf. Friman (n 11) 229; Vasiliev (n 26) 653–4 (favouring a narrow interpretation of 'views and concerns').

²³² *Lubanga* appeal decision on joint application of victims (n 57) para. 28.

the guilt of the accused lies squarely with the Prosecutor (Art 66 (2) of the Statute). Provision is made in the Statute (Art 54 (1)) for the Prosecutor to seek and obtain information from victims about the facts surrounding the crime or crimes forming the subject-matter of the proceedings.... It is not the victims' domain either to reinforce the prosecution or dispute the defence. Participating victims' views and concerns are referable to the cause that legitimizes their participation, the cause that distinguishes them from other victims, namely their personal interests to the extent they are affected by the proceedings.²³³

However, the *Lubanga* Trial Chamber, which pioneered the notion of 'evidence called by the victims', based it not on any entitlement of participating victims to that effect in the ICC Statute or Rules but on the power of the Chamber to request the submission of all evidence necessary for the determination of the truth:

the right to introduce evidence during trials before the Court is not limited to the parties, not least because the Court has a general right (that is not dependent on the cooperation or the consent of the parties) to request the presentation of all evidence necessary for the determination of the truth, pursuant to Article 69(3) of the Statute.... [V]ictims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has 'requested' the evidence.²³⁴

This rationale for victims' role in truth-finding, intimately linked to the Chamber's *ex officio* power, was endorsed by the Appeals Chamber and adopted without reservation—and with an overbearing emphasis on the epistemic objective—by Trial Chamber II:

the only legitimate interest the victims may invoke when seeking to establish the facts which are subject of the proceedings is that of contributing to the determination of the truth by helping the Chamber to establish what exactly happened. They may do so by providing it with their knowledge of the background to the case or by drawing its attention to relevant information of which it was not aware. In the latter case, the Chamber may also deem it appropriate for a particular victim to testify in person.²³⁵

The opportunity for participating victims to call incriminating or exonerating evidence or to challenge its admissibility is not a manner of expressing 'views and concerns', but an autonomous form of participation de-linked from the Article 68(3) regime and deriving from Article 69(3). It hinges on, and is justified by, the expected

²³³ Separate Opinion of Judge Georghios M. Pikis, *Lubanga* appeal decision on joint application of victims (n 57) para. 16.

²³⁴ *Lubanga* decision on victim participation at trial (n 72) para. 108.

²³⁵ *Katanga and Ngudjolo* decision on victim participation at trial (n 212) para. 60. See also paras 65, 82–4, 91, and 96. Further, see Directions for the conduct of the proceedings and testimony in accordance with Rule 140, *Katanga and Ngudjolo*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1665, TC II, ICC, 20 November 2009 ('*Katanga and Ngudjolo* trial directions'), para. 20 (legal representatives will be allowed to call one or more of their clients to testify in person if the proposed testimony 'can make a genuine contribution to the ascertainment of the truth').

contribution of such evidence (or admissibility challenges) to the establishment of the truth. The primary consideration behind allowing victims to present evidence is that this should assist the Chamber in discharging its truth-finding function. In addition, the *Lubanga* Trial Chamber held that Rule 91(3), which authorizes legal representatives to question witnesses with leave of the Chamber, including experts and the defendant, does not limit this right to witnesses called by the parties. While under that Rule victims may be authorized by the Chamber to participate in the questioning of witnesses through legal representatives, it is a tenuous legal ground at best to assert their competence to lead evidence. If the Statute's drafters did not intend victims to be able to do so in the first place, there would be no reason for them to add a limitation to Rule 91(3) from the absence of which the *Lubanga* Trial Chamber drew support for its construction.

The Appeals Chamber's majority upheld the *Lubanga* trial decision on the issue of evidence, but its judgment was accompanied by strong dissents from Judge Pikis and Judge Kirsch.²³⁶ The majority acknowledged that the right to lead evidence pertaining to guilt or innocence and the right to challenge its admissibility lies primarily with the parties, referring to 'numerous provisions which support this interpretation'.²³⁷ The majority also pointed out that the disclosure regime in the Statute and Rules is addressed to the parties alone and does not envisage disclosure by victims. It found that '[p]resumptively, it is the Prosecutor's function to lead evidence of the guilt of the accused', but concluded nonetheless that victims are not precluded from leading or challenging the admissibility of such evidence.²³⁸ According to the majority, Article 66(3), which stipulates that in order to convict, the Court 'must be convinced of the guilt of the accused beyond reasonable doubt', is determinative of the issue. The provisions granting judges the power to call additional evidence and/or all evidence necessary for the determination of the truth (Articles 64(6)(d) and 69(3), second sentence) prevail over those regarding the onus of proof and the presentation of evidence by the *parties* (Articles 64(8)(b), 66(2), and 69(3), first sentence).²³⁹ Second, the majority considered that in order to 'give effect to the spirit and intention of article 68(3) of the Statute in the context of trial proceedings it must be interpreted so as to make participation by victims meaningful'.²⁴⁰ Because evidence that does not go to guilt or innocence would 'most likely be considered inadmissible and irrelevant', precluding victims generally from leading or challenging the admissibility of such evidence would have rendered their participatory rights at trial 'ineffectual'. This reasoning is speculative and erroneous, as it advances a groundless limitation on the competence of the Trial Chamber to determine the admissibility of evidence.²⁴¹

²³⁶ Partly Dissenting Opinion of Judge Georgios M Pikis, *Lubanga* appeal judgment on victim participation at trial (n 74); Partly Dissenting Opinion of Judge Philippe Kirsch, *Lubanga* appeal judgment on victim participation at trial (n 74), ICC-01/04-01/06-1432-Anx, AC, ICC, 24 July 2008 ('Lubanga partly dissenting opinion of Judge Kirsch').

²³⁷ *Lubanga* appeal judgment on victim participation at trial (n 74) para. 93 (including Arts 15, 53, 54, 58, and 61(5) ICC Statute and Art 66(2), which imposes the onus to prove guilt on the prosecutor).

²³⁸ Ibid., paras 93–4.

²³⁹ Ibid., para. 95.

²⁴⁰ Ibid., para. 97.

²⁴¹ Art 64(9)(a) ICC Statute ('The Trial Chamber shall have, *inter alia*, the power on application of the party or on its own motion to...[r]ule on the admissibility or relevance of evidence') and Art 69(4) ICC Statute (referring to the Court rather than the Chamber).

This also inappropriately excludes from admissible and relevant evidence any items that may be relevant to sentencing and reparations (e.g. going to the scope and nature of harm suffered by the victims)—the evidence that may be presented not only during separate post-conviction hearings but also during trial.²⁴²

The Appeals Chamber's majority held that leading evidence and challenging its admissibility is not an unfettered right of victims, but an opportunity that is subject to the Trial Chamber's authorization in each instance. Considering the imperative need to guarantee fairness for the accused and to place the onus of proof squarely on the prosecution, the Trial Chamber may exercise its discretion to allow victim evidence subject to (i) a discrete application; (ii) notice to the parties; (iii) demonstration that personal interests are affected by the specific proceedings; (iv) compliance with disclosure obligations and protection orders; (v) determination of appropriateness; and (vi) consistency with the rights of the accused and a fair trial.²⁴³ It is true that Trial Chambers' tight control over this form of participation is crucial and that this legal test enables them to exercise such control. Still, the Appeals Chamber's position is difficult to reconcile with the logic of its previous pronouncement that 'personal interests' of victims should be distinguished from the prosecutor's interests;²⁴⁴ it is regrettable that the contradiction is nowhere addressed.

Judge Pikis dissented from the majority's position and adhered to his previous view regarding the distinction between the victims' role and the prosecutorial function. In rejecting the notion of the victims' evidence, he referred to the provisions of the Statute reserving the right to submit evidence to the parties and placing the burden of proof on the prosecution, and emphasized the defendant's right not to be confronted with multiple accusers.²⁴⁵ Similarly, Judge Kirsch pointed out that the ICC legal framework assigns the role of leading the evidence relevant to the verdict exclusively to the parties. The absence of disclosure obligations incumbent on participating victims from the Statute and Rules plainly confirms that they were not intended by the drafters to lead evidence.²⁴⁶ According to the judge, the related safeguards do not mitigate the concern that leading evidence as to the guilt or innocence does not comport with the ordinary meaning of 'views and concerns'. His reasons deserve to be quoted at length:

On an ordinary understanding of those words, they do not equate to an ability to lead evidence on guilt. It would...be perfectly legitimate for victims to present their views and concerns in relation to the evidence submitted by the parties where it affects their personal interests. However, there is a sizeable difference between presenting their views and concerns in relation to issues that arise at the

²⁴² Art 76(1) ICC Statute ('In the event of conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account *the evidence presented and submissions made during the trial that are relevant to the sentence*'); Regulation 56 Regulations of the Court ('The Trial Chamber may hear the witnesses and examine the evidence for the purposes of a decision on reparations in accordance with Article 75, paragraph 2, at the same time as for the purposes of trial').

²⁴³ *Lubanga* appeal judgment on victim participation at trial (n 74) para. 104.

²⁴⁴ See text accompanying *supra* n 232.

²⁴⁵ Partly Dissenting Opinion of Judge Georghios M Pikis, *Lubanga* appeal judgment on victim participation at trial (n 74) paras 5 *et seq.*

²⁴⁶ *Lubanga* partly dissenting opinion of Judge Philippe Kirsch (n 236) paras 5 *et seq.*

trial that affect the personal interests of victims and presenting a prosecution case by leading additional evidence—Independent of that led by the Prosecutor—on guilt.... Far from lending support to the idea that victims should be permitted independently to lead evidence on guilt, [Rule 91(3)] emphasises...the more limited role that was assigned to the victims during the course of a trial, when compared with that provided to the parties. Rule 91 falls within a subsection of the Rules relating specifically to the participation of victims in the proceedings.... [T]here is no reference to victims leading evidence pertaining to guilt or innocence in rule 91 itself or within the section of the Rules in which it appears. On a matter of such fundamental importance, a provision to deal with this subject would have been expressly included, had it been the intention of the drafters for victims to lead such evidence.²⁴⁷

As for the right to challenge the admissibility and relevance of evidence, Judge Kirsch was of the view that such routine challenges would be inappropriate, but in limited circumstances where the submission of evidence by the parties affects the victims' personal interests, they may be allowed to express their views and concerns.²⁴⁸

This discussion says enough about the controversy of victims' evidence, even though this notion is now well established in practice. During the *Lubanga* trial, three participating victims testified in January 2010 and evidence was presented on behalf of the school with a status of victim prior to the presentation of the defence case.²⁴⁹ The *Katanga and Ngudjolo* Trial Chamber heard the testimony of two victims called by legal representatives between 21 and 25 February 2011, after the prosecution concluded its case.²⁵⁰ In the *Bemba* trial, two victims called by the legal representatives testified in early May 2012.²⁵¹ The Trial Chambers have handed down detailed guidelines with the requirements applicable to any requests by legal representatives to call evidence, namely that they should clarify the relevance of the proposed testimony of the victim to the issues in the case and illustrate its supposed contribution to the establishment of the truth.²⁵² The relevant considerations include whether (i) 'the proposed testimony relates to matters that were already addressed by the Prosecution in the presentation of its case or would be unnecessarily repetitive of evidence already tendered by the parties'; (ii) the topic on which the victim proposes to testify is sufficiently closely related to issues raised by the charges before the Chamber; (iii) the proposed testimony is 'typical of a larger group of participating victims, who have had similar experiences as the victim who wishes to testify, or whether the victim is uniquely apt to give evidence about a particular matter'; and (iv) 'the testimony will

²⁴⁷ Ibid., paras 30 and 32.

²⁴⁸ Ibid., paras 36–8.

²⁴⁹ *Lubanga* trial judgment (n 1) para. 21; *Lubanga*, Decision on the request by victims a/0225/06... (n 205) para. 44.

²⁵⁰ *Ngudjolo* trial judgment (n 1) para. 23; *Katanga and Ngudjolo* trial directions (n 235) paras 5 and 24.

²⁵¹ See testimonies of CAR-V20-PPPP-0001 and CAR-V20-PPPP-0002; Transcripts, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-T-220-ENG, ICC-01/05-01/08-T-221-Red-ENG, ICC-01/05-01/08-T-222-ENG, ICC-01/05-01/08-T-223-Red-ENG, ICC-01/05-01/08-T-224-ENG, ICC-01/05-01/08-T-225-ENG, TC III, ICC, 1-7 May 2012.

²⁵² *Katanga and Ngudjolo* trial directions (n 235) para. 30; *Bemba* decision on supplemented applications (n 217) paras 24–5.

likely bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges'.²⁵³

The testimony of victims may be permitted upon a written application that is to be filed prior to the conclusion of the prosecution case.²⁵⁴ The primary concern for the judges is that the victim's testimony must take place in an expeditious manner not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.²⁵⁵ More specifically, such testimony should not (i) infringe the right of the accused to be tried without undue delay as per Article 67(1)(c); (ii) effectively amount to auxiliary prosecution; or (iii) consist in an anonymous testimony vis-à-vis the defence.²⁵⁶ The testimony may not come as an 'unfair surprise' to the defence, which is entitled to disclosure and adequate time for preparation.²⁵⁷ Therefore, the legal representative's request is to be accompanied by a signed statement by the victim, containing a comprehensive summary of the proposed testimony that is to be disclosed to the parties under Regulation 54(f) in case the application is granted.²⁵⁸ Legal representatives should avoid redactions in the statements other than those necessary to protect the safety, or physical or psychological well-being of the victims or third persons; such redactions are subject to authorization by the Chamber.²⁵⁹

Although evidence called by victims is now mainstream practice at the ICC, it remains one of its most questionable aspects. The possibility for the victims, as *participants* rather than *parties*, to lead evidence relevant to the verdict borders on the prerogative of parties; this makes the differentiation between parties and participants elusive.²⁶⁰ The 'personal interest' of victims in connection with the verdict (in essence, the interest in obtaining the verdict of guilty) has become judicially recognized.²⁶¹ As quasi-parties, victims dispose of the procedural means to pursue their cause through the submission of evidence that forms part of the 'victims' case' advanced by legal representatives, even though it is not a self-standing case but the one inextricably linked to the judicial authority to order evidence necessary for the ascertainment of the truth and, therefore, subordinate to that goal.²⁶²

²⁵³ *Katanga and Ngudjolo* trial directions (n 235) para. 30.

²⁵⁴ Ibid., para. 25; *Katanga and Ngudjolo* decision on victim participation at trial (n 212) para. 87.

²⁵⁵ *Katanga and Ngudjolo* trial directions (n 235) para. 21.

²⁵⁶ Ibid., para. 22. Reaffirming the third prong, see *Katanga and Ngudjolo* decision on victim participation at trial (n 212) para. 92.

²⁵⁷ Ibid., para. 23.

²⁵⁸ Ibid., para. 26. Both the application and the summary shall be notified to the parties who will have seven days to make observations (para. 28).

²⁵⁹ Ibid., para. 27. ²⁶⁰ See also Friman (n 14) 492 and 500.

²⁶¹ E.g. *Katanga and Ngudjolo* decision on victim participation at trial (n 212) para. 86 (allowing victims to testify after the prosecution case because 'the persons concerned will give evidence about the crimes with which the accused have been charged, and about any part played therein by the accused, [and] the Defence should be given the opportunity to present its case once all victims of the crimes to which the accused must answer have given their evidence, including any victims called by the Legal Representatives').

²⁶² Cf. Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-2138, TC III, ICC, 23 February 2012 ('Bemba dissenting opinion of Judge Steiner'), para. 10 (rejecting 'the strict condition according to which the testimony of a victim "needs to be considered to make a genuine contribution to the ascertainment of the truth"').

The ultimate purpose and expected consequence of allowing victims to call evidence is for the Trial Chamber to emancipate itself, at least in part, from its dependency on the parties for evidence, by giving itself access to the victims' evidence casting the 'third perspective' on the issues at trial. Such may indeed be the evidence that none of the parties would be interested in calling, given that partisan interests are far from always aligned with the goal of establishing the truth. The latter also concerns the ICC prosecutor whose function as an impartial truth-seeker does not formally extend to trial proceedings.²⁶³

While the goal of enhancing the Trial Chamber's truth-finding capacity can be accepted as the rationale for authorizing victims to present evidence, there seems to be an ongoing confusion in the ICC's interpretation of that derived competence, which has also affected the legal test that the Chambers are using. On the one hand, both the Appeals Chamber and Trial Chambers went to great lengths to consistently de-link this procedural opportunity from the Article 68(3) regime, by anchoring it to the judicial authority under Article 69(3) to establish the truth. On the other hand, most of them—with the notable exception of the *Katanga and Ngudjolo* Chamber—have at the same time continued to require the participants to demonstrate that the proposed evidence is relevant to their 'personal interests'.²⁶⁴ However, if Article 69(3) is a self-sufficient legal authority for allowing victims to call evidence, there is neither legal basis nor conceivable procedural rationale to limit it to evidence that affects or promotes 'personal interests', as long as it is conducive to truth-finding. Such limitation cannot be inferred from the controlling Article 69(3) and, moreover, the objective of 'determining the truth' is broader than, and not subordinate to, victims' 'personal interests'.

It is submitted that this incongruence lays bare the insecurity underlying the concept of 'victims' evidence' and the persisting uncertainty about the proper role of victims in the context of the ICC trial proceedings. Despite the mandate of the Chamber to order evidence necessary for the determination of the truth serving as the single main authority for allowing victims to present evidence going to the verdict, the Chambers still prefer to fall back on the Article 68(3) requirement of 'personal interests' in considering requests to submit evidence. One probable reason for that is the wish to avoid a discomforting impression that the Court is 'using' victims as evidentiary sources just as keenly as the ad hoc tribunals did—something that Judge Steiner has called a 'utilitarian approach towards the role of victims before the Court'.²⁶⁵

²⁶³ Art 54(1)(a) ICC Statute. For further discussion, see S Vasiliev, 'Trial' in L Reydams et al. (eds), *International Prosecutors* (Oxford: Oxford University Press, 2012) 708–9.

²⁶⁴ E.g. *Ruto and Sang* victim participation decision (n 126) para. 77. By contrast, TC II regarded requests for the submission of incriminating or exculpatory evidence pursuant to Art 69(3) as 'a means for the victims to express their "views and concerns" within the meaning of article 68(3) of the Statute', not the submission of such evidence in and of itself: *Katanga and Ngudjolo* decision on victim participation at trial (n 212) para. 82; *Katanga and Ngudjolo* trial directions (n 235) paras 19–30 (making no mention of 'personal interests' as the element that needs to be satisfied in order for the victims to present evidence).

²⁶⁵ *Bemba* dissenting opinion of Judge Steiner (n 262) para. 11 (stating, regarding the requirement that victim evidence must constitute a genuine contribution to the establishment of the truth, that 'the strict limitations imposed by the Majority to the presentation of evidence by victims and the "case-by-case" analysis of the victims' right to present their views and concerns reflect a utilitarian approach towards the role of victims before the Court, which has no legal basis and appears to unreasonably restrict the

However, it would appear, following the Appeals and Trial Chamber's own logic, that 'personal interests' should not play any role in the determination of the requests to present evidence. This criterion is automatically met whenever a legal representative seeks to call evidence and hence is irrelevant to the determination. Establishing the truth, being the goal pursued by the Chamber in the exercise of its Article 69(3) power, is an essentially public interest, which may (or may not) coincide with the victims' 'personal interests'. Therefore, it is a procedurally incoherent and legally flawed approach for the Chambers to continue guising the presentation of evidence on behalf of participating victims under Article 69(3) as a manner for them to express their 'views and concerns' that is only allowed in pursuit of their 'personal interests'.

The Court's vision of the victims' evidentiary role and its reasoning underlying the treatment of relevant matters must be more transparent and unambiguous. The ICC Trial Chambers do in fact expect and appreciate the participating victims' contributions to the determination of the truth, which—both legally and theoretically speaking—is the only true rationale for allowing them to call evidence. The current thinking and equivocality at the Court are the signs of the phenomenon that can be called the 'restorative justice complex of a retributive court'. This refers to the flawed idea that it is unjustifiable or inappropriate for an institution, which is aspiring to mete out 'restorative justice' for the victims, to submit the principal aspects of their role and participation in the criminal process to the cornerstone goals and rationales of that process—i.e. not only to the demands of a fair trial, as expressly recognized in Article 68(3), but also to the basic goal of truth-finding. While the 'restorative justice complex' and its implications will be discussed later in the chapter, suffice it to say here that there are no cogent reasons for the ICC to be affected by it. The ICC does indeed benefit from the evidentiary contributions of victims, as it is essentially a victim-friendly, retributive (criminal) court, not a restorative justice institution—at least before the reparations stage. Being such, the Court 'makes it up' to participating victims by offering them other avenues through which they can pursue their personal interests in the procedural domain—including by expressing 'views and concerns' and by making themselves heard on the matters which squarely affect such interests (e.g. admissibility of certain evidence, protective measures, detention and interim release, and so on).

45.3.2.3 Questioning witnesses

Rule 91(3) authorizes legal representatives to participate in the examination of witnesses. Presumably, this is the best way for them to present victims' 'views and concerns'.²⁶⁶ Like with other forms of participation at trial, this is not an unconditional right but one subject to judicial authorization pursuant to Article 68(3) and Rule 91(3)(b).²⁶⁷ Rule 91(3) does not give specific guidance on the admissible scope and mode of such

rights recognised for victims by the drafters of the Statute'). See also *Bemba* dissenting opinion of Judge Steiner, para. 14.

²⁶⁶ *Katanga and Ngudjolo* decision on victim participation at trial (n 229) para. 74.

²⁶⁷ Rule 91(3)(b) ICC RPE ('The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to Article 68, paragraph 3.').

questioning, and the Chambers hold a considerable discretion in this regard. As an aspect of the Article 68(3) regime, questioning by legal representatives should be confined by the scope of ‘personal interests’. In defining the mode and scope of the questioning by legal representatives, the Trial Chambers should balance various interests at stake.

For example, the *Lubanga* Trial Chamber required a sufficient connection between the victims’ personal interests and the testimony regarding historical and socio-political context of the crimes to be given by the Chamber expert whom the legal representatives requested to be allowed to question.²⁶⁸ The Chamber found that victims had ‘an undoubted interest in setting their personal experiences, and the harm it is said they individually experienced, in their true historical, economic, and social context’ and therefore allowed legal representatives to ‘explore such aspects of these background matters as are relevant to each of them provided, and to the extent, that the areas are relevant to, and are of assistance in, establishing the context in which the alleged crimes have been committed’.²⁶⁹ In responding to the defence submission that ‘personal interests’ are not the same as general or public interests, the Chamber recalled that while ‘general interest’ is insufficient to allow questioning,²⁷⁰ the ‘personal interests’ do not have to be ‘unique or singular’.²⁷¹ It identified the substantive areas that could be addressed at questioning to the extent not already covered in testimony and not limited to the expert’s written report.²⁷² The questioning on behalf of the participants was to be limited to (i) the issues and areas in which the victims have a personal interest; (ii) the context and history which is relevant to the charges the accused faces; and (iii) the matters within the expertise of the witness (not limited to the contents of the written report). The Chamber reminded of the imperative need for the questions to be ‘proportionate, relevant and focused’ and not to amount to ‘submissions’.²⁷³ During the defence phase of the *Lubanga* trial, the Chamber rejected the defence motion requesting it to formulate a different standard of ‘personal interests’ for the purpose of questioning of defence witnesses by the legal representatives.²⁷⁴ It considered the existing safeguard that the manner and timing of their questioning must not be prejudicial as adequate and valid and held that this is a case-specific determination that may not be conducted in advance or generally.²⁷⁵

The character of admissible questions by legal representatives, in particular whether those may be leading questions like at cross-examination, received attention in the *Lubanga* case as well. In the course of a hearing, one of the legal

²⁶⁸ Transcript, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-T-193-ENG, TC I, ICC, 17 June 2009, 3–10.

²⁶⁹ Ibid., 8.

²⁷⁰ *Lubanga* decision on victim participation at trial (n 72) para. 96 (‘A general interest in the outcome of the case or in the issues or evidence the Chamber will be considering...is likely to be insufficient’).

²⁷¹ *Lubanga* transcript (n 268) 9.

²⁷² Ibid., 9–10.

²⁷³ Id.

²⁷⁴ Decision on the defence observations regarding the right of the legal representatives of victims to question defence witnesses and on the notion of personal interest -and- Decision on the defence application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defence witnesses, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2340, TC I, ICC, 11 March 2010, paras 7 and 28.

²⁷⁵ Ibid., para. 35.

representatives was instructed to refrain from posing questions ‘suggestive of an answer’ and to put neutral questions instead.²⁷⁶ The instruction was followed up by a decision holding that a distinct role of legal representatives renders the common-law modes of questioning (examination-in-chief, cross-examination, and re-examination) not applicable.²⁷⁷ Both the Trial and Appeals Chambers’ jurisprudence connected the participatory rights of victims at trial, including the opportunity to question witnesses under Rule 91(3), to the purpose of ‘assisting the bench in the pursuit of the truth’ under Article 69(3).²⁷⁸ Therefore, legal representatives were authorized to ask questions seeking to clarify or elicit evidence relevant to the victims’ personal interests, whether going to the guilt or innocence of the accused.²⁷⁹ The Chamber held that there is ‘a presumption in favour of a neutral approach to questioning on behalf of victims’, i.e. victims ‘are less likely than the parties to need to resort to the more combative techniques of “cross-examination”’.²⁸⁰ But where the views and concerns of the victims conflict with the evidence given by a witness, legal representatives may legitimately ‘seek to press, challenge or discredit a witness’ and to pose closed, leading, or challenging questions, depending on the interests affected and issues raised.²⁸¹ The reversible presumption in favour of neutral questioning requires a legal representative to make an oral request to the Chamber whenever he or she wishes to depart from it.²⁸² Essentially, this *sui generis* mode of questioning by legal representatives is akin to examination-in-chief that may turn into cross-examination of a hostile witness, since witnesses adverse to victims could be asked leading questions upon leave.

The *Katanga and Ngudjolo* Chamber’s directives regarding the questioning by legal representatives reflect a stricter approach. As the Chamber held repeatedly, such questioning must mainly pursue the goal of determining the truth because victims are not parties and have no role in supporting the prosecution case.²⁸³ Questions posed by legal representatives ‘may be an important factor in helping the Chamber to better understand the contentious issues of the case in light of their local knowledge and socio-cultural background’.²⁸⁴ The Chamber classified the questions likely to be posed by legal representatives into (i) questions asked under Article 75 concerning potential orders on reparations; (ii) anticipated questions; and (iii) unanticipated questions. With respect to the former type of questions, Rule

²⁷⁶ Transcript, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-T-169-ENG, TC I, ICC, 6 May 2009, 14.

²⁷⁷ Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2127, TC I, ICC, 16 September 2009 (*Lubanga* decision on victims’ questioning), para. 24.

²⁷⁸ *Ibid.*, para. 27.

²⁷⁹ *Ibid.*, para. 26; *Lubanga* appeal judgment on victim participation at trial (n 74) para. 102.

²⁸⁰ *Lubanga* decision on victims’ questioning (n 277) para. 28.

²⁸¹ *Ibid.*, paras 28–9.

²⁸² *Ibid.*, para. 30.

²⁸³ *Katanga and Ngudjolo* decision on victim participation at trial (n 229) para. 75; *Katanga and Ngudjolo* trial directions (n 235) para. 82; Transcript, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-T-87-Red-ENG, TC II, ICC, 30 November 2009, 33 (‘the legal representatives of the victims are not supplemental prosecutors or part two of the Prosecution.... They are not to gather up all the various questions and bring them all together at the very end. If that role is to be played by anyone, it will be played by the Chamber’).

²⁸⁴ *Katanga and Ngudjolo* trial directions (n 235) para. 82.

91(4) on the questioning by legal representatives during hearings concerning reparations exempts them from the condition set out in Rule 91(2), i.e. the right of parties to make observations on the application.²⁸⁵ The legal representative makes a written application, including an explanation of the purpose and scope of questions and documents to be used at questioning, which is notified to the parties.²⁸⁶ For anticipated questions on matters other than reparations, the same protocol applies, except that parties are entitled to make observations under Rule 91(2).²⁸⁷ The Chamber may also authorize the legal representative, subject to Rule 91(3)(b), to pose the question or do so on his or her behalf before cross-examination, if the matter has not been addressed sufficiently by the witness during examination-in-chief.²⁸⁸ Unanticipated questions on unforeseen matters relevant to the interests of the victims and arising out of examination-in-chief may be put to the witness by the Chamber if necessary for ascertainment of truth or for clarification of testimony.²⁸⁹ At trial, the *Katanga and Ngudjolo* Chamber posed three questions to the first prosecution witness after examination-in-chief and prior to cross-examination by the defence teams, as proposed by legal representatives.²⁹⁰

On the issue of the scope of questioning by legal representatives, Trial Chamber II concurred with the *Lubanga* Decision in ruling that their questions are only residual and must aim to clarify or complement previous evidence of a witness. Factual questions going beyond matters raised in examination-in-chief may be allowed provided that they (i) are not duplicative or repetitive of what has already been asked by the parties; (ii) are limited to matters in controversy between the parties or matters directly relevant to the interests of victims; (iii) do not go to the credibility and/or accuracy of testimony, unless the testimony goes directly against the interests of victims; and (iv) pertain to possible reparations for specific individuals or groups, unless authorized under Regulation 56 of the Regulations of the Court.²⁹¹ With respect to the nature of questions to be posed by legal representatives, the Chamber followed the *Lubanga* jurisprudence holding that questioning must be conducted neutrally and leading or closed questions avoided, unless the Chamber specifically allows them to conduct cross-examination.²⁹²

Noting the ‘slight differences in the formulation of the approach’ towards questioning by legal representatives between other chambers, the *Bemba* Trial Chamber held that ‘the underlying position is the same’ and ‘has been demonstrated in both trials as providing an effective means of addressing the issue’.²⁹³ It therefore adopted

²⁸⁵ Ibid., para. 86. See Rule 91(4) ICC RPE ('For a hearing limited to reparations under Article 75, the restrictions on questioning by the legal representatives set forth in sub-rule 2 shall not apply. In that case, the legal representatives may, with the permission of the Chamber concerned, question witnesses, experts and the person concerned').

²⁸⁶ *Katanga and Ngudjolo* trial directions (n 235) paras 84–5 (the application must be made as early as possible and not later than seven days before the witness's first appearance, as the Chamber needs to decide whether the defence is to be given an opportunity to make observations on it).

²⁸⁷ Ibid., para. 87. ²⁸⁸ Ibid., para. 88. ²⁸⁹ Ibid., para. 89.

²⁹⁰ Transcript, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-T-87-Red-ENG, TC II, ICC, 30 November 2009, 45–6.

²⁹¹ *Katanga and Ngudjolo* trial directions (n 235) para. 90.

²⁹² Ibid., para. 91; *Katanga and Ngudjolo* decision on victim participation at trial (n 229) para. 78.

²⁹³ *Bemba* victim participation decision (n 229) para. 40.

the presumption of neutral questioning by legal representatives, subject to the possibility of varying it if necessary. The legal representatives were instructed to file a discrete application outlining the nature and detail of proposed questions seven days before the relevant witness is scheduled to testify.²⁹⁴ During the trial, the Chamber rejected the defence argument that insider witnesses are ‘collectively unlikely to be able to give evidence which impacts upon the personal interests of the victims’ and granted requests of two legal representatives to be allowed to question such a witness supposed to testify on the mode of liability and the crime of pillage.²⁹⁵ The Chamber held that the interests of victims are not limited to issues relating to physical commission of crimes but also extend to the question of who should be held liable. Therefore, this is the area that may legitimately be explored by the legal representatives where the Chamber finds the proposed questions appropriate.²⁹⁶

The framework decision on the conduct of the *Ruto and Sang* trial provided for the same protocol to be followed in case legal representatives wish to question a witness. This included the requirement of a reasoned filing to be notified to the parties seven days in advance of the witness’s appearance, subject to variation in case of changes in the witness schedule or unanticipated issues raised during testimony.²⁹⁷ The Trial Chamber held that the proposed questions must be relevant to the victims’ interests, must not repeat questions posed by the calling parties, and must not formulate new allegations against the accused.²⁹⁸ The Chamber also upheld the presumption in favour of a neutral manner of questioning by the legal representative reversible upon an oral request made during examination.²⁹⁹

To sum up, the ICC trial practice displays a considerable degree of consolidation on the issues relating to the questioning of witnesses, including experts and the accused, by the legal representatives of participating victims. Questioning pursuant to Rule 91(3)(a) is an indirect form of the expression of views and concerns on behalf of victim participants and is subject to a distinct application. In order to ensure that witness questioning is kept within the boundaries of Article 68(3), the Chambers have exercised close control over when and how witnesses may be examined on behalf of the participating victims. The Trial Chambers have uniformly required from the legal representatives a reasoned application explaining the relevance of specific questions to the matters expected to be raised in the testimony and to the victims’ personal interests. The legal representatives’ questioning is of a residual nature and subject to a reversible presumption in favour of a neutral manner of posing questions. Like with leading evidence, the Chambers have linked this form of participation with the determination of the truth as the overarching goal of the trial proceedings before the Court.

²⁹⁴ Ibid., para. 102(h).

²⁹⁵ Decision (i) ruling on legal representatives’ applications to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1729, TC III, ICC, 9 September 2011.

²⁹⁶ *Bemba* decision (i) ruling on legal representatives’ applications to question Witness 33 (n 295) paras 16–17.

²⁹⁷ Decision on the Conduct of Trial Proceedings (General Directions), *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-847, TC V(A), ICC, 12 August 2013 (‘*Ruto and Sang* general directions’), para. 19. See also *Ruto and Sang* victim participation decision (n 126) para. 74.

²⁹⁸ *Ruto and Sang* victim participation decision (n 126) para. 75.

²⁹⁹ Ibid., para. 76.

45.3.3 Representation

The organization of legal representation of victims is crucial to enabling them to effectively realize their participatory rights, given that the bulk of victim participation before the ICC occurs through legal representatives. In essence, ‘meaningful’ participation is impossible without a real and effective representation, given the ‘physical and conceptual’ distance between most victims and the legal proceedings before the ICC.³⁰⁰ The procedural and logistical challenges to ensuring effective representation have been significant.³⁰¹ They related, among other things, to grouping victims, selection of representatives, provision of legal aid, and the relationship between legal representatives and the OPCV. Further, tensions have surged between the ideals of ‘meaningful’ participation and ‘real’ representation of victims’ personal interests on the one hand, and what may be perceived as the reality of symbolic representation and participation of victims at the ICC on the other.³⁰² This paragraph will barely scratch the surface of those tensions.

Article 68(3) provides that ‘views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the [RPE]’. The RPE appear to encourage participation through legal representatives, not least because some forms of participation are only available to victims’ representatives, e.g. attendance of and participation in hearings and questioning witnesses.³⁰³ Although Rule 90(1) provides that ‘[a] victim shall be free to choose a legal representative’, this is qualified in the following paragraphs, stipulating that individual preferences regarding the choice of a legal representative may be overridden. First, in case of a large number of victims the Chamber may request victims or groups of victims to choose a common legal representative in order to ensure the effectiveness of the proceedings and, second, it may request the Registrar to ‘choose one or more common legal representatives’ if the victims ‘are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide’.³⁰⁴ The measures aimed at organizing common legal representation are subject to the requirement that the selection of a legal representative must ensure that the victims’ ‘distinct interests’, in particular those relating to protection, are represented and that the conflict of interests is avoided.³⁰⁵ Regulation 79(2) of the Regulations of the Court further provides for a duty to give due consideration to ‘the views of victims, and the need to respect local traditions and to assist specific groups of victims’.

Identifying a suitable (common) legal representative is an inherently difficult task. An external counsel from the same country where victims are will have cultural proximity to them, speak their language, know the context of the conflict and crimes, and, therefore, will have an advantage of being able to communicate with the clients more effectively. But, at the same time, he or she will more likely be unfamiliar with the Court’s law and jurisprudence and find it challenging to operate in the Court’s

³⁰⁰ REDRESS (n 8) 55.

³⁰¹ Report of the Court on the Revised Strategy in Relation to Victims, ICC-ASP/11/40 (n 50) para. 35.

³⁰² For an analysis, see Haslam and Edmunds (n 14). ³⁰³ Rule 91(2) and (3)(a) ICC RPE.

³⁰⁴ Rules 90(1)–(3) ICC RPE. ³⁰⁵ Rule 90(4) ICC RPE.

proceedings: ‘they are generally from a very different legal context from the ICC and may not have the background or training that enables them to work optimally in a multicultural setting with different norms and modes of interaction’.³⁰⁶ By contrast, a court-appointed counsel, including an OPCV staff member, may be an effective advocate. But without a sufficient link and direct contact with victims he or she may be unable to genuinely present their ‘views and concerns’ that amount to more than general legal submissions second-guessing what those views and concerns are. This form of ‘representation’ rather creates a bogus of participation. Indeed, the Court has assured that common legal representation is organized considering the ‘need to ensure that the participation of victims, through their legal representatives, is as meaningful as possible, as opposed to “purely symbolic”’.³⁰⁷ However, the representation is necessarily collective, whereby each group of victims encompasses large numbers of individuals and is given one voice in the courtroom through a common legal representative. The question arises whether victim participation and representation can be anything other than ‘symbolic’ in the context of crimes with mass victimization and to what extent the familiar concept of the lawyer–client relationship is applicable to the representation of victims participating in the ICC proceedings.³⁰⁸

According to court monitors, the Court’s practice of consultations with victims regarding the selection of legal representatives has been shaped by managerial concerns and undermined by the perennial problem of the deficit of resources.³⁰⁹ The Registry was unable to consult victims as to their wishes before choosing legal representatives and the Chambers held that the interests of each victim could be taken into account only to some extent.³¹⁰ As a result, (common) legal representatives were at times appointed unilaterally and over the applicants’ objections.³¹¹ In addition to external counsel chosen by the Registry and appointed by the Chambers, the OPCV has acted as a legal representative for unrepresented applicants.³¹² Proposals have been made to enhance the OPCV’s role and shift to it all responsibility for representing victims in order to increase the cost-efficiency of the representation system.³¹³ However, the possible exclusive role of the OPCV as victim representative raised concerns, as it would effectively abrogate the victims’ freedom to choose legal representatives.³¹⁴

³⁰⁶ Report of the Court on the Revised Strategy in Relation to Victims, ICC-ASP/11/40 (n 50) para. 35.

³⁰⁷ Decision on common legal representation of victims for the purpose of trial, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1005, TC III, ICC, 10 November 2010 (‘Bemba decision on common legal representation’), para. 9(a).

³⁰⁸ Kendall and Nouwen (n 7) 248 (‘structural constraints often dilute this relationship’).

³⁰⁹ REDRESS (n 8) 56.

³¹⁰ *Bemba* decision on common legal representation (n 307) para. 14.

³¹¹ E.g. Decision on the ‘Motion from Victims a/0041/10, a/0045/10, a/0051/10, and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta Chana for All Victims’, *Ruto et al., Situation in the Republic of Kenya*, ICC-01/09-01/11-330, PTC II, ICC, 9 September 2011; Decision on Common Legal Representation, *Banda and Jerbo, Situation in Darfur, Sudan*, ICC-02/05-03/09-337, TC IV, ICC, 25 May 2012.

³¹² Regulation 80(1) Regulations of the Court.

³¹³ Report of the Committee on Budget and Finance on the work of its Eighteenth Session’, Committee on Budget and Finance, 22 May 2012, ICC-ASP/11/5 (Eleventh Session of the ASP), para. 57.

³¹⁴ See e.g. REDRESS (n 8) 57; VRWG Report (n 191) 9–10.

Large numbers of victims have tended to be represented by a single legal representative appointed by the Court. Victims were grouped based on the criteria relevant in light of Rule 90(4), such as by the geographical area or by crime from which they suffered. As an exception rather than the rule, in *Lubanga* victim participants chose their own legal representatives and, as a result, there were eight represented groups of victims in the court, which may be deemed excessive. In the *Katanga and Ngudjolo* trial, 366 victims were split into two groups, each represented by a common legal representative.³¹⁵ In *Bemba*, over 5,000 victims participating in the trial have been represented by two common legal representatives.³¹⁶ The OPCV was authorized to represent victim participants who had not yet chosen a representative and until the decision on the appointment of such was made, including for the purpose of opening statements.³¹⁷ In each of the two *Kenya* cases, the totality of victims were represented by one common legal representative based in Kenya and by the OPCV acting on his behalf in the proceedings before the Court.³¹⁸ Under this novel ‘combined approach’, the common legal representative acts as the ‘point of contact’ for the victims. He or she formulates their ‘views and concerns’ and may appear on their behalf at ‘critical junctures of the trial’ (e.g. opening and closing statements as well as, upon specific request, on other occasions).³¹⁹ By contrast, the OPCV’s role is to serve, on a daily basis, as the ‘interface’ between the common legal representative and the Chamber, including attendance of hearings, oral interventions, written submissions, access to confidential documents, and questioning witnesses on behalf of the representative.³²⁰

The representation system in the *Kenya* cases is an attempt at combining the best of both worlds. First, it envisages a close involvement by the OPCV, which has considerable expertise on victim representation and courtroom experience; and, second, this scheme is meant to preserve a genuine attorney-client link between the victims and the local-based professional and independent common legal representative who maintains regular and direct contact with the victims and is more than a mere ‘intermediary’ in The Hague.³²¹ While this experiment is interesting and promising, its expected merits are yet to be validated by experience. The division of labour, effective communication, and two-way transmission of the victims’ views and concerns and court developments between the common legal representative and the OPCV may pose challenges and will depend heavily on their ability to construct an effective working relationship. Other than that, as noted, it is the

³¹⁵ Order on the Organisation of Common Legal Representation, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1328, TC II, ICC, 22 July 2009, 2–4.

³¹⁶ *Bemba* decision on common legal representation (n 307) para. 7.

³¹⁷ Decision on the legal representation of victim applicants at trial, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1020, TC III, ICC, 19 November 2010, paras 24–7.

³¹⁸ *Ruto and Sang* victim participation decision (n 126) paras 41–5; *Muthaura and Kenyatta* victim participation decision (n 126) paras 40–4.

³¹⁹ *Ruto and Sang* victim participation decision (n 126) paras 42, 71, and 73.

³²⁰ Ibid., paras 43–4, 68, and 71.

³²¹ VRWG Report (n 191) 10. Cf. Kendall and Nouwen (n 7) 249 (characterizing this arrangement as ‘re-representation’, because victims are represented by the common legal representative who is in turn represented in court by the OPCV).

Chamber's top-down manner of introducing this scheme that has been subject to criticism: the victims whose rights and interests are most affected by the decision were not consulted.³²²

45.3.4 Towards a pragmatic system: evolution or devolution of the regime?

The foregoing overview of the ICC's practice regarding the key aspects of the application, representation, and participation process shows that the Court has been continuously clarifying and refining the specifics of the participation system in response to challenges arising in individual cases. In addition, the Court has been engaged in the genuine and critical monitoring of its own performance and the transparent appraisal of practices employed by different Chambers in search of strategically coherent and enduring solutions. This commendable endeavour was not only aimed at identifying workable quick fixes but also did not eschew fundamental questions of the broader philosophy that should inform the direction to be taken by the Court in the future. A long way has been travelled from the initial approach of allowing 'symbolic' participation to limiting it to substantive and 'meaningful' participation.³²³ It is worth recalling that this discursive shift surfaced at first in the Appeals Chamber's judgments striking down the notion of general participatory rights and victim status under Article 68(3) in non-judicial phases of the investigation into a situation and restricting participation during that early stage to instances explicitly envisaged by the legal framework.³²⁴

By now, the Court's drift away from 'victim symbolism' to procedural pragmatism can be discerned in all major aspects of victim participation, at least as far the trial process is concerned. The application, representation, and participation processes have been taking a markedly more pragmatist shape. In respect of the application scheme, the emphasis has increasingly been put on the kind of eventual participation

³²² REDRESS (n 8) 59 ('The Court should be doing more than paying lip-service to honour its obligation to consult with participating victims about their legal representation'); VRWG Report (n 191) 10.

³²³ See e.g. *Lubanga* appeal judgment on victim participation at trial (n 74) para. 97; Order on the Organisation of Common Legal Representation of Victims, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1328, TC II, ICC, 22 July 2009, para. 10(a) ('the Chamber attaches the greatest importance to the requirement that the participation of victims, through their legal representatives, must be as meaningful as possible as opposed to being purely symbolic'); *Katanga and Ngudjolo* decision on victim participation at trial (n 229) para. 57; Decision on common legal representation of victims for the purpose of trial, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-1005, TC III, ICC, 10 November 2010, para. 9 (a); *Ruto and Sang* victim participation decision (n 126) para. 10.

³²⁴ Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *Situation in the Democratic Republic of the Congo*, ICC-01/04-101, PTC, ICC, 17 January 2006. But see Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007, *Situation in Darfur, Sudan*, ICC-02/05-177, AC, ICC, 2 February 2009; Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, *Situation in the Democratic Republic of the Congo*, ICC-01/04-556, AC, ICC, 19 December 2008.

sought by the applicants, as opposed to the issue of formal eligibility to participate. In testing the different individual and collective approaches and their combinations, the Chambers have generally operated within the remit of the Statute, but some experiments, most notably in the *Kenya* cases, did conflict with the plain legal requirement of the individualized judicial treatment of applications provided for by Rule 89. The preference for collective approaches in structuring application, participation, and representation constitute the unmistakable trend of the past few years of the ICC practice. But this trend does not go so far as to discourage or exclude individual and direct forms of participation allowed by the Statute. Victims do retain the possibility of appearing before the Chamber in person, provided that they are in a position to meaningfully contribute to the proceedings.

The cornerstone questions are what kind of participation is regarded as ‘meaningful’, and whose perspective on this is determinative, given that it is likely to vary by actor? With regard to the modalities of participation at trial that have been discussed previously, all of which relate to the ad hoc forms of involvement subject to a requirement of distinct application, the red thread going through the jurisprudence is the participating victims’ expected contribution to truth-finding and clarification of matters raised by evidence. Under ‘meaningful participation’, the Court understands participation that not only benefits the victims but also promotes the Court’s primary function, in particular the determination of the truth in the case in a manner consistent with the tenets of a fair trial. The ways in which the Trial Chambers have interpreted and applied participation modalities clearly demonstrate that the judges have expected active procedural participation by victims to further (and at a minimum not to obstruct) the goals of criminal process. This is when the Chambers have granted applications for the presentation of evidence, questioning of witnesses, and the expression of views and concerns.

These considerations have substantially shaped the exercise by the judges of their broad discretion in fashioning the aspects of victim participation and the enjoyment by victims of their participatory rights under the Article 68(3) regime. Whether with regard to the expression of ‘views and concerns’, presentation of evidence, or questioning of witnesses, the Trial Chambers have consistently given a special prominence to the search for the truth as the cornerstone rationale of active procedural participation of victims. This is also the kind of contributions which the Chambers have appreciated most:

the Chamber wishes to commend the contribution made by the legal representatives and their teams throughout the proceedings. In the Chamber’s view, they were able to find their rightful place during the trial and in their own way, by, at times, taking a different stance to the Prosecution, they made a meaningful contribution to establishing the truth in relation to certain aspects of the case. The Chamber extends its gratitude for their contribution.³²⁵

³²⁵ Summary of Trial Chamber II’s Judgment of 7 March 2014 pursuant to Art 74 of the Statute in the case of *The Prosecutor v Germain Katanga* <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/986/14_0259_ENG_summary_judgment.pdf> accessed 17 March 2014.

It is as telling as it is understandable that the judges have been forthcoming in accommodating the forms of participation deemed crucial in light of the fundamental objectives of the criminal process. To that end, the Chambers have demonstrated considerable flexibility and creativity, occasionally going beyond the letter of Article 68(3) of the Statute, so as to enable victims to participate in the way that promoted their ‘personal interests’ while remaining in harmony with the truth-finding objective. The Trial Chambers’ consistent position, endorsed by the Appeals Chamber, that victims may be allowed to lead and challenge the admissibility of evidence going to the guilt or innocence of the accused, is the case in point. The judges did not shy away from devising this procedural device in the absence of a direct statutory basis and grounding it in their *ex officio* competence under Article 69(3). In the areas of the trial process discussed earlier, the procedural rationales for victim participation and the nature and scope of recognized ‘personal interests’ of victims are inextricably linked with the goals of an orderly and effective functioning of the criminal court. The objectives regularly invoked in the ICC’s treatment of victim participation have included truth-finding; fair and expeditious determination of the guilt or innocence of the accused; and ensuring that victims are able to express their views and concerns on matters affecting their personal interests and that they have an opportunity and means to participate ‘meaningfully’ in the process in accordance with the legal framework.

The subheading of this paragraph queries whether the development of victim participation at the ICC is more appropriately described as evolution or devolution of the regime. The answer to that depends on what normative content and rationales are read into this indeterminate and malleable regime. Do victims participate in order to pursue specific judicially recognized ‘personal interests’ that can realistically and reasonably be catered for in the framework of the criminal process, given the institutional features of the ICC and the challenges of its operational context? Or do they participate for the sake of it, as a means of benefiting from the supposed ‘restorative’ effects of such participation? The two ways of asking this question reflect the different schools of thought competing in this domain. The distinct philosophies of justice, retributive and restorative justice, inform the ICC debates and exercise a strong pull in opposite directions. The contestation is about the nature of the ICC’s victim participation system, namely whether it is a key element of a victim-friendly and victim-oriented, yet essentially retributive, justice process, or whether it is a ‘restorative justice’ device in the proper sense that is grafted onto the ICC procedural system.

The perspective determines how the (d)evolution of the ICC regime is viewed, with its major trends being the pull towards a (partially) collective and combined approach to processing applications (except where direct and personal participation is being sought); general preference for collective legal representation; and keen endorsement of participation aligned with the goals and functions of criminal procedure. Looking at these dynamics through the ‘restorative justice’ prism first, the ICC victim participation system has imploded and devolved. Worse still, it has given up on the promise of ‘restorative justice’ through participation because victims are being effectively ‘instrumentalized’ through current trials arrangements. The ICC as a ‘retributive court’ only

guises itself as a dispenser of restorative justice, but in fact it depends on—and keenly uses—victims as evidentiary sources, only providing them with extensive forms of participation where those can promote the Court's own interests and assist it in carrying out its functions. Victims are participants, not full parties, without an unconditional right to speak, present evidence, and to express their views and concerns. The most tangible participation is subjected to stringent control by the judges and is made strictly subordinate to the procedural objectives that have little in common with the goal of personal and social restoration of victims and affected communities. The vetting through which victims gain judicial recognition and the courtroom process through which they are 'participating' are format-driven, sterile, indirect, and collective to a large extent, while the agency of a common legal representative epitomizes such an emasculated 'participation'.

However, the picture transforms once one 'changes the lenses' and adopts the perspective under which 'meaningful participation' is one that promotes the ultimate objectives of the criminal process and contributes to the discharge by the Court of its core functions. Under this view, the steady and consistent developments at the ICC constitute *evolution* in the positive sense; they signify the Court's growing maturity and its deliberate, experience-driven move towards procedural pragmatism that benefits the victims, the Court, and the major stakeholders. With the diverging approaches being tested by the Chambers and with the growing consolidation—not to say uniformization—of practice, the Court has made significant progress in giving effect to the victim participation regime and in constructing a more sustainable and efficient system through trial and error. The importance of these achievements is not diminished by the fact that they came at the cost of initial ambitions and unrealistic expectations. The more pragmatic system, which is not yet wholly adequate and settled but is well on the way towards this end, can only emerge if the ideal of 'restorative justice' through victim participation is abandoned. As the choice needs to be made of the prism through which to look at victim participation before the ICC, the superposition of the two lenses—retributive and restorative—is bound to obscure the vision of what it should amount to and what can and should be expected of the ICC in this respect. Uncertainties about the ultimate goals of victim participation not only reflect on the rigour of judicial reasoning, but also feed unrealistic expectations among victims and their communities. A court that considers itself accountable under incompatible sets of ideals and rationales is doomed to fail them all.

45.4 Victim Participation as Governance Matter

45.4.1 Victim participation and the ASP: positions and action

45.4.1.1 Evolving perceptions and approaches

The first signs of trouble faced by the Court in organizing the victim participation system started surfacing during the first few years of the ICC's judicial operation. The contours and dimension of the problem were not totally clear, especially considering that in the first cases the number of victim applicants and participants was significant but still manageable. For this reason, the need to enhance the effectiveness and

sustainability of the system did not show on the ASP's agenda until 2011. The first engagement in the ASP with the topic of victims had a considerably broader focus: it was neither problem-driven nor motivated by the urgency of solving issues that had arisen in practice. As late as in 2009 the ASP decided, at its eighth session and following the proposal by Chile and Finland, that the 2010 Review Conference in Kampala would cover, as one of the four sub-items under the agenda item 'Stocktaking of international criminal justice', the topic of the 'Impact of the Rome Statute on victims and affected communities'.³²⁶ During the Kampala conference, the technicalities of victim participation and the ICC's performance in this respect were far from priorities, although side events on the topic were held as part of the stocktaking exercise. The states were clearly reluctant to open Pandora's box by revisiting the debates settled and compromises sealed in Rome.³²⁷ With hindsight, it was for the better that Article 68(3) was not reviewed in Kampala as a way of making the relevant regime more specific.³²⁸ This would have been premature at that stage and would have reduced the room for the ICC judges to experiment with the Article, without guaranteeing that the practice under the amended provision would present lesser challenges. As a result of the decisions reached in Kampala, States Parties requested the ICC to continue optimizing its 'strategic planning process' in relation to victims, without providing any more specifics on the direction such strategic planning should take.³²⁹ Subsequently, at the eleventh session in 2011, the ASP requested the Court to revise its strategy in relation to victims and to report thereon in advance of the eleventh session. The revised strategy was adopted in 2012 and the ASP requested the ICC to monitor its implementation.³³⁰

The growing concern of the Assembly in respect of victim participation was in reaction to disturbing reports from the Court itself. The ongoing managerial problems with the system for the victims to apply for participation, including delays with processing applications and resulting backlogs, were conveyed to it on several occasions, whereby the Court referred to the deficit of time and human resources and the need to consider collective forms of application.³³¹ The ASP's Bureau on Victims and Affected Communities echoed these misgivings in 2012, when it noted the unsustainability of the application system as 'the most pressing major concern'

³²⁶ Official Records of the ASP to the Rome Statute of the ICC, Eighth Session, The Hague, 18–26 November 2009 (ICC publication, ICC-ASP/8/20) vol. I, part II, Resolution ICC-ASP/8/Res.6, para. 5 and annex IV. Other issues were complementarity, cooperation, and peace and justice.

³²⁷ See also REDRESS (n 8) 36 ('To date, States have wisely refrained from making any significant amendments to the legal framework of the ICC, despite the recent opportunity provided by the Review Conference, given the very careful balances that were achieved in the Treaty negotiations at Rome').

³²⁸ Cf. Vasiliev (n 26) 688 (arguing in 2008 that the problem with Art 68 (3) could more effectively and promptly be resolved at the coming review conference). In light of the subsequent developments, it is unlikely that this proposal would have led to a more sustainable and effective regime, if implemented at that stage. That said, States Parties could and should have concerned themselves with the problems in this domain earlier than they actually did.

³²⁹ Resolution RC/Res.2, 'The impact of the Rome Statute system on victims and affected communities', adopted at the 9th plenary meeting, on 8 June 2010, para. 2.

³³⁰ Court's Revised strategy in relation to victims, ICC-ASP/11/38 (n 20).

³³¹ E.g. Study Group on Governance: Lessons Learnt: First Report of the Court to the ASP, Annex ('Identification of Issues'), ICC-ASP/11/31/Add.1, 23 October 2012 <<http://www.icc-cpi.int/iccdocs/asp-docs/ASP11/ICC-ASP-11-31-Add1-ENG.pdf>> accessed 17 March 2014, 5.

and in 2013 when emphasizing the need to reform the system with a view to simplifying it.³³² As a result, from 2011 on, the Assembly turned its attention to the critical state of affairs at the Court and repeatedly placed on record its concerns about the continued backlogs in processing victims' applications, as relevant resolutions make clear.³³³ In 2012 the informal consultations of the joint facilitation of the Bureau led to the consensus that a feasible solution could lie in 'a predominantly collective approach to the submission and review of victims' applications, as well as to victims' participation in the proceedings as the general rule, without precluding exceptional individual applications when the circumstances so warrant it'.³³⁴ The Bureau considered that 'with a view to strengthening the consistency of the system, a collective approach to victims' participation throughout the system, at all stages of the proceedings, i.e., application, participation and reparations, may in the long term contribute to guarantee its effectiveness and sustainability'.³³⁵ Accordingly, at the eleventh session (2012) the Assembly expressed an unequivocal endorsement of, and preference for, a collective approach to structuring the system for victims to apply for participation.³³⁶

The 2013 ASP Resolution adopted at the twelfth session welcomed 'the ongoing and continuous work of the Court in implementing and monitoring the implementation of the Revised Strategy'³³⁷ and recalled its concerns about 'the difficulty the Court has encountered, on some occasions, in processing applications from victims seeking to participate in proceedings'.³³⁸ Moreover, the resolution reaffirmed 'the need to review the system for victims to apply to participate in proceedings, in order to ensure the sustainability, effectiveness, and efficiency of the system, including any necessary amendment to the legal framework, while preserving the rights of victims under the Rome Statute', and called upon the Court 'to explore ways to harmonize the application process for victims to participate in the proceedings before the Court, and in consultation with all relevant stakeholders'.³³⁹ Finally, the Bureau on Victims

³³² Report of the Bureau on Victims and Affected Communities, ICC-ASP/11/32 (n 32) para. 24 ('with the existing resources the system is not likely to be able to handle the increase in victims' applications foreseen in upcoming cases....[L]eaving this matter unresolved might, in fact, place the credibility of the entire Rome Statute system and the Court's work at risk, if it results in the system's failure to protect victims' rights and interests and ensuring that they are fully represented and are able to participate in the proceedings, matters at the core of the Rome Statute'); Report of the Bureau on Victims and Affected Communities, ICC-ASP/12/38 (n 4) para. 10.

³³³ See e.g. Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res.5, (n 158) para. 49; Victims and Reparations, Resolution ICC-ASP/11/Res.7, 21 November 2012 (Eleventh Session of the ASP), paras 3 and 4; Victims and Affected Communities, Reparations and Trust Fund for Victims, Resolution ICC-ASP/12/Res.5, 27 November 2013 (Twelfth Session of the ASP), para. 2.

³³⁴ Report of the Bureau on Victims and Affected Communities, ICC-ASP/11/32 (n 32) para. 25.

³³⁵ Ibid., para. 27.

³³⁶ Victims and Reparations, Resolution ICC-ASP/11/Res.7 (n 333) para. 5 ('requests the Bureau to prepare, in consultation with the Court, any amendments to the legal framework for the implementation of a predominantly collective approach in the system for victims to apply to participate in the proceedings').

³³⁷ Victims and Affected Communities, Reparations and Trust Fund for Victims, Resolution ICC-ASP/12/Res.5 (n 5) para. 1.

³³⁸ Ibid., para. 2 (also noting 'the efforts of the Court to ensure that such a process impacts positively on the effective implementation and protection of the rights and interests of victims under the Rome Statute'). See also the 2014 Resolution on "Victims and affected communities, reparations and Trust Fund for Victims", ICC-ASP/13/Res.4, 17 December 2014 (Thirteenth Session of the ASP), para. 2.

³³⁹ Victims and Affected Communities, Reparations and Trust Fund for Victims, Resolution ICC-ASP/12/Res.5 (n 5) para. 3. Reiterating this in 2014, see Resolution on "Victims and affected communities, reparations and Trust Fund for Victims", ICC-ASP/13/Res.4 (n 338) para. 3.

and Affected Communities was invited ‘to explore, in consultation with the Court, the need for possible amendments to the legal framework for the participation of victims in the proceedings’.³⁴⁰ Interestingly, no references to the need or preference for a collective approach to organizing the system of victim applications as the best way forward appear in the 2013 and 2014 Resolutions, which merely ‘note’ it. This retreat from the previously stated emphasis on collective forms of application and participation as the only possible solution indicates hesitance or a lack of coherent vision (and consensus) within the ASP itself.

45.4.1.2 Appraising harmonization agenda: a case for ‘soft’ harmonization

The evolution of the ASP’s positions invites observations on the role it has played thus far in respect of victim participation issues. First, it is clear that the Assembly did not closely monitor the Court’s performance in this domain from the outset. Initially, prior to the Court’s alarming reports, it adopted a detached, rather than hands-on, approach: it neither conducted its own in-depth analysis of the judicial approaches tested by the Court in individual cases on an ongoing basis, nor engaged in a strategic planning process early enough that would have benefited the ICC system as a whole.

It is only recently that the ASP embarked on a strategic reflection regarding victim issues in the framework of the ‘Bureau on Victims and Affected Communities and the Trust Fund for Victims, including reparations and intermediaries’. This is a welcome but overdue development. If the Assembly had kept its finger on the pulse of the Court from the beginning, it would have been in a better position to discharge its responsibility in guiding the Court, at least by indicating the general direction in which it should be moving on victim participation matters. The fact that it did not do so earlier reduced its ability to anticipate problems and take effective steps in helping the Court manage the system. The open substantive and critical dialogue with States Parties—not necessarily resulting in policy guidance handed down by the ASP—would have been of great assistance to the Court and would have enabled a consolidated position on controversial issues, along with specific proposals, to emerge sooner. The continuing absence of an overarching vision and the ICC system-wide strategic thinking within the Assembly is a part of the problem that the Court has been facing and from which it is yet to emerge. The closer involvement by the Assembly in the matters reflecting on general governance does not imply executive interference with the Court’s work, let alone the unilateral imposition of specific solutions; such a hegemonic approach would have infringed its judicial autonomy and undermined its independence or the perception thereof.³⁴¹ Instead, a balanced approach is warranted, involving regular consultations and joint brainstorming and problem-solving by the Court and by the Assembly organs.

³⁴⁰ Victims and Affected Communities, Reparations and Trust Fund for Victims, Resolution ICC-ASP/12/Res.5 (n 5) paras 2 and 3. See Resolution on “Victims and affected communities, reparations and Trust Fund for Victims”, ICC-ASP/13/Res.4 (n 338) para. 4 (entrusting the task of exploring the need to amend the legal framework, based on the Court’s 2015 report, to the Bureau’s Study Group on Governance).

³⁴¹ Victims and Reparations, Resolution ICC-ASP/11/Res.7 (n 333) para. 5 (‘requests the Bureau to prepare, in consultation with the Court, any amendments to the legal framework for the implementation of a predominantly collective approach in the system for victims to apply to participate in the proceedings’).

The 2013 Resolution ICC-ASP/12/Res.5 and the 2014 Resolution ICC-ASP/13/Res.4 indicate that the Assembly is steering its course towards harmonization of arrangements for the victims to apply for participation in the proceedings. Presumably, this is to be achieved through the adoption of a uniform system that would apply across cases. The need to harmonize approaches as such does not suggest a specific direction in which the Court should be heading; thus, as noted, the latest Resolutions refrained from prodding the Court towards the collective approach. Nevertheless, the appropriateness, timeliness, and feasibility of the agenda oriented at ‘harmonization’ raise questions. The Bureau stated in its 2013 report that ‘the main concern in this matter is the existence of different approaches within the Court considering the victims’ right to participate and the resources that are needed to implement the different options’.³⁴² It referred, in particular, to the approaches developed by different Chambers since 2012 in the *Gbagbo*, *Ntaganda*, and *Kenya* cases, as well as to the six options outlined in the Court’s Report on the review of the application system.³⁴³ Still, it is not self-evident why the existence of diverging approaches within the Court is in itself a matter of concern and inappropriate or detrimental in principle. The real problem is the inability to devise and implement a system that would ensure a sustainable, effective, and meaningful victim participation in each case. It ought not to be substituted by the ‘problem’ of non-uniformity of the approaches applied by different Chambers. Non-uniformity in and of itself would not be a ground for concern in case each of the divergent approaches enabled the Court to meet the demands of each individual case and to ensure sustainable practice.

Convincing arguments in favour of an institution-wide uniform approach across situations and cases are yet to be heard. Total consistency serves no immediate purpose other than academic or administrative propensity for standardization and orderliness. But, as the ICC practice demonstrates, these concerns are very distant from the practical realities. As long as there are no delays in processing the applications, no deprivation of rights victims are provided with under the legal framework, no defects and disconnects in legal representation, and no mismanaged participation, it is unlikely to matter to individual victims and victim groups whether they are being treated slightly differently by the Court than the victims in any other situation in the Court’s present or past practice. Pluralism and certainty are not irreconcilable, while premature and ill-conceived harmonization could be counterproductive and impoverishing. As seen from the practice to date, the situations before the Court are diverse in terms of the number of victims applying for participation. Besides the scope and success of outreach effort in situation countries, this is indicative of the objective differences between the situations, including, but not limited to, the character of crimes committed, the nature and patterns of victimization, the presence of special categories of victims (e.g. victims of gender-based and sexual violence crimes), and the general security situation on the ground. With forensic contexts varying by case, so may be the challenges raised by victim participation in each of them. As noted, in the *Lubanga* trial, 129 victims participated, distributed

³⁴² Report of the Bureau on Victims and Affected Communities, ICC-ASP/12/38 (n 4) para. 10.

³⁴³ Ibid., para. 10 and n 14. See section 45.3.1.3, Judicial experimentation and review of the system.

into three groups, whereas in *Bemba*, over 5,000 victims, organized in two groups, are participating. This gives a reason for pause; the question is to what extent the modalities of processing victim applications and organizing legal representation and participation should be identical in cases involving substantially different numbers of victim applicants and victims with recognized status. Situation-sensitive policies and case-specific approaches may be called for.³⁴⁴

The Bureau on Victims and Affected Communities reported that the Court had been sceptical about the proposal for a uniform system on which the States Parties have insisted:

[w]ith regard to victims' participation, both the Court and other stakeholders agree that there is a need to review the participation system with the aim of simplifying it.... While States Parties have expressed the need for a uniform system, the Court has stressed that it is up to the Judges within their judicial independency to choose the method of participation, bearing in mind the fact that the number of victims seeking to participate in the cases before the Court can vary greatly. Finally, it was proposed that discussions on victims' participation should continue, considering, *inter alia*, the issue of the stage of the proceedings at which the status of victims will be decided.³⁴⁵

The Court's position is understandable. As was shown previously, the ICC was unable to take a clear stance in its Report on the review of the application system on which one of the options presented therein was preferable. It is still testing the effectiveness and efficiency of each of the Chambers' experiments.³⁴⁶ Any attempt to hurry the Court out of the current experimental phase should take account of the dimension of the procedural and logistical challenges it faces. Since the assessment of the merits of specific approaches needs to wait until the completion of the relevant proceedings, it may take the Court longer to be able to draw credible and empirical conclusions about their performance. Arguably, the Court should be given sufficient room and time for making such assessments and deciding on the optimal approach based on the outcome of the experimentation by different Chambers.³⁴⁷ It is advised to tread carefully and opt for a specific approach only once it has discovered 'what works'. Without certainty about the scheme that deserves to serve as the basis for harmonization and about the reasons for which it is to be preferred to the alternatives currently on the table, a definitive move in a specific direction poses a significant risk of error. Given the need to preserve the stability of the ICC system to the extent possible, any steps entailing a drastic reform of victim participation system must be thoroughly considered. Because undertaking reforms and amending the course or restoring the *status quo* afterwards would seriously discredit the ICC, the 'measure thrice and cut once'

³⁴⁴ See also Report of the Court on the Revised Strategy in Relation to Victims, ICC-ASP/11/40 (n 50) para. 80 ('Overall, the Court must adapt to the unique aspects of each case and situation.').

³⁴⁵ Report of the Bureau on Victims and Affected Communities, ICC-ASP/12/38 (n 4) para. 10 (emphasis added).

³⁴⁶ See section 45.3.1.3, Judicial experimentation and review of the system. A major review is taking place and will be completed in the course of 2015. See Resolution on "Victims and affected communities, reparations and Trust Fund for Victims", ICC-ASP/13/Res.4 (n 338) para. 4.

³⁴⁷ VRWG Report (n 191) 7. The recent addition of the Ntaganda trial approach (*supra* n 157) attests that the Court's experimentation is anything but complete.

approach is to be favoured over hasty choices. What is needed is patience, resilience, and creativity in devising workable solutions, lest the valuable avenues that could be identified or validated experimentally would be foreclosed.³⁴⁸ Finally, in case the ‘harmonization’ agenda is pursued, it may only be ‘soft’ and allow room for reasonable flexibility in specific cases.³⁴⁹ The Court should be able and prepared to exercise ‘manual control’ until an acceptable uniform approach has been identified. It is only after a critical mass of experiential knowledge has been accumulated from the monitoring of different models that an informed deliberation would be possible in the areas in which harmonization is desirable or imperative and along which lines it must proceed.

45.4.2 Forging the way ahead

45.4.2.1 ‘Restorative complex’ of ‘retributive court’

In reflecting on the way forward, commentators and court monitors have expressed concern that further developments and reforms in respect of victim participation at the ICC will be resource-driven and be aimed at scaling it down from ‘what the drafters had in mind’.³⁵⁰ States have recognized that there exist objective practical, financial, and logistical constraints making the review and reform of the system pressing, while the Court has been acutely aware of ‘the difficult economic circumstances facing the global community’.³⁵¹ The zero-growth budget and the increasing donor-fatigue in the conditions of the world financial crisis make it unlikely that maintaining victim participation, as it currently exists at the ICC, would be possible in the near future, let alone expanding it further.³⁵² The proponents of victim participation believe that this way of looking at it is in itself a matter of concern.³⁵³ For them, the utilitarian or resource-driven approach leads to unprincipled concessions. It is a betrayal of the hope vested in the Rome Statute and weakens the ICC system as a whole.³⁵⁴

It can be agreed that budgetary constraints and logistical and financial challenges, daunting as they were, are a tenuous reason for giving up on the idea of meaningful and effective victim participation. Furthermore, it is true that before embarking on any reforms, it is imperative to arrive at a shared understanding of the goals and rationales of victim participation in the ICC process.³⁵⁵ But the pull towards a

³⁴⁸ See also ICC Report on the Review of Application System (n 42) para. 20 (‘The possible options identified in this preliminary report are not exhaustive and others not yet identified at this stage may also deserve consideration.’).

³⁴⁹ VRWG Report (n 191) 7 (‘considering that each situation or case will be different, with different crimes covered and challenges faced by victims, a certain degree of flexibility may need to be retained.’).

³⁵⁰ Ibid. (‘Each option should be considered on its own merits, financial considerations being only one of a number of objectives, the key one being to develop a system of meaningful participation as anticipated by the drafters of the Rome Statute.’). See also *supra* n 31.

³⁵¹ Report of the Court on the Revised Strategy in relation to victims, ICC-ASP/11/40 (n 50) para. 55.

³⁵² Report of the Bureau on Victims and Affected Communities, ICC-ASP/11/32 (n 32) para. 18.

³⁵³ VRWG Report (n 191) 7.

³⁵⁴ Pena and Carayon (n 14) 18 (‘If the debate is focused on patching up the side-effects of the current system, which has not allowed victim participation to reach its full potential, the risk of removing international justice further from the very persons and communities it is meant to serve runs high.’).

³⁵⁵ Pena and Carayon (n 14) 18 (‘Any effort to review or amend the victim participation system must first seek to understand the rationale and goals of victim participation’).

more streamlined, pragmatic, and outcome-oriented, or effective, system does not necessarily derive from the financial pressures alone—it can and should also be the result of the ICC learning a whole lot more about itself in light of experience. At this juncture, the Court should reflect on what rationales for participation can realistically be accommodated in the criminal process and which of them can be translated without loss of meaning into procedural language. The time is ripe for it to ask the right questions and to make fundamental choices: the Court is poised to decide which of the conceptual lenses—that of ‘retributive justice’ or that of ‘restorative justice’—enables a clearer vision for the institution, States Parties, and the victims and affected communities, and which distorts the idea about how the ICC procedural system works and generates unrealistic expectations that are a far cry from what a *criminal* court can deliver.

From the outset, the ‘restorative justice’ rhetoric has accompanied the development of the rights of crime victims under international law to obtain redress for the harm suffered; it also entered the international criminal law domain with the expansion of the procedural status of victims in the context of the ICC. The ‘restorative’ rationale was on the minds of the drafters of the ICC legal framework. It was also invoked by commentators when describing the purposes of *participation*, next to those of reparations under Articles 75 and 79.³⁵⁶ Therefore, it comes as no surprise that this ‘restorative justice’ discourse has entered the meetings of the Assembly and the corridors of the Court,³⁵⁷ although no uniform understanding of the concept has emerged. However, the validity of the parallel, let alone equation, between this paradigm and the ICC’s process is questionable; this rhetoric is fallacious and detrimental insofar as it misrepresents the nature of the ICC’s procedural system and feeds unreasonable expectations.³⁵⁸ Rather than a restorative justice institution, the ICC is more accurately described as a victim-friendly, yet essentially retributive justice, court.³⁵⁹ Leaving to one side the reparation system, which is yet to be put to service, there is hardly anything ‘restorative’ about the ICC’s day-to-day criminal justice work.

It is true that some aspects of the two paradigms of justice are comparable, in particular the emphasis on the truth. It is widely recognized—and not contested

³⁵⁶ E.g. S Fernández de Gurmendi and H Friman, ‘The Rules of Procedure and Evidence of the International Criminal Court’ (2001) 3 *Yearbook of International Humanitarian Law* 289, 312 (‘The Rome Statute moves away from the exercise of purely retributive justice to incorporate a new dimension of participation of and reparation to victims’).

³⁵⁷ E.g. Report of the Court on the Strategy in Relation to Victims, ICC-ASP/8/45 (n 20) para. 3 (‘A key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but also a restorative function. It reflects growing international consensus that participation and reparations play an important role in achieving justice for victims’).

³⁵⁸ Vasiliev (n 26) 675–9 (‘applying the “restorative” label to the ICC is inaccurate and engenders risk of overstating the ambit and purpose of the victim-serving function that the Court can reasonably be expected to fulfil’).

³⁵⁹ F Guariglia, ‘The Rules of Procedure and Evidence for the International Criminal Court: A New Development in International Adjudication of Individual Criminal Responsibility’ in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court* (Oxford: Oxford University Press 2002) 1128 (‘the ICC is a much more victim-oriented tribunal’ than the predecessors); Vasiliev (n 26) 677–8. Cf. Pena and Carayon (n 14) 6 (using ‘victim-oriented’ and ‘restorative justice’ concepts interchangeably).

here—that victims can make an important contribution to the establishment of the truth about the crimes, given their first-hand knowledge about the facts and socio-political and historical context.³⁶⁰ Their active involvement in the international criminal process benefits the victims themselves, the Court, and the affected communities in the long term. Regardless of their contribution to the process, victims are entitled to a responsive system that treats them with utmost respect and caters to their legitimate interests. However, this does not mean that it is justified to read the ‘restorative justice’ philosophy into the victim participation or that this paradigm can be engrained into the criminal procedure as it is enshrined in the Court’s constituent documents. The purposes and processes of restorative justice and those of retributive justice are too conceptually and practically remote to draw a deterministic link between the possible (occasional) restorative and healing effects experienced by individual victims and their active involvement in international criminal proceedings.

The asserted nexus between victim participation and the restoration of individual victims as well as whole societies was an element of the discourse within the Court and the Assembly. Thus, the ICC Revised Strategy in Relation to Victims states that ‘[v]ictims’ participation empowers them, recognises their suffering and enables them to contribute to the establishment of the historical record, the truth as it were of what occurred.... Moreover their participation in the justice process... is one step in the process of healing for individuals and societies.’³⁶¹ This conception prematurely adopts the idea of therapeutic jurisprudence.³⁶² At the micro-level of individuals, the court proceedings might have a healing and restorative effect, as some commentators tend to believe.³⁶³ While the processes can and should be improved and organized in such a way as to prevent secondary victimization, the healing and restorative effects of the courtroom experience are strictly individual and subject to variables which are difficult to account for in advance. Moreover, there is only some extent to which the criminal justice process, charged with its own functions, can pursue the objectives of personal restoration and empowerment of victims.³⁶⁴ Cathartic and therapeutic experiences of victims from giving testimony or expressing views and concerns in person are precious by-products of international criminal justice but they are neither mandatory nor regular outcomes. This uncertainty multiplies when one zooms out to the macro-level of communities: it is exceedingly difficult to ascertain to what extent individual proceedings contribute to the objectives of restoration and reconciliation

³⁶⁰ Jorda and de Hemptinne (n 19) 1388; REDRESS (n 10) 5; Independent Panel of experts report (n 22) para. 4; Pena and Carayon (n 14) 7–8.

³⁶¹ Court’s Revised Strategy in Relation to Victims, ICC-ASP/11/38 (n 20) para. 10.

³⁶² D Oluwu, ‘International Criminal Justice and the Promise of Therapeutic Jurisprudence’ <<http://www.aija.org.au/TherapJurisp06/Monograph%20Papers/4%20Oluwu.pdf>> accessed 17 March 2014, 63–5.

³⁶³ Pena and Carayon (n 14) 5 (‘justice should be restorative, as opposed to having a strictly punitive objective, and that in itself participation in the justice process could bring recognition to victims and be an important factor in their healing and rehabilitation’).

³⁶⁴ Ibid., 16–17 (‘ICC’s justice to be restorative, participation in the proceedings should empower victims rather than confine them to a position where others decide what is best for them’).

in the social group dimension. Both individual and far-reaching societal effects of legal proceedings are yet to be empirically ascertained and conflating those effects at the two distinct (individual versus collective) levels is unwarranted.³⁶⁵ The belief in the possibility of achieving restorative justice through victim participation at the ICC is unverified (like any other article of faith though).³⁶⁶

But the ICC's actual practice demonstrates that the 'restorative justice' rhetoric has had little, if any, impact on the operation of procedural modalities of participation, unlike the idea of victim-oriented retributive justice. While the expansive interpretations of victim status and 'personal interests' were not uncommon in the early years, the Court has been steadily drifting towards a more pragmatic model. The narrower interpretations and increasingly 'utilitarian' approach were occasionally lamented by some of the judges,³⁶⁷ but the 'restorative justice' rationales were given little space in judicial decisions setting the parameters of victims' procedural role before the ICC. The experimentation with collective forms of application and representation does not comport with the 'restorative justice' ideals that supposedly underlie victim participation. Participation does not occur for its own sake; on the contrary, the most 'meaningful' modes of active participation by the victims are always underpinned by a specific rationale: the determination of the truth. As noted, the Court has occasionally revealed insecurity about its 'utilitarian' attitude to the role of victim participants at trial; this 'restorative complex' is discernible, for instance, in the contradictory treatment by the Chambers of the opportunity for legal representatives to lead evidence relevant to the verdict.³⁶⁸ Like with this limited manifestation of the 'restorative complex', the Court should free itself from the same in other areas as well. The sooner it rediscovers itself as a victim-oriented yet retributive court constrained in the mandate and resources, as opposed to a 'restorative justice' organ, the faster it will arrive at workable procedural and administrative solutions in respect of victim participation. Likewise, the ICC's stakeholders are advised to abandon the 'restorative justice' think and embrace a more pragmatic, realistic, and earnest approach when it comes to the operation of the ICC procedural system. This would make it easier to manage the expectations, boosted too high in the first years of the ICC. It also offers a vision motivated by considerations other than trivial preoccupation with cost reduction. Victim participation is not to be pursued for the sake of its 'restorative' effects, the promise of which is elusive. Instead, it must be grounded in the functions of the criminal process and contributions victims can make to the discharge of those functions while pursuing 'personal interests' through participation—i.e. 'participation must be meaningful for victims but also for the purposes of the

³⁶⁵ J Doak, 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions' (2011) 11 *International Criminal Law Review* 263, 264.

³⁶⁶ E.g. Pena and Carayon (n 14) 18 ('We strongly believe that the ICC can deliver restorative justice to victims').

³⁶⁷ See e.g. *Bemba* dissenting opinion of Judge Steiner (n 262) paras 10–11.

³⁶⁸ See section 45.3.2.2, Leading and challenging the admissibility of evidence.

proceedings, in other words, to provide sufficient relevant information for the Judges, the parties and participants'.³⁶⁹

45.4.2.2 Optimal 'harmonization' and amendments

It may not be the right time to discuss the harmonization of standards and practices in detail while the Court is still testing some of the models that could indicate the avenues for any future reforms. A comprehensive appraisal should ideally proceed on the basis of a full cycle of judicial proceedings, and preferably in several completed cases. But the goal of harmonizing practice articulated by the Assembly and the views expressed by the representatives of States Parties in the joint facilitation of The Hague Working Group may already indicate the contours of possible reforms and set the agenda for strategic planning.³⁷⁰ This section therefore reflects on the directions the possible harmonization should take in light of how the system has functioned, as well as on the amendments to the legal framework necessary to enable reforms and consolidation of practice, if it is to be undertaken.

First of all, as noted, any harmonization of practice and standards across different Chambers must allow tailoring any 'default' approaches to the circumstances and demands of individual cases. Second, the selection of a specific model as the 'axis of harmonization' must not ignore the general direction in which the victim participation scheme has been developing. The Court's movement towards a more pragmatic procedural system has been endorsed by the Assembly and its Bureau on Victims and Affected Communities. Neither retaining the current system nor enhancing it as a way to amplify its restorative potential would be tenable, given the practical realities of delivering justice for crimes involving mass victimization and the essence of the ICC's criminal adjudication. Restorative ambitions must be tempered in part of the core criminal process (as opposed to its 'reparations add-on') and efforts intensified to manage the expectations among victims and affected communities. Accordingly, the basis for harmonization should reflect the most pragmatic, lowest common denominator standard found across the ICC Chambers. The harmonization model should maximize the effective and meaningful character of victim participation (both for the victims and for the Court) and to streamline it to the extent possible. The participation of victims in the proceedings will be meaningful to them only if it is also meaningful for the Court. For example, as Trial Chambers have held repeatedly, the role of victims at trial is to contribute to the truth-finding objective of the trial. The opportunities for the victims to lead evidence on the guilt or innocence, to participate in the questioning of witnesses, and to express their views and concerns have consistently been qualified by the obligation to ensure that these forms of participation contribute to the determination of the truth. This warrants a principled interpretation of 'personal interests' as those interests that are aligned and compatible with the functions of the criminal court.

³⁶⁹ Report of the Bureau on Victims and Affected Communities, ICC-ASP/12/38 (n 4) para. 10.

³⁷⁰ See section 45.4.1, Victim participation and the ASP: positions and action.

While the ASP endorsed a ‘predominantly collective approach in the system for victims to apply to participate’ in the past,³⁷¹ it is unclear what it actually meant under such an approach.³⁷² The Court’s practice provides several options that might fall under this description, including the ‘partly collective’ model used in *Gbagbo* and the ‘differentiated approach’ in the *Kenya* cases.³⁷³ Most certainly, the fully collective approach is not the only proposal on the table; the less drastic measures have been identified, are being tested, and might prove workable. The *Kenya* approach allows for the participation-oriented, rather than eligibility-driven, application process and ensures that the effort and resources invested in vetting the applications for participation are commensurate to the type of participation sought. The individual treatment must, to the extent possible, be reserved for the applications of those victims seeking individual and direct participation before the Chamber in order to present evidence or express views and concerns in person. This differentiated approach restricts the Rule 89(1) procedure to the applications for individual participation while channelling the applications of victims who wish to participate through a common legal representative via the simplified registration process. This solution holds a significant promise and its outcome would deserve close scrutiny. Objections have been made, from a practical perspective, that this avoids rather solves the problem, as nothing precludes large numbers of victims to choose to appear in person before the Chamber. But it is not implausible that this solution would prove workable in light of the experience in the cases thus far, where only a handful of victims requested to testify or present their views and concerns to the Chamber directly.³⁷⁴ Moreover, where a large number of victims wish to appear, the Chamber has a further possibility of making a selection among the relevant victims, as indicated by the *Ruto and Sang* and *Bemba* Trial Chambers.³⁷⁵ Such selection has been based on whether the proposed evidence is expected to contribute to truth-finding and whether the views and concerns the relevant victims requested to express in person reflect the ‘personal interests’ shared by a larger group of victims.

Another challenge posed by the *Kenya* approach is the system of legal representation and participation in which the common legal representatives and the OPCV distribute the tasks and responsibilities amongst themselves and are expected to operate in tandem. On its face, the system allows ensuring the real and meaningful representation of victims in the ICC proceedings—a local-based common legal representative with direct access to, and contact with, the victims who may appear during the critical junctures of the process and the OPCV representing him in the proceedings and serving as his eyes and ears in The Hague. It remains to be seen whether the combined scheme is viable despite foreseeable difficulties in ensuring an effective communication and coordination between the two tiers of representatives. The endorsement of this (or any other) approach does not mean that it is to be imposed on, and to be

³⁷¹ See n 336.

³⁷² VRWG Report (n 191) 5 (‘the term “collective” carries multiple meanings and is in itself a complex concept. A collective approach may be suitable only for some, but not all, victims....[T]here is a need for more reflection around what is meant by this term, and to whom it might apply’).

³⁷³ See section 45.3.1.3, Judicial experimentation and review of the system.

³⁷⁴ WCRO Report on application system (n 109) 53.

³⁷⁵ Ibid., 54. See also *Ruto and Sang* victim participation decision (n 126) para. 56; *Bemba* decision on supplemented applications (n 217) para. 22.

applied uniformly in, all cases. But provided that it proves effective, there exist no principled or practical reasons why it cannot be used in other cases, including those with relatively small numbers of victims (which will at any rate be rare at the ICC). Subject to all caveats, the *Kenya* approach—or, for that matter, the approach adopted for the *Ntaganda* trial—can in principle serve as the basis for any future harmonization of standards and practices.

This brings us to the question of possible amendments to the ICC's legal framework that would enable the necessary reforms to the victim participation system. The same issue has been considered by the Court in its review of the system and during the consultations in the Bureau. In affirming the urgency of the reforms, the Bureau recommended that:

the Court should not be inhibited by the existing legal framework of the Rules of Procedure and Evidence in analysing and proposing ways forward, some of which could require amendments to the existing legal framework. Furthermore, it was up to States Parties and the Court to progressively review the Rules of Procedure and Evidence in light of experience and lessons learnt. Some delegations expressed their preparedness to adapt the legal framework if, as a result of consultations, it was deemed necessary.³⁷⁶

Nonetheless, the issue of amendments has not been taken lightly by the Court, the Bureau, and States Parties. Any adjustments to the legal framework must be based on the solid assessment of practice, and this exercise is still under way. This cautious approach regarding the amendments should be—and has been—welcomed.³⁷⁷ At the same time, the Bureau,³⁷⁸ the Court,³⁷⁹ and observers³⁸⁰ have all recognized that the system can hardly be reformed without amending the RPE. While the nature of such amendments may vary depending on the specific proposal, under many of them Rule 89(1) would be an obvious candidate for review. In particular, this Rule will need to be modified in order to accommodate the ‘differentiated’ approach based on the collective processing and simplified registration of victim applications for participation. Such an amendment is indispensable in any event, as a way to provide a legal authority for the continued reliance on this approach in the *Ruto and Sang* case,³⁸¹ which was arguably adopted in violation of the Rule and *ultra vires* the Statute.³⁸² Similarly, if States Parties decide to reform the application system by making it fully collective, so that victims would be expected to apply and participate as groups or associations, the amendments to Rule 85 will be required, at a minimum.³⁸³

³⁷⁶ Report of the Bureau on Victims and Affected Communities, ICC-ASP/11/32 (n 32) para. 21.

³⁷⁷ E.g. VRWG recommendations to ASP-12 (n 6) 5 ('changes to the legal framework of the Court in relation to the participation of victims are premature and that any proposal to that effect must be preceded by a Court-led comprehensive evaluation of how the system has worked to date').

³⁷⁸ Report of the Bureau on Victims and Affected Communities, ICC-ASP/11/32 (n 32) para. 26 ('streamlining the processing of the applications in order to simplify the judicial oversight required for victims' admission as participants, in order to avoid undue delays and expedite the judicial process' would be enabled by an amendment of Rules 89 and 90).

³⁷⁹ See section 45.3.1.4, Court's review of the system and possible avenues.

³⁸⁰ E.g. Independent Panel of Experts Report (n 22) para. 6 (recognizing that changes to the RPE, Regulations of the Court, or Regulations of the Registry may be required to implement procedural recommendations proposed by the panel).

³⁸¹ WCRO Report on application system (n 109) 60.

³⁸² See section 45.3.1.3, Judicial experimentation and review of the system.

³⁸³ See section 45.3.1.4, Court's review of the system and possible avenues.

The Court also indicated in its Report on the review of the system for victims to apply for participation that amendments to Article 68(3) may be necessary to enable some of the possible reforms. However, the Article is sufficiently open-ended to accommodate any of the reforms currently under consideration (including the fully collective approach). At least, the provision has proven to be capacious enough to do without amendment in order to enable victims to lead evidence as to the guilt or innocence of the accused. While the vague character of Article 68(3) may have been a reason to propose its amendment at an earlier stage, it may seem paradoxical that now, when it is clear that the system is in need of reform, the ‘constructive ambiguity’ of this provision can turn into its greatest advantage. It allows avoiding the complicated process of amending the Statute under Article 121, which States Parties are unlikely to be willing to undertake in any event, at least in the near future.

45.5 Conclusion

Victim participation has been a major stumbling block for the Court and the issue that generated unprecedented academic and policy debates. What appears as the ICC’s immaturity, considering its slow progress in making victim participation sustainable, effective, and uniform, is explained by objective factors. The culprits are, first, the unprecedented legal and logistical challenges posed by the task of accommodating the procedural participation by potentially large numbers of victims and, second, the fundamental uncertainty about the rationales of such participation the judges were left with as a result of indeterminate law constructed through the unhappy marriage of diplomatic compromise and activism. The clarification of the exact parameters of the victim participation regime was bound to become a long-drawn-out process of trial and error. It was developed on a case-by-case basis and in light of issues and challenges posed by practice.

The assessments of the ICC’s performance in fleshing out the progressive but unhelpfully ambiguous statutory provisions on victim participation and in turning them into an operational regime are a mixed bag. The same holds for the reality of the ICC’s participatory regime as experienced by the victims in the growing number of cases and situations in the Court’s docket. The bulk of this chapter was spent on describing the hurdles faced by the Court in implementing the key aspects of that regime (application, participation at trial, and representation), the implications those have had for victim applicants and participants, and the corrective measures its organs have taken to make the system work. The Court deserves praise for the strenuous efforts and strides made by its judges, relevant sections of the Registry, and parties in developing, through creative experiments, and continuously improving the procedural solutions balancing the ‘meaningful’ and ‘sustainable’ participation. Experimentalism was the right attitude, especially in the absence of alternatives. However, innovations did not always work as expected. On occasions, the Chambers overtly strayed outside the ICC’s legal framework and failed to consult with victims on the key issues of organization of the application, representation, and participation process.

It is understandable why the Court’s policies in enabling and structuring the participation of victims have varied across cases. No one-size-fits-all framework that lends

itself to effective use in all cases could be developed. Some of the solutions devised by the Court are promising, given the need for, and imminence of, reforms of victim participation. The framework devised for the purpose of *Kenya* trials is particularly interesting. It employs both individual and collective approaches to processing the applications and enabling participation, which are used depending on the type of participation sought by the applicant. While not bereft of potential problems, this approach commends itself for its procedural pragmatism and, possibly, effectiveness in ensuring meaningful participation (which remains to be seen). It is participation-oriented rather than eligibility-driven and thus it could spare the victims, the Chamber, the Registry, and the parties from the inefficiencies of the individualized vetting procedure under Rule 89(1). Because most victims do not appear in person but participate exclusively through a common legal representative, allowing them to register as participants without going through the innervating formal application process corresponds to the scope of their actual participation. Nevertheless, the continued use of this approach calls for an amendment of Rule 89(1); its adoption obviated the clear language of the Rule and the justification by the Chamber for referring to Article 68(3) is legally problematic.

In the past two years, the sustainability of the system (belatedly) emerged as a governance matter of concern for the Assembly. It was only towards the end of the first decade of the Court that the question of viable procedural translations of its victim-servicing mandate moved higher up the agenda of the ICC's governing body. As the Court's relationship with the 'victim constituency' strikes at the heart of its effectiveness, the dimension of the problem of victim participation clearly transcends the procedural domain. Given the divergence and experimental character of the approaches to victim participation, the Assembly currently expects the ICC to harmonize its practices, most notably with regard to the application process. This agenda can only be realistic and timely if 'soft' harmonization is pursued that leaves room for flexibility and manoeuvre in light of the experience and challenges posed in specific cases. While the Court is testing different solutions by cut-and-try, the search for a singularly effective framework *in abstracto* is premature and misconceived, given the diversity of the present and future situations. A constant re-evaluation of the approaches adopted and 'manual control' may be needed to ensure the successful operation of the regime in light of the demands of specific cases. Legal uncertainty and inequality of treatment across cases and over time may be the downsides of this experimental phase, but they could be minimized by providing victims and affected communities with timely information and through effective outreach and engagement in situation countries. It is crucial for the Court to consult with victims, intermediaries, and representatives of the affected communities when assessing the impact of its decisions and policies on the ground.³⁸⁴ This is more likely to lead to effective and situation-sensitive modalities

³⁸⁴ See also Report of the Court on the Revised Strategy in Relation to Victims, ICC-ASP/11/40 (n 50) para. 83 ('The Court must constantly monitor and adjust strategies and messages in order to respond not only to judicial developments but also to local dynamics. To do so requires from the entire Court system immense flexibility, creativity and, at times, speed. Coordinated public information campaigns targeted at appropriate audiences often clear up (mis)perceptions and set the record straight'); VRWG recommendations to ASP-12 (n 6) 5 (arguing that discussions on victim participation should 'seek out

of facilitating the application, representation, and participation process that could serve as the possible basis for future reforms. Additional efforts should be invested in the outreach with a view to expectation-management, especially if and when structural changes are made. In turn, States Parties should remain closely involved and monitor the state of affairs in the domain of victim participation. Constructive dialogue and consultation with the Court are needed, as opposed to top-down ‘hard’ guidance.

Any further reflection on the practices that could be potential bases for harmonization should not be exclusively resource-driven. Instead, the principled consideration will be much facilitated if the cornerstone questions of the rationales behind the participation of victims in the process are squarely addressed. The scholarly and policy debates on victim participation have been overshadowed by the latent contestation between the ‘restorative justice’ and ‘retributive justice’ paradigms, which are competing for prevalence. The chapter argued that this quandary should be solved by the disavowal of the goal of achieving ‘restorative justice’ through victim participation (as opposed to reparations). When it comes to criminal procedure, the ICC is a ‘retributive’ court rigidly constrained in its mandate and resources, rather than an arm of restorative justice. The two justice philosophies are not easily combined. Hence, a coherent understanding of the reasons to allow for victim participation—and the workable scheme to enable it—will not emerge until the Court emancipates itself completely from what appears to be a ‘restorative’ complex. The review of the Trial Chambers’ interpretations of the role of victims and their legal representatives in respect of the key modalities of participation at trial undertaken in this chapter has shown that the Court is not significantly disturbed by that complex. Although some signs of conceptual unease have been detected, the Chambers have consistently viewed ‘meaningful participation’ in terms of its alignment with, and contribution to, the fundamental objectives of the criminal process, most notably the search for the truth.

Finally, it is clear that the victim participation system should and will be further improved and even substantially reformed. There is no capacity to continue implementing it as it currently exists, let alone expanding it any further, because with the growing docket it will only become more and more unwieldy. Conversely, it is equally true that victim participation is here to remain—it is long past the point of return for the ICC system. Since victim participation is not apt to be dismantled or taken away, as the more radical of its foes may have wished, there is only one avenue for the future: to intensify efforts in making it more sustainable and effective than it currently is.³⁸⁵ While it is the Court rather than the Assembly that will lead the way in that process, at least in the short term, it must not be left alone and should be able to count on the unwavering support of States Parties and major stakeholders.

relevant expertise and include consultations with relevant stakeholders, including victims themselves, NGOs and victims legal representatives’).

³⁸⁵ See also REDRESS (n 10) 8–9 (“This does not mean that victim participation is impossible or that it is not worth doing, if that were even an option for the sceptics to pursue....Further creativity must be deployed to strengthen a system which works in some respects but is underperforming”).

The Rome Statute's Regime of Victim Redress

Challenges and Prospects

*Conor McCarthy**

46.1 Introduction

In its judgment on reparations in the *Lubanga* case, a Trial Chamber of the ICC observed that ‘the reparation scheme provided for in the Statute¹ is not only one of the Statute’s unique features, it is also a key feature’,² and that ‘the success of the Court is, to some extent, linked to the success of its reparation system’.³ Despite its significance, over ten years since the establishment of the ICC a great deal of uncertainty continues to surround its regime of victim redress, which comprises both Court-ordered reparations and, it must not be forgotten, the support provided by the Trust Fund for Victims pursuant to the Fund’s independent mandate to provide ‘physical, psychological rehabilitation and/or material support’ to victims.⁴

There is uncertainty as to the legal character of the regime and the proper scope of its ambition. In particular, there is uncertainty as to how (or, indeed, even perhaps whether) the framework of international criminal law can provide an appropriate context within which the harm caused by the excesses of war or mass violence can be addressed given all of the specific problems to which redress in such circumstances gives rise. At the doctrinal level, it is unclear whether the advent of the regime may herald the development, over time, of something akin to a system of delictual liability under the Rome Statute predicated upon the crimes enumerated therein, or whether, more modestly, the role of the reparations regime is largely limited to a discrete procedural mechanism ancillary to criminal proceedings before the Court. The procedural and, to a lesser extent, institutional means by which

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¹ Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (‘ICC Statute’).

² Decision Establishing the Principles and Procedures to be Applied to Reparations, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2904, TC I, ICC, 7 August 2012, para. 177 (‘Lubanga reparations decision’); see also Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012, Lubanga, Situation in the Democratic Republic of Congo, ICC-01/04-01/06 A A 2 A 3, AC, ICC, 3 March 2015 (Appeals Chamber Reparations Judgment).

³ Id.

⁴ Regulation 49 of the Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3, 3 December 2005 (Fourth Plenary Meeting of the ASP) (‘TFV Regulations’). See also Rule 98(5) of the Rules of Procedure and Evidence, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A (adopted and entered into force 9 September 2002) (‘ICC RPE’).

reparations decisions will be made and implemented remains largely uncharted. Added to this, the relationship between the ICC's regime of victim redress and the heterogeneous patchwork of mechanisms and procedures for redress that exist (in theory and practice) at the domestic and international level remain to be resolved. These are just some of the complex and difficult questions that are beginning to be faced by the Court and the Trust Fund and the other various institutions involved in the Statute's regime of victim redress. Without purporting to offer definitive conclusions in respect of these issues, this chapter will seek to identify what, in practice, the key challenges have been (and are likely to be) in respect of the Statute's system of victim redress.

This chapter begins by sketching an overview of the Statute's framework of victim redress by way of essential background, before moving on to consider a number of the key substantive, overarching questions which face the regime. First, the chapter explores the character of the Statute's reparations regime, asking how the regime is properly characterized in legal terms. Does it create (or does it provide the potential for the creation of) a system of substantive individual secondary liability under the Statute or does it merely serve as a procedural adjunct to criminal proceedings before the Court? Second, the chapter identifies a number of key issues which arise in respect of the relationship between the Statute's regime of victim redress as a whole and national legal systems, in particular the question of complementarity and victim redress. It asks what lessons can be drawn from early practice and looks ahead to possible future developments. Third, the chapter focuses on the early challenges the Statute's regime of victim redress has encountered and identifies trends in its practice. The chapter concludes with some reflections on whether the regime, in view of the obstacles it faces and the practice to date, is in a position to weather the many challenges it is likely to encounter in the coming years.

46.2 Overview of Rome Statute's Regime of Victim Redress

The creation of a regime of victim redress within the framework of the Rome Statute was a novel, but controversial, feature of the Statute at the time of its creation. Agreement as to the inclusion of a regime of victim redress (and, indeed, the arrangements for victim participation more generally)⁵ were matters settled at a late stage in the negotiations preceding the Rome Statute. The form ultimately taken by the Statute's regime of victim redress reflects, in part, many influences, including the attitudes of states, the ILC's work on the topic, and, significantly, the lobbying of NGOs, in particular the victims' lobby which played an immensely active role during, and prior to, the Rome Conference.⁶ The regime of victim redress which eventually emerged at the culmination of the Rome Conference was, in consequence, not the result of some overarching

⁵ The ILC's Draft Statute for an ICC contained no provision for victim participation. See Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May–22 July 1994, UN Doc A/49/10.

⁶ For a detailed discussion of the drafting history of the Rome Statute see C McCarthy, *Reparations and Victims' Support in the International Criminal Court* (Cambridge: Cambridge University Press 2012) 48 ff.

'grand design' but was rather the amalgamated result of proposals which emerged from many different quarters.⁷

Following the ILC's groundwork on a draft statute, the Preparatory Committee for the Establishment of an ICC (which provided a forum for further discussions and negotiations between states prior to the Rome Conference itself) included various options on arrangements for victim redress within its proposals, in particular at the suggestion of the French delegation to the Committee.⁸ But even at the conclusion of the Preparatory Committee's work, proposals in respect of victim redress appeared only in bracketed form indicating that their inclusion was controversial for a number of delegations.⁹ Certain delegations, it appears, feared that the incorporation of a power to award reparations in respect of crimes under international law may implicate the responsibility of states and may eventually be used to make reparations orders against them.¹⁰ There was also a concern that the potentially enormous complexity of dealing with reparations in respect of crimes under international law may distract from the central purpose of the Court, namely the prosecution and punishment of those responsible for heinous crimes (a concern exacerbated by the fact that many judges inevitably come from legal traditions where questions of redress rarely form an element of criminal proceedings).¹¹ Ultimately, consensus about the creation of a regime of victim redress emerged at a late stage, just a few days before the conclusion of the Rome Conference,¹² a consensus which resulted from the strong support by certain, influential states (most notably, France and the United Kingdom, together with some support from the United States and Japan). This was combined with the intense and highly effective lobbying efforts of a broad coalition of NGOs active in the area of victims' rights. It was all of this which culminated in the establishment of the Statute's victim redress arrangements.

In its final form, the regime provides for the possibility of redress in respect of the harm suffered by victims of crimes within the jurisdiction of the Court, including genocide,¹³ crimes against humanity¹⁴ and war crimes.¹⁵ When the Court has jurisdiction in respect of the crime of aggression, the reparations regime and the power of the Trust Fund to provide victim support will also arise in this context. As noted earlier,

⁷ For a detailed discussion of the negotiating history of the Rome Statute's reparations regime and the development of proposals relating to the Trust Fund for Victims, see O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court—Observers' Notes, Article by Article* 2nd edn (München: C H Beck 2008 1399 ff (on reparations) and 1439 (on the Trust Fund for Victims). See also R Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International 1999) 262ff (on reparations) and 319ff (on applicable penalties).

⁸ See e.g. French proposal to PrepComm regarding Art 45bis (the forerunner of Art 75), UN Doc A/AC.249/1997/WG.4/DP.3 (5 December 1997).

⁹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of Proposals), UN Doc A/51/22 (1996) 224, para. 3.

¹⁰ See C Muttukumara, 'Reparations to Victims' in Lee (n 7) 264.

¹¹ Id.

¹² See Report of the Working Group on Procedural Matters, UN Doc A/CONF.183/C.1/WGPM/L.2/Add.7 (13 July 1998), 5. A number of earlier proposals on the question of reparations were introduced in the course of the Conference by various delegations, including UN Doc A/CONF.183/C.1/WGPM/L.63 (8 July 1998); UN Doc A/CONF.183/C.1/WGPM/L.63/Rev.1 (11 June 1998); and (proposal by the United States delegation) UN Doc A/CONF.183/C.1/WGPM/L.69 (10 July 1998).

¹³ Art 6 ICC Statute.

¹⁴ Art 7 ICC Statute.

¹⁵ Art 8 ICC Statute.

the Statute's regime of victim redress encompasses two distinct elements, namely the power of the ICC to award reparations to victims of crimes within its jurisdiction and the capacity of the Trust Fund for Victims to provide support to such victims outside the context of court-ordered reparations'.¹⁶

The powers of the Court with regard to reparations are principally dealt with in Article 75 of the Statute. Article 75(1) empowers the Court to 'establish principles relating to reparations to, or in respect of, victims including restitution, compensation and rehabilitation'. Based on such principles, the Court may award reparations to victims. The Court's power to order reparations is set out in Article 75(2), which stipulates that '[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims'. As well as deriving resources for reparations from a convicted person by way of a reparations order pursuant to Article 75(2), resources may also be derived from fines imposed pursuant to Article 77(2)(a) and from '[a] forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties'.

The Trust Fund created by Article 79 of the Statute is a further crucial element of the Rome Statute's regime for victim redress. Money and other property collected through fines or forfeiture may be transferred to the Trust Fund by order of the Court.¹⁷ In addition, the Trust Fund may receive voluntary contributions from a range of sources including 'governments, international organizations, individuals, corporations and other entities'.¹⁸ Resources derived from voluntary contributions to the Trust Fund may be used to supplement resources available for Court-ordered reparations and the Trust Fund may also play a role in the design and implementation of reparations awards.¹⁹ However, a further crucially important aspect of the Trust Fund's mandate is the provision of support to victims outside the context of court-ordered reparations. Such support may be provided prior to the issuance of a reparations order by the Court against a convicted person in a given situation and may be provided to victims including those not eligible for reparations.²⁰

Given the negotiating history of the Statute, it is clear that the regime that eventually emerged from negotiations was the result of a confluence of different interests, agendas, and concerns. Unsurprisingly, therefore, it bears the hallmarks of compromise, more perhaps than it reflects a planned, overarching scheme for redressing the human consequences of mass violence. Indeed, this is perhaps implicitly acknowledged by the fact that the drafters of the Statute have left to the Court itself the task of 'establishing' reparations principles pursuant to Article 75(1) of the Statute, in many ways leaving it to the Court to bring the regime to life. The Court's challenge, then, in its developing practice in respect of victim redress is to bring to fruition the regime

¹⁶ Rule 98(5) ICC RPE provides the Trust Fund with the general power to use resources, other than those collected through fines, forfeiture, or reparations, 'for the benefit of victims'. See also Chapters I and II TFV Regulations.

¹⁷ Art 79(2) ICC Statute.

¹⁸ Regulation 21(a) TFV Regulations.

¹⁹ See Chapters II–V TFV Regulations. See also Chapter VIII.

²⁰ See Regulation 50 TFV Regulations. See also Chapter VIII.

and its disparate elements in a coherent and practicable way. Without doubt, this is not an easy task.

46.3 The Character of the Rome Statute's Reparations Regime

The notion that individuals may bear individual criminal responsibility for crimes under international law is axiomatic. In perhaps the most famous passage of its judgment, the International Military Tribunal at Nuremberg ('IMT') declared that 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.²¹ The idea that from individual criminal responsibility, secondary responsibility for reparation also arises is undoubtedly attractive. As Christian Tomuschat observes:

If the author of a [grave] crime is responsible for an act characterised by international law as unlawful, all arguments seem to favour a right for the victim or persons claiming through the victim to obtain reparation for the damage caused and a corresponding obligation to do so on behalf of the author of the crime.²²

But, as Tomuschat notes, there is no logically inevitable relationship between primary responsibility and an obligation to make reparation.²³ Despite it being long established that individuals bear criminal responsibility under international law historically, no obligation has been imposed on perpetrators to provide reparation to their victims.

The ICC's reparations regime departs from this approach. The parameters of the regime, however, remain unclear. In particular, it is unclear whether the regime is substantive or procedural in scope. Does the Statute create a regime whereby the Court merely has power to order a perpetrator to provide reparations pursuant to Article 75(2) (with the reparations principles established by the Court being limited to the management of reparations in cases before the Court) or, more ambitiously, may the Court recognize an obligation to provide reparation between individuals as part of the Court's power to 'establish principles relating to reparations' pursuant to Article 75(1) of the Statute?²⁴ Whereas the former view merely sees the Court's reparations regime as essentially being a procedural adjunct to criminal proceedings, the latter is more akin to a system of individual delictual liability in respect of crimes under international law,

²¹ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946* vol. I (International Military Tribunal 1947) 223.

²² C Tomuschat, 'Private Individuals' in J Crawford et al. (eds), *The Law of International Responsibility* (Oxford: Oxford University Press 2010) 321.

²³ C Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press 2008) 355.

²⁴ It should be noted that the idea of an international court with the power to make orders binding upon individuals is incredibly unusual. It does seem fairly clear, at the very least in the context of reparations, that the ICC does have this power. Not least given that Art 75(2) of the Statute expressly provides that the 'Court may make a reparations order directly against the convicted person'. See also M Milanovic, 'Is the Rome Statute Binding Upon Individuals? (And Why We Should Care)' (2011) 9 *Journal of International Criminal Justice* 25.

albeit one ultimately premised on the criminal responsibility of perpetrators. In the Lubanga Reparations Judgment, the Appeals Chamber took the view that ‘reparation orders are intrinsically linked to the *individual* whose criminal liability is established’ (para. 67). But there is no consensus in the literature on the issue. Some have welcomed the creation of the regime as potentially heralding the development of a system of individual civil responsibility under international law, at least within the framework of the law of the Rome Statute. Others have adopted a more cautious approach.²⁵

As to the first of these possibilities, the language adopted in Article 75,²⁶ in particular the use of the term ‘principles’ (as opposed to terms such as ‘laws’ or ‘rules’), does not perhaps readily lend itself to the conferral of a power upon the Court to establish general hard-edged obligations that are binding upon individuals. The term ‘principle’ is defined in the Oxford English Dictionary as ‘a fundamental... proposition that serves as the foundation for a system of... behaviour or for a chain of reasoning’. Thus, on a narrow interpretation, the power to establish ‘principles’ connotes a power to lay down propositions guiding the way in which the Court itself exercises its power to order reparations against a perpetrator pursuant to Article 75(2). This narrow interpretation is perhaps supported, contextually, by the structure of Article 75(1) itself, which provides that on the basis of the principles the Court establishes, it may ‘determine the scope and extent of’ harm to victims ‘and will state the principles on which it is acting’, indicating perhaps that the role of the principles is merely to guide the Court in the exercise of its own power. One further supporting point in this regard, is that although the Court is *obliged* to establish reparations principles, it has *discretion* as to whether to award reparations to victims under Article 75(2). As Christian Tomuschat notes, the conferral of a discretionary power upon the Court sits ill-at-ease with the notion that there exists, or could be brought into being by the Court, an obligation incumbent upon all perpetrators of crimes within the jurisdiction of the Court to make reparation to victims.²⁷ In summary, on this view, the obligation on perpetrators to provide reparation to victims would only arise where it is expressly imposed by the Court pursuant to Article 75(2) of the Statute and would not exist outside the context of such an order.

A broader, more ambitious interpretation of Article 75 is also conceivable, under which the Court, through ‘establishing principles relating to reparations to, or in respect of, victims’, may recognize an obligation incumbent upon perpetrators to provide reparations to victims of crimes within the jurisdiction of the Court (even where such an obligation did not arise from an order made by the Court itself pursuant to Article 75(2) of the Statute). This interpretation would necessarily give a broader reading to the term ‘principles’ so as to allow for the possibility of the recognition of

²⁵ Tomuschat (n 22) 322, raising the question of whether ‘[g]iven the discretion that the Court enjoys [in making a decision to order a perpetrator to provide reparations], it might be asked whether [Art 75 of the Rome Statute] is a reflection of civil responsibility in the proper sense of the term’.

²⁶ It will be recalled that in accordance with Art 31 (1) of the VCLT, ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. VCLT (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

²⁷ Tomuschat (n 22) 317.

a principle of liability as between perpetrator and victim with regard to reparation. Inevitably, such a principle would have to be sufficiently nuanced in formulation to allow for the essentially discretionary nature of the Court's power to order that a perpetrator make reparation. A broader interpretation may also be supported by aspects of the language of Article 75(1). The ordinary meaning of the term 'establish' connotes the conferral of a power 'to fix, settle, institute or ordain permanently' or 'to set up on a secure or permanent basis'.²⁸ This plainly allows the Court to bring into being *new* principles or principles which have not previously been firmly established in the field of international criminal law (subject, of course, to the limits imposed by the Court's overall jurisdiction). Allied to this, the Court is obliged to establish principles relating to reparations to or in respect of victims. There is nothing in the text of Article 75 which requires the Court only to establish principles in respect of victims of the crimes prosecuted before the Court.²⁹ The ordinary meaning of the wording appears broader than this. Indeed, were the scope of the Court's reparations principles limited merely to regulating and managing the exercise of its power to make a reparations order, it may be said that Article 75(1) would be largely otiose, since the Court would plainly have the power to set out principles as to how and when it exercises one of its statutorily conferred powers. This is simply part and parcel of the judicial function and not something that would require specification in the Statute. All of this may be invoked in favour of a broader interpretation of the Court's power to establish reparations principles.

The decisions on reparations in the *Lubanga* case did not purport to lay down any general principles, outside those necessary for the Court to deal with reparations in the case at hand. This cautious approach is plainly not to be criticized, but does not necessarily indicate that a broader approach could not be adopted in future. Going forward, however, the question is not of insignificant importance. If the narrow interpretation posited is correct (and there are undoubtedly powerful arguments in support of it), then the ICC's reparations regime cannot be seen as a true system of secondary liability (albeit one contingent upon criminal responsibility) as some have contended. Its role and potential for development would be much more modest.

Whichever of these accounts of the Rome Statute's reparations regime is to be preferred, important practicalities must not be overlooked. In reality, the reasons which underlie the failure of post-conflict victim redress at the domestic level have little to do with the absence or insufficiency of obligations at the international level. A variety of other factors explain why it is commonplace for victims in the aftermath of armed conflict to find themselves without redress for the harm inflicted upon them.

First, a state that is unwilling or unable to prosecute or punish those who bear responsibility for crimes within the jurisdiction of the Court is, for many of the

²⁸ *The Oxford English Dictionary* vol. III (Oxford: Clarendon Press 1933) 297.

²⁹ It is notable in this regard that in Resolution ICC-ASP/10/Res.3, 20 December 2011 (Seventh Plenary Meeting of the ASP), the ICC ASP invited the Court to pre-establish principles relating to reparations.

same underlying reasons, likely to be equally unwilling to acknowledge the victim-hood of those harmed by the atrocities in question. This may manifest itself in a refusal either by the state itself to provide redress to victims where it bears responsibility, or it may manifest itself through the state and its courts failing to facilitate the provision of redress against perpetrators or non-state actors through the civil justice system (or through *partie civile* proceedings in civil-law jurisdictions where they operate in the context of criminal trials). There are numerous examples of conflicts in which just as the prospect of criminal prosecutions has been politically inconceivable, so too is the prospect of redress for victims unthinkable. Where national reparations schemes are established, it is almost invariably only following a change in political dispensation or, at the very least, during the period of transition that victims can obtain reparations. Examples include national post-conflict or post-repression reparations programmes in Argentina (in respect of the junta period between c. 1976 and 1983); Chile (relating to atrocities committed in the period 1973–90); Brazil (relating to arbitrary killings perpetrated in the junta period between 1964 and 1985); and Malawi (concerning the period 1964–94).³⁰

Malign factors do not, by any means, always underlie the failure of victim redress. A second reason for the absence of reparations in post-conflict situations is equally often the impecuniosity of the state concerned or perhaps a political desire to expend resources and energy on development and reconstruction rather than expending resources and efforts providing redress for past wrongs. An illustrative example is provided by post-apartheid South Africa. In the aftermath of apartheid, the major problem facing that country was not the willingness of authorities to provide programmes for redress to those who had been victimized (many of whom were, after all, by that time in the government of the state itself), but rather the central dilemma was the state's inability to provide redress. The scale of the task facing the government was immense. As explained by South Africa's Justice Minister, Penuell Maduna, in a submission to the United States Courts as part of the apartheid litigation occurring within that jurisdiction, '[i]n addition to institutionalising enforced racial segregation, and denying the majority the franchise, the apartheid system sought systematically to exclude most South Africans from access to adequate education, health care, housing, water, electricity, land and communications, while likewise excluding it from proper participation in the economy'.³¹ Large-scale reparations programmes to redress the consequences of such acts would have meant taking resources from the public, the majority of whom were themselves victims of violations perpetrated by the former regime and, in many cases, returning these resources in the form of redress to much of the population from whom they came, thereby diverting resources from pressing economic development activities at a time when development and job creation were essential.

³⁰ See generally P de Greiff (ed.) *The Handbook of Reparations* (Oxford: Oxford University Press 2006).

³¹ Declaration by Penuell Maduna, Justice Minister of the Republic of South Africa, on Apartheid Litigation in the United States, 11 July 2003 <<http://www.nftc.org/default/ussabc/Maduna%20Declaration.pdf>> accessed 25 July 2014.

46.4 The Failure of Victim Redress at the National Level: Reparations and Complementarity

It is often observed that the ICC's role in relation to the prosecution of crimes within its jurisdiction is necessarily subsidiary to that of national legal systems. The ICC has neither the resources nor capacity to play the primary role in prosecuting and punishing those responsible for mass-scale events. In the context of victim redress, this is all the more true. Dealing with reparations on a case-by-case basis before the Court will almost inevitably result, to a greater or lesser extent, in a fragmented and piece-meal response to mass-scale harm involving different, potentially quite fractionalized groups of perpetrators and victims drawn from different communities caught up in conflict. The ICC itself, with its focus on the prosecution of those most responsible, can do little more than deal with a relatively small element of the harm caused by crimes under international law occurring in a conflict. If a coherent approach to addressing the harm caused by conflict is to be adopted, then it is essential for a national response to reparations to be developed, where possible, at some point. What role, then, if any, can the Rome Statute play in promoting or encouraging victim redress at the domestic level?

A similar issue arises in respect of the prosecution of crimes within the jurisdiction of the Court, and a gargantuan literature has developed seeking to explain, evaluate, and critique the idea of 'complementarity' in the context of the prosecution of crimes within the Court's jurisdiction.³² The theory has been posited that the ICC's regime for the prosecution of crimes within the jurisdiction of the Court may catalyse the prosecution of conduct amounting to such crimes at the national level.³³ Whether the Rome Statute is capable of producing such effects (something which must, on any view, be highly context-dependent)³⁴ is a controversial and open question.³⁵

Despite the controversy, a framework for 'complementarity' has been put in place in respect of the prosecution and punishment of crimes under the Rome Statute. As is well known, the primary responsibility for the prosecution and punishment of crimes within the jurisdiction of the Court lies with national authorities. Where the Court has jurisdiction, a case before the ICC is inadmissible, by virtue of Article 17, where a State has investigated, is investigating, or has tried an individual in respect of the conduct subject to the complaint unless the State is unwilling or unable to do so genuinely.

³² See C Stahn and M Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press 2011); J Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford: Oxford University Press 2008); D Robinson, 'Three Theories of Complementarity: Charge, Sentence or Process?' (2012) 53 *Harvard International Law Journal* 85; D Robinson, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 *Criminal Law Forum* 67.

³³ The concept of complementarity has varyingly been described as, in theory, having the potential to catalyse compliance as, *inter alia*, a legitimating process; as a sanctioning process; as a managerial process; and as a process of norm internalization. See Kleffner, (n 32) 309 ff.

³⁴ S Nouwen and W Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941.

³⁵ See S Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press 2012).

In contrast, in the context of reparations, there is no overt mechanism by which the Court, when determining whether a case is admissible, can consider whether and the extent to which a state has facilitated the provision of redress for victims at the national level. The primary focus of the Statute's admissibility provisions set out in Article 17 is (unsurprisingly) on the prosecution and punishment of grave crimes within the jurisdiction of the Court and not with arrangements for victim redress or, specifically, the question of whether *bona fide* efforts have been made to facilitate the remedying of the harm suffered by victims as a consequence of such crimes.

The question arises, then, as to whether there is any room for the Statute's provisions relating to complementarity to be interpreted and applied by the Court or, where relevant, the ICC OTP in a manner which is not limited purely to the questions relating to the prosecution and punishment of crimes at the domestic level, but which also takes cognizance of arrangements (or lack thereof) to facilitate victims in obtaining redress in respect of crimes within the jurisdiction of the Court. To date, the practice of the Court in its decisions on admissibility has focused, almost exclusively, on domestic processes for the prosecution and punishment of crimes. In none of its decisions examining domestic responses to crimes under international law at either the 'situation'³⁶ or 'case' stages³⁷ of proceedings, whether in admissibility decisions under Article 17 or the authorization of an investigation by the Court pursuant to Article 15, has the existence or absence of national programmes for victim redress or measures to facilitate victims in obtaining redress featured, even as a subsidiary matter.

As regards the prosecutorial decision to initiate an investigation in accordance with Article 53, the existence of national reparations do not seem to feature much more prominently. Alongside the power of the Court under Article 17 to consider the existence or character of reparations at the domestic level, the OTP could also take the existence or otherwise of national reparations programmes into account in considering whether to initiate an investigation in accordance with Article 53 of the Statute. Article 53(1) of the Statute states:

The prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:... (c) [t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

There is, however, an indication that the OTP is alive to the potential for national reparations arrangements to form part of the assessment of whether it is in the 'interests of justice' to proceed with an investigation and, if appropriate, prosecution. In

³⁶ E.g. when the Court is considering whether to authorize the prosecutor to investigate a situation pursuant to Art 15 ICC Statute. See e.g. Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01-09-19-Corr, PTC II, ICC, 31 March 2010.

³⁷ See Decision by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Art 19 (2) (b) of the Statute, *Muthaura et al., Situation in the Republic of Kenya*, ICC-01/09-02/11-96, PTC II, ICC, 30 May 2011.

its *Policy Paper on the Interests of Justice*, the OTP noted the existence of alternative forms of justice in respect of mass atrocities other than individual punishment. It observed that '[a]ll approaches can be complementary' and listed alternative justice mechanisms including national reparations programmes as a 'potential consideration' under Article 53, when determining whether it is in the 'interests of justice' to prosecute. The position paper further observed that OTP 'fully endorses the complementary role that can be played by...reparations programs...in the pursuit of a broader justice. The Office notes the valuable role such measures may play in dealing with large numbers of offenders and in addressing the impunity gap'.³⁸ The significant bulk, however, of the OTP's policy position is concerned with the interests of justice test, as it applies to prosecution and punishment at the national level rather than the relationship between the interests of justice concept and alternative justice schemes such as reparations. Moreover, in its general 2003 policy position, entitled *Paper on Some Policy Issues before the Office of the Prosecutor*, dealing, *inter alia*, with complementarity, the relevance of national reparations schemes was not addressed.

Thus, in the practice of both the trial chambers of the ICC and the OTP, reparations have generally not been approached as a significant element in the interpretation and application of the provisions of the Statute relating to complementarity. This, however, is not an approach necessitated by the terms of the Statute. In appropriate cases, the Court could quite properly have regard to the existence (or lack thereof) of reparations programmes at the domestic level. This is clear from the text and ordinary meaning of Article 17. It will be recalled that, under Article 17(1), cases before the Court are inadmissible where the national authorities have investigated a case and decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability genuinely to instigate and prosecute the case. Article 17(2) of the Statute provides:

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether...the national decision [not to investigate or prosecute] 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.

Article 17 of the Statute undoubtedly affords discretion to the Court to take into account reparations programmes (and indeed, other transitional justice mechanisms) in determining whether a State Party's 'national decision' not to prosecute and punish all (or perhaps even the majority) of perpetrators is indicative of an effort to 'shield' perpetrators from criminal responsibility. As the OTP's Policy Paper on the interests of justice implicitly recognizes, a range of different purposes may underlie a decision not to prosecute and punish certain categories of case, other than an attempt to shield a perpetrator.

With regard to crimes under international law, a key challenge faced by criminal justice processes dealing with such crimes, is that they often involve mass-scale conduct perpetrated by many individuals, at times even involving persons who

³⁸ Policy Paper on the Interests of Justice, OTP, September 2007, 7–8.

collectively comprise a substantial section of society as a whole. This is illustrated nowhere more vividly than Rwanda where, in the years immediately following the genocide, approximately 100,000 individuals were detained and prosecuted for crimes associated with it.³⁹ Such was the scale of participation that the Rwandan authorities considered it necessary to establish the *Gacaca* judicial process, an adaptation of customary Rwandan forms of justice. But in the months following its establishment, rather than providing swift closure, *Gacaca* in fact revealed an almost unimaginable level of genocidal participation, with estimates suggesting that perhaps a million individuals (in a country with a population of around seven million) were implicated in the genocide.⁴⁰

In such situations, the investigation, prosecution, and punishment of every transgressor will often not be feasible. The cost of investigating and prosecuting every crime may be enormous, imposing a significant burden on a conflict-affected country perhaps unable to provide basic public services including running water and housing. Perhaps most importantly, a political cost may be associated with post-conflict prosecutions. In a society transitioning from conflict, the need to move beyond past events may arguably render the prosecution of all of those bearing a degree of criminal responsibility undesirable. Such processes may take many years and perhaps make it difficult to move an ongoing peace process forward. Although such factors are inevitably highly context-dependent, the punishment of individual perpetrators often provides only partial means of administering justice in respect of crimes under international law and, in such situations, arrangements for victim redress can have a significant role to play.

There are principled reasons, too, why the use of programmes for victim redress rather than punitive measures against certain categories of perpetrator may still genuinely serve purposes of criminal justice. It has long been recognized that criminal justice processes may be understood in expressivist terms.⁴¹ Reparations arrangements, like criminal injuries compensation schemes at the national level, can be seen as part and parcel of the response to crime by the criminal justice system as broadly understood, enabling the authoritative disavowal of criminal conduct as well as the vindication of the law and the rights of victims. From a principled standpoint, therefore, retribution involving the prosecution and punishment of perpetrators is not the only means by which criminal justice can be conceptualized or understood, or by which societal censure and the disapproval of criminal conduct can be given expression.⁴² As Joel Feinberg, one of the leading social philosophers of the twentieth century, notes,

³⁹ Report on the Situation of Human Rights in Rwanda Submitted by the Special Representative, Mr Michel Moussalli, Pursuant to Resolution 1998/69, Commission on Human Rights, Fifty-Fourth Session, UN Doc E/CN.4/1999/33, 8 February 1999.

⁴⁰ See A Meldrum, 'One Million Rwandans to Face Killing Charges in Village Courts', *The Guardian*, 15 January 2005; J Fierens, 'Gacaca Courts: Between Fantasy and Reality' (2005) 3 *Journal of International Criminal Justice* 896.

⁴¹ J Feinberg, 'The Expressive Function of Punishment' in J Feinberg (ed.), *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton University Press 1970) 95.

⁴² For further consideration of the role of international criminal justice and the role of reparations therein, see C McCarthy, 'Victim Redress and International Criminal Justice: Competing Paradigms or Compatible Forms of Justice?' (2012) 10 *Journal of International Criminal Justice* 351.

'[t]o say that the physical treatment [of punishment] itself expresses condemnation is simply to say that certain forms of hard treatment have become the conventional symbol of public reprobation'.⁴³ Although individual punishment is the conventional means by which recognition or denunciation may be given expression, there is no *a priori* reason why this must be so. A wide range of other mechanisms can also serve this purpose. For its part, victim redress can provide an authoritative pronouncement that the conduct to which the victim was subjected was a specific, and particularly grave type of wrong, namely a crime under international law.

In short, from both a principled and pragmatic standpoint, there may be occasions where it is entirely proper for the ICC to have regard to the existence or otherwise of reparations schemes at the national level as part of an assessment of whether cases are admissible before the Court. *Bona fide* efforts by a State to instigate reparations could also be a significant factor in the decision by the OTP as to whether it is in the 'interests of justice' to initiate an investigation in accordance with Article 53 of the Statute, perhaps particularly in situations where mass violence had occurred and the state had shown willingness and ability to prosecute perpetrators thought to bear most responsibility. As the post-genocide situation in Rwanda illustrates, in the aftermath of mass violations, it may be neither possible nor perhaps desirable to prosecute all those bearing a degree of criminal responsibility. To date the Trial Chambers dealing with questions of complementarity, either initially when authorizing an investigation by the Prosecutor or when determining the admissibility of cases pursuant to Article 17, have not considered the unavailability of redress at the national level or the lack of national reparations mechanisms as a factor of significance. While the OTP has referred to the potential relevance of reparations in the application of the interests of justice test pursuant to Article 54, overall the practice of the Court and its institutions to date has not been to treat reparations as an integral or important part of the Statute's complementarity regime. It remains to be seen whether, as the reparations regime of the Court develops, questions of reparations will be 'mainstreamed' within the Court's approach to complementarity or whether the regime for victim redress develops very much as an ancillary adjunct to criminal proceedings before the Court as suggested by the Appeals Chamber Reparations Judgment.

The ICC Trust Fund, and its victim support mandate, could also have a role to play from the perspective of complementarity. Inevitably in the aftermath of conflict a state may lack the resources or infrastructure (indeed, perhaps even the expertise) to put in place arrangements for reparations, such as rehabilitation facilities for victims, medical support, counselling, or micro-credit initiatives for those whose livelihood has been destroyed by, for instance, looting or wanton destruction. Many post-conflict states simply lack the resources to provide redress to victims. Appealing to the generosity of states (and other potential contributors) may, in some ways, provide a more effective means of acquiring resources for victim redress than relying solely on the imposition of responsibility which, in any event, may well be impecunious in the aftermath of armed conflict. Processes for the allocation of responsibility (whether that of individuals, organizations, or of the state itself) are often long, drawn-out,

⁴³ Id.

and laborious, with the result that victims may wait years to obtain redress. Equally importantly, it will be recalled, for example, that in the aftermath of apartheid, the major problem facing that country was not the willingness of authorities to provide programmes for redress to those who had been victimized (many of whom were, after all, by that time in the government of the state itself), but rather the central dilemma was the state's inability to provide redress. Through providing a conduit and facility by which willing States can channel support for victims, the Trust Fund could play a significant role in supporting arrangements for redress at the national level. The difficulty, however, in practice which the Trust Fund has faced has been the relatively modest resources which States Parties have to date put at its disposal for use in victim support or reparations arrangements. Annual contributions to the Trust Fund (which may receive funds not just from States Parties, but also from individuals and organizations) has fluctuated a good deal year-to-year since the establishment of the Fund. In general, contributions have ranged from around €500,000 to €1.5 million.⁴⁴ Fund balances are generally in the region of around €2 to 3 million.⁴⁵ While these funds are not trivial and have, in practice, been sufficient for targeted intervention in redressing the harm suffered by victims before the Court, the sums placed at the disposal of the Trust Fund by States Parties has been relatively modest. A number of states have been generous in their contributions, but many have made no contribution at all. It remains to be seen whether, as the profile of the Fund increases and it establishes a track record with States Parties, contributions will increase, enabling the Fund to have a much broader and deeper impact.

In view of this, there are strong arguments in favour of a regime of victim redress which is not developed in isolation from national legal systems, but which operates effectively alongside such systems. Although there is no overt complementarity framework created in the provisions of the Statute, there is absolutely no reason, where appropriate, the existence of reparations programmes at national level (or lack thereof) cannot be taken into account by the Court and the OTP in decisions relating to complementarity. To date, questions of victim redress have not been integrated to any great extent into decision-making in relation to complementarity. There is certainly scope for this, and as the Statute's regime becomes more established, it will perhaps be desirable for victim redress to be 'mainstreamed' within the overall complementarity framework of the Court.

46.5 Early Trends: Towards a More Flexible System of Victim Redress?

The practice of the Court in respect of reparations and victim support in its early years has been very limited. The *Lubanga* case resulted in the Court's first determination on reparations in 2012, almost a decade after the creation of the Court. The Secretariat of the Trust Fund for Victims was established in Resolution ICC-ASP/3/Res.7 on 10

⁴⁴ See e.g. Financial Statements for the Period 1 January to 31 December 2007, ICC-ASP/7/20 (Seventh Session of the ASP), 338.

⁴⁵ Ibid., 335.

September 2004 and its victim support programmes began in earnest the following year. The regime is plainly at a very early stage in its development; however, the overall trend at present appears to be a move away from the procedural rigidity which seems apparent in the Statute and, particularly, the Rules of Procedure and Evidence to an approach characterized by a much greater degree of flexibility. There are three particular ways in which this is apparent: first, the Court, in *Lubanga*, signalled a move away from the applications-based approach to reparations; second, there appears to be a move away from an individualized to a more collective approach to reparations; and third, procedurally the Trial Chamber has, at least to some extent, outsourced issues relating to the operation and design of the reparations process as well as the assessment of harm to the Trust Fund for Victims.

As regards the seeming rigidity of the system, this is reflected in various provisions of both the Statute and the ICC Rules of Procedure and Evidence. One important aspect of this is the manner in which the Rules envisage reparations claims being initiated and assessed by the Court. Article 75(1) of the Statute requires that the Court only proceed to determine the extent of damage, loss, or injury to victims 'upon request' and further that it may only proceed 'on its own motion in exceptional circumstances'. The emphasis on an applications-based approach to reparations is reflected in the Rules of Procedure and Evidence. Rule 94 sets out the 'procedure upon request', which requires victims to file an application for reparations with the Registry of the Court setting out the harm they have suffered, the form of reparation sought, together with supporting documentation (no small task for many vulnerable or marginalized victims including the sick and disabled, children, the illiterate, or those poorly educated). Under the alternative, Rule 95 procedure, where the Court proceeds of its own motion, an applications-based approach is still envisaged. Rule 95 provides that where the Court proceeds of its own motion, the Registrar shall 'to the extent possible' seek to notify victims. According to Article 75(2)(a), 'where a victim makes a request for reparations, that request will be determined as if it had been brought under rule 94', in other words, the applications-based approach.

The definition of 'victim' in the Rules of Procedure and Evidence (particularly when read alongside Rules 94 and 95 regarding the initiation of reparations claims) also appears to indicate an emphasis on individual rather than the potentially more varied and flexible forms of collective reparations. Under Rule 85(a) of the Rules of Procedure and Evidence victims are 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.⁴⁶ Although this does not preclude communities (which are after all collectivities of individuals) from obtaining collective reparations for the harm they have suffered, this aspect of the definition of victim, on its face, points towards a potential emphasis on individualized rather than collective approaches to reparations.

⁴⁶ Note that Rule 85(b) defines 'victims' also as including 'organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'.

Similarly, as regards the determination of reparations claims a degree of rigidity also seems to be present. Article 75(1) of the Statute states that the court will ‘determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting’. The latter requirement is unsurprising, not least to ensure that victims in different situations before the court or even different categories of victim in the same situation are treated consistently and therefore fairly. It is very unusual, however, at least in mass-scale claims situations, for a judicial institution to itself determine the scope of damage, loss, or injury suffered by victims. Although there may be instances when it is possible to determine the scope of loss in relatively short order, more often, where harm to countless victims is involved, a judicial process for the assessment of such harm at all but the most abstract level would involve enormous resources of time and expense on the part of a court. The assessment of ‘the scope of damage, loss, and injury’ has taken very well-resourced mass-scale claims processes a great deal of time to undertake in circumstances not dissimilar from those which are likely to come before the ICC. Examples include the damages phase of the work of the Eritrea–Ethiopia Claims Commission, the work of the Kosovo Property Claims Commission (relating to property claims following the forced displacement which occurred in the Kosovo conflict (1998–9)), and the work of its Iraqi equivalent, the Iraqi Property Claims Commission.

These various factors give rise to the potential for a somewhat formalistic and procedurally inflexible approach to reparations. Rigid processes or a singular approach to the procedures used for reparations are, however, likely to be ill-suited to remedying the many multi-faceted situations which come before the ICC. In some situations, there may be fairly significant resources available for reparations, whereas in others (and much more commonly) resources will be scarce, with the result that a targeted and highly prioritized approach to reparations may be both necessary and unavoidable. This would evidently have process implications. There is little point in notifying and encouraging many hundreds of victims to apply individually for reparations (with all of the expectations which that engenders) if only a small proportion of them will, in the end, receive reparations. Equally, collective reparations may also have an important role to play in redressing the harm suffered by victims, whether for resource reasons or simply because such redress is better able to respond to certain forms of harm, including harm to communities or groups which is not untypical of crimes under international law, a number of which by definition involve the targeting of particular ethnic, racial, or religious groups. Where collective reparations are contemplated it may be artificial or contrived to rely on an individualized applications-based process as the procedure by which issues of reparations are determined. More fundamentally, in many situations an applications-based approach may be wholly inappropriate. Victim communities (many of whom may be internally displaced or refugees) will often be highly disbursed through a country, region, or, in a prolonged conflict, internationally. In addition, many of the most vulnerable victims—who may be most in need of the assistance that reparations provide—may have great difficulty accessing and ultimately using an applications-based process. Child victims, women victims in certain cultural contexts, the illiterate, and the ill, disabled, or poverty-stricken are all perhaps examples of this. The need for a proactive, selective, and carefully

targeted approach to reparations may therefore be acute. A single, rigid approach to the procedure or process adopted in determining questions of reparations is therefore clearly undesirable. The heterogeneous pattern of harm that victims may experience in conflict or mass violence requires a process capable of responding in a flexible and nuanced way in determining how such harm can best be addressed.

Perhaps owing to factors such as those set out earlier, the apparent rigidity of the Court's regime of victim redress appears to have given way to a more pragmatic and flexible (and perhaps more realistic) approach to the operation of its reparations regime. First, the Court appears to have avoided resorting to an applications-based approach to reparations in favour of a more proactive approach reliant upon victim-mapping processes, whereby the Court (through the TFV and the Registry) identifies victims eligible for reparations. In *Lubanga* this was to be done through a consultative exercise conducted by the TFV. This consultative phase was outlined by the TFV in submissions to the Court and involved meetings and informational sessions with communities in specific localities with victims groups, social services agencies, NGOs, community associations, traditional leaders, and others.⁴⁷ In effect, this consultative exercise appears to amount, in practice, to a broad-ranging victim-mapping exercise in which the location and distribution of victim communities, their needs, and the nature and scope of the harm they have suffered (individually and collectively) are all assessed, in order to inform the design and structure of the reparations arrangements which the Trust Fund has been invited to present to the Chamber for its approval. In conducting this process the Trust Fund is assisted by the Registry, in particular the Victims Participation and Reparations Section ('VPRS') together with the Public Information and Documentation Section ('PIDS'), both of which have substantial experience in outreach, and, in the case of VPRS, consultation with victims. The VPRS has extensive experience of conducting and managing victim-mapping exercises of different forms given its central role in ensuring that victims can participate in proceedings and to ensure that, where requested by the Court, their views are effectively represented to the chambers where they are called upon to make decisions affecting the interests of victims.

In addition, considerable responsibilities have been devolved to the Trust Fund in respect of reparations. In the *Lubanga* case, the Trial Chamber, rather than seeking to assess the harm suffered by victims, held that 'the assessment of harm is to be carried out by the TFV during a consultative phase in different localities'.⁴⁸ This was to be carried out by the Trust Fund as part of the consultative process referred to earlier. Not only have questions of process and the methodology of assessment been left to the TFV, but substantive issues relating to the prioritization of resources for reparations, the identification of those victims to be treated as eligible for devised programmes, and those not deemed eligible have all been left to the Trust Fund. In its decision the Chamber expressly eschewed an approach which required victims to have applied for

⁴⁷ See Trust Fund for Victims Observations on Reparations in Response to the Scheduling Order of 14 March 2012, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2872, TC I, ICC, 25 April 2012, para. 199.

⁴⁸ *Lubanga* reparations decision (n 2) para. 283, reversed by the Appeals Chamber Reparations Judgment (n 2), para. 1.

reparations in order to be considered eligible for receiving reparations, finding that the ‘individual application forms received thus far by the Registry should be transmitted to the TFV’ and that ‘[i]f the TFV considers it appropriate, victims who have applied for reparations could be included in any reparations programme that is to be implemented by the TFV’.⁴⁹ In March 2015, the broad outsourcing of harm assessment to the Trust Fund was overturned on appeal.

Finally, the Court has proven itself open to collective forms of redress despite the structure and terms of the Rules of Procedure and Evidence, set out previously. In *Lubanga*, the Trial Chamber endorsed the ‘suggestion of the TFV that a community-based approach, using the TFV’s voluntary contributions, would be more beneficial and have greater utility than individual awards, given the limited funds available and the fact that this approach does not require costly and resource intensive verification procedures’.⁵⁰ Thus, not only has the Court eschewed an individualized approach to the initiation and assessment of reparations claims, but it has also indicated its openness to collective forms of redress as well. In March 2015, the Appeals Chamber stressed that collective reparations to a community require a sufficient link between the harm suffered by community members and the crimes of the convicted person (para. 212).

46.6 Conclusion

A tension underlies almost all systems for the redress of potentially mass-scale harm (whether established at the international or national level). This is a tension between the principled need for fairness and consistency in the treatment of victims and potential beneficiaries, against the need for efficiency and the expeditious delivery of redress to those who are to benefit from it and often in very great need. This balance is perhaps all the more difficult for an international institution, such as the ICC, to strike given the paramount importance it gives to treating victims in the various situations which come before it with scrupulous fairness and the very real difficulties that an international institution, without a developed bureaucracy at the national level, will inevitably face in verifying claims and delivering redress to disbursed victim communities. The response of the Trial Chamber to these challenges has been, in its early practice, to favour increasing flexibility in respect of arrangements for victim redress. In circumstances where resources are highly limited and where very few of the many potentially eligible victims can obtain redress, such an approach is perhaps inevitable. Caution, however, is required. In societies which suffer from deeply ingrained poverty, where even relatively modest benefits of one form or another (for instance, access to additional medical services, micro-credit initiatives, or rehabilitation programmes) can, if not distributed through a process seen to be fair, give rise to significant grievance, the need for a degree of rigour in terms of verification may be unavoidable. Moreover, procedures are also necessary to ensure that the integrity of a reparations process, at a more general level, is maintained. Reparations, after all, are not simply a specific form

⁴⁹ Ibid., para. 284.

⁵⁰ Ibid., para. 274.

of humanitarian relief or charitable assistance. As suggested by the Appeals Chamber Reparations Judgment, care must be taken to ensure that carefully delineated distinctions are drawn between the proper function of reparations and social or humanitarian assistance which, although equally worthy, serve purposes quite distinct from the administration of criminal justice processes and the recognition of harm suffered by victims which underlie reparations. Proper procedures, including verification and monitoring arrangements, will therefore be necessary to ensure that the overall role of reparations arrangements is respected. The tension between these competing concerns of fairness and effectiveness is not one that is easy to resolve. In each new situation which comes before it, a different and tailored approach by the Court to these issues may be necessary. Time will tell how the balance is best struck.

More generally, the practical difficulty of reconciling the demands of fairness and effectiveness also illustrates that the ICC's regime of victim redress must operate in a manner which supports rather than substitutes redress at the national level. The structure of the reparations regime is perhaps not ideally suited to this endeavour, but Trial Chambers, the OTP, and the Trust Fund for Victims can play a role ensuring that, where possible, national reparations arrangements are encouraged and coordinated with those established under the auspices of the Court. Ultimately, it is this task, that of ensuring an effective relationship between the ICC's regime of victim redress and national systems, which is likely to be the most important with regard to the success or otherwise of the regime.

PART VI

IMPACT, ‘LEGACY’,
AND LESSONS LEARNED

The Deterrent Effect of the ICC on the Commission of International Crimes by Government Leaders

*Nick Grono** and *Anna de Courcy Wheeler***

47.1 Introduction

The first decade of the ICC's work saw a number of significant milestones—on 14 March 2012 it secured its first conviction in the trial of Thomas Lubanga for war crimes. It also arrested its first former head of state, former president of Côte d'Ivoire Laurent Gbagbo. But for many the ICC's proceedings have been marred by disappointments—over prosecutorial strategy,¹ Trial Chamber decisions that have seen the release of criminal suspects, and notably a growing sense that a permanent court set up to try the worst abuses of humanity has, despite its stated goal, failed to deter the commission of such crimes.

The hope that the ICC could deter the commission of the crimes it was established to try is part of a wider and growing commitment to early warning and prevention of atrocities and other human rights abuses. UN Secretary General Ban Ki-Moon declared that 2012 would be 'the year of prevention'² and the preventive possibilities of the Responsibility to Protect doctrine have been widely discussed.³ The possibility of a preventive or deterrent effect has repeatedly been proffered as a rationale for the establishment of international criminal tribunals, not least the ICC, where the aim of prevention is specifically stated in the preamble to the Rome Statute.⁴ Individual criminal prosecutions, it is posited, set a precedent, establishing international norms and deterring those who would commit egregious international crimes by demonstrating an end to impunity. This assumed deterrent function has been widely criticized by those who argue that the very nature of the crimes prosecuted by the ICC—war crimes, crimes against humanity, and genocide—make them resistant to deterrence

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¹ Strategic Plan June 2012–15, OTP, 11 October 2013.

² Address by Ban Ki-moon, Secretary-General of the United Nations, to the Stanley Foundation Conference on the Responsibility to Protect (18 January 2012).

³ See e.g. J Welsh and SK Sharma, 'Operationalizing the Responsibility to Prevent', (Oxford: Oxford Institute for Ethics, Law and Armed Conflict, 2012).

⁴ Preamble of the Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute'), 'Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.'

through prosecution, and that the record of international prosecutions thus far suggests that not only do international prosecutions offer little hope of preventing future atrocities, but risk prolonging conflicts.⁵ Such crimes, it is suggested, often require significant mass participation and a degree of moral inversion that suggests the possibility of criminal prosecution would not significantly alter any cost-benefit analysis undertaken by perpetrators, nor would international justice reach to sanction members of the ordinary population whose participation enlivens such crimes. Critics of the ICC in particular point to the slow pace of prosecutions, difficulties in fulfilling arrest warrants—notably in the case of President Al Bashir of Sudan—and allegations of selectivity to argue that the Court as it currently operates cannot hope to have any real deterrent effect.⁶

There is, however, a much-overlooked middle ground. While supporters of the ICC regularly offer prevention of future crimes as a primary benefit and *raison d'être* for the Court, and its detractors point to the lack of evidence that domestic, let alone international, prosecutions have a deterrent effect on the commission of crimes, there is arguably reason to be hopeful. The possibility of ICC prosecution may be one of a range of calculations made by government leaders in determining, for example, the best way to put down a nascent rebellion, prevent secession, or deal with an increasingly challenging domestic opposition. This is not to suggest a mechanical cause and effect, or that the possibility of prosecution would be determinative. Rather, the prospect of prosecution by the ICC may be one of a range of domestic and international factors—such as the possibility of internal opposition, financial consequences, likelihood of military success, international disapproval short of prosecutions, and the possibility of sanctions and other coercive measures—that, in cases where a regime still perceives room for manoeuvre, could impact upon its strategic calculus.⁷

This chapter explores a growing body of evidence that suggests national leaders are aware of the possibility of ICC prosecution, and that this can influence their decision-making, for better or worse. If there is reason to believe that fear of ICC prosecution factors into a regime or leader's determination to cling to power, it is not unreasonable to posit that such a fear may also, in certain circumstances, act to curtail action and shift the calculus in favour of avoiding war crimes or crimes against humanity.

47.2 The Effect of Prosecutions on Political Calculations

A central difficulty for those seeking to establish a deterrent effect for criminal prosecutions is that 'while we can readily point to those who are not deterred, it is nearly

⁵ See e.g. A Branch, 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 21 *Ethics and International Affairs* 2.

⁶ K Rodman, 'Darfur and the Limits of Legal Deterrence' (2008) 30 *Human Rights Quarterly* 529, 530–4; R Cryer, 'Prosecuting the Leaders: Promises, Politics and Practicalities' (2009) 1 *Goettingen Journal of International Law* 45.

⁷ For an insightful survey of how deterrence might be expected to operate in the international arena see K Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7 *International Journal of Transitional Justice* 434.

impossible to identify those who are,⁸ a difficulty magnified in an international setting. There are plenty of examples in which the threat of criminal prosecution has failed to deter perpetrators of crimes against humanity or atrocities. Since the establishment of the ICC in July 2002, wars or civil conflict in, *inter alia*, the DRC, Côte d'Ivoire, Sudan, Syria, and Libya have seen the commission of horrific atrocities that appear to provide ample evidence of the ICC's failure to deter.

This, however, does not mean that deterrence does not work. Those who argue that prosecutions do not deter future violations often focus on what Payam Akhavan has termed 'specific deterrence', that is, the possibility that prosecutions can deter leaders who have already committed war crimes or crimes against humanity from committing them in the future.⁹ In fact, this is likely where prosecutions will have the least deterrent effect—in cases where a leader has already committed atrocity crimes, prosecution by the ICC will instead represent an existential threat to power and is thus more likely to cause leaders to dig in or further entrench an abusive or criminal campaign. We have seen this in Sudan, where President Bashir's indictment by the ICC has done little to halt attacks on civilians in both Darfur and, more recently, South Kordofan. Instead our focus should be on the longer-term legal deterrence and the entrenchment of human rights norms. Where prosecutions are unlikely to deter individuals who have already committed war crimes or crimes against humanity, over the longer term they can act to dissuade future generations of leaders from the commission of such crimes.¹⁰

As with conflict prevention efforts more broadly, the lack of substantive evidence in support of the deterrence theory may simply mean that we cannot concretely establish something that has not happened. There is, despite such evidentiary difficulties, significant anecdotal evidence to suggest that the danger of prosecution by the ICC—which today is one of the few credible threats faced by leaders of warring parties¹¹—may influence the calculations and policy choices of national leaders.

47.2.1 Northern Uganda and the LRA

For 20 years the LRA targeted government officials and civilians alike with terror tactics that wreaked havoc and destruction across Northern Uganda. Headed by Joseph

⁸ W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press 2010) 61.

⁹ A Payam, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *American Journal of International Law* 7.

¹⁰ See e.g. H Kim and K Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries' (2010) 54 *International Studies Quarterly* 939: 'Once violence has erupted, threats of punishment can do little to achieve immediate deterrence. However, the outbreak of such violence can be inhibited, and its resumption in post-conflict situations prevented, because it often results from an elite's deliberate political choices.'

¹¹ For example, in Sudan the threat of prosecution by the ICC was practically the only credible threat applied to the Khartoum government in relation to the Darfur conflict in the face of a Security Council unwilling or unable to make tough decisions. The international community's response was limited to the deployment of a small peacekeeping force that has repeatedly been challenged by government and rebel actors. The threat of prosecution itself has thus far not proved credible—the OTP has been unable to secure the arrest of President al-Bashir and other senior indictees.

Kony, who claimed to be on a spiritual mission to cleanse Northern Uganda and to rule according to the Ten Commandments, the LRA abducted tens of thousands of children and adults, putting them to work as porters or sex slaves, or turning them into rebel fighters. The group became notorious not only for their use of child soldiers, who were frequently forced to commit some of the worst atrocities of the conflict as a way of barring their return to civilian life and binding them to the LRA, but also for their willingness to kill and mutilate indiscriminately.¹² The Ugandan government's response—herding over a million of the North's predominantly Acholi inhabitants into squalid, insecure IDP camps—only served to compound the suffering of civilians in the region.¹³

In January 2004 the ICC announced that the Ugandan government had made the first State Party referral to the ICC. The opening of an investigation was controversial from the start. A wide range of international NGOs, mediators, academics, and Northern Ugandans argued that the threat of ICC prosecutions would undermine fragile local peace initiatives, would prolong the conflict by removing the LRA's incentive to negotiate, and would make displaced Northern Ugandans even more vulnerable to LRA attacks.¹⁴ Three years later, however, others claimed that the ICC had played an important role in transforming the conflict in Northern Uganda.¹⁵ A landmark cessation of hostilities agreement in August 2006 removed most LRA combatants from Uganda, allowing civilian resettlement and redevelopment in the region. The LRA has now largely abandoned Northern Uganda as a field of operation, though it continues sporadic attacks in neighbouring countries, most notably the DRC and the CAR.

To what extent the peace process, never completed, can be attributed to the initiation of ICC prosecutions is difficult to determine. Some have argued that the failure of states and other stakeholders to 'consistently and reliably support the international justice mechanisms' undermined their possible preventive or deterrent effect, and instead allowed Kony and the LRA to '[take] advantage of peace talks to regroup and re-arm his forces in order to perpetuate crimes'.¹⁶ Apart from the peace process itself,

¹² T Allen, 'War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention', Crisis States Research Centre, Development Studies Institute, London School of Economics (2005); J Egeland, 'A Ugandan Tragedy', *Washington Post*, 10 November 2004.

¹³ A 2005 survey assessing the health of IDPs found an excess mortality rate of almost 1,000 per day, caused by insufficient quality and quantity of healthcare, inadequate water and sanitation services, and a lack of specific disease control interventions. Health and mortality survey among internally displaced persons in Gulu, Kitgum, and Pader districts, Northern Uganda, World Health Organization (2005).

¹⁴ For example, J Volqvartz, 'ICC Under Fire Over Uganda Probe' *CNN.com*, 23 February 2005; K Southwick, 'When Peace and Justice Clash', *International Herald Tribune*, 14 October 2005; 'Not a Crime to Talk: Give Peace a Chance in Northern Uganda', Joint Statement by Refugee Law Center and Human Rights Focus (HURIFO) on the Juba Peace Talks (July 2006); H Cobban, 'Uganda: When International Justice and Internal Peace are at Odds', *Christian Science Monitor*, 24 August 2006; Z Lomo, 'Why the International Criminal Court must Withdraw Indictments against the Top LRA Leaders: A Legal Perspective', Kampala: Refugee Law Project (2006).

¹⁵ N Grono and A O'Brien, 'Justice in Conflict? The ICC and Peace Processes' in N Waddell and P Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society 2008); 'Northern Uganda Peace Process: The Need to Maintain Momentum', Crisis Group Africa Briefing No. 46 (2007).

¹⁶ J Mendez, 'Justice and Prevention' in C Stahn and M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* vol. 1 (Cambridge: Cambridge University Press 2011) 35.

certainly various political and military developments in the region—in particular, the signing of Sudan's Comprehensive Peace Agreement in 2005¹⁷—reduced the LRA's tactical and strategic options, which in turn compelled the leadership to approach negotiations for a peace settlement with more commitment than in the past.

The ICC process does, however, appear to have had some impact, both through isolating the LRA leadership to the degree that they approached the negotiating table, and in giving them an incentive to reach a deal. The peace process subsequently developed a momentum of its own, and the LRA has effectively withdrawn from Uganda, its ranks depleted by the departure of those who have re-joined civilian life under the auspices of the Amnesties Act enacted in 2000.¹⁸ Some have also suggested that the ICC indictments served to sever the LRA from crucial financial support from the Ugandan diaspora.¹⁹ By raising awareness and focusing the attention of the international community, which in turn created a crucial broad base of regional and international support for the fledgling peace process, the ICC's efforts to hold the LRA leadership criminally responsible for its atrocities in Northern Uganda not only helped create that momentum, but embedded accountability and victims' interests in the structure and vocabulary of the peace process.

The LRA's refusal to negotiate, ostensibly for fear of arrest and prosecution, should of course temper some of the enthusiasm of those who support the ICC prosecutions in Uganda.²⁰ The LRA leadership has notably cited the ICC indictments as the ultimate barrier to a final peace deal,²¹ with the media reporting that the Ugandan government had considered withdrawing Uganda's self-referral to the ICC in order to tempt the LRA towards peace negotiations.²²

¹⁷ The Comprehensive Peace Agreement (CPA) included a provision that all foreign rebel groups be forced out of Sudan. From the mid-1990s, Sudan had collaborated with and offered support to the LRA, including providing a safe haven to LRA rebels and supplying weapons and training. LRA bases were primarily located in the South, but once the Sudan People's Liberation Movement (SPLM) took over the government of the South, the LRA's activities were increasingly curtailed. Nevertheless, accusations that the government of Sudan has resumed its support for the group continue to surface. See e.g. P Ronan et al., 'Hidden in Plain Sight: Sudan's Harbouring of the LRA in the Kafia Kingi Enclave 2009–13', *The Resolve LRA Crisis Initiative with The Enough Project and Invisible Children* (2013).

¹⁸ The January 2000 Amnesty Act offered amnesty to 'Ugandans involved in acts of a war-like nature' since 26 January 1986. In the decade following its adoption almost 13,000 LRA members received amnesty, securing immunity from prosecution.

¹⁹ See 'The Impact of the Rome Statute System on Victims and Affected Communities', Victims' Rights Working Group (2010) ('VRWG Report') 23: 'In Uganda some community members state that the ICC has had a deterrent effect on people financing and supporting war criminals. Ugandan civil society members point out: "[t]here were individuals and institutions both internally within Uganda and in the Diaspora who may have been aiding, promoting and collaborating with the LRA by giving financial, material or technical support to the LRA rebels. The issue of arrest warrants for the top LRA leaders scared this category of collaborators and promoters who eventually gave up with the acts, for fear of being indicted by the ICC [...]".'

²⁰ The ICC has had little success with securing custody of the LRA indictees: of five suspects, two are believed to be dead, and the other three, including Joseph Kony, have not yet been apprehended.

²¹ Joseph Kony has himself directly addressed the issue of ICC warrants: 'We seem to have built our own deathbed by committing to this peace process... The international justice system is that if you are weak, the justice is on you... If you want to remain safe from ICC, you must fight and be strong.' Quoted in M Schomerus, 'International involvement and incentives for peace-making in northern Uganda' (2008) 19 *Accord* 92, 95.

²² 'From early January 2005 the media reported that LRA leader Joseph Kony and his top commanders feared ICC prosecution if they came out of the bush and that this was an obstacle to the progress

Even with some temporal distance, it remains difficult to separate the influence of the ICC indictments from a host of political and strategic pressures on the LRA. What does appear clear, however, is that both critics and supporters of these indictments agree that they had some effect on the LRA leadership—that the threat of prosecution by the ICC is something that the LRA has taken into account when making strategic decisions on negotiations, surrender, or continued rebel activities. This effect is *inter alia* reflected in the 2015 transfer of Dominic Ongwen to the Court. This fact in itself is often, understandably, passed over in the rush to determine whether such influence was for the overall good or bad of the conflict and long-suffering victims. Nevertheless, it indicates the ICC's potential to act as a point of leverage, and thus a possible, if not proven, deterrent in the commission of atrocities.

47.2.2 DRC

The situation in the DRC—scene of a devastating civil war since 1998 that, despite a 2003 peace accords, continues in the east—is by some measures the most successful ICC intervention so far. On 14 March 2012 the ICC secured its first conviction, finding Congolese warlord Thomas Lubanga Dyilo, leader of the Union of Congolese Patriots (UPC), guilty of enlisting and using child soldiers in his home district of Ituri in Orientale province. Of the four other indictees whose arrest the ICC has secured, two former defendants—Ituri-based rebel leaders Germain Katanga and Mathieu Ngudjolo Chui—are Congolese. A third, on trial for alleged war crimes and crimes against humanity in the CAR, is the former Vice-President of the DRC, Jean-Pierre Bemba.

The ICC's activities in the DRC have not been without critics—some have argued that 'in Ituri, the prosecutor's strategy is seen more as fulfilling his own need to get fast judicial results than reflecting the magnitude of Lubanga's crimes'.²³ The ICC's long inability to secure the arrest of Bosco 'the Terminator' Ntaganda, leader of Congrès National pour la Défense du Peuple (National Congress for the Defence of the People, CNDP) rebel group accused of atrocities in the Kivus, who in January 2005 was integrated into the DRC armed forces despite the ICC arrest warrant, prompted fears that a perception of impunity could empower those targeting civilians.²⁴ These fears were compounded in December 2011 when Callixte Mbarushimana, alleged executive secretary of the FDLR and accused of war crimes and crimes against humanity in the Kivus, was released by the ICC, and the charges against him dismissed.²⁵ Though

of the peace talks. According to press reports the government provided the LRA with assurances that the ICC investigation could be withdrawn, or an amnesty given, if the LRA agreed to peace talks. One report suggested that the government's reassurances were contained in a draft Memorandum of Understanding (MoU) given to the LRA on 4 January, but this could not be confirmed as the MoU had not been made public by the end of January. There appeared to be confusion about the legal basis (if any) for formally withdrawing a complaint which had already been submitted to the ICC.' CRC Country Briefing: Uganda—Update April 2004 to January 2005, Coalition to Stop the Use of Child Soldiers (2005).

²³ 'Jury Still Out on ICC Trials in DRC', *IRIN News*, 19 January 2011.

²⁴ Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, Philip Alston, Human Rights Council, Fourteenth Session, Mission to the Democratic Republic of the Congo, UN Doc A/HRC/14/24/Add.3 (2010).

²⁵ 'Prosecutor Seeks New Charges in DRC', *IWPR*, 18 May 2012.

Ntaganda eventually surrendered and was transferred to ICC custody, his case serves as a reminder to many of the ICC's impotency in the absence of state cooperation. Others have criticized the ICC for concentrating on small-time rebel leaders, particularly those in Ituri, rather than focusing efforts on establishing charges against government members or high-ranking officials who are perceived as leading drivers of the DRC's civil conflict.²⁶

There are, nevertheless, indications that the ICC prosecutions are having some impact on the strategic decisions of troop commanders in the DRC. Media reports suggest that a number of ex-combatants have noticed a modification in the behaviour of rebel commanders designed to avoid the possibility of ICC prosecution.²⁷ In April 2010 the Victims' Rights Working Group reported the perceived positive impact of the ICC arrests on the national peace process, including demobilisation, noting the belief among some victim communities in South Kivu that 'the ICC [...] deters, dissuades'.²⁸ As always, concrete evidence of the impact of ICC prosecutions is hard to come by. But, again, anecdotal evidence suggests that ICC indictments can act as a point of leverage to influence the calculations of certain leaders.

47.2.3 Colombia

The situation in Colombia has been under preliminary examination by the ICC Prosecutor since 2006. For over 40 years Colombia has been devastated by civil conflict, with approximately one-tenth of the population suffering displacement.²⁹ Two years later, the OTP declared that it would not open an official investigation, since the Colombian courts were undertaking war crimes and crimes against humanity trial proceedings, but that the situation remains under analysis.³⁰ In December 2011 and November 2013 the Prosecutor published a report presenting preliminary research findings, including those that indicate the commission of crimes against humanity and war crimes. Notably, the reports also indicated that crimes attributed to the Colombian army—including the use of 'false positives',³¹ or the killing of civilians and the disguising of their bodies as guerrillas in order to artificially inflate the body count of guerrillas killed in combat—had come under analysis or pre-investigation.³²

²⁶ J Stearns, *Dancing in the Glory of Monsters* (New York: Public Affairs 2011), 334: 'It is precisely because many former warlords are still in power that diplomats have been wary of launching prosecutions. This has resulted in an army and government replete with criminals who have little deterrent to keep them from resorting to violence again.'

²⁷ See e.g. 'Jury Still Out on ICC Trials in DRC', IRIN News, 19 January 2011.

²⁸ VRWG Report (n 19).

²⁹ J Easterday, 'Deciding the Fate of Complementarity: A Colombian Case Study' (2009) 26 *Arizona Journal of International & Comparative Law* 50.

³⁰ M Isabel, 'Moreno Ocampo: "Colombia Resembles But is Not Congo"', 29 August 2008 <<http://www.oschin.org/en/misc-americhe/moreno-ocampo-sulla-colombia.html>> accessed 15 September 2014.

³¹ In a report on Colombia in March 2010 the UN Special Rapporteur on extrajudicial executions noted that 'while there are examples of such [false positives] going back to the 1980s, the evidence indicates that they began occurring with disturbing frequency across Colombia from 2004'. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Mission to Colombia, Human Rights Council, Fourteenth Session, UN Doc A/HRC/14/24/Add.2, (2010).

³² Report on Preliminary Examination Activities, ICC OTP (2011).

Despite the possibility of prosecutions remaining relatively remote, there is nevertheless anecdotal evidence to suggest that the initiation of a pre-investigation and the possibility of prosecution before the ICC held significant sway over actors in the armed conflict.³³ Since the OTP announced its interest in the country, the government has taken a number of measures—most notably promulgating Peace and Justice Law³⁴—arguably designed to avoid the spectacle of high-ranking government officials and army officers appearing at The Hague.³⁵ The improvement of Colombia's judicial workings has been attributed to the ICC's pre-investigation activities, with the Prosecutor's exertion of pressure on the government through visits and statements being credited with '[boosting] Colombia's historically ineffective justice system'.³⁶ The efforts of the Supreme Court in tackling impunity for human rights violations has similarly been partially credited to the threat of ICC-driven prosecutions and the desire to keep the accountability process in Colombia.³⁷

The threat of ICC prosecution appears to not only have influenced the calculations of the Colombian government—including former President Pastrana who, according to the WikiLeaks cables, expressed (unwarranted) concern that he may be prosecuted

³³ See e.g. P Engstrom, 'In the Shadow of the ICC: Colombia and International Criminal Justice', Report of the Expert Conference Examining the Nature and Dynamics of the Role of the International Criminal Court in the Ongoing Investigation and Prosecution of Atrocious Crimes Committed in Colombia (2011); 'Colombia's ratification of the Rome Statute and the OTP's ongoing interest in the country has already had an important impact in Colombia that goes far beyond merely influencing domestic criminal law. The prospect of prosecutions before the ICC has played directly into the dynamics of the armed confrontation, including the recent demobilisations of right-wing paramilitary groups. Various high-level initiatives are being undertaken by the government to avoid Colombian military officials and their civilian counterparts being brought before the ICC, and the left-wing guerrilla groups equally appear to be engaged in damage-limitation measures. In tandem, heightened sensitivity around issues of justice and peace has developed across Colombian society, as different sectors re-evaluate their positions or build new forms of alliances, both in elite political circles and among the diverse victims of the armed conflict.'

³⁴ The law came into force in 2005 and provides for reduced sentences for demobilized guerrillas and paramilitaries, but notably by August 2012 only two people had been sentenced despite the participation of over 4,000 demobilized guerrillas and paramilitaries. Despite these disheartening figures, the OTP in 2011 reported that '[t]here is no basis at this stage to conclude that the existing [national investigations and proceedings] are not genuine. The Office will continue to monitor the commission of new crimes and the judicial developments.' Report on Preliminary Examination Activities, ICC OTP (2011), para. 87.

³⁵ It is worth noting that this Law has been extensively criticized as being used as a shield to ICC prosecution, rather than representing a true attempt to secure justice of the victims. See e.g. K Ambos and F Huber, 'The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there Sufficient Willingness and Ability on the Part of the Colombian Authorities or Should the Prosecutor Open an Investigation Now?', Extended version of the Statement in the 'Thematic Session: Colombia' ICC OTP-NGO roundtable (2010) 7: 'In the Colombian case, special attention must be given to the extradition of paramilitary leaders to the US, the pressure exercised by the former Uribe government against judicial sectors and the fact that Law 915 of 2005 is only being applied on a voluntary basis to a very reduced number of members of illegal armed groups who accept to be prosecuted under the special criminal procedure. Therefore, the great majority of members of illegal armed groups and all state officials are excluded from the application of Law 975 of 2005, which poses the question if there is a real willingness to investigate and prosecute effectively these persons under the subsidiary ordinary criminal system.' See also Easterday (n 29).

³⁶ The ICC's Colombia Investigation: Recent Developments and Domestic Proceedings, American Non-Governmental Organizations Coalition for the International Criminal Court (2009) 8.

³⁷ Id.

by the ICC for his actions while in power from 1998–2002³⁸—but also those of paramilitary leaders operating under the umbrella of the United Self-defence Forces of Colombia (Autodefensas Unidas de Colombia, AUC).³⁹ Carlos Castaño, a paramilitary commander at one time believed to have been a leading figure in the AUC, was apparently sharply aware and fearful of the possibility of ICC prosecution, a fear that reportedly directly contributed to his demobilization.⁴⁰

Though the degree to which the fear of prosecution by the ICC motivated Castaño's relinquishing of arms was arguably exceptional, what is clear is that, though other political or strategic motivations may have exerted a stronger influence on decision-making processes, following Colombia's ratification of the Rome Statute in 2002 and the expiration in November 2009 of the seven-year grace period contained in its Article 124 reservations to the Statute, paramilitary commanders in Colombia were aware of the risk of ICC prosecution and took this risk into account. This does not mean that they were immediately deterred—in 2012 Avocats Sans Frontières reported the continued existence of paramilitaries, neo-paramilitaries, and accompanying human rights violations.⁴¹ Rather, it indicated that, as in the DRC and Uganda, in certain situations there may be space to use the possibility of ICC prosecutions as leverage not only against government leaders, but also against rebel groups.

47.2.4 Sudan and the case of Darfur

The case of Sudan represents the strongest challenge to those seeking to argue that the ICC provides a deterrent to the commission of war crimes and crimes against humanity. The government has proven immune not only to ICC pressures, but also those of the Security Council whose repeated resolutions calling a halt to violence in Darfur were routinely ignored.⁴² For some, Sudan therefore provides clear evidence that ICC's prosecutions do not, and cannot, have a deterrent effect.

The war in Darfur truly began in February 2003 when rebels took up arms against a centralized government in Khartoum. The response was unequivocal—the government of Omar Al Bashir launched a military campaign, relying heavily on paramilitary

³⁸ A cable from then-US Ambassador William Brownfield to Washington dated 14 November 2007 revealed that Pastrana had voiced concern that the ICC could attempt to prosecute him for allegedly creating a safe haven for narcotics through the Caguán process.

³⁹ See e.g. C Sriram, 'The ICC Africa Experiment: The Central African Republic, Darfur, Northern Uganda, and the Democratic Republic of the Congo', Annual Convention of the International Studies Association (2008): 'there is anecdotal evidence both that fear of ICC prosecution motivated paramilitary fighters (or at least their leaders) in Colombia to strike a deal, and that fear of prosecutions may lead them to return to fighting or deter the two main guerrilla groups from negotiating.'

⁴⁰ 'Habla Vicente Castaño' ('Vicente Castaño Speaks'), *Revista Semana*, 5 June 2005.

⁴¹ The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a 'Positive' Approach, Avocats Sans Frontières (2009)

⁴² UN Security Council Resolution 1564 called on the Government of Sudan to 'end the climate of impunity in Darfur by identifying and bringing to justice all those responsible [...] and insists that the Government of Sudan take all appropriate steps to stop all violence and atrocities', UNSC Res 1564 (18 September 2004) UN Doc S/RES/1564, para. 7; UN Security Council Resolution 1556 called on the Government of Sudan to disarm Janjaweed militias, allow humanitarian access, and investigate violations of human rights and international humanitarian law. See UNSC Res 1556 (30 July 2004) UN Doc S/RES/1556.

militias and Janjaweed, displaced over 2.5 million people, and killed an estimated 300,000 in the first five years.⁴³ In 2007 the ICC issued arrest warrants for the Sudanese Minister of State for Humanitarian Affairs, Ahmad Harun, and for alleged Janjaweed leader Ali Kushayb issues in 2007. These arrests were eclipsed in March 2009 by the Court's indictment of President Bashir for war crimes and crimes against humanity in Darfur in a landmark decision to try a sitting head of state.

The Prosecutor was almost immediately pilloried for what some, including the Assistant-General for Peacekeeping, saw as not only judicial overreach, but a step that could endanger the fragile peace processes in both Darfur and South Sudan.⁴⁴ The government reacted to Bashir's indictment by expelling 13 international aid agencies, including Médecins Sans Frontières (MSF) and Oxfam, and shutting down Sudanese human rights groups. Kidnappings of aid workers increased following the issuance of the warrant for Bashir—on 11 March, a week after the warrant was issued, five MSF aid workers were kidnapped. For many, these actions acted to bolster the belief that the government of Sudan would not be swayed, let alone deterred, by the threat of ICC prosecution. The government continues to obstruct any ICC attempts at investigation and the prosecution has, thus far, relied exclusively on evidence gathered outside Darfur.

Though the leading inner circle of Bashir's ruling National Congress Party (NCP) proved unresponsive to the threat of prosecution by the ICC and to Security Council ultimatums, there are signs that the government was not entirely immune or indifferent to the international stigmatization associated with such measures. Following the Prosecutor's July 2008 application for an arrest warrant for Bashir, there was a flurry of announcements of renewed peace initiatives and yet another ceasefire declaration. With regard to more concrete measures, the ICC indictment appears to have had little impact, though this could arguably be attributed more to the fact that the regime, confident most of the condemnation from the Security Council and wider international community would amount to nothing more than empty threats, calculated that continued warfare held the promise of best results—the reticence of the United States, for fear of upsetting the hard-won North–South peace deal, China's continued oil interests, and the lack of decisive sanctioning action by the Security Council, arguably fostered conditions where the regime had more to gain by continuing down a path that involved war crimes and crimes against humanity than it did by dialling back and committing to a genuine peace process.⁴⁵

⁴³ Report to United Nations Security Council by Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator John Holmes, 22 April 2008.

⁴⁴ See e.g. K Ainley, 'The International Criminal Court on Trial' (2011) 24 *Cambridge Review of International Affairs* 3 325: 'In November 2008, Assistant Secretary-General for Peacekeeping Edmond Mulet told the Security Council that Ocampo's attempts to charge Bashir could potentially derail the 2005 Comprehensive Peace Agreement in South Sudan, and lead to serious security threats to UN peacekeepers in Darfur'. See also A de Waal, 'The ICC, Sudan and the Crisis of Human Rights', *African Arguments*, 5 March 2009; J Flint and A de Waal, 'To Put Justice before Peace Spells Disaster for Sudan', *The Guardian*, 6 March 2009.

⁴⁵ P Castillo, 'Rethinking Deterrence: The International Criminal Court in Sudan', UNISCI Discussion Papers, 13 (2007).

47.2.5 Newer cases—Kenya and Mali

The ICC has more recently brought a raft of newer charges and cases in Africa, in Mali, Kenya, and Libya. Each case is unique, with only Mali inviting ICC intervention, and each has received dramatically differing levels of domestic support. In Kenya, political leaders who had initially argued that only the ICC could provide the requisite independence and impartiality to ensure a fair trial quickly backtracked. Kenyan politicians repeatedly attempted to block the ICC prosecutions, lobbying to have the case suspended. These attempts to block accountability processes, though primarily rooted in the need to secure domestic support, particularly among certain ethnic groups, could also hint at a tendency among senior politicians to see prosecution, whether international or domestic, as a threat to their traditional ability to use violence to retain power during elections. The cases, once under way, received further blows—one of the judges on the case withdrew in April 2013 citing a heavy workload but amid criticisms of the prosecution's behaviour, and a key indictee, Uhuru Kenyatta, was elected President while fellow indictee William Ruto took the post of Vice-President. Kenyatta's trial has been repeatedly delayed at the request of the prosecution, and the ICC's ASP agreed that Kenyatta did not always need to be present at trial. But at the same time, widely feared election violence did not manifest—the peaceful holding of elections may be attributable, to some degree, to a fear of prosecution outweighing any possible political gains from violence.

In July 2012 the government of Mali, following a coup and the re-emergence of a powerful secessionist movement in the North, referred its case to the ICC. After conducting a preliminary examination the OTP in January 2013 opened an investigation into alleged crimes including murder and rape since January 2012. Though the case was originally referred by the Malian government, ICC Prosecutor Bensouda's repeated and firm assertions that the ICC will be watching all sides to the conflict, rather than only the rebels, raises the possibility that the ICC intervention in Mali could act to constrain the commission of abuses by government forces, particularly as military action in the north came at a time when the government was also struggling to establish international legitimacy.

47.2.6 Other international criminal prosecutions

Of course the ICC prosecutions are just the latest manifestation of a growing international trend towards individual criminal responsibility in the international sphere. Any possible deterrent effect of ICC prosecutions will naturally build on prosecutions that have come before, or that occur alongside the ICC's activities. The ad hoc ICTR and ICTY solidified the concept of individual international criminal responsibility, and the Yugoslav Tribunal in particular, having been established during an ongoing conflict, indicates the way in which potential or actual perpetrators can be influenced by the threat of prosecution. Many have noted that atrocities continued to be committed well after the establishment of the ICTY⁴⁶—the Srebrenica massacre, the most

⁴⁶ See e.g. M Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press 2007) 149.

infamous atrocity in the Yugoslav wars, occurred after the Tribunal was established. There were, however, patterns of behaviour modification that could be attributed to the establishment of the Tribunal and a fear of prosecution—examples such as the moving of mass graves to better disguise crimes and the perceived restraint of the Kosovo Liberation Army. In Sierra Leone, the Special Court's conviction of Charles Taylor, which marks the first time an international tribunal has convicted a former head of state, has been widely applauded. There are also indications that the threat of prosecution had an impact on perpetrator behaviour—some argue that the Court may have further fuelled the conflict in Liberia by driving combatants to join the Liberians United for Reconciliation and Democracy rebel group in an attempt to avoid possible indictments in Sierra Leone.⁴⁷

47.2.7 Assessment of practice

Unfortunately, concrete evidence of immediate or short-term deterrence resulting from ICC prosecutions will by its nature remain scant, and it is currently too early to trace any longer-term deterrent effect. Nevertheless, anecdotal evidence from states subject to ICC investigations, indictments, or prosecutions indicates cause to be hopeful.⁴⁸ As the ICC becomes more widely known, its norms deeper entrenched, there appears to be a growing realization amongst governments, and perhaps more surprisingly rebel leaders, that they too could find themselves in the dock. Though there is evidence to suggest that in some situations, particularly those where conflict is ongoing and where war crimes or crimes against humanity have already occurred, the possibility of international individual criminal prosecution may act to prolong conflict, thereby facilitating the further commission of atrocities, there are equally certain situations, notably where a leader is not facing an existential threat, where the possibility of an ICC prosecution could tip the cost-benefit scale away from a criminal course of action. If there is reason to believe that fear of ICC prosecution factors into a leader's determination to cling onto power, it is not unreasonable to suggest that such a fear may also, in certain circumstances, factor into the cost-benefit analysis of a despot intent on crushing a secessionist or revolutionary movement, ethnic group, or the opposition.

47.3 The Wider Context, Public Policymaking

The debate over the role of prosecutions in deterring international crimes forms part of a larger debate on how, if at all, international pressure can encourage the development of rule of law and democracy, and reduce human rights abuses and repression in sovereign states. There are techniques we are all familiar with—the ‘naming

⁴⁷ M Staggs, Second Interim Report on the SCSL, UC Berkeley War Crimes Studies Center (2006) 23.

⁴⁸ See M Burnham, ‘Naissance of the Court: The ICC at Ten’, Global Policy Forum (2008) and ‘Courting History: The Landmark International Criminal Court’s First Years’, Human Rights Watch (2008) 69 on the ‘Lubanga syndrome’; see also D Wippman, ‘Can an International Criminal Court Prevent and Punish Genocide?’ in N Riemer (ed.), *Protection against Genocide: Mission Impossible* (Westport: Praeger Publishers 2000) 91.

and shaming' approach taken by much of the human rights community,⁴⁹ the imposition of sanctions,⁵⁰ the offering of development aid or lucrative financial and business arrangements to those states that engage with the international community,⁵¹ and the threat of military intervention.⁵² Nevertheless, one of the main challenges for international policymakers in their efforts to resolve conflicts or reduce human right abuses is that they often lack effective incentives or sanctions (diplomatic, legal, military, or economic) of sufficient credibility to influence the calculations of the warring parties.

Taking as a starting point the assumption that leaders—of governments or of rebel groups—wish to either maintain or attain access to domestic power, and that these leaders take rational and goal-oriented decisions, it is possible to establish a framework for elite decision-making that can elucidate how international pressure, including in the form of ICC prosecution, could influence the decision-making process of domestic leaders.⁵³ Prosecution of government leaders attaches personal culpability to those who act as 'conflict entrepreneurs', that is to say, those who strategically foment and normalize hatred and their accompanying crimes.⁵⁴ This personal culpability can have both direct (imprisonment) and indirect (bolstering opposition movements, reducing aid flows) deleterious effects on a leader's personal power. Furthermore, not only are government leaders more likely to have knowledge of the international legal system and the concept of international individual criminal responsibility than an average citizen, but they are also arguably more likely to be motivated by rational considerations that allow for the kind of cost-benefit analysis central to any model of deterrence.⁵⁵ Thus when evaluating the possibility of deterring such leaders, it may be that a practical approach that emphasizes the need to extend prosecution and dissemination of the work of the ICC can have some impact.

⁴⁹ Several human rights organisations, including Human Rights Watch and Amnesty, frequently adopt a 'name-and-shame' approach. For example, in 2000 Amnesty published two-dozen reports on Israel's activities and abuses in the Occupied Palestinian Territories. Myanmar was similarly targeted following the Junta's seizure of power in the late 1980s, with Amnesty, Avaas, and others leading an annual Global Day of Action for Burma. Atrocities in Sudan's Darfur have garnered much high-profile, sometimes celebrity, attention.

⁵⁰ A range of sanctions were imposed by the UN Security Council, the US, and the EU on Iraq, for example, after the invasion of Kuwait in 1990, and then later tied to the removal of WMDs; sanctions were also imposed on Yugoslavia in 1992 over the expulsion of non-Serb civilians and other human rights abuses. Similarly Muammar Gaddafi's regime was sanctioned following the Lockerbie bombing in 1992. Long-standing sanctions on Burma have been slowly lifted since 2013 in response to positive developments in the country.

⁵¹ Since the early 1990s the EU has tied respect for human rights to specific agreements, including human rights conditionality clauses in its association agreements and other international trade and cooperation agreements. Several states, including Sri Lanka, Nicaragua, and India, have refused to sign a GSP+ agreement with the EU, allowing them preferential access to the EU market, in part due to the human rights and democracy requirements attached to these agreements.

⁵² Several states have been threatened with military intervention on the basis of human rights abuses or atrocities, including Yugoslavia (ahead of the NATO bombing), Libya, and more recently Syria.

⁵³ David Keen has broken elite goals in situations where atrocity crimes are committed into four overlapping aims: (i) to establish or extend state power; (ii) to shore up elites against a threat; (iii) to legitimize or facilitate exploitation; (iv) to resolve insecurities. D Keen, *Complex Emergencies* (Cambridge: Polity Press 2008).

⁵⁴ Druml (n 46).

⁵⁵ Robinson and Darley have suggested three prerequisites for deterrence: (i) potential offenders must be aware of the law and punishments, and understand what constitutes criminal behaviour; (ii) they must feel that the law is applicable to them, understanding that the law as applied at a different time, to

Rebel groups, however, are less likely to be vulnerable to international pressure. Most rebellions fail, and most rebels embarking on their challenge to the central government are unlikely to be concerned that they may later be sanctioned for their atrocities. For these individuals, survival and success are probably much more immediate concerns. When it comes to the calculations of government officials, however, sanctions—including prosecution—present a threat to power they have already attained, and thus may have greater influence or deterrent impact. If the threat of prosecution for future atrocities is a credible threat, then a government leader will arguably weigh that risk when deciding how to respond to a challenge to their authority, assuming a rational decision-making process.

Following this rationalist policymaking school of thought, the form international pressure takes and the degree to which it is successful will to a large extent be dependent upon complex domestic political contexts. Folch and Wright have set out a useful taxonomy of authoritarian regimes, and how different structures of repression and resource distribution affect sensitivity to economic sanctions, which can be of use in predicting how such regimes might react to legal sanctions.⁵⁶ Of particular interest is their finding that certain regimes—those which are heavily reliant on patronage networks and pay-offs to a small ruling elite—are particularly vulnerable to economic sanctions, which they argue ‘may actually increase the perception of threat on the part of the members of the small supporting coalition of a personalist ruler, while at the same time the benefits of such support are likely to shrink’.⁵⁷ Like economic sanctions, by increasing the costs of supporting an indicted leader, ICC prosecutions can corrode the power base of leaders who rely on highly centralized systems of government. The degree to which the ICC can hope to deter through a pattern of prosecutions will always be hostage to the immediate domestic context. Autocratic leaders who face an existential threat are unlikely to be swayed by the possibility of prosecution, but those with hope of retaining power through non-criminal means are more likely to view the threat of indictment as a disincentive to criminal action.

47.3.1 The normative value of ICC prosecutions

When combined with a rationalist theory of domestic policy decision-making, the theory of incrementalism gives a more nuanced understanding of how and why national leaders make certain policy decisions with implications for foreign relations, particularly in the context of human rights. Incrementalism posits that public policy is structurally biased towards incremental changes to a largely stable status quo. Thus the uncertainty of the costs and consequences of radical change acts to limit leaders to

a different person, and possibly in a different way applies equally to them; (iii) the individual must find that the costs outweigh the benefits of criminality. P Robinson and J Darley, ‘Does Criminal Law Deter? A Behavioural Science Investigation’ (2004) 24 *Oxford Journal of Legal Studies* 173, 174.

⁵⁶ A Excribà-Folch and J Wright, ‘Dealing with Tyranny: International Sanctions and Autocrats’ Duration’, *IBEI Working Papers* (2008).

⁵⁷ Id.

changes that fall within the parameters of existing policy consensus. This incrementalism has been observed on a much larger, and longer, scale by philosopher Steven Pinker. Writing on the decline in violence over the arch of human history, he has emphasized the growing intolerance of human society towards war, torture, and other forms of brutality, reflecting a normative shift in what is viewed as acceptable and part of the status quo.⁵⁸ A similar, more narrowly focused shift can be seen in international politics and the human rights movement, where concern for the conduct of hostilities between states set out in the Hague Conventions at the turn of the twentieth century has given way to increasing concerns over the internal conduct of state leaders, a development that would have been unthinkable in the previous millennia where state sovereignty precluded outside interference in the internal affairs of another state. As part of a growing normative value attached to human rights, prosecutions for war crimes or crimes against humanity are arguably progressively narrowing the space for criminal courses of action that as recently as 60 years ago were deemed to be beyond the concern of the international community.

Over the past two decades, human rights trials have gathered pace as part of a growing focus of individual criminal accountability in human rights law. The establishment of the ICTR and ICTY as well as a number of hybrid tribunals, including those in Sierra Leone and Cambodia, and the increasing number of domestic human rights trials for previous leaders, seen particularly in Latin America, are all part of what has been termed a 'justice cascade'.⁵⁹ In particular, the recent conviction of Charles Taylor, and the prosecutions of Bashir, Gbagbo, and Milošević, evidence a growing norm that posits that even national leaders who would have once been able to claim state immunity are no longer viewed as immune from international criminal prosecution for war crimes or crimes against humanity. The ICC—the world's first permanent international court established to try war crimes and crimes against humanity—marks for many a high point in the project of international justice, and has itself indicted two of these government leaders. As the norms of international law and individual criminal accountability become increasingly entrenched, the ICC has the opportunity, through its prosecutions, to contribute to emerging culpability norms that act to limit future atrocity crimes both by making them more costly in terms of a rational public policy choice analysis, and by establishing such crimes as firmly outside the status quo of behaviour accepted on the international scale.

Kathryn Sikkink and Hoon Kim have argued that an examination of data on human rights prosecutions suggests that 'both normative pressures and material punishment are at work in deterrence'.⁶⁰ Legal norms and expanding human rights discourse are increasingly acting to shape the decisions and even identity of political actors. As these human rights norms—which include the increasing legalization of

⁵⁸ S Pinker, *The Better Angels of Our Nature: The Decline of Violence in History and its Causes* (London: Penguin Books 2011).

⁵⁹ E Lutz and K Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2001) 2 *Chicago Journal of International Law* 1.

⁶⁰ H Kim and K Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries' (2010) 54 *International Studies Quarterly* 939, 942.

human rights—move towards global institutionalization, non-compliant regimes risk increasingly heavy costs to legitimacy and reputation.

47.3.2 Strengthening the ICC

If we accept that, in certain cases, the possibility of prosecution by the ICC may have some limited influence on the policy decisions of leaders, either through increasing the costs to ‘conflict entrepreneurs’ of criminal courses of action, or by incrementally narrowing the policy options to exclude the most egregious crimes, the question then turns to how the ICC and international community can best leverage this influence to deterrent effect. The impact of ICC prosecutions rests on the credibility and consistency of the Court, as well as the willingness of the international community to accept such prosecutions as a signal of pariah status—‘only if national or international institutions establish a credible and consistent pattern of accountability replacing impunity, it will be possible over time to impose a high cost on the use of atrocities to further political goals’.⁶¹

Key to the ICC’s deterrent success will be its ability to secure arrests and convictions. The ICC took ten years to secure its first conviction, meaning that for the first decade of its operation its deterrent value was more theoretical than actual. The *Lubanga* trial, though criticized for its slow pace and its focus only on the recruitment of child soldiers, marked the first successful prosecution of a defendant under the Rome Statute and hopefully marks a turning point. By securing a conviction, the OTP, and the Court as a whole, demonstrated its effectiveness for the first time.

But the Court’s reliance on political will in order to secure both arrests and convictions remains problematic. Without any standing police or military force to execute arrest warrants, the ICC depends wholly on international cooperation and in particular the acquiescence of the UN Security Council’s permanent five members who can exert the necessary pressure on intransigent national governments.

Unfortunately, international cooperation in the execution of arrest warrants has been inconsistent at best. On 25 May 2010 Pre-Trial Chamber I issued a complaint to the Security Council over the non-compliance, or lack of cooperation, of Sudan in the cases of Ahmad Harun and Ali Kushayb, and suggested the Security Council take any action it deemed appropriate.⁶² The Security Council has so far not addressed this matter—it has not sanctioned Sudan in any way, and there appears to have been no renewed effort to secure the arrest of the two indictees despite repeated reminders by the ICC (among others) that the matter is in the Council’s hands. Similarly a number of African States Parties to the Rome Statute have declined to arrest President Bashir during state visits, and the African Union has argued that as a rule, heads of state should not be tried by the Court while in office. Yet even where there is a degree of

⁶¹ P Castillo, ‘Rethinking Deterrence: The International Criminal Court in Sudan’, UNISCI Discussion Papers, 13 (2007).

⁶² Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan, *Harun and Kushayb, Situation in Darfur, Sudan*, ICC-02/05-10/07-57, PTC I, ICC, 25 May 2010, 7.

political will, the Court still struggles to apprehend suspects. In Uganda, the national army has repeatedly failed to secure the arrest of LRA indictees despite improvements to their capabilities, and a lack of coordinated response by regional governments has allowed the LRA to retreat across borders and to continue its attacks.

Securing the arrest of suspects, when it happens, is only the first step in a process that hopes to provide an end to impunity. The threat of prosecution will only be credible if it is carried out both consistently and successfully, but securing convictions is by no means a foregone conclusion. The *Lubanga* case came close to collapse a number of times on procedural grounds, and despite his successful arrest, Callixte Mbarushimana's case did not come to trial after Pre-Trial Chamber I declined to confirm charges against him that included both war crimes and crimes against humanity due to a lack of substantial incriminating evidence against him.⁶³

There is also the danger that, due to political concerns, a case may not even get so far as an evaluation of evidence and procedure: though the Rome Statute provides no mechanism for the withdrawal of warrants, a number of UN members have suggested that cooperation in peace processes could lead to the suspension or deferral of an ICC investigation or prosecution.⁶⁴ In both Sudan and Uganda, the Prosecutor has faced calls to abandon investigations or withdraw warrants to enable a peace deal to be made. Such calls do little to bolster the potential deterrent effect of ICC prosecutions. If the ICC is unable to convict perpetrators of atrocities because its prosecutions are consistently trumped by peace processes that explicitly or implicitly offer immunity, then its value as a deterrent will inevitably be compromised. Would-be perpetrators will not be deterred from the commission of war crimes or crimes against humanity by the threat of future prosecution if they are confident that a later agreement to participate in peace processes will secure them *de jure* or *de facto* immunity.

Calls to halt justice for the purposes of peace and an evident reliance on the P-5 for support have also exacerbated allegations and perceptions that the OTP has been politicized. Perceptions of a politicized office have damaged the legitimacy of the Prosecutor in the eyes of signatory states, most notably in Africa, and of civil society observers. As Kirstin Ainley has noted, 'the circumstances of [the ICC's] establishment and the first years of its operation have shown how bound-up the Court is with political power and political processes'.⁶⁵

To limit such perceptions, it is vital that the Prosecutor's decisions are seen to be based on legal merit rather than political expediency. If political decisions must be made, they should be made by the UN Security Council which, under Article 16, has the power to defer an ICC investigation or prosecution for a renewable period of 12 months. For example, in cases where the Prosecutor is called on to halt investigations or withdraw warrants in the interests of peace, such decisions should rightly be

⁶³ Decision on the Confirmation of Charges, *Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-465-Red, PTC I, ICC, 16 December 2011.

⁶⁴ The AU has widely campaigned for the deferral of ICC cases against Sudan's President al-Bashir and Kenya's President and Vice-Presidents Uhuru Kenyatta and William Ruto, and has received at various points backing from P-5 members Russia and China among others.

⁶⁵ K. Ainley, 'The International Criminal Court on Trial' (2011) 24 *Cambridge Review of International Affairs* 309, 320.

seen as falling within the peace and security mandate of the Security Council. Though Article 53 of the Rome Statutes allows for the Prosecutor to decide to halt an investigation or prosecution if it is ‘in the interests of justice’⁶⁶ the same option is not provided for in the interests of peace. The Rome Statute instead evinces a strong presumption that the kind of crimes under the Court’s jurisdiction require effective criminal punishment, and the fact that negotiations are under way would not in itself be sufficient for the Prosecutor to halt proceedings.

The Court’s legitimacy has also been harmed by its focus on African states. Of 21 cases and eight country situations brought before the Court in its first 12 years of operation, all are African. This has partly been a by-product of the UNSC’s referral power—both Sudan and Libya, who were not signatories to the Rome Statute and therefore did not fall under the automatic jurisdiction of the Court, were referred by the Security Council. This power, though it expands the Court’s jurisdictional reach, is a political, rather than legal one, and thus risks tainting the Court itself with allegations of political selectivity. The Court’s focus on African states to the detriment of others where egregious atrocities have been reported, such as in Afghanistan and Sri Lanka, has eroded much of the initial support received from African governments by playing into critiques that paint the ICC as a tool of the West, used by powerful states to sanction weaker nations. The OTP is currently conducting preliminary examinations of a number of non-African states, including Afghanistan, Georgia, Honduras, Korea, and the Ukraine.⁶⁷ The launch of a full investigation and the initiation of prosecutions in any of these states should substantial evidence of war crimes or crimes against humanity be found, would hopefully work to contradict such allegations.

Just as the Court is, through Security Council referrals and its need for support, rendered at least partially dependent on the political will of the P-5 and other powerful states, it is also dependent upon the cooperation of states under investigation. This has arguably led to a situation in which, in order to maintain the cooperation of governments, the Court has shied away from targeting government leaders and instead focused on rebel groups. These accusations have been levelled at the Court in the situations of Uganda and the DRC, where government actors have played a significant role in provoking or exacerbating conflict. If the Court is to have the hoped for deterrent impact, it must not allow government leaders to use it as a tool against political opponents or to shield themselves from rigorous scrutiny. The potential deterrent impact of ICC prosecutions, which could be expected to have a greater impact on government leaders than on rebel groups, is lost if government leaders who themselves abuse human rights can escape conviction.

Finally, but perhaps most crucially, it is essential that the Court and international community act in unison in their response to war crimes and crimes against humanity. The Court, where necessary, should cajole or shame the international community, particularly those states who spearheaded its creation and who profess to be strong supporters of the Court, into taking concrete action to support

⁶⁶ See also Policy Paper on the Interests of Justice, OTP, September 2007.

⁶⁷ ICC Preliminary Examinations <<http://www.icc-cpi.int/>> accessed 25 July 2014.

the Court's arrest warrants, investigations, and prosecutions. One of the most powerful deterrent effects of ICC prosecutions may be those that are indirect—other sanctioning measures initiated as a result of the Court's finding that there is preliminary evidence to suggest a leader is guilty of committing, sanctioning, or aiding and abetting atrocities. Leaders may fear ICC prosecution not so much because they foresee a real possibility that they might themselves end up in the ICC dock, but because prosecution by the ICC is the strongest international signaller of pariah status, with all the political, economic, and strategic punishment that entails. As Richard Falk has noted, 'the maximum impact of human rights pressures, absent enforcement mechanisms, is to isolate a target government, perhaps denying it some of the benefits of trade and aid'.⁶⁸ Though ICC prosecutions are only one of a number of policy instruments that can be used to influence national governments, they should arguably act as a strong signaller to the international community of the need for the application of other policy measures in concert. Such measures could range from diplomatic pressure and incentives for cooperation to cutting off financial support, suspension of diplomatic relations, and targeted sanctions, particularly those targeting indicted individuals.

The Court itself faces both structural and operational challenges in maximizing its potential to not only influence government leaders, but to use that influence to deter future crimes. The Court, particularly in cases of a UNSC referral, needs to ensure that it operates independently of the political processes that trigger its involvement, gathering its own momentum in prosecutions. Allegations of selectivity and politicization should be tackled through exhibiting more consistency and transparency in the selection of cases, and through finding a better balance between seeking cooperation from target countries and prosecuting government members. Crucially, the decisions of the Court need the full backing of those members of the international community that profess to be its supporters but who have too often undermined the work of the Court through silence or political bargaining.

47.4 Conclusions

The success or failure of the ICC in deterring the commission of atrocity crimes rests to a large degree on its ability to pursue successful prosecutions. Only when national and international institutions establish a credible and consistent pattern of accountability will it be possible to impose a high enough cost on the use of atrocities to advance political goals. At present, this remains a key challenge for the Court and its supporters. If the Court can replace impunity with accountability, it will be able to capitalize on its potential to deter those contemplating future atrocities; not in all cases, and probably not in the midst of conflict, but in those situations where the commission of crimes is one of a series of police options available to a leader facing a challenge to his or her authority. The hope is that future leaders, cognizant of the

⁶⁸ R Falk, 'Theoretical Foundations in Human Rights' in R Claude and B Weston (eds), *Human Rights in the World Community: Issues and Action* 3rd edn (University of Pennsylvania Press 1992) 3.

prosecutions of Taylor and Milošević and Gbabgo and Bashir, may factor the possibility of his or her own prosecution into policy choices, such as whether to crush a growing opposition with violence, or negotiate, or address the underlying grievances. It will not be a determinative factor, but it will hopefully carry significant and increasing weight. To ensure that this potential deterrent impact becomes more actual than theoretical, the Court through its actions, and States Parties through their support need to enhance the consistency and credibility of ICC prosecution. Only then will the Court begin living up to its founders' expectations that it will contribute to the prevention of international crimes.

The ICC and Capacity Building at the National Level

*Olympia Bekou**

48.1 Introduction

With the adoption of the Rome Statute of the International Criminal Court¹ on 17 July 1998, the permanent ICC (the Court) was established. Few thought at the time that the ICC would become operational as early as July 2002, and even fewer appreciated the full extent of what had been achieved in Rome. The emerging field of international criminal justice, with the ICC at its core, soon became a firm reality. At the same time came the realization that the Rome Statute puts forward a *system* of criminal accountability, where states, alongside the Court, shoulder much of the responsibility to investigate and prosecute the core international crimes, namely genocide, crimes against humanity, and war crimes.

The key principle that determines the role played by states is that of complementarity.² Under the Rome Statute, the ICC can only take over from national courts when they are deemed to be ‘unwilling’ or ‘unable’ to deal with a case. Consequently, and given the limited resources the ICC has, only a handful of cases from a particular situation will be tried in The Hague.³ National jurisdictions are therefore called to deal with the vast majority of cases before domestic courts. For states to fulfil their role envisaged in the Statute and to maintain primacy in adjudicating mass atrocity, they need to both investigate and prosecute, whilst keeping the ICC at bay, but also to be able to execute cooperation requests made by the Court.⁴ Whilst willingness is essentially a matter of politics,⁵ the ability of states to perform these functions can significantly improve through ‘capacity building’. Capacity building is understood as the strengthening of national jurisdictions in order to be able to oversee national

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¹ Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute').

² Tenth preambular paragraph and Arts 1 and 17 ICC Statute.

³ The Court budget for 2015, approved at the 13th plenary session of the ASP (ICC-ASP), was set at €130,665,600. See Resolution on the Programme budget for 2015, the Working Capital Fund for 2015, scale of assessments for the apportionment of expenses of the ICC, financing appropriations for 2015 and the Contingency Fund, ICC-ASP/13/Res.1, 17 December 2014.

⁴ It should be noted that there is a clear obligation under the Statute for States to make national procedures available for all forms of cooperation. See Art 88 ICC Statute.

⁵ See e.g. Y Lijun, 'On the Principle of Complementarity in the ICC Statute of the International Criminal Court' (2005) 4 *Chinese Journal of International Law* 121, 123.

investigations and prosecutions at a suitable level, and to cooperate with the Court.⁶ The chapter examines the importance of capacity building in administering justice for core international crimes. It discusses the obstacles national jurisdictions need to overcome in order to meet the complementarity challenge. It further explores the notion of positive complementarity as the basis for capacity building with a view to revisiting the position of national legal orders in the Rome Statute system of justice.

48.2 Complementarity and the Challenges of National Capacity

Central to the Rome Statute system of international criminal justice is the principle of complementarity. As mentioned already, the willingness and ability of states to investigate and prosecute at the national level determines whether or not a case is admissible before the ICC.⁷ As a 'court of last resort',⁸ the ICC's jurisdiction is activated only when national proceedings are not forthcoming. By only granting the ICC the ability to exercise its jurisdiction in the residuary of situations where states have failed, the primary responsibility to attain those objectives must lie with states. Consequently, complementarity acts as a filter, which only lets through those cases that truly merit international intervention, leaving the rest of the cases to be dealt with by willing and able national courts. Complementarity is also an acknowledgement of the primacy of the state and the respect for state sovereignty.⁹ Observing and applying the principle of complementarity ensures that the ICC does not overstep the boundaries of its competence negotiated by the drafters of the Rome Statute and consented to by ratification. However, the implications of the principle of complementarity are much more complex.

In the years that followed the adoption of the Statute, it became common to refer to the 'catalytic effect' of complementarity.¹⁰ Put simply, complementarity acts as a catalyst, by virtue of which states feel encouraged to initiate investigations or prosecutions in order to evade ICC jurisdiction.¹¹ The effects of this encouragement are equally profound, as such investigations and prosecutions may signal a shift from a 'culture of impunity' to a 'culture of accountability'.¹²

⁶ See generally, M Bergsmo et al., 'Complementarity after Kampala: Capacity Building and the ICC's Legal Tools' (2010) 2 *Goettingen Journal of International Law* 791–811.

⁷ Art 17 ICC Statute.

⁸ See e.g. P Kirsch, 'The Role of the International Criminal Court in Enforcing International Criminal Law' (2007) 22 *American University International Law Review* 539, 543.

⁹ J Holmes, 'The Principle of Complementarity' in R Lee (ed.), *The International Criminal Court: The Making of the ICC Statute* (The Hague: Kluwer Law International 1999), 41.

¹⁰ J Kleffner and G Kor (eds), 'Complementarity as a Catalyst for Compliance' in *Complementary Views on Complementarity—Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court* (The Hague: T M C Asser Press 2006), 79–104. A-M Slaughter and W Burke-White, 'The Future of International Law is Domestic (or, the European Way of Law)' (2006) 47 *Harvard International Law Journal* 327, 341.

¹¹ The absence of cases before the Court was hailed as a measure of the ICC's success by the Court's first prosecutor. See Statement by Luis Moreno-Ocampo, Chief Prosecutor of the ICC during the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC (16 June 2004).

¹² Report on Prosecutorial Strategy, OTP, The Hague, 14 September 2006, 4.

From a domestic perspective, the internalization of the responsibility to investigate and prosecute crimes under international law can contribute to the process of strengthening, if not building, a domestic culture of justice and the rule of law.¹³ It is a reality that international crimes are committed in the context of systematic and systemic violence where there has been a partial or complete breakdown of law and order.¹⁴ The process of ensuring criminal accountability for serious and mass violations of human rights can play an important role in the process of transitional justice. Ultimately concerned with the facilitation of the process of societal reconciliation, transitional justice denotes the various policies and strategies adopted by societies in transition to address gross human rights violations that occurred in the course of periods of conflict, authoritarianism, or other forms of violence and social unrest.

In addition, where appropriate, it is important to encourage local ownership over criminal justice for atrocities in order to strengthen the contribution that international criminal justice may make to societal reconciliation.¹⁵ The proceedings of international judicial institutions of international criminal justice—the ICC, the ad hoc ICTY and ICTR,¹⁶ and even the proceedings of hybrid institutions such as the SCSL and the STL are geographically and temporally remote from the societies that experienced and were victim to the impugned violence.¹⁷ They all have struggled for local acceptance due to the physical and cultural distance between the tribunal and the community where the atrocities took place.¹⁸ This is why outreach is of such fundamental significance.¹⁹ The fact remains however, that trials in The Hague are still unlikely to have as much meaning for the local community as those occurring in the state where the crimes were committed.²⁰ For the impact of justice at the national level to take effect within the local community, it must be visible, comprehensible, and considered legitimate within such affected communities.²¹ Where trials are held

¹³ See e.g. J Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 *Hague Journal on the Rule of Law* 87–97.

¹⁴ See e.g. Kirsch (n 8) 540.

¹⁵ See e.g. Bergsmo et al. (n 6) 800.

¹⁶ The ad hoc tribunals were created under the Security Council's Chapter VII powers and could therefore fall back on the Security Council's powers of enforcement, though they have not done so in practice. See Art 8 Statute of the ICTY, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, Annex ('ICTY Statute'); Art 7 Statute of the ICTR, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Annex ('ICTR Statute'); Agreement between the United Nations and the Lebanese Republic on the Establishment of an STL, UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757, Annex.

¹⁷ See e.g. C Sriram, 'Globalising Justice: From Universal Jurisdiction to Mixed Tribunals' (2004) 4 *Netherlands Quarterly of Human Rights* 7–32.

¹⁸ See C Sriram, 'Revolutions in Accountability: New Approaches to Past Abuses' (2003) 19 *American University International Law Review* 301, 383; C Stahn, 'The Geometry of Transitional Justice: Choices of Institutional Design', (2005) 18 *Leiden Journal of International Law* 425, 449; J Stromseth, 'Pursuing Accountability for Atrocities After Conflict: What Impact on Binding the Rule of Law' (2007) 38 *Georgetown Journal of International Law* 251, 260.

¹⁹ The fact that outreach was only engaged in at a late stage in the process has only exacerbated the struggle. See D Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (New York: Open Society Institute 2008) 22. The ICC has acknowledged the importance of outreach in its work, and has sought to communicate its activities amongst affected local communities. See ICC, Structure of the Court, Outreach <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/outreach/Pages/outreach.aspx> accessed 15 September 2014.

²⁰ J Turner, 'Nationalizing International Criminal Law' (2005) 41 *Stanford Journal of International Law* 1, 24.

²¹ M Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press 2007), 148.

at the national level, it is more likely that victims and members of the local community will be able to attend hearings and engage with the criminal justice process. Such participation has been thought to help victims 'find meaning and a catharsis following seemingly random victimization'.²² By encouraging local justice rather than international justice, complementarity assists in making the process of justice visible, so that it is both done and seen to be done by those directly affected by the wrongdoing.²³

From a practical perspective, it is also important to acknowledge the limitations to the ICC's capacity. As mentioned already, it is impossible for the Court to shoulder responsibility for the investigation and prosecution of *every* act of core international criminality.²⁴ By encouraging states to step up to the challenge, the principle of complementarity relieves some of the pressure on the ICC as an institution of finite resources and capacity. Therefore, the principle of complementarity operates to reduce the 'impunity gap', both between the situations that are subject to investigation by the ICC and those that are not, and between those individuals who are prosecuted by the Court and those perpetrators who are not.²⁵

The principle of complementarity, by engaging both national authorities and the Court in the pursuit of the objectives of universal accountability, helps to manage the workload of the Court. Further, where national judicial systems have the capacity to conduct effective investigations and prosecutions and there exists the political will to enable those proceedings to take place—and to do so in accordance with the rule of law—national proceedings, particularly those undertaken by the situation-states, are likely to be more efficient with a greater chance of success. For example, national authorities have easier and more direct access to evidence and witnesses, and do not face the logistical challenges faced by the ICC or by third states that are not only geographically more remote, but which rely on the full cooperation of the situation-state to access that evidence and those witnesses.²⁶

In light of this, the state of national jurisdictions following mass atrocity may hinder the application of complementarity in practice, as it may not always be possible for national jurisdictions to oversee investigations and prosecutions. The state of national jurisdictions following mass atrocity may be such that any accountability efforts or transitional justice processes may be impeded regarding their effectiveness or efficiency. In addition, it should not be forgotten that, even though the Rome Statute does not oblige states to investigate and prosecute,²⁷ it does require national

²² Sriram (n 18) 383.

²³ See Sriram (n 17).

²⁴ Stahn (n 18) 449.

²⁵ Report of the Bureau on Stocktaking: Complementarity, ICC-ASP/8/51, 18 March 2010 (Resumed Eighth Session of the Assembly of States Parties), para. 3 ('Report of the Bureau on Stocktaking: Complementarity').

²⁶ See Paper on some policy issues before the OTP, September 2003, 4. Other reasons that suggest local proceedings are more favourable to the remoteness of international proceedings are discussed in Bergsmo et al. (n 6) 800.

²⁷ See H Duffy and J Huston, 'Implementation of the ICC Statute: International Obligations and Constitutional Considerations' in C Kreß and F Lattanzi (eds), *The ICC Statute and Domestic Legal Orders, Volume I: General Aspects and Constitutional Issues* (Baden-Baden: Nomos 2000), 31; J Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86, 90.

institutions to cooperate in respect of investigations and prosecutions conducted by the ICC through, amongst other things, transferring perpetrators, witnesses, and evidence to the Court.²⁸ This leads to the ‘complementarity paradox’, whereby states that are unable or unwilling to investigate or prosecute may be relied upon to cooperate with the ICC, if it decides to exercise its jurisdiction.²⁹ Successful prosecution of perpetrators is also dependent on the availability of evidence and witnesses, as well as the ability to secure evidence in a timely fashion.³⁰ The Rome Statute places an obligation on states to cooperate with the Court in respect of investigations and prosecutions carried out by the ICC.³¹ The ability of states to cooperate with the ICC in respect of trials carried out at the international level also has great significance for the success of the ICC’s regime. The need for capacity building is therefore evident. Before turning to the mechanics of capacity building, it is important to briefly explore the challenges faced by national legal orders, the very challenges that capacity-building efforts generally seek to address.

48.3 Challenges to Domestic Capacity

Of the difficulties faced by states in fulfilling their role under the complementarity regime, the absence of national implementing legislation is the first one to consider. Legislation enables states to investigate and prosecute—and therefore engage with—the implementation of complementarity, provides the legal basis for the execution of a request for cooperation with the ICC, and ensures that, when trials are carried out at the national level, they meet international standards. Of the 123 States Parties to the ICC, approximately less than half possess full legislation implementing the crimes and cooperation provisions of the Statute and enabling them to execute ICC cooperation requests and to investigate and prosecute at the national level.³² Not only does legislation need to be present, but it must also be of a suitable standard to adequately facilitate effective cooperation and to ensure that trials carried out at the national level meet international standards.

The absence of specific legislation incorporating the crimes and substantive law into domestic law forces investigations and prosecutions to be labelled merely as ordinary crimes such as murder, rape, or theft. Such ‘ordinary crimes’ lack the stigma of the core international crimes, i.e. genocide, war crimes, or crimes against humanity, and may not carry the same significance in the eyes of victims, perpetrators, and the wider international community.³³

²⁸ Art 86 ICC Statute. States are obliged to provide for the various forms of cooperation outlined in Parts IX and X of the ICC Statute.

²⁹ O Bekou and R Cryer, ‘The International Criminal Court and Universal Jurisdiction: A Close Encounter?’ (2007) 56 *International and Comparative Law Quarterly* 49, 63.

³⁰ M Bassiouni, ‘Where is the ICC Heading?’ (2006) 4 *Journal of International Criminal Justice* 421, 423.

³¹ Art 86 ICC Statute.

³² See information obtained through the National Implementing Legislation Database which forms part of the ICC Legal Tools Project <<http://www.legal-tools.org/en/go-to-database/national-implementing-legislation-database/>> accessed 17 July 2014.

³³ See W Ferdinandusse, ‘The Prosecution of Grave Breaches in National Courts’ (2009) 7 *Journal of International Criminal Justice* 723, 729–34.

Moreover, even where the necessary legislation incorporating the crimes under the jurisdiction of the Court is present, states may still struggle to pursue justice at the national level. This is because the investigation and prosecution of international crimes is a complicated affair, requiring a high degree of precision, organization, and expertise. The elements of international crimes are far more complex than those of ordinary domestic law crimes. Obtaining evidence to reach the level of proof required to meet the contextual and circumstantial elements inherent in international crimes and proving the existence of one or more specialized modes of liability is not an easy task.³⁴

The complexity of the situation is further exacerbated by the very demand for justice. The lack of resources, infrastructure, and manpower to respond to situations of potential mass criminality may be lacking. Post-conflict states generally lack courtrooms, detention centres, and prisons, as well as judges, police officers, etc., necessary to practically conduct investigations and prosecutions.³⁵ State law enforcement agencies and judicial authorities may not have the technical expertise necessary to conduct large-scale complex criminal investigations, potentially involving a high number of both victims and perpetrators.³⁶ The size of the investigations and volume of evidence can be overwhelming for even the most well-resourced justice systems. Large numbers of factually rich cases, concerning large quantities of data, given the limitations in resources, skills, and expertise, further impede the ability of national courts to meet an increased caseload. The capacity of national institutions to deliver justice may also be hindered by inefficient work processes. Doing justice for atrocities requires the handling and organization of large quantities of data. Failure to organize data and maintain a clear overview of each case may lead to cases being pursued, but failing later in the process due to weaknesses or gaps in the evidence, wasting time and increasing the cost of the administration of justice.³⁷ Further, societies transitioning out of periods of authoritarianism and internecine violence may lack trust in the very justice and security institutions that would be responsible for delivering criminal accountability given the role that those institutions can often play in maintaining authoritarian regimes and in systematic violence.³⁸

Turning now to some of the situations currently before the ICC, the difficulties of doing justice for atrocities on the ground can be easily understood through looking at some numbers. Although one cannot easily get access to reliable statistics, either

³⁴ M Bergsmo and P Webb, 'Innovations at the International Criminal Court: Bringing New Technologies into the Investigation and Prosecution of Core International Crimes' in H Radtke et al. (eds), *Historische Dimensionen von Kriegsverbrecherprozessen nach dem Zweiten Weltkrieg* (Baden-Baden: Nomos 2007), 205.

³⁵ See e.g. E Baylis, 'Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks' (2009) 50 *Boston College Law Review* 1, 49.

³⁶ S Straus, 'How Many Perpetrators Were There in the Rwandan Genocide? An Estimate' (2004) 6 *Journal of Genocide Research* 85. See also M Bergsmo et al., *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina* (Oslo: Torkel Opsahl Academic EPublisher 2009) <http://www.ficlh.org/fileadmin/ficlh/documents/FICHL_3_Second_Edition_web.pdf> accessed 17 July 2014.

³⁷ M Bergsmo et al., 'Preserving the Overview of Law and Facts: the Case Matrix' in A Smeulers (ed.), *Collective Violence and International Criminal Justice* (Antwerp: Intersentia 2010), 413–35.

³⁸ See e.g. Baylis (n 35) 29.

because they simply do not exist in a given country, or because even where some statistics are available, they are not accurate or are incomplete, a quick overview of some key indicators demonstrates the state of national capacity. In Uganda, for instance, there were approximately 295 judges in 2012 to deal with roughly 127,000 cases before national courts, only 23 of which were war crimes cases.³⁹ An individual spends on average 15.1 months on remand, and the convict–remand ratio is 53:47.⁴⁰ In the DRC, the number of judges in 2009 was 2,150 and justice occupied only 0.6% of the national budget, whereas 18,000 persons were in pre-trial detention with 4,000 prisoners post-sentencing, which is demonstrative of the slow pace of proceedings.⁴¹ In Kenya, in 2011 there were 332 judges, 83 civilian prosecutors, and 360 police prosecutors to deal with a backlog of 6,000 cases before the Court of Appeal in 2013, of which 5,000 (according to the Director of Public Prosecutions, but questioned by many) are post-election violence related.⁴² In 2011 there were 6,642 persons detained at the pre-trial stage, with 8,825 sentenced prisoners.⁴³ In Côte d'Ivoire, with 1 judge per 26,000 persons, and 5% of the national budget spent on justice, there were apparently 150 cases concerning individuals from the Gbagbo regime.⁴⁴ Of the total number of prisoners, 29% were in pre-trial detention and 71% had been sentenced.⁴⁵

These rudimentary statistics demonstrate that there is a great need to enhance national courts in order to fulfil the promise of complementarity and to give meaning

³⁹ See S Lubwama and S Kakaire, 'With Few Judges, Justice is Delayed and Denied', *The Observer (Uganda)*, 24 October 2012; M Habati, 'Uganda: Staff Crisis in Judiciary', *The Independent (Uganda)*, 10 June 2012; H Athumanji, 'Uganda Needs More Judges', *Uganda Radio Network (Kampala)*, 23 July 2012; Justice, Law and Order Sector (Uganda), Facts and Figures <<http://www.jlos.go.ug/index.php/2012-09-25-11-10-36/facts-figures>>; ibid., Case Backlog Reduction Program <<http://www.jlos.go.ug/index.php/2012-09-25-11-09-41/case-backlog-reduction>>.

⁴⁰ Id.

⁴¹ See Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the DRC between March 1993 and June 2003, United Nations Office of the High Commissioner for Human Rights (2010), 416; La Mise en Oeuvre Effective du Principe de Complémentarité—République démocratique du Congo, Open Society Justice Initiative (2011); Document—République Démocratique Du Congo. Il Est Temps Que Justice Soit Rendue. La République Démocratique Du Congo A Besoin D'une Nouvelle Stratégie En Matière De Justice, Amnesty International (2011); Country Reports on Human Rights Practices for 2013: Congo, Democratic Republic of the US Department of State, Bureau of Democracy, Human Rights and Labor (2013); L Davis, Justice-Sensitive Security System Reform in the DRC, International Center for Transitional Justice (2009).

⁴² See International Commission of Jurists, Kenyan Section, 'Access to Justice' <<http://www.icj-kenya.org/index.php/icj-programmes/access-to-justice6>> accessed 17 July 2014; National Council for Law Reporting (Kenya Law), 'Kenya Law Blog' <<http://www.kenyalaw.org/kenyaLawBlog/>> accessed 17 July 2014; Kenya, 'Turning Pebbles': Evading Accountability for Post-Election Violence in Kenya, Human Rights Watch (2011); D Madegwa, 'Kenya: Judiciary Begins Clearing Backlog of Cases', *The Star (Kenya)*, 14 January 2013; M Mutiga, 'Kenya CJ Vows to Clear Case Backlog in 6 Months', *Daily Nation (Kenya)*, 29 October 2011.

⁴³ Id.

⁴⁴ See Côte d'Ivoire, Ministère de la Justice, 'Personnel et Cadre de Travail' <<http://justice-ci.org/cellule/76-personnel-et-cadre-de-travail.html>> accessed 17 July 2014; *L'Organisation et le Fonctionnement du Système Judiciaire en Côte d'Ivoire*, United Nations, *United Nations Operation in Côte d'Ivoire, Rule of Law Unit* (2007); ibid., Rapport sur la Situation des Établissements Pénitentiaires en Côte d'Ivoire; Turning Rhetoric into Reality: Accountability for Serious International Crimes in Côte d'Ivoire, Human Rights Watch (2013).

⁴⁵ Ibid.

to the system of justice that the Court envisages. Indeed, the success of the ICC as a mechanism of accountability passes through the strength of national legal orders. Identifying the legal foundation which could be used as a basis in order to build capacity is therefore crucial.

48.4 Positive Complementarity: A Suitable Basis for Capacity Building?

For many, positive complementarity constitutes a valuable tool in the armoury of capacity building.⁴⁶ The emergence of the concept came as an answer to the conundrum of how to deal with the absence of a provision in the Statute that could provide the basis for comprehensive assistance with building national capacity.⁴⁷

As a term, 'positive complementarity' was first used within the ICC OTP in 2006 to describe the active encouragement of states to conduct national proceedings and, where appropriate, to provide the necessary assistance to enable them to do so.⁴⁸ Until 2010, the notion of positive complementarity was perceived only as a prosecutorial strategy. In the view of the OTP, positive complementarity 'encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation'.⁴⁹

Positive complementarity received much attention ahead of the first Review Conference of the Rome Statute for the ICC which took place in Kampala, Uganda in 2010, and which gave further prominence to positive complementarity in the stocktaking exercise that formed part of the Conference.⁵⁰ Culminating in a resolution on positive complementarity,⁵¹ the Review Conference transformed what was the common understanding of positive complementarity until then and changed its character from a purely prosecutorial strategy to the basis for engaging in capacity building. Before the Review Conference, positive complementarity was understood as the part of the ICC's role and its potential to enhance national systems; in Kampala, that understanding shifted, primarily because of the limitations in the capacity of the ICC to take on such a role. As the Bureau on Stocktaking

⁴⁶ See e.g. C Stahn, 'Complementarity: A Tale of Two Notions' (2008) 19 *Criminal Law Forum* 87–113; W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harvard International Law Journal* 53–108; P Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court' (2005) 99 *American Journal of International Law* 403–21.

⁴⁷ Art 93(10) ICC Statute provides very limited scope for such assistance. See e.g. F Gioia, "Reverse Cooperation" and the Architecture of the ICC Statute: A Vital Part of the Relationship between States and the ICC? in M Malaguti (ed.), *ICC and International Cooperation in Light of the ICC Statute* (Lecce: Argo 2011), 75–101.

⁴⁸ Report on Prosecutorial Strategy, OTP, 14 September 2006.

⁴⁹ Id., 5.

⁵⁰ See Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/8/Res.3, Annex IV, 'Topics for Stocktaking', 26 November 2009 (Eighth Plenary Meeting of the ASP) <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.3-ENG.pdf> accessed 15 September 2014. See also, generally, Bergsmo et al. (n 6).

⁵¹ Complementarity, Resolution RC/Res.1, 8 June 2010 (Ninth Plenary Meeting of the ASP) <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf> accessed 15 September 2014 ('Resolution RC/Res.1').

explicitly put it in its report to the Review Conference, ‘the Court is not a development agency... Activities aimed at strengthening national jurisdictions as set out in this paper should be carried forward by States themselves, together with international and regional organizations and civil society, exploring interfaces and synergies with the Rome Statute system.’⁵² That states, as well as other organizations, including NGOs are publicly called upon to step in, in support of capacity building, is a significant acknowledgement of their role in building such capacity and the shifting of the onus from the ICC to other actors.⁵³ Furthermore, positive complementarity was then defined as ‘all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis’.⁵⁴

Accordingly, in its resolution, the Review Conference recognized ‘the need for additional measures at the national level as required and for the enhancement of international assistance to effectively prosecute perpetrators of the most serious crimes of concern to the international community’,⁵⁵ recognized ‘the desirability for States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level’,⁵⁶ and encouraged ‘the Court, States Parties and other stakeholders, including international organizations and civil society, to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern’.⁵⁷

Positive complementarity therefore focuses on the technical and financial assistance provided to states in order to build their capacity to oversee investigations and prosecutions of core international crimes. It can take the form of legislative assistance, technical assistance, and capacity building, as well as assistance in terms of constructing physical infrastructure.⁵⁸ Examples of technical assistance and capacity building include the training of law enforcement and judicial officials, defence counsel, and forensic investigators, and the development of capacity to ensure the protection of victims and witnesses. Such support could also involve supplying judges and prosecutors to assist national courts, specialist international crimes divisions, or hybrid tribunals, or the provision of mutual legal assistance and cooperation to facilitate actual prosecutions. In terms of physical infrastructure, international crimes often occur in the context of periods of conflict and protracted insecurity. Positive complementarity can involve the provision of assistance in the (re)construction of the necessary infrastructure to establish an operational system of criminal justice.⁵⁹

⁵² Report of the Bureau on Stocktaking: Complementarity, ICC-ASP/8/Res.9, Appendix, 25 March 2010 (Tenth Plenary Meeting of the ASP) (‘Report of the Bureau on Stocktaking: Complementarity’), para. 4.

⁵³ Resolution RC/Res.1 (n 51) paras 3 and 8.

⁵⁴ Ibid., para. 16.

⁵⁵ Ibid., para. 3.

⁵⁶ Ibid., para. 5.

⁵⁷ Ibid., para. 8.

⁵⁸ Report of the Bureau on Stocktaking: Complementarity (n 52) para. 17.

⁵⁹ Id.

Capacity building has evolved through a strategy of positive complementarity, and states and other actors are now charged with building capacity through voluntary and bilateral assistance. It is the clear intention of the States Parties that positive complementarity ought to constitute the foundation on which all capacity building should occur.

48.5 The 'How To' of Capacity Building

With positive complementarity having entered the vocabulary of international criminal lawyers, attention should focus on the question of how to strengthen national capacity. Whereas complementarity pertains to both willingness and ability, the strengthening of domestic capacity is more likely to influence the ability rather than the willingness.⁶⁰

An important step in designing capacity-building programmes is the identification of the actual needs and gaps of a national criminal justice system independently of any assumed solutions.⁶¹ Usually, this is done through a diagnostic process to determine needs or 'gaps' between current conditions and desired or required conditions. Otherwise known as 'needs assessment', it is often a prerequisite to any capacity-building scheme, and is usually linked to development funding. Performed in order to solve or avoid current problems, create or take advantage of a future opportunity, or to provide learning, development, or growth,⁶² a needs assessment, done properly, may offer an accurate snapshot of the state of national proceedings.

Indeed, having access to reliable and current information and factual data on the criminal justice system in a post-conflict country is a challenge. It is likely that many of the key challenges encountered in undertaking a needs assessment would also be telling of the actual needs and gaps of the criminal justice system as a whole. For instance, in states where capacity is lacking, institutions rarely hold up-to-date catalogues of staff, equipment, buildings, and facilities.⁶³ Budgets are often unknown and few institutions have developed operational plans. Annual Reports may be prepared and published one year, but not the next. The telecoms infrastructure is limited and painfully interrupted by the conditions on the ground.

Identifying the current and aspired conditions in a national criminal justice system is a prerequisite in order to strengthen that system and enable it to undertake investigations and prosecutions of core international crimes. Contrasting the existing conditions to the aspired conditions of a given criminal justice system assists with identifying the gaps and needs. In that context, it might be crucial to ascertain and, if possible, seek to address the underlying causes of the current conditions before

⁶⁰ See e.g. E Hunter, 'Establishing the Legal Basis for Capacity Building by the ICC' in M Bergsmo (ed.), *Active Complementarity: Legal Information Transfer* (Oslo: Torkel Opsahl Academic EPublisher 2011), 67–93.

⁶¹ R Kaufman, 'Strategic Thinking: A Guide to Identifying and Solving Problems' (2006) jointly published by the American Society for Training and Development, and the International Society for Performance Improvement; R Kaufman, *Mega Planning: Practical Tools for Organizational Success* (Thousand Oaks: Sage Publications, 2000); R Kaufman, *Change, Choices, and Consequences: A Guide to Mega Thinking and Planning* (Amherst: HRD Press 2006).

⁶² K Gupta et al., *A Practical Guide to Needs Assessment* 2nd edn (San Francisco: Pfeiffer 2007) 17.

⁶³ See Baylis (n 35) 29.

identifying the possible solutions or steps that could be employed to reduce the gaps between the current conditions and the aspired conditions.⁶⁴

Despite their increasing emphasis, needs assessments cannot be seen as a panacea to the obstacles faced by national legal orders in the pursuance of investigations and prosecutions. Whilst it is undeniably significant to recognize the precise reasons a national system is inhibited, it should be accepted that needs assessments cannot possibly be wholly objective and/or accurate. Rather, it is important to accept that the inherent biases of the assessor, as well as the very access to information he/she has, are likely to affect their findings. In addition, a state's need or sense of ownership/pride might not be conducive to such a holistic overview. States on the receiving end of capacity building should therefore be encouraged to articulate what they perceive their needs to be and to select the level and intensity of the capacity building they would be prepared to receive. In practice, most of the capacity-building efforts are likely to be on an ad hoc basis. Even in situations where a large rule of law programme is in place,⁶⁵ there is always a need for specialized capacity building in distinct areas that may not fall within the remit of pre-planned activities.

Besides engaging in assessing the needs of criminal justice systems, providing access to legal information on core international crimes would benefit those individuals who engage in the justice for atrocities sector. Law professionals need to have access to relevant information and also understand the substantive and procedural aspects of core international crimes and the way in which other jurisdictions, be it national or international, have approached them. Writing legal motions, arguments, and decisions is the bread and butter of all legal professionals, regardless of the nature of the legal system and the legal tradition it follows, i.e. common or civil law, etc. In order to effectively perform their tasks, law professionals in well-resourced countries would physically visit a library, or access online resources. In a post-conflict setting, this is not likely to be the case. Libraries may not be easily available, adequately stocked, or up to date. Online databases come at a premium and require access to certain infrastructure, such as personal computers and Internet access of a reasonable speed, which are beyond the reach of the vast majority of such professionals. Democratizing access to knowledge and information, although obviously not addressing all of the challenges associated with the lack of capacity, is an important step in improving the quality of proceedings at the national level.⁶⁶

⁶⁴ Needs assessments have been the subject of the 'Greentree Process', an initiative facilitated by the 'International Centre for Transitional Justice' (ICTJ). One of the initiatives being explored by the Greentree Process is the possibility of enhancing coordination in the implementation of the principle of positive complementarity by developing a centralized system for the assessment of capacity-building needs to strengthen the rule of law and justice systems and the deployment of assistance to meet those needs. While discussions have been ongoing since 2010, with the first of the three high-level retreats convened at the Greentree Estate in New York, the process has yet to yield concrete outcomes. For further information, see Synthesis Report on 'Supporting Complementarity at the National Level: An Integrated Approach to Rule of Law', ICTJ (2011) and Synthesis Report on 'Supporting Complementarity at the National Level: From Theory to Practice' (2012).

⁶⁵ See E Witte, *Putting Complementarity into Practice: Domestic Justice for International Crimes in the Democratic Republic of Congo, Uganda, and Kenya* (New York: Open Society Foundations 2011).

⁶⁶ Initiatives such as the ICC's Legal Tools Project (n 32) that provide access to such information free of charge are therefore particularly welcome.

Putting access to information to one side, another challenge to national capacity is the lack of relevant skills and expertise. The accumulated knowledge concentrated in the international sphere, through the work of international(ized) courts and tribunals, ought to be transferred to the national courts, if national capacity is going to be enhanced. The two decades of international adjudication of core international crimes have provided ample information and case law, and a wealth of documents which may be useful to national jurisdictions, should they engage in investigations and prosecutions of mass atrocity crimes.⁶⁷ Channelling the key findings of international jurisprudence to national courts, assisting with improving work processes, and legal expertise can possibly be achieved with specific technical assistance.

Such assistance would need to be adapted to the needs of the concrete situation. Undeniably, significant challenges will be encountered during the process that the capacity builders would need to address. As regards the lack or inadequacy of implementing legislation discussed in an earlier section, emphasis should be placed on realizing its importance in terms of giving meaning to complementarity. However, it should not be forgotten that drafting such legislation is a complex, time-consuming, and politically loaded task. Reviewing the compatibility of existing legislation with the Rome Statute provisions, preparing new legislative instruments, and getting them through the legislative body, usually the national Parliament, is an onerous process, which may also be affected by changing political will.⁶⁸ In addition, the drafting of legislation requires expert knowledge and sufficient resources to do it properly. Such resources are not always available, particularly in war-torn countries where the drafters are few and the needs for other pieces of legislation may be more pressing. Furthermore, the complexity of the Rome Statute requires a good understanding by the national drafters of a variety of areas, such as criminal law and procedure, international law and process, as well as human rights and humanitarian law, which in turn impacts upon the speed and quality of the drafting of such legislation.⁶⁹

The diminished physical and human infrastructure further impacts on the operational capacity of a domestic system. For example, for domestic institutions operating in the context of a weak economy, the lack of infrastructure, the lack of confidence in the judicial structure, as well as possible disputed authority may impede the building of national capacity.⁷⁰ Such operational capacity problems are likely to be aggravated in situations where there is a large backlog of cases, typical of post-conflict situations where limited resources and expertise lead to limited capacity to process cases, thus causing increased bottlenecks. The lack of training may further exacerbate this situation. The need for specific training is widely recognized;⁷¹ however, all training should aim to equip

⁶⁷ See e.g. the ICTR/ICTY Case Law Database <<http://www.unmict.org/en/cases/ictr-icty-case-law-database>> accessed 17 July 2014.

⁶⁸ For example, the implementation process in the DRC has taken several years. See O Bekou and S Shah, 'Realising the Potential of the International Criminal Court: the African Experience' (2006) 6 *Human Rights Law Review* 499, 502.

⁶⁹ See O Bekou, 'Building Databases for the ICC Legal Tools Project: Data Structures and the National Implementing Legislation Database' in Bergsmo (n 60) 159.

⁷⁰ As such they had been highlighted at a special panel on complementarity hosted by South Africa and Denmark, the focal points for complementarity on 2 June 2010, in the course of the Review Conference.

⁷¹ See Baylis (n 35) 52; M Ellis, 'The International Criminal Court and its Implication for Domestic Law and National Capacity Building' (2002–3) 15 *Florida Journal of International Law* 215, 239.

the recipients with those skills necessary to enable them to function without the need to have recourse to external consultants after the completion of such training. It should be emphasized, however, that despite the best intentions, this is not easily achieved.

These examples of capacity building make it necessary to consider yet another aspect: the availability of funds. Less well-resourced states are more likely to rely on external funding to help with the enhancement of national capacity. This is because the financial position of a country transitioning out of mass atrocity is unlikely to be able to cover the cost of re-building shattered infrastructure or raising the skills and expertise of those professionals likely to steer the process of national investigations and prosecutions and execution of ICC cooperation requests. By providing financial support to the affected states, they are given the opportunity to play their role in the Rome Statute system of justice with the view to putting an end to impunity. Part of this responsibility can also be shared by civil society organizations, whose activities, when supported, help strengthen the work of the ICC at grassroots level, both in terms of political initiatives and also in the promotion of the values, principles, and objectives underpinning the concept of international criminal justice.

Funding is the key to setting the wheels of positive complementarity in motion. The realization of the link between development aid and capacity building has increased in importance, as has the need for forward planning and avoidance of duplication of mandate amongst (competing) donors.⁷² Providing access to funds should therefore be a priority, as should be matching the needs on the ground to the organization that can best deliver results regarding the relevant capacity-building activity. International donors should be cognizant of the fact that local capacity builders are not always in a position to fit the former's requirements. Despite the importance of maintaining standards, some flexibility ought to be exercised in order to enable the participation of local actors in the capacity-building process; a combination of funding cycles that allows for longer-term planning as well as initiatives that are shorter in length or issue-specific may therefore be needed. This is because the situation on the ground can be unpredictable, and the capacity needs of national legal orders may change in ways that do not necessarily correspond to internal deadlines of funders. Due emphasis should also be placed upon mainstreaming the inclusion of positive complementarity work areas beyond international criminal justice, such as conflict prevention or peacebuilding, which could assist in further strengthening capacity.

48.6 Concluding Remarks

Equipping national legal orders with the capacity required to enable them to oversee national investigations and prosecutions and cooperate with the ICC has gained in importance ever since the realization that what was created in Rome was not merely an international court, but a system of international criminal justice, with the ICC firmly at its centre and where national courts hold a pivotal role. The inclusion of the

⁷² Joint Staff Working Document on Advancing the Principle of Complementarity: Toolkit for Bridging the Gap between International and National Justice, High Representative of the European Union for Foreign Affairs and Security Policy (2013).

complementarity principle in the Rome Statute constitutes the cornerstone of that system. However, it was not until the advent of positive complementarity that capacity building gained in significance, with the former providing the necessary foundation for the advancement of the latter.

Through an understanding of the regime created by the Rome Statute and through an overview of some of the obstacles present at the national level, the chapter has sought to shed some light on the challenges faced in the enhancement of the ability of national legal orders to enable the investigation and prosecution of core international crimes. It also focused on highlighting some of the routes that may be available to those who wish to engage in capacity building. Implicit in this analysis is the view that what ought to be expected from national courts, given the capacity limitations, should not be the creation of 'mini-ICCs' on the ground, but national justice institutions that serve the needs of the societies they represent, whilst complying with requisite international standards. Striking the right balance in that respect is not an easy task.

With a view to the future, emphasis should be placed on how to best deliver capacity building on the ground, in light of the operational realities and without disregarding the need to increase national investigations and prosecutions that are fair, effective and efficient, as well as timely and in full cooperation with the ICC. Based on positive complementarity, fostering synergies amongst the international community and national legal actors should help to overcome the considerable challenges that restrict the effectiveness of capacity-building efforts, in order to materialize the complementarity promise and help attain the common goal of ending impunity.

Completion, Legacy, and Complementarity at the ICC

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49.1 Introduction

Ten years after the ICC opened its doors, the tribunals which preceded it in the modern era of international criminal justice have had to wrestle with how they will finish up their work and close their doors. Although addressing this question was left until relatively late in the game, the SCSL and the ad hoc ICTY and ICTR developed ‘completion strategies’ to guide the winding down of their activities.¹ These strategies address not only the immediate issue of completing case work and trials, but also how so-called residual issues will be addressed. That is, how any ongoing obligations such as the protection of witnesses or the revision of sentences will be handled. Importantly, they also address how the legacy of the tribunals will be consolidated in the communities affected by the crimes within their jurisdiction.²

As a permanent court, the ICC may seem at first to be immune to questions about its own completion strategies. Indeed, the Rome Statute³, while offering detailed guidance as to the criteria governing the opening of investigations, does not prescribe a legal mechanism for closing an investigation. That is, there is no apparent limit on the number of cases that can be brought in an ICC situation, usually understood as the specific set of incidents in a given country.⁴ This is not to say that the prosecutor’s

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¹ Report on the SCSL: Activities, Achievements, and Completion of its Mandate, Annex to Letter dated 5 October 2012 from the Permanent Representative of Canada to the United Nations addressed to the President of the Security Council, UN Doc S/2012/741 (5 October 2012); UNSC Res 1503 (28 August 2003) UN Doc S/RES/1503; UNSC Res 1534 (26 March 2004) UN Doc S/RES/1534.

² See K Heller, ‘Completion’ in L Reydams et al. (eds), *International Prosecutors* (Oxford: Oxford University Press 2012) 887 (identifying completion issues, residual mechanisms, and legacy projects as three distinct components of completion strategies).

³ Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (‘ICC Statute’).

⁴ The Prosecutor may take a decision not to prosecute under Art 53 ICC Statute once an investigation is open, but this is a decision that may be revisited by the Prosecutor at any point and appears to relate primarily to a decision regarding the prosecution of a specific case, that is, a specific charge or charges against a specific individual or individuals. As the Court affirmed in a 2013 report: ‘the ICC’s legal framework does not foresee any limit on the number of cases that the OTP may bring before the Court—this is a matter of prosecutorial discretion.... [The absence of a statute of limitations for the crimes under the Court’s jurisdiction] is a distinct strength of the ICC in the sense that individuals subject to outstanding arrest warrants cannot expect their cases to lapse and disappear.’ Report of the Court on Complementarity: Completion of ICC Activities in a Situation Country, ICC-ASP/12/32, 15 October 2013 (Twelfth Session of the ASP), paras 11, 12, and 15.

ability to open new cases in a situation country is entirely without its limits. New cases will need to fall within the temporal and territorial limits of the situation, defined either by the scope of the referral to the Court or by the decision of the ICC Pre-Trial Chamber authorizing investigations.⁵ Jurisprudence from the Court’s Pre-Trial Chamber in the *Mburashimana* case suggests that even where a State Party referral is, on the face of it, open-ended, additional cases in that country may require the opening of a new situation if there is an insufficient link with the referral initially triggering the Court’s jurisdiction.⁶

Even with these limits, however, the Court’s jurisdiction is more open-ended than that of its predecessor tribunals, particularly given that with regard to States Parties, the ICC prosecutor can seek to open a new situation *proprio motu* in an existing situation country without relying on a mandate from either that state or the United Nations Security Council.⁷ This is an important advantage when it comes to completion strategies. As discussed later in the chapter, completion strategies at other tribunals have been developed in the shadow of prospective and sometimes premature closure. Deficits in these strategies, or in their implementation, can undermine a tribunal’s delivery of justice and its legacy, a topic Kevin Jon Heller has explored comprehensively in his study of completion.⁸

In practice, however, the ICC’s work will, at some point, come to a conclusion as existing judicial proceedings are completed and additional cases are not pursued by the prosecutor. The ICC cannot stay in a particular situation in perpetuity:⁹ While avoiding arbitrarily imposed timelines, there are several reasons that Court officials and States Parties need to enter new situations with their eyes already firmly trained on how the ICC will responsibly complete its work when the time comes.

First, ignoring that there will eventually be a closure to ICC situations would dilute the need for the ICC and its States Parties to think clearly and responsibly about the ICC’s legacy, that is, to consider the overall impact of the Court on affected populations in terms of ending impunity, ensuring accountability and redress, strengthening the rule of law, and contributing to sustainable peace. These are elements that make the most sense only when contemplated in the

⁵ Arts 1, 15, and 17 ICC Statute.

⁶ See discussion of the *Mburashimana* jurisprudence in R Rastan, ‘The Jurisdictional Scope of Situations before the International Criminal Court’ (2012) 1 *Criminal Law Forum* 23, 1, 2–20.

⁷ See Art 15(1) ICC Statute; see also Arts 1, 18, and 19 Statute of the ICTY, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, Annex (‘ICTY Statute’) and Arts 1, 18, and 19 Statute of the ICTR, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Annex (‘ICTR Statute’).

⁸ See Heller (n 2). Heller’s analysis of completion strategies includes a range of other international or internationalized tribunals beyond the ICTY, the ICTR, and the SCSL, namely the Nuremberg Military Tribunals, the Bosnian War Crimes Chamber, the STL, the IMT, the IMT for the Far East, the Special Panels for Serious Crimes in East Timor, and Regulation 64 panels in Kosovo.

⁹ Cf. S Bibas and W Burke-White, ‘International Idealism Meets Domestic-Criminal-Procedure Realism’ (2010) 59 *Duke Law Journal* 637, 680. According to Bibas and Burke-White, ‘[t]he idealistic desire to do justice collides with the reality of limited time and money’. As a result, international criminal justice has just recently begun to heed to systematic issues of case management. Because of limited resources, these authors argue, the system must do a better job at screening cases including through “proactive complementarity”.

context of the ICC's eventual conclusion of work and departure from any particular country.

Avoiding the inevitable because it may be unpredictable would risk missing real opportunities to consolidate this legacy in *existing* ICC situation countries. For example, focusing on the Court's eventual completion of its activities from the outset is likely to highlight the desirability of the Court's ability to transfer some responsibilities to national authorities. This, in turn, could engender an orientation in the Court's activities towards ensuring there is capacity domestically to take up those responsibilities after the ICC has completed its work. While this will assist the Court in concluding its activities, enhancing national capacity would also benefit the Court's contributions to national jurisdictions. It would help put in place some of the elements necessary for national authorities to conduct additional investigations and prosecutions in order to bring fuller accountability than the ICC is likely to yield acting on its own. This could have real benefits for the ICC's legacy and contribution to national jurisdictions.¹⁰

Second, there are also opportunity costs for the ICC in terms of prospective *new* ICC situation countries. If the ICC's permanence and potential global reach are among its greatest strengths and innovations, they also create a real dilemma regarding how many situations and cases the Court, as a single institution with finite resources, can be expected to handle simultaneously.¹¹ States Parties should be willing to ensure the Court has the resources needed to increase the depth and reach of its work, but a clear sense of how to define the Court's mission in a given situation country and a strategy for completing that mission will enable the Court to increase its ability to respond to the high demand for justice.

Third, having one eye on the 'end game' is also important from the perspective of the populations affected by conflict. While justice cannot be rushed, there should come a time when the bulk of the accountability work can be considered to be done, so that it does not drag on forever. If the ICC is clear and up-front about when it considers its contribution to accountability has concluded, this will enable local populations to identify what still needs to be done by the national system and also enable them to feel a sense of closure of at least part of the accountability process. Great care should be taken to ensure that the ICC is not asked to move on prematurely before its work is completed in a given situation—a risk the Court has already encountered, as discussed later. But defining what that 'end' should look like and how the Court should arrive there responsibly so as to ensure its ongoing obligations are met and its legacy is consolidated, are key questions that the ICC, like its predecessor tribunals, needs to face.

¹⁰ Report of the Court on Complementarity: Completion of ICC Activities in a Situation Country, ICC-ASP/12/32, 15 October 2013 (Twelfth Session of the ASP) ('ASP Report of the Court on Complementarity'), paras 27–37; Report of the Bureau on Complementarity, ICC-ASP/11/24, 7 November 2012 (Eleventh Session of the ASP), paras 16–20.

¹¹ See generally Bibas and Burke-White (n 9) discussing potential methods for better case management systems.

The need for real attention to completion strategies of international tribunals, and, in particular, to ensure that these strategies are legacy-sensitive, has been a matter of consensus for some time. As early as 2004, the UN Secretary-General reported that 'it is essential that, from the moment any future international or hybrid tribunal is established, consideration be given, as a priority, to the ultimate exit strategy and intended legacy in the country concerned'.¹² In spite of this, the ICC's first decade passed largely without any real forward momentum in a strategic consideration of these issues. There are positive signs that this is now changing and that a real discussion is finally emerging at the Court and among States Parties regarding the need for completion strategies.

Since the Kampala Review Conference in 2010, the ICC's ASP has had a dedicated 'facilitation' on 'complementarity' within its Bureau.¹³ The facilitation has focused on so-called positive complementarity, that is, how international assistance to national jurisdictions can be enhanced in order to strengthen the willingness and ability of those jurisdictions to conduct the investigation and prosecution of ICC crimes.¹⁴ In 2012 the ASP's Resolution on complementarity explicitly recognized that 'greater consideration should be given to how the Court will complete its activities in a situation country and that such exit strategies could provide guidance on how a situation country can be assisted in carrying on national proceedings when the Court completes its activities in a given situation'.¹⁵ In its 2013 report to the ASP on complementarity, referenced earlier, the Court, in turn, set out initial observations on completion within the context of the ICC, lessons learned from other international or internationalized tribunals, and the role of the Court's field operations in completion strategies.¹⁶

Several of the issues raised here overlap with those identified by the Court in this 2013 report and this chapter seeks to make a contribution to pushing forward this important work. This chapter will first examine some of the key questions the Court and its States Parties will need to address to adapt and define the concept of 'completion' for the ICC. While recognizing that completion in the ICC context will have a number of unique features, this chapter will then go on to describe some of the lessons learned from the completion strategies of other international or internationalized tribunals in three key areas: capacity building, outreach, and archive management. Finally, as indicated, at the heart of a successful completion strategy will be an overriding concern to consolidate the Court's legacy in its situation countries. For this reason, this chapter will argue that realizing a connection between completion and positive complementarity, while not without

¹² The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General, UN Doc S/2011/634 (24 August 2004), para. 46; see also Heller (n 2) 887, 917–20 (noting that the OTPs of tribunals which have pursued a 'global' completion strategy, that is, a strategy developed prior to the creation of a tribunal, have been largely more successful than those which have adopted a 'situational' strategy, adopted after the tribunal is already established and operational).

¹³ ASP Report of the Court on Complementarity (n 10) para. 47.

¹⁴ Ibid., paras 13–14.

¹⁵ Preamble of the Complementarity Resolution, ICC-ASP/11/Res.6, 21 November 2012 (Eighth Plenary Meeting of the ASP).

¹⁶ ASP Report of the Court on Complementarity (n 10).

its challenges, could focus States Parties' discussions, including on the role of the Court, and achieving a correct understanding of the role of the Court, when it comes to complementarity.

49.2 Adapting the Concept of 'Completion' to the ICC

The ICC can benefit from the experience of the SCSL, ICTY, and the ICTR in the development of completion strategies. These experiences, however, cannot be borrowed nor the solutions adopted wholesale, given the differences between these institutions and the ICC, including in its length of operations, its mandate, and its structure. We identify here some of the key questions the ICC may face in contemplating its completion strategies.

49.2.1 Avoiding restrictions on the ICC's mandate

It is important to understand that the development of completion strategies for the ICTY, ICTR, and SCSL did not take place *sua sponte*, nor were they initially motivated by a primary concern for safeguarding legacy. Instead, completion strategies were developed as a direct by-product of the pressure on these tribunals—largely budgetary—to accelerate their conclusion.¹⁷ Completion strategies went hand in hand with other measures to wrap up work, including, at the ICTY and ICTR, greater selectivity in the choice of cases, forced by the requirement in United Nations Security Council Resolution 1534 that the ICTY and ICTR focus on 'the most senior leaders'.¹⁸

Indeed, as Heller notes, even beyond Resolution 1534, completion deadlines and corresponding changes in procedures had a direct impact on prosecutorial decisions and, he argues, impaired prosecutorial independence as well as opened up impunity gaps and limited the effectiveness of legacy projects. These include ICTY rule changes permitting Trial Chambers to direct the prosecutor to select on which counts to proceed and to limit the prosecution's presentation of its case in chief, as well as giving the decision to refer a case to national jurisdictions under Rule 11bis to the Trial Chamber at both the ICTY and the ICTR.¹⁹ Additionally, Rule 28 of the

¹⁷ See generally D Raab, 'Evaluating the ICTY and its Completion Strategy—Efforts to Achieve Accountability for War Criminals and their Tribunals' (2005) 3 *Journal of International Criminal Justice* 82, 84–8; citing President Claude Jorda's first Press release in 2000, where he was struck with completion concerns: 'What time-frame does the Tribunal set itself for fulfilling its mission?' Since then, ICTY Presidents and Officials have continuously responded to timeline concerns; F Donlon, 'The Transition of Responsibilities from the Special Court to the Residual Special Court for Sierra Leone—Challenges and Lessons Learned for Other International Tribunals' (2013) 11 *Journal of Criminal Justice* 857, 860–2; E Møse, 'The ICTR's Completion Strategy—Challenges and Possible Solutions' (2008) 6 *Journal of International Criminal Justice* 667, 668–9.

¹⁸ Heller (n 2) 908; UNSC Res 1534 (26 March 2004) UN Doc S/RES/1534.

¹⁹ Ibid., 906–9; Rule 11bis of the Rules of Procedure and Evidence of the SCSL (adopted 16 January 2002, as amended 27 May 2008) ('SCSL RPE'); Rule 11bis of the Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (adopted 11 February 1994, as amended 22 May 2013) UN Doc IT/32/Rev. 49 ('ICTY RPE'); Rule 11bis of the Rules of Procedure and Evidence of the ICTR (adopted 29 June 1995, as amended 10 April 2013) ('ICTR RPE').

ICTY Rules of Procedure and Evidence was amended to allow for additional review and scrutiny of indictments.²⁰ Anticipated closure created pressures that led to a reduction in the number of cases and increased the use of plea bargaining to expedite proceedings, leading to more lenient sentencing.²¹ Closure also meant insufficient time to invest in domestic capacity building to close remaining impunity gaps at the national level.²²

The ICC, as a permanent institution, can avoid some of the pitfalls associated with 'closure' in that it should be able to define for itself 'completion', permitting a fuller execution of its mandate. It is important that discussions of completion within the ICC context avoid imposing similar restrictions on the mandate of the Court's OTP or the Court as a whole. As discussed, given the more open-ended nature of the Court's jurisdiction and the permanence of the institution, the ICC prosecutor has a freer hand to stay longer and do more. Importantly, where possible within the defined limits of the situation open before the Court, the ICC prosecutor can also intervene again where there may be renewed violence without seeking a new mandate. This flexibility can be essential for responding to crisis situations, where early interventions can save lives and limit damage to property, making post-conflict or post-violence reconstruction quicker. Preparation for the point at which investigations and prosecutions will be complete should not be permitted to devolve into pressure to bring these possibilities to a premature end.²³

Planning ahead will increase the likelihood that the Office and the Court as a whole will find ways to wind down activities in a manner that contributes to—rather than detracts from—its legacy. Indeed, an increased institutional focus on completion could have a positive effect. It could encourage the Office to undertake a much-needed

²⁰ Rule 28 of the Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (adopted 11 February 1994, as amended 12 November 1997), UN Doc IT/32/Rev.44.

²¹ See Raab (n 17) at 89–91. According to Raab, the use of plea bargains have significantly facilitated to the accomplishment of the ICTY's mandate, and should be regarded as 'a sound development at the ICTY'. However, case management developments at the ICTY have not come without criticism. As Raab explains, Complaints of lenient sentencing were heard in the *Banović* case. In *Banović*, a prison guard pleaded guilty to killing five inmates and beating many more, and was sentenced to eight years in prison. Presiding Judge Robinson dissented, believing that the sentence was too lenient. Raab notes that the sentences handed down in Darko Mrđa and Biljana Plavšić were criticized for the same reason; Sentencing Judgment, *Predrag Banović*, IT-02-65/1-S, TC, ICTY, 28 October 2003.

²² Heller (n 2) at 900–6; see also A Chehtman, 'Developing Local Capacity for War Crimes Trials: Insights from BiH, Sierra Leone, and Colombia' (2013) 49 *Stanford Journal of International Law* 297, 300–4, noting the weaknesses of national legal systems in post-conflict situations.

²³ It is important to note that 'completion' will not be a straightforward progression in most situations. Cases are likely to face a number of stumbling blocks and delays, particularly given the real challenges the ICC has faced so far in securing the assistance necessary for investigations and arrests in several situations. Investigations in situations where crimes are ongoing or where impunity is deep and pervasive—again a majority of ICC situations, given its role as a court of last resort—mean that the Court will need to conduct more than just a handful of cases. For this reason, it is important to underscore once again that no artificial timelines should be imposed on the Court's work in a given situation once it opens investigations.

evaluation of its existing situations, and, going forward, from the outset in any new situations to assess just what will be needed—whether there are additional cases, or clearly communicated and reasoned decisions not to prosecute—in order to complete its work.²⁴

49.2.2 Timeliness of devising and implementing completion strategies

The argument that the OTP is under no obligation to ‘complete’ its work in any strict sense—nor should it be—has been offered as a reason it is premature to develop completion strategies at the ICC, as compared to the closures squarely faced by the SCSL and ad hoc tribunals. Here, however, the ICC has more, rather than less in common with the SCSL and ad hoc tribunals, and cannot afford to wait.

First, this is clear from the experiences of the ad hocs and, to a lesser extent, the SCSL. The ICTY began discussions on its exit strategy in 2000.²⁵ This came about because of the desire to transfer cases to national jurisdictions in states that had made up the former Yugoslavia. Previously, this was not considered possible because those states had been neither willing nor able to conduct investigations and prosecutions themselves.²⁶ The lack of a clear mandate and development of the completion strategy meant that there were uncertainties regarding the ICTY’s mandate and how it would operate, challenges with respect to witness protection especially in domestic jurisdictions, and difficulties planning for maximizing the ICTY’s legacy, which likewise had received little attention during the first ten years of the ICTY’s existence.²⁷ While the end date for the ICTY’s closure was pushed back many times, the focus in the early 2000s on issues of completion and legacy undoubtedly had a strong and positive impact on how the ICTY carried out its work, both in terms of case selection (and case referral) and on how it viewed itself vis-à-vis the populations in the States making up the former Yugoslavia.²⁸ The completion strategy of the SCSL was first presented to the Management Committee in 2005, less than three years after the SCSL opened its doors.²⁹ Issues of legacy were built into

²⁴ Heller (n 2) 918: ‘A global [completion] strategy facilitates the creation of a coherent prosecutorial programme. It is almost impossible for an OTP to develop such a programme if it has no idea how long it will operate, particularly when its mandate extends to a large number of suspects.’

²⁵ T Pittman, ‘The Road to Establishment of the International Residual Mechanisms for Criminal Tribunals, From Completion to Continuation’ (2011) 9 *Journal of International Criminal Justice* 797, 799. The first formal mention of closure of the ICTY or ICTR was in 2000, in a letter from the ICTY President, Judge Claude Jorda, to the UN Secretary-General, Raab (n 17) at 84.

²⁶ Letter dated 10 June 2002 from the President of the ICTY addressed to the Secretary-General, Annex to the Letter dated 17 June 2002 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2002/678 (19 June 2002).

²⁷ Eleventh ASP to the ICC: NPWJ convenes side event on ‘Developing a Comprehensive Completion Strategy for the ICC, No Peace without Justice, 17 November 2012 <<http://www.npwj.org/node/5747>> accessed 6 November 2013.

²⁸ For example, outreach efforts intensified during this period, as the ICTY had a greater focus on legacy, which by definition requires the engagement of local communities. See also ‘Conclusions and the Way Ahead’, First Annual Report of the President of the SCSL for the Period 2 December 2002–1 December 2003, 31.

²⁹ Completion Strategy, SCSL (2009), para. 2.

the fabric of the SCSL from the start and constituted the vision that informed how the SCSL built itself as an institution and carried out its work.³⁰ This, alongside the limitations on the SCSL's jurisdiction to 'those who bear the greatest responsibility' and the limited budget with which the SCSL had to operate, has undoubtedly contributed to the extremely positive impact of the SCSL in the country and the region. It is the first of the international courts and tribunals to have closed its doors at the end of 2013.

Second, even within the ICC context, there is already some pressure from States Parties on the ICC to develop 'exit' or 'completion strategies'. While discussions have taken on increasing substance over the past year, this initially stemmed from what appeared to be at least primarily, if not exclusively budgetary interests, that is, an interest in managing the Court's expanding workload within 'existing resources' by seeking to shuffle around resources.³¹

In fact, a kind of 'exit' or at least a 'transition' is already happening. The ICC may have eight open situations, but there has been a transfer of resources out of the Darfur and Uganda situations, for example, in redeploying outreach staff and scaling back on field presences.³² This transfer of resources can be justified with reference to a lack of judicial activities given the failure to arrest suspects in cases arising out of these situations, and the need, in the absence of significant new resources from ICC States Parties, to stretch to new situations. Although arrests in cases in these situations will require a scaling back up of court activities, what to do about situations where proceedings have stalled due to non-cooperation could be an important feature in any discussion about completion or transition strategies, a challenge the Court already faces. A desire to get out ahead of these pressures and address them in a responsible fashion should argue in favour of developing appropriate strategies now.

Third, and most fundamentally, completion is not just about activities that need to take place before the ICC can wrap up its work and move on. It is equally about the spirit with which the Court carries out all of its work in a situation country, which is a lesson that should be well learned from the SCSL. In addition, the timeline necessary

³⁰ See generally Donlon (n 17). Art 23 of the SCSL Agreement states that upon completion of judicial activities of the Special Court, the agreement shall be terminated. As Donlon explains, The SCSL agreement did not set down residual factors, nor indicate how completion would be managed in the future. Officials began to tackle completion and closure issues at the 2008 Freetown Conference. The SCSL recruited Donlon as adviser to prepare a report to analyse various residual institutional options for the Special Court. The Report noted several obligations that would survive on completion of all trials and appeals. See also Art 23 Agreement between the United Nations and the Government for Sierra Leone on the Establishment of a Special Court for Sierra Leone, UN Doc S/2002/246 (16 January 2002), Appendix II; F. Donlon, Consultant, Report on the Residual Functions and Residual Institution Options for the Special Court of Sierra Leone, December 2008.

³¹ As an indication of the link between budgetary Pressure on the court to hold down growth and a push to develop completion strategies, see Report of the Committee on Budget and Finance on the Work of its Seventeenth Session, ICC-ASP/10/15, 18 November 2011 (Tenth Session of the ASP), para. 18 (warning that there are limits to the degree to which new court activities can be absorbed within existing resources, and suggesting the need to give further consideration to how the court will complete its activities in a situation country, including as one measure to permit the redeployment of existing resources).

³² ASP Report of the Court on Complementarity (n 10) para. 42.

to lay the groundwork for responsible completion is so extensive that completion activities can be started as soon as an investigation is opened, without fear of jeopardizing the Court's independent exercise of its own mandate. This is particularly true of activities aimed at enhancing domestic capacity to take over certain responsibilities and to conduct additional investigations and prosecutions as part of consolidating the ICC's legacy, as discussed in section 49.3, which are likely to encounter challenges with regard to the willingness of authorities to put measures in place at the national level.³³

49.2.3 Defining completion at the ICC

In defining 'completion', the ICC should benefit from wide consultation in affected communities and with national authorities. This is a lesson learned both by the ad hocs and the Special Court, the experiences of which stress the importance of broad national consultation to embed completion work in local populations and ensure the sustainability of completion plans.³⁴ How do these core constituents understand the completion of the ICC's work? How can strategies be devised to match or inform expectations about completion? How can completion strategies be developed to ensure they will be sustainable and carried on by the local populations, which is particularly important for ensuring the ICC's lasting legacy? How can the political willingness of national authorities to take over responsibilities or to conduct additional investigations and prosecutions be gauged and bolstered, and with what consequence for the timeline for implementation of completion strategies? Throughout the various activities that can be undertaken to consolidate legacy and ensure a smooth completion, it is critical that the ICC engage with local communities and authorities to make sure that whatever their strategy, it is one that actually can work.

A clear and unique challenge for the ICC, then, is that its same officials will be required to devise and implement completion strategies that may vary markedly from situation to situation. The Court is likely to need a working definition and model of completion, to be adapted to the specifics of a given situation based on the wide consultation suggested here. In our view, completion should be defined with respect to whether the Court has achieved its mandate and under what conditions the Court will be able to say it has done so. This will primarily relate to whether the Court has delivered impartial, independent, and meaningful justice. However, a definition of completion should also consider fulfilment of the Court's mandate as turning also on whether the domestic jurisdiction is ready to take over the Court's ongoing responsibilities in

³³ Heller (n 2) 901 ('Flawed strategies have often undermined the efforts of hybrid and internationalized tribunals to build domestic judicial capacity, limiting the ability of national jurisdictions to prosecute international crimes after the tribunals close').

³⁴ Ibid., 911 (terming the failure to consult with victims regarding the ICTR's closure as 'a critical oversight, even if the victim's desires would not have affected the completion strategy: although victim satisfaction may not be a sufficient condition of a tribunal's legitimacy, it is certainly one of its necessary conditions. A tribunal that is not seen as legitimate by the victims of a conflict is unlikely to be seen as legitimate by anyone else').

the situation and resume their primary responsibilities to investigate and prosecute ICC crimes.

This is likely to be a controversial definition of what it means to complete the ICC's mandate. The ICC is a court of last resort and not a development agency. By definition this means it is stepping in where there is either a lack of capacity to try serious crimes under international law, or a lack of political will to do so, or both. Shifting the landscape to a point where national authorities are able and willing to assume the responsibility, for example, of protecting ICC witnesses, let alone carrying out investigations and prosecutions that may continue to run counter to politically powerful interests, will often be an uphill battle.³⁵ It may even be an unwinnable battle. Indeed, in the broader context of 'positive complementarity', actors have been slow to come to terms with the degree to which political will is far more dispositive—and far more difficult to generate—than technical assistance.

Insisting on this as a dimension of the Court's mandate, however, is the approach most consistent with a sense of completion that is alive to consolidating the Court's legacy. That is, as defined earlier, its long-term contribution to ending impunity and reasserting the rule of law in the countries in which it acts. It is also most consistent with recognizing that the ICC is likely to have sustained engagement with situation countries over significant periods of time in challenging and transitional circumstances, and the potential impact on national jurisdictions that its work can bring about should not be underestimated.³⁶ It is not to suggest that this is a role exclusively for the ICC alone; rather, it makes particularly relevant States Parties' discussions on 'positive complementarity,' as examined later in the chapter.³⁷ Nor is it meant to suggest that the ICC and States Parties should be held hostage where it proves, in spite of concerted effort and sustained attention, impossible to fully realize this goal. In those cases, it may be necessary to recognize that more modest measurements of completion will be necessary. However, it should be considered as a feature of completion at the outset.

It is also worth emphasizing that while the completion strategy timelines and benchmarks will have to be driven by the OTP, there is a need for the entire Court to be involved, since the entire Court will be required to implement the strategy. In addition, it will be imperative to involve not only local populations and authorities but also the ICC's States Parties, international organizations, civil society, and others who may be called upon at different times to play a part in implementing the completion strategy along the way.

³⁵ See Chehtman (n 22) 300, noting the unreliability of witness support and protection mechanisms in national post-conflict jurisdictions. Post-conflict areas tend to have great difficulty in providing support for victims, a lack of institutional framework, know-how, and resources.

³⁶ See F Pocar, 'Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY' (2008) 6 *Journal of International Criminal Justice* 655. Pocar notes the rich heritage of the ICTY and its impact on the region as well as other international criminal tribunals.

³⁷ See section 49.4.

49.3 Lessons Learned for Capacity Building, Outreach, and Archive Management

As indicated in the previous section, the completion strategies of international tribunals are generally understood to have three components: completion issues, residual functions, and legacy issues. The ICC has set out the following definitions:

- i. Completion issues: core judicial and administrative work performed before completion or closing dates, including planning for residual issues;
- ii. Residual functions: a range of core judicial and administrative tasks that must be performed post-completion, since a criminal court's mandate is not complete with the final rendering of decisions; and
- iii. Legacy issues (long-term post-completion projects, which begin prior to the institution's closure, such as outreach and institutional and capacity-building efforts, aimed at leaving a lasting positive impact on affected communities and their criminal justice systems).³⁸

Unlike the SCSL and ad hocCs, all of which required the setting-up of special mechanisms to deal with this second category—residual issues—the ICC as a permanent institution will have capacity to address enforcement of sentences, revisions of convictions or sentences, protection of witnesses, management of archives, and other similar activities. These activities still remain relevant to the development of ICC completion strategies, in that planning and resources will be needed for the ICC to carry out what would otherwise have been issues delegated to the residual mechanisms of the SCSL and ad hocCs. Such functions include assistance with implementation of reparations awards and oversight of the enforcement of sentences, both of which are critical functions that will need to be budgeted for, both financially and in terms of human resources, as part of a situation-specific ICC completion strategy. Perhaps even more critically, a focus in completion strategies on bolstering national capacity to take over residual functions is likely to benefit ‘legacy issues’, in that enhanced national capacity is likely to promote additional investigations and prosecutions and leave ‘a lasting positive impact on affected communities and their criminal justice systems’.³⁹

This section focuses on aspects of completion where there is greater potential for overlap between the strategies of the SCSL and ad hocCs, and those of the ICC, and therefore for drawing on lessons learned. Some of the key elements that should feature in ICC completion strategies in this respect are outlined here: capacity building, outreach, and archive management. All the various courts and tribunals, including the ICC, could benefit from cooperation with one another, to reduce the need for any of them to reinvent the wheel.

³⁸ ASP Report of the Court on Complementarity (n 10) para. 17.

³⁹ Id.; see also Pocar (n 36) 661–2. As Pocar explains, One of the underlying principles in the ICTY completion strategy is building the region more generally. The ICTY has paved the way for domestic adjudication of international crimes. Judge Pocar argues that the Tribunal’s legacy will not just be about its efficiency, but reinforcing the principles of its establishment.

Again, it is worth highlighting that completion and legacy are not just about specific activities that can usefully be carried out to prepare for the time when the ICC will depart, and to enhance the impact the ICC can have on local populations and on the rule of law and human rights in its situation countries. In many ways, the preparations for completion lie in how things are done, which should be informed by the difference it is foreseen the Court will make in its situation countries once its work is completed. The SCSL's legacy, for example, first had its own discrete section in the very first Annual Report of the Court, speaking about the development of the Court complex, including the buildings, as a legacy of the Court's presence; the development of skills of Sierra Leonean staff also as a means to have a lasting impact on the country's development; and a process of information and education being carried out across the country, led by the Outreach Section.⁴⁰ All of this work, from the very early days of the Court, was done as a means to build the foundations for leaving a legacy of accountability and contributing to legal reform in Sierra Leone.⁴¹ The ICTY, with the assistance of the Organization for Security and Co-operation in Europe (OSCE), has conducted assessments in its outreach activities, training, and identification of best practices in order to ensure a lasting impact in the former Yugoslavia.⁴² This is the kind of vision that the ICC and its States Parties need to develop prior to the ICC's entry into a situation country if it is to work most effectively and efficiently to achieve its goals. For those countries where the ICC is already carrying out activities, it is critical that this vision be identified as soon as possible.

49.3.1 Capacity building

Technical assistance and transfer of knowledge should be pillars of a completion strategy to facilitate the transfer of responsibilities to national authorities. Responsibilities that can be appropriately transferred to situation countries are likely to include investigation and prosecution of outstanding cases, whether arrest warrants or summons to appear have been sought by the ICC or not, and witness protection.

In the case of the SCSL, its Rules of Procedure and Evidence were amended in 2008 to allow for the possibility of referral of its cases to a national jurisdiction, much as the ICTY and ICTR's Rules were amended to facilitate implementation of its completion strategy.⁴³ While there is only one fugitive remaining at the SCSL, Johnny Paul Koroma, it is possible that there will be contempt cases. The SCSL has made it abundantly clear that any interference with witnesses will be dealt with swiftly and severely by the Residual Special Court.⁴⁴ Such cases could be dealt with either by the Residual Special Court or by national courts.⁴⁵

⁴⁰ For an overview of legacy activities of the SCSL see <<http://scsl-legacy.ictj.org/>> accessed 29 October 2013.

⁴¹ Ibid. ⁴² Pocar (n 38) 663.

⁴³ Rule 11bis SCSL RPE; Rule 11bis ICTY RPE; Rule 11bis ICTR RPE; Rule 28 ICTY RPE (as amended 12 November 1997). See nn 20–1.

⁴⁴ 'Prosecutor Hollis Welcomes the Historic Final Judgment in the Charles Taylor Case', *African Press Organization*, 26 September 2013 <<http://appablog.wordpress.com/2013/09/26/special-court-for-sierra-leone-scsl-prosecutor-hollis-welcomes-the-historic-final-judgment-in-the-charles-taylor-case/>> accessed 17 July 2014.

⁴⁵ Regarding prosecution of Koroma see Donlon (n 17) 862–3; Art 1(2) SCSL Agreement (Ratification) Act, 2011 <<http://www.rscsl.org/Documents/RSCSL-Act.pdf>> accessed 16 July 2014 ('RSCSL Statute'). If

In terms of witness protection, ongoing responsibilities will include arranging protection and support in residual trials, appeals, and review proceedings; providing a contact point for protected victims and witnesses to inform them of the release of relevant convicted persons; monitoring and assessing threats to ensure that protective measures are effective and respected; and revising protective measures if necessary, as well as assisting victims and witnesses in their relocation to another State if required.⁴⁶ This is a wide array of responsibilities that will remain on the shoulders of the ICC, as it remains on the shoulders of the residual mechanisms for the ad hoccs and the SCSL. The ICC has asked witnesses to testify and invited victims to participate; the responsibility for ensuring their safety and security will remain with the ICC long after the trials have concluded.

That said, witness protection is one area where it makes sense to have the tasks and duties carried out by the national authorities, where it is appropriate to do so and under the overall oversight of the ICC itself. This, for example, is what will happen with the Residual Special Court: its obligation towards the protection of victims and witnesses is continuing, in collaboration with the Sierra Leonean Police, through its support in the creation of a special Witnesses Protection and Assistance Unit whose work will be overseen by witness protection officers of the Residual Special Court.⁴⁷ This kind of cooperation, without abdicating responsibility, is a way in which the ICC could work in the future, which would both ensure a positive legacy through strengthening national witness protection programmes while at the same time reducing the financial burden on the ICC, which would need to oversee the national witness protection scheme but not need to have a fully functional witness protection unit working on a situation that has already closed.

49.3.2 Outreach

Outreach activities are needed to raise understanding about the institution, its mechanisms, and procedures. A survey conducted in 2012 by No Peace without Justice and its partners on the impact and the legacy of the SCSL both in Sierra Leone and in Liberia showed that a high awareness of the SCSL, its purposes, and work is evident in both countries.⁴⁸ In general, perceptions in Sierra Leone were

Koroma is not referred to a competent national jurisdiction, the Residual Special Court shall have authority to try him.

⁴⁶ See generally, e.g. Arts 1, 18 RSCSL Statute; Arts 1, 2, and 20 Statute of the International Residual Mechanism for Criminal Tribunals, UNSC Res 1966 (22 December 2010) UN Doc S/RES/1966, Annex 1 ('IRMCT Statute'); G Acquavida, "Best Before Date Shown": Residual Mechanisms at the ICTY' in B Swart et al. (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press 2011) 8, citing Report of the Secretary-General on the Administrative and budgetary aspects of the ICTY and the ICTR and the Seat of Residual Mechanism(s) for the Tribunal, UN Doc S/2009/258 (21 May 2009).

⁴⁷ See 'Legacy: Completing the Work of the Special Court for Sierra Leon,' Open Society Justice Initiative (2011), pp. 12–13; see also description of national witness protection programme available at <http://www.rscsl.org/legacy.html>

⁴⁸ 'Making Justice Count: Assessing the Impact and Legacy of the Special Court for Sierra Leone in Sierra Leone and Liberia', Special Court for Sierra Leone and No Peace without Justice (2012).

more positive than in Liberia and more people had heard of the SCSL in Sierra Leone than in Liberia.⁴⁹ This comes down to two things: first, the SCSL was based in Sierra Leone and not in Liberia. Second, outreach began much earlier in Sierra Leone than in Liberia and was able to have a broader reach, in part due to the establishment of outreach offices in every district of Sierra Leone from an early stage. There can be no doubt that there is a direct correlation between the outreach activities of the SCSL and strengthening its legacy and the positive contributions it has made to peace and justice. In the later years of the Court’s life, SCSL outreach also began to focus on its closure and the establishment of the Residual Special Court, which is an important way to consolidate the SCSL’s early gains and to promote acceptance by the populations both of the SCSL’s closure and of the work of the Residual Special Court.

Similarly, the ICC will need to do outreach around its completion and closure in any given situation. For this reason, it will be critical that the ICC has a clear vision of what completion will mean, particularly in terms of the conditions that need to be realized in order to say the Court has completed its mandate. In part, this will—or should—also be dependent on what the local population has to say about this issue: while the OTP has to be independent in determining when it can say it has completed its work, as discussed earlier, there is a need to be responsive to what local populations think on the matter, otherwise irrespective of the excellent work the ICC may do, its departure risks leaving a bitter taste in too many mouths. This is one reason it is critical to undertake wide-ranging consultations, encompassing a variety of sectors of society and ensuring broad geographic reach, to minimize the risk of that happening. Involvement that was missing in the case of the ICTY was that of Serbian civil society actors as opposed to civil society from Croatia and Bosnia. The effects are evident: the situation now is that Bosnia is fully going ahead with national prosecutions; Croatia is moving forward but on a regional level; and Serbia has not shown any interest in national trials.⁵⁰

49.3.3 Archives

There are two aspects to the archives of the ICC. On the one hand, there is a residual function—that of management of the ICC’s archives—that clearly belongs with and can be carried out by the ICC itself. Indeed, there is an argument that the material produced by the ICC belongs to the ICC and should be retained by it and shared pursuant to the rules established in its archival policy. However, there is also an argument to be made that the archives of the ICC, at least insofar as they are not confidential, ‘belong’ in a non-technical and non-legal sense to the populations where the crimes that were investigated and prosecuted were actually carried out. While of course the ICC cannot write the country’s history, and nor should it attempt to do so, it can make an important contribution at least to filling in parts of that history through the adjudication of contested facts and the attribution of individual criminal responsibility. As

⁴⁹ Id.

⁵⁰ See Raab (n 17) at 92–5.

such, the archives of the ICC form, or should form, part of the history of its situation countries.⁵¹ For the ICTY, for example, 90% of the ICTY's public archives are co-held with the Humanitarian Law Centre, which makes those records available for research and perusal by people from the region.⁵² The public archives of the SCSL will likewise be available in Sierra Leone.⁵³

Indeed, the issuance of judgments could be a milestone or a starting point for a population, which could lead to national reconciliation. It is important that local actors have access to materials. The success of the Peace Museum project in Sierra Leone, which involved a national body and trained local actors to deal with the Special Court's expertise, materials, and proceedings, is an example of this.⁵⁴

It will be important for the ICC to build into its completion plans how it will share its archives with the situation country and which original items, such as exhibits whose owner cannot be found, should be provided to the situation country, for example for use in a museum or other memorial.⁵⁵ This is also important to avoid charges of the ICC 'stealing' both memories and property from its situation countries, which is a useful lesson learned from the ad hoc and the SCSL.⁵⁶

49.4 A Role for the Court and the ASP

At the Kampala review conference, the ICC's ASP succeeded in putting the discussion of 'complementarity' on the map. More specifically, as indicated above, the ASP and individual States Parties have attempted to push forward discussion of 'positive complementarity', that is, how international assistance can be directed towards the strengthening of national jurisdictions in the investigation and

⁵¹ See observations regarding the SCSL archives in Donlon (n 17) at 867–9.

⁵² See Fond za Humanitarno Pravo ('Humanitarian Law Centre') <http://www.hlc-rdc.org/?page_id=17468&lang=de> accessed 6 November 2013.

⁵³ Art 7 RSCSL Statute; see also Donlon (n 17) at 867–9.

⁵⁴ Donlon (n 17). As Donlon explains, The SCSL in cooperation with national stakeholders developed the Sierra Leone Peace Museum with the objective of establishing a memorial in Freetown which will include archives, a memorial, and exhibitions of war-related material. The Sierra Leone Human Rights Commission decided to house the archives of the Truth and Reconciliation Commission alongside the copy of the SCSL public records in the Peace Museum. Greater public education on the end of impunity and responses to grave human rights abuses will result as public records from various transitional justice institutions and will be available in one location.

⁵⁵ See generally G Frisso, 'Winding Down the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims' (2011) 3 *Goettingen Journal of International Law* 1093, 1118, 1119. Frisso argues that Archives are particularly important, as they offer a historical record and information about the circumstances in which atrocities were committed. It becomes part of a people's national heritage and should be preserved. It offers victims a collective right to know and may help contextualize victims' experiences, thereby facilitating the healing of wounds.

⁵⁶ See generally P Manning, 'Governing Memory: Justice, Reconciliation and Outreach at the Extraordinary Chambers in the Courts of Cambodia' (2012) 5 *Memory Studies* 165, 166. Manning brings to light criticisms of the ECCC's contributions to reconciliation. He argues that the ECCC's mandate provides a 'selective memory' of events: particular events are recalled through narrow factual and legal lenses rather than a broader historical context, placing memory in neat positions between guilt and innocence.

prosecution of ICC crimes.⁵⁷ Since the review conference, the ASP, which has mandated annually facilitators and now ad hoc country focal points, to lead its work in this area, has sought out a strong role in pushing forward discussion with other important actors, particularly in the development and rule-of-law communities.⁵⁸ Experience since has shown that capacity building on investigation and prosecution of ICC crimes is no easy task, topped perhaps only by the challenge of securing the willingness of authorities to permit independent judicial activities to go forward without interference.⁵⁹ Nonetheless, the ASP's efforts to keep this issue front-and-centre for States Parties and to serve as an ambassador for complementarity with the development community hold potential for real contributions to seeing the principle of complementarity put increasingly into practice. The Court, however, has largely been sidelined by States Parties in discussions on complementarity. Particularly as discussions on positive complementarity were first undertaken within the ASP, some States Parties argued strenuously that the ICC has no role to play on positive complementarity. For some of these states, this was a mandate issue—they did not see positive complementarity in the Rome Statute. For other states, it has clearly been driven by a concern to keep the Court's budget down, fearing that complementarity efforts on the part of the Court would require additional resources.⁶⁰

Given that ICC completion strategies will, as outlined, have a significant component related to capacity building, a consequence of State Party pressure on the Court to avoid its own role in complementarity may have contributed to stymied progress on discussion of such strategies. Court officials and staff will have specific expertise when it comes to identifying needs for capacity building in situations under investigation, and this expertise could be very useful to catalyse necessary complementarity efforts by other actors in these situation countries.⁶¹ While capacity building directed to activities that support the transfer of ICC responsibilities represents a smaller basket than the long list of possible assistance that can support complementarity, it nonetheless includes a number of functions that are also essential to national investigations and prosecutions, including—perhaps most clearly of all—witness protection and support.⁶²

⁵⁷ See e.g. Report of the Bureau on Complementarity, ICC-ASP/12/31, 15 October 2013, (Twelfth Session of the ASP); Report of the Bureau on Complementarity, ICC-ASP/11/24, 7 November 2012 (Eleventh Session of the ASP).

⁵⁸ Id. ⁵⁹ Chehtman (n 22) 300–4.

⁶⁰ Authors' observations of State Party consultations on complementarity.

⁶¹ 'Making Kampala Count: Advancing the Global Fight against Impunity at the ICC Review Conference', Human Rights Watch (2010), 46–9.

⁶² For an overview of the kinds of assistance necessary to support national prosecutions and investigations, see Report of the Court on Complementarity, ICC-ASP/11/39, 16 October 2012 (Eleventh Session of the ASP); Joint Staff Document on Advancing the Principle of Complementarity, High Representative of the European Union for Foreign Affairs and Security Policy (2013); E Witte et al., *International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers* (New York: Open Society Foundations 2011); Chehtman (n 22) 309–15.

Resurgent interest at the Court and among States Parties on completion strategies could midwife this kind of meaningful collaboration between court officials and States Parties on complementarity. Once completion strategies are conceived and given the time it will take to build capacity in these areas, it would be preferable for these strategies to be developed almost from the outset of the opening of a situation. It could become a clear roadmap for the Assembly, as part of its role and the role of its secretariat to facilitate information exchanges on complementarity, to then broker international assistance towards these ends. Focusing on delivering the national capacity to support the Court's completion would provide a useful clarity of purpose to the efforts of the ASP, which otherwise would have seemed to cast about quite broadly for appropriate inroads on complementarity. States may want to resist a role for the Court—or even for themselves—in complementarity, but bringing complementarity discussions closer to emerging discussions on completion, as indeed reports produced for the twelfth ASP session have done, will contribute to a vision of the Court at the core of which there is a concern for legacy and impact.⁶³

49.5 Conclusion

As the ICC enters its second decade, focused discussion on how the ICC will responsibly complete its activities in situations under investigation is long overdue. While there remains substantial work for the ICC to do in each of its current situations, a clear lesson learned from other international tribunals is that it is never early enough to begin preparing for eventual completion. This is important not only to ensure proper planning and implementation of completion strategies, but also because a focus on the 'end game' is likely to influence significantly how the ICC carries out its activities from the outset, increasing the Court's orientation, and that of its States Parties, towards its legacy and impact.

Recent progress made in directing Court and State Party attention towards completion should be capitalized upon, and urgently. In devising completion strategies, the ICC will need a working model of what 'completion' will look like, and to develop methods, including consultation with affected communities and national authorities, to adapt that model to a given situation country.

It is clear, however, that a second lesson learned is that capacity building of national jurisdictions should be a pillar of completion strategies across the Court's situations. Strengthened national jurisdictions can facilitate the Court's completion of its activities in that responsibilities can be turned over to local authorities. It will also help to put in place the building blocks necessary to promote additional investigations and prosecutions nationally, provided it goes hand in hand with efforts to promote the willingness of those authorities to permit independent judicial activities to go

⁶³ ASP Report of the Court on Complementarity (n 10); ASP Report of the Bureau on Complementarity (n 57).

forward. This will afford broader accountability than the ICC acting alone and contribute to the Court's legacy: it should be considered a key dimension of any definition of the Court's completion of its mandate. Indeed, the ICC is uniquely positioned as compared to the other tribunals to harness the existing discussions of its member states on 'positive complementarity' to this end. It is an opportunity that should not be squandered.

A Look towards the Future— The ICC and ‘Lessons Learnt’

*Philipp Ambach**

50.1 Introduction

The establishment of the ICC in 2002 marks the hallmark of a dynamic process that had picked up pace in the early to mid-1990s with the inception of the ad hoc International Criminal Tribunals of the UN for the former Yugoslavia and Rwanda.¹ However, the ICC was—and is—fundamentally distinct from the ad hoc Tribunals: while the latter started off as small pioneer units which grew successively over the years up to their completion in 2012 (ICTR) and 2013 (ICTY),² the former was designed to become a global court from its inception.³ The Statute and Rules of Procedure and Evidence of the ICC⁴ are the result of a concerted thought process and valiant common effort of a great many states to create a court that could help ‘end impunity’.⁵

The present contribution focuses on some of the Court’s major future challenges, and initiatives to improve the efficient management of criminal proceedings. I will first address challenges and strategies in relation to macro issues in the ICC’s focus: (i) global membership; (ii) cooperation; (iii) complementarity; (iv) judicial integrity; and (v) efficiency of proceedings, before addressing specific features of the ‘Lessons Learnt’ initiative which was established in 2011 to assess the functioning of the ICC’s procedural framework and look into possible improvements.⁶ In conclusion, the lessons learnt initiative is brought into context with the Court’s other challenges.

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¹ ICTY, under <<http://www.icty.org>>; and ICTR, under <<http://www.ictr.org>>; in the following when mentioned together: ad hoc Tribunals.

² Operations of ICTY and ICTR are gradually being transferred to the United Nations Mechanism for International Criminal Tribunals (MICT), which has been established to carry out a number of essential functions of the ICTR and ICTY after the completion of their respective mandates. The MICT is tasked with (i) continuing the ‘jurisdiction, rights and obligations and essential functions’ (UNSC Res 1966 (22 December 2010) UN Doc S/RES/1966) of the ICTR and the ICTY, and (ii) maintaining the legacy of both institutions. See under <<http://www.unmict.org/index.html>>.

³ See for instance the Draft Programme Budget for 2005, ICC-ASP/3/2, 26 July 2004 (Third Session of the ASP), paras 100 and 141.

⁴ Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('ICC Statute'); Rules of Procedure and Evidence, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A (adopted and entered into force 9 September 2002) ('ICC RPE').

⁵ See Preamble ICC Statute.

⁶ Study Group on Governance: Lessons learnt: First report of the Court to the Assembly of States Parties, ICC-ASP/11/31/Add.1, 23 October 2012 (Eleventh Session of the ASP) ('First Report'), para. 13.

50.2 Operational Challenges of the ICC

The main challenges of the ICC can be broadly subdivided into two clusters: (i) challenges of a heteronomous nature where the Court's main stakeholders, the States Parties, are called upon in the first place to continue to put the ICC on the map and the ICC's direct influence to meaningfully tackle these challenges on its own is limited; and (ii) challenges that lie more within the institution's own risk and responsibility sphere. Both of them are discussed here.

50.2.1 Global membership

Increasing membership is crucial for the Rome Statute system to increase its jurisdictional reach and eventually achieve universal jurisdictional coverage.⁷ Failing broad membership, the Court's territorial jurisdiction remains limited⁸ and a number of conflicts (and consequently perpetrators of the gravest crimes) remain outside the Court's reach.⁹ Limited global reach and at times political rather than judicial dynamics in the Security Council leave room for accusations of selectivity in the Court's operations.

With 123 States Parties to the Court after 12 years of operations, more than 70 states have yet to join, including the world's most populous countries, such as China, India, the United States, Indonesia, and Russia. A majority of the world's population therefore remains outside the Rome Statute's legal protection and limits the reach and applicability of its provisions. In a geopolitical context where many states are facing economic challenges and, often coupled with that, internal political instability, the interest to engage in supranational justice efforts, which some view as further eroding the traditional image of state sovereignty,¹⁰ is limited. While the territorial coverage of the Rome Statute is fairly advanced on the European and American continents, approximately a third of African States and as many as two-thirds of Asia-Pacific states have yet to join the ICC. The slowing pace in ratifications in recent years¹¹ can be explained by the fact that nearly all states that intended to join from the beginning have done so by now. However, ICC accession remains a challenge in

⁷ Preamble ICC Statute, paras 3 and 5: 'Recognizing that such grave crimes threaten the peace, security and well-being of the world'; 'Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes' (emphasis added).

⁸ Art 12(2) ICC Statute.

⁹ While the UN Security Council can—in theory—override concerns of the ICC's limited jurisdiction through its referral power under Art 13(b) ICC Statute, the Security Council remains a political body and its decisions (or, at times, the absence thereof) consequently risk bearing political impetus. Most illustratively, the question has been asked repeatedly why the Security Council—unanimously—referred the situation in Libya which led to the fall of the Gaddafi regime without much ado to the ICC, whereas hundreds of thousands of Syrian victims are waiting for a similar resolution of the Security Council to the present day.

¹⁰ G Werle, *Principles of International Criminal Law* 2nd edn (The Hague: T M C Asser Press 2009), Part One, paras 2 ff, 90, and 126.

¹¹ This development is reflected in the accessions to the Rome Statute: from four in 2010 and six in 2011 to only one State joining in 2012 and another in 2013; 2014 has seen no accession to date; see <http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 13 August 2014.

relation to the many non-States Parties that have not yet ratified the Rome Statute because of the sheer absence of lawmakers taking action and not for reasons of opposition to the ICC.

The ASP (Assembly)¹² as the 'parent body' of the ICC engages, through its Bureau,¹³ in a variety of efforts with signatories and non-States Parties with a view to informing them, resolving misunderstandings, and overcoming institutional as well as political obstacles to joining the Rome Statute system.¹⁴ But efforts and initiatives by the Assembly and the Court, where appropriate, are insufficient. Increasing the universality of the Rome Statute in the future will require coordinated awareness-raising and advocacy from a wide range of other actors such as States Parties, civil society, regional and international organizations, and professional associations,¹⁵ especially at a time where political consensus is hard to find in the highest international echelons to provide immediate crisis relief and protection of civilians in ongoing armed conflicts.¹⁶

50.2.2 Cooperation

A second major challenge for the credibility and strength of the ICC in its operations is the cooperation of states with the Court and the enforcement of its orders through national authorities. In the absence of a police force of its own, the ICC is bound to rely on states to execute any judicial order that entails an enforcement-related function, most importantly its arrest warrants, but also measures to obtain evidence, the appearance of witnesses, and the freezing and seizing of assets.¹⁷ The Court is ever

¹² The Assembly is the collective body of the ICC's States Parties and the governing body of the ICC with a number of management oversight functions; see Art 112 ICC Statute. It is also the Assembly that decides on amendments to the Rome Statute, see Arts 121 and 122.

¹³ The Bureau is established pursuant to Art 112(3) ICC Statute. As for its work on universality see Report of the Bureau on the Plan of Action for Achieving Universality and Full Implementation of the Rome Statute of the International Criminal Court, ICC-ASP/11/26, 9 November 2012 (Eleventh Session of the ASP).

¹⁴ Recent initiatives include the appointment of several States Parties as co-focal points for the 'Plan of action of the Assembly of States Parties for achieving universality and full implementation of the Rome Statute of the International Criminal Court'. See Report of the Bureau on the Plan of Action for Achieving Universality and Full Implementation of the Rome Statute of the International Criminal Court, ICC-ASP/12/26, 15 November 2013 (Twelfth Session of the ASP).

¹⁵ See e.g. the Universal Periodic Review (UPR) at the UN Human Rights Council, which also provides a platform for States Parties to make recommendations to other States regarding the ratification or implementation of the Rome Statute: Universal Periodic Review provides opportunity to promote ICC, Coalition for the ICC (20 May 2014) <<http://ciccglobljustice.wordpress.com/2014/05/20/universal-periodic-review-provides-opportunity-to-promote-icc/>> accessed 13 August 2008.

¹⁶ A very blatant example is the inaction of the UNSC during a long period of reported massive human rights abuses and attacks on civilians in the ongoing armed conflict in Syria. See UNSC Res 2043 (21 April 2012) UN Doc S/RES/2043, establishing a United Nations Supervision Mission in Syria (UNSMIS) deploying unarmed military observers; and UNSC Res 2118 (27 September 2013) UN Doc S/RES/2118 on the destruction of Syrian chemical weapons; see generally at <<http://www.securitycouncilreport.org/syria/>> accessed 13 August 2014.

¹⁷ Fundamentally, Art 86 ICC Statute stipulates a general obligation of States Parties to cooperate with the Court in its investigative and prosecutorial activities. Arts 89 and 92 ICC Statute govern the arrest warrant-related cooperation. See further Arts 15(2), 54(3)(c), 93, 96, and 99. See also C Kress et al., 'Part 9—International Cooperation and Judicial Assistance—Preliminary Remarks' in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court—Observers' Notes, Article by Article* 2nd edn (München: C H Beck 2008) 1.

more in need of state cooperation because its increasing number of cases generates a fast-growing number of witnesses requiring protection.¹⁸ While a number of framework agreements exist between the Court and States Parties on both the enforcement of sentences and the relocation of witnesses,¹⁹ cooperation efforts have to remain strong to cater for the expected growing needs in the future.

In the past few years, cooperation between the ICC and States Parties as well as non-States Parties²⁰ has intensified. Yet, it is not unproblematic, particularly in situations where the OTP is investigating or prosecuting representatives of the very same regime from which cooperation is sought.²¹ At worst, cooperation is not forthcoming at all—several suspects subject to ICC arrest warrants in a number of situations have successfully evaded arrest for many years and continue to do so.²² In this regard, it is important that the States Parties collectively hold each other accountable for compliance with the ICC's cooperation regime—a treaty obligation that applies to each of them in the same manner. Failure to cooperate should not pass without consequences and the Court's jurisprudence provides the ground for subsequent actions amongst the States Parties.²³ In this respect, the Assembly has created a means to encourage cooperation through the non-cooperation procedures adopted at its eleventh session.²⁴ As for the cooperation duties of (non-Member) States in situations before the ICC through a UN Security Council referral, a more proactive role of the latter is needed to remind states of those duties which, in those cases, stem directly from the UN Charter.²⁵

¹⁸ Issues such as the enforcement of sentences and the relocation of witnesses are subject to voluntary cooperation of States and the ICC needs to establish cooperation through framework agreements with states that are willing.

¹⁹ The last agreement on the enforcement of sentences dates from July 2012 (Agreement between the Kingdom of Denmark and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court (adopted 1 June 2010, entered into force 5 July 2012) Official Journal of the International Court, ICC-PRES/12-02-12). See the Official Journal of the International Criminal Court for the current number of agreements <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/index.aspx>. Agreements on witness protection remain confidential.

²⁰ See Art 87(5) ICC Statute. See also Z Wenqi, 'On Co-operation by States Not Party to the International Criminal Court' (2006) 88 *International Review of the Red Cross* 87, 88f.

²¹ See only Decision on Prosecution's Applications for a Finding of Non-Compliance Pursuant to Art 87(7) and for an Adjournment of the Provisional Trial Date, *Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-908, TC V(B), ICC, 31 March 2014, paras 92–5.

²² At present, as many as 12 suspects sought with a warrant of arrest remain in abeyance. See <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx> accessed 13 August 2014.

²³ Decision Pursuant to Art 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, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-139, PTC I, ICC, 12 December 2011; and Decision Pursuant to Art 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-140, PTC I, ICC, 13 December 2011.

²⁴ Assembly Procedures Relating to Non-Cooperation, ICC-ASP/10/Res.5, Annex, 21 December 2011 (Ninth Plenary Meeting of the ASP), 420. See also Report of the Bureau on Non-Cooperation, ICC-ASP/11/29, 1 November 2012 (Eleventh Session of the ASP). See for both <http://www.icc-cpi.int/en_menus/asp/non-cooperation/Pages/default.aspx> accessed 13 August 2014.

²⁵ Decision Regarding the Visit of Omar Hassan Ahmad Al Bashir to the Federal Republic of Ethiopia, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-199, PTC II, ICC, 29 April 2014, para. 12. See

50.2.3 Complementarity

The primacy of national jurisdictions, and in consequence the complementary role of the ICC, is one of the core features of the Rome system that requires further attention. The first pillar of complementarity, i.e. the judicial pillar, relates to the choice of the proper forum of jurisdiction. According to Article 17 of the Rome Statute, a case is admissible before the ICC only when a state with jurisdiction over the crime(s) in question ‘is unwilling or unable genuinely to carry out the investigation or prosecution’.²⁶ There was an initial fear that the Court would interpret the admissibility threshold overly restrictively in order to keep any case once received in its docket in an effort of self-preservation.²⁷ But such tensions have been mitigated. In particular, the Libya cases have shown that the system works in both directions.²⁸

The second pillar of complementarity is ‘positive’ partnership and mutual assistance between the Court and its stakeholders, as well as between stakeholders.²⁹ A key element is the strengthening of national justice systems, including implementation of the Rome Statute in domestic jurisdictions. The role of the ICC itself in the strengthening and capacity building of national judiciaries is, however, very limited.³⁰ While a substantial number of States Parties have taken action or are in the process of passing necessary legislation, more can and needs to be done. In order to safeguard a professional and independent national judiciary, a number of key elements are fundamental: investigators with skills and resources; functioning witness protection facilities; guarantees for a proper defence; financial resources; judges’ and prosecutors’ know-how; and finally, the political will to bring perpetrators to justice.³¹ This is where initiatives and efforts need to concentrate on strengthening national capacities and encouraging local ownership of domestic judicial proceedings.

also D Akande, ‘The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities’ (2009) 7 *Journal of International Criminal* 335.

²⁶ Art 17(1)(a) ICC Statute.

²⁷ See P Bernhard Jr., ‘The Paradox of Institutional Conversion: The Evolution of Complementarity in the International Criminal Court’ (2011) 1 *International Journal of Humanities and Social Science* 203.

²⁸ The Appeals Chamber confirmed a decision of the Pre-Trial Chamber in the Libya situation declaring the case of Mr Abdullah Al-Senussi inadmissible before the ICC on the grounds that domestic proceedings are under way and that Libya was willing and able genuinely to carry out such proceedings. Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the Admissibility of the Case against Abdullah Al-Senussi’, *Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-565, AC, ICC, 24 July 2014; Judges Sang-Hyun Song and Judge Anita Ušacka appended two separate opinions.

²⁹ W Burke-White, ‘Implementing a Policy of Positive Complementarity in the Rome System of Justice’ (2008) 19 *Criminal Law Forum* 59–85; C Stahn, ‘Complementarity: A Tale of two Notions’ (2008) 19 *Criminal Law Forum* 87–113.

³⁰ The ICC is a criminal court whose focus lies in rendering justice through fair and expeditious criminal proceedings. It is not a capacity-building agency or provider of rule of law training and general judicial assistance in nation-building settings. See Report of the Court on Complementarity, ICC-ASP/11/39, 16 October 2012 (Eleventh Session of the ASP), para. 59.

³¹ See the elements proposed by the ICC for States to assist others in need as part of a more technical approach to complementarity: *ibid.*, Section III—Thematic areas for the attention of other complementarity actors, 4 f.

Capacity-building programmes supported by States Parties, United Nations bodies, and civil society³² are instrumental in building a solid network of states that can help each other strengthen and, where necessary, reform their national judicial systems.³³

50.2.4 Judicial integrity

A fourth critical challenge for the Court is to maintain judicial integrity in the geopolitical environment it operates. The Court is part of a broader institutional landscape, including international and national political actors, such as the UN Security Council and other UN bodies, the AU, regional organizations, and national governments. The ICC must establish its place amongst these bodies while preserving its independence from the influence of national and international political actors around it. This is not always simple, as the Court's options to respond to politically motivated attempts to undermine its institutional legitimacy are limited: in its ongoing proceedings the ICC is restricted to providing factual information only.³⁴ In addition, the prosecutor, while having slightly more liberty to publicly comment upon current issues of relevance, needs to be reflective of her statutory mandate as an independent and impartial organ of justice.³⁵ In its existing operations, the Court has countered external political pressure, including from the US Administration in the ICC's earlier days³⁶ and regarding proceedings against African heads of states.³⁷ If and where changes of the ICC's legal framework are postulated in order to adapt the Court's operations to political realities, caution is warranted. Any such change needs to be properly reflected in an abstract manner and should not merely serve as a response to what is perceived as a concrete dilemma, possibly flanked by political pressure.³⁸

³² Resolution on Complementarity, ICC-ASP/11/Res.6, 21 November 2012 (Eighth Plenary Meeting of the ASP), paras 3 and 8; Resolution on Complementarity, ICC-ASP/12/Res.4, 27 November 2013 (Twelfth Plenary Meeting of the ASP), paras 3 and 5. See also the ASP Bureau Report on Complementarity 'Taking stock of the principle of complementarity—Bridging the impunity gap', ICC-ASP/8/51 (Eighth Session of the ASP).

³³ Note in this regard efforts on the part of the Assembly to provide a platform for exchanging information between the Court, States Parties, and other stakeholders, including international organizations and civil society, aimed at strengthening domestic jurisdictions; see Resolution on Complementarity, ICC-ASP/12/Res.4, 27 November 2013 (Twelfth Plenary Meeting of the ASP), para. 6; Report of the Secretariat on Complementarity, ICC-ASP/12/33, 15 October (Twelfth Session of the ASP).

³⁴ For the judges of the Court this is stipulated in Art 9(2) of the Code of Judicial Ethics, ICC-BD/02-01-05.

³⁵ Art 54(1) ICC Statute; Code of Conduct for the OTP, 5 September 2013, OTP2013/024322, Section 8.

³⁶ See UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593; C Heyder, 'The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status' (2006) 24 *Berkeley Journal of International Law* 650f.

³⁷ Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-1, PTC I, ICC, 4 March 2009, amended by Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-95, PTC I, ICC, 12 July 2010; proceedings before Trial Chamber V(b) in the case of Kenyatta, *Situation in the Republic of Kenya*, ICC-01/09-02/11.

³⁸ The Assembly, in collaboration with the ICC, has established a formalized and consultative process for the amendment of the ICC's Rules of Procedure and Evidence. The process will be discussed in detail *infra*. Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/11/Res.8, 21 November 2012 (Eighth Plenary Meeting of the ASP), para. 41, Annex II, Terms of reference of the Working Group on Amendments; and ICC-ASP/12/Res.8, 27 November 2013 (Twelfth Plenary Meeting of the ASP), para. 39.

50.2.5 Efficient management of judicial proceedings

A fifth challenge relates to the management of proceedings. International trials are, and will always be, comparatively slow in relation to ordinary national trials; the sheer size of international trials with multiple crime sites, a high number of distinct charges, often more than 50 witnesses per case, and thousands of pages of documentation submitted as evidence requires significant time and resources. This is exacerbated by the high complexity of these proceedings with perpetrators often far detached from the actual crimes on the ground, leading to a high degree of legal and factual complication. These factors have led to trial phases in international criminal tribunals that lasted for years.³⁹ The ICC is no exception in this regard.⁴⁰

Another factor adding to the length of proceedings is the fact that the ICC operates in areas of conflict, which generates security obstacles for investigators and other ICC personnel in the field. Carrying investigations against *all* parties to a conflict in which atrocities have been committed⁴¹ may lead to decreased cooperation by state authorities implicated in crimes.⁴² Another factor adding to the complexity of proceedings is the ICC's victim participation regime.⁴³ Participation is only vaguely defined in the Statute and has created a great amount of diverse jurisprudence by the Chambers as to its handling.⁴⁴ On the technical level, both the Court's Registry and Chambers are exploring ways to optimize the participation procedure in the different stages of proceedings.⁴⁵

In addition, the ICC procedural regime contains a number of unresolved issues. Uncertainties remain in relation to the standard of evidence used in the pre-trial phase prior to submitting the case to trial;⁴⁶ the general treatment of evidence;⁴⁷ the

³⁹ There are many examples at both ICTR and ICTY of trial phases that lasted years and generated relevant litigation (see only Judgment, *Gatete*, ICTR-00-61-A, AC, ICTR, 9 October 2012, para. 45; Décision Relative à la Requête de l'Accusé aux Fins de Mettre un Terme à son Procès, *Šešelj*, IT-03-67-T, TC III, ICTY, 29 September 2011, with Separate Individual Opinion of the Presiding Judge Jean-Claude Antonetti).

⁴⁰ See only the length of the *Lubanga* and *Katanga* trials as well as the *Bemba* trial proceedings to date before the ICC <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx> accessed 18 August 2014.

⁴¹ The Prosecutor may use a staggered approach in her investigations; see Strategic plan June 2012–15, OTP, 11 October 2013, para. 22.

⁴² This may be exacerbated in cases where the cooperation obligation is generated not by virtue of the Rome Statute but through a UNSC Resolution in accordance with Art 13(b) of the Rome Statute. See Public Document informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, *Ahmad HarunAli Kushayb*, Situation in Darfur, Sudan, ICC-02/05-01/07-57, PTC I, ICC, 26 May 2010.

⁴³ Of note, the Statute also provides for the possibility of reparations in case of a conviction. Art 75 ICC Statute; Rules 94-98 ICC RPE.

⁴⁴ See REDRESS, 'The Participation of Victims in International Criminal Court Proceedings—A Review of the Practice and Consideration of Options for the Future', October 2012 <http://www.redress.org/downloads/publications/121030participation_report.pdf> accessed 18 August 2014.

⁴⁵ See the Court's Guide for the Participation of Victims in the Proceedings of the Court <<http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf>> accessed 18 August 2014.

⁴⁶ See Art 61(7) ICC Statute ('substantial grounds to believe that the person committed each of the crimes charged'); see Decision adjourning the hearing on the confirmation of charges pursuant to Art 61(7)(c)(i) of the Rome Statute, *L Gbagbo*, Situation in the Republic of Côte d'Ivoire, ICC-02/11-01/11-432, PTC I, ICC, 3 June 2013, as well as the Dissenting opinion of Judge Silvia Fernandez de Gurmendi, ICC-02/11-01/11-432-Anx.

⁴⁷ For example, regarding the handling of prior recorded testimony, Rule 68 of the Rules was introduced only recently through Resolution ICC-ASP/12/Res.7 of 27 November 203.

issue of *in situ* trials pursuant to Rule 100 of the Rules;⁴⁸ the modification of the legal characterization of facts pursuant to Regulation 55 of the Regulations of the Court;⁴⁹ and the application of Article 75 of the Rome Statute on reparations to victims;⁵⁰ but also the fundamental question regarding the procedural relationship between the pre-trial and trial phases—just to name a few.

Increasing the efficiency of the criminal process requires a number of measures. Inefficient and/or repetitive processes have to be identified, relevant statutory provisions have to be assessed, and solutions have to be formulated. Some problems may be solved through a simple change or streamlining of procedural practice between the chambers and judicial divisions.⁵¹ Others may require a change of a Rule or even a provision of the Rome Statute.

50.3 The ICC's 'Lessons Learnt' Initiative to Increase the Efficiency of its Criminal Process

The ICC's Principals have made it clear to their stakeholders—most prominently at the twelfth session of the Assembly in December 2013⁵²—that enhancing the efficiency of its operations is a major priority of the Court. Towards the end of the judicial cycle on trial of the first case before the Court in the *Lubanga* case,⁵³ the Court embarked on a 'lessons learnt' process regarding the efficiency of judicial proceedings, in close cooperation with States Parties.⁵⁴

⁴⁸ Notification of the Decision of the Plenary of Judges on the 'Joint Defence Application for a Change of Place where the Court Shall Sit for Trial', *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-875, Presidency, ICC, 26 August 2013, plus Annex.

⁴⁹ See, for example, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3319, TC II, ICC 21 November 2012.

⁵⁰ See only Report of the Court on Principles Relating to Victims' Reparations, ICC-ASP/12/39, 8 October 2013 (Twelfth Session of the ASP); Report of the Court on the Criteria for the Determination of Disposable Means Relating to Reparations, ICC-ASP/12/40, 8 October 2013 (Twelfth Session of the ASP).

⁵¹ The ICC consists of three judicial divisions: Pre-Trial, Trial, and Appeals. See Arts 34(b) and 39 ICC Statute.

⁵² Statement by Judge Sang-Hyun Song, President of the International Criminal Court, at the Opening of the Twelfth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (20 November 2013) <http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ASP12-OP-Statement-ICCPRE-ENG.pdf> accessed 18 August 2014. Address by Fatou Bensouda, Chief Prosecutor of the International Criminal Court, to the Assembly of States Parties during their Twelfth Session (20 November 2013) <http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ASP12-OP-Statement-PROS-ENG-FRA.pdf> accessed 18 August 2014. Presentation of the 2014 Proposed Programme Budget by Herman von Hebel, Registrar of the International Criminal Court, during the Twelfth Session of the Assembly of States Parties (20 November 2013) <http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ASP12-Statement-REG-ENG.pdf> accessed 18 August 2014.

⁵³ *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06.

⁵⁴ The Court recognized that procedural efficiency of its judicial proceedings will remain a continuous challenge for the institution. Report of the Bureau on the Study Group on Governance, ICC-ASP/11/31, 23 October 2012 (Twelfth Session of the ASP), para. 12 f, as well as its Annex I Draft Roadmap on reviewing the criminal procedures of the ICC.

50.3.1 Initial States Parties initiatives to increase the efficiency of Court operations

In 2010 dialogue started between the Court and States Parties in light of the perceived need to take stock of the institutional framework of the Rome Statute system, focusing on the efficiency and effectiveness of the Court in its operations.

As a result of these informal discussions between the Court and States Parties, the Assembly issued a resolution at its ninth session in December 2010 in which it emphasized that enhancing the efficiency and effectiveness of the Court is of a 'common interest both for the Assembly...and the Court'.⁵⁵ The Assembly stressed the 'need to conduct a structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence', and asked the Court to engage in such a dialogue with States Parties.⁵⁶

The Assembly then established a study group on governance issues (Study Group)⁵⁷ within its 'Hague Working Group'⁵⁸ to facilitate the aforementioned dialogue with a view to 'identifying issues where further action is required' in consultation with the Court, and formulating recommendations to the Assembly through its Bureau.⁵⁹ The Assembly initially gave a mandate to this Study Group for a period of one year.⁶⁰ The Study Group consists of representatives of States Parties; representatives of the organs of the Court are regularly invited. Court-external stakeholders such as representatives of Counsel and the NGO-community may also take part as appropriate.

As a result of the Study Group's first year of work, the first amendment of the Court's regulatory framework was proposed to the Assembly pursuant to Article 51(2) of the Rome Statute:⁶¹ the amendment of Rule 4 and the addition of Rule 4bis to the Rules, transferring the decision on the assignment of judges to the judicial divisions from the plenary of judges to the Presidency.⁶² At the same time, the focus of the Study Group was trained on the issue of expediting the criminal process.⁶³

⁵⁵ Establishment of a Study Group on Governance, ICC-ASP/9/Res.2, 10 December 2010 (Fifth Plenary Meeting of the ASP). Pursuant to Art 112 ICC Statute, the Assembly shall provide management oversight to the Presidency, the Prosecutor, and the Registrar regarding the administration of the Court.

⁵⁶ *Id.*

⁵⁷ Subsequently, the 'Study Group on Governance' took up its work in 2011, deriving its mandate from ICC-ASP/9/Res.2. For ease of reference, the abbreviation 'Study Group' shall be retained, as the group remained the same in its composition throughout the process of institutionalization.

⁵⁸ The Hague Working Group of the Assembly is, alongside the New York Working Group and the Committee on Budget and Finance, one of its subsidiary bodies pursuant to Art 112(4) ICC Statute.

⁵⁹ Establishment of a Study Group on Governance, ICC-ASP/9/Res.2, 10 December 2010 (Fifth Plenary Meeting of the ASP).

⁶⁰ The Assembly decided that the issues to be dealt with by the Study Group 'include, but are not limited to, matters pertaining to the strengthening of the institutional framework both within the Court and between the Court and the Assembly, as well as other relevant questions related to the operation of the Court'. *Id.*

⁶¹ Pursuant to Art 51(2) ICC Statute, amendments to the Rules may be proposed by any State Party, the Prosecutor, or the judges acting by an absolute majority. These amendment proposals enter into force upon adoption by a two-thirds majority of the members of the Assembly.

⁶² Report of the Bureau on the Study Group on Governance, ICC-ASP/10/30, 22 November 2011 (Tenth Session of the ASP), para. 21.

⁶³ *Ibid.*, para. 23.

50.3.2 The ICC’s ‘lessons learnt’ exercise

Further to the initial discussions in the Study Group in 2011, the Presidency of the Court decided to tackle the issue of increasing the efficiency of the criminal process in a systematic and sustainable fashion. As a first step, it communicated to states the Court’s intention to conduct a thorough ‘lessons learnt’ exercise during 2012 in light of the experience of the first trials once a judicial cycle has been finished (at least for the trial phase), with a view to identifying potential improvements in current procedures. This initiative was endorsed by states as well as subsequently by the Assembly.⁶⁴ It was agreed that such a mechanism would become a channel between the Court and States Parties to achieve appropriate changes, where necessary, to the legal framework of the Court.⁶⁵ The Presidency indicated that the Advisory Committee of Legal Texts (ACLT), established pursuant to Regulation 4 of Regulations of the Court,⁶⁶ would be the proper body to address such issues, as it comprises all parties concerned, including representatives of the OTP and Counsel before the Court.⁶⁷

50.3.2.1 Identification of legal issues

Throughout 2012 the Court and States Parties agreed that with the conclusion of the *Lubanga* case before Trial Chamber I,⁶⁸ sufficient courtroom practice had developed to conduct a substantive review of the Court’s criminal process. It was agreed that as a starting point, the Court would identify areas of importance requiring further consideration;⁶⁹ it was further agreed to focus on the ICC Rules of Procedure and Evidence.⁷⁰

In order to identify such issues, judges were invited by the Presidency to submit their individual ideas and suggestions, together with proposed solutions. In response, several judges identified issues and recommended solutions, either by suggesting the standardization of best practices or proposing amendments to the legal framework.⁷¹

⁶⁴ Report of the Bureau on the Study Group on Governance, ICC-ASP/11/31, 23 October 2012 (Eleventh Session of the ASP), para. 10.

⁶⁵ Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res.5, 21 December 2011 (Ninth Plenary Meeting of the ASP) paras 35–8.

⁶⁶ Regulations of the Court, ICC-BD/01-01-04, 26 May 2004 (Fifth Plenary Session of the Judges of the Court) established pursuant to Art 52(1) of the Rome Statute. Pursuant to Regulation 4 of the Regulations of the Court, it is comprised of three judges elected from each division of the Court, as well as one representative from the OTP, one representative from the Registry, and one representative of Counsel included in the list of counsel pursuant to Rule 21(2) of the Rules.

⁶⁷ The Assembly has since repeatedly extended the Study Group’s temporal mandate to accommodate for relevant discussions, see Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res.5, 21 December 2011 (Ninth Plenary Meeting of the ASP), paras 36–8; Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/12/Res.8, 27 November 2013 (Twelfth Plenary Meeting of the ASP), Annex I, para. 7 (extending the mandate to 2013 and later to 2014).

⁶⁸ Judgment Pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TCI, ICC, 14 March 2012.

⁶⁹ First Report (n 6) para. 3.

⁷⁰ Ibid., para. 6; Report of the Bureau on the Study Group on Governance, ICC-ASP/11/31, 23 October 2012 (Eleventh Session of the ASP), para. 11.

⁷¹ First Report (n 6) paras 2–5.

This list was discussed and revised with input from all organs of the Court and a representative of defence/victims' counsel. As a result, a list of legal/institutional issues to expedite proceedings and enhance their quality (List) was finalized.⁷² The List does not contain any concrete proposals regarding Rule changes, but rather provides topical areas where it was considered by the Court that a Rule amendment would in all likelihood be required in order to meaningfully affect proceedings for the better.⁷³ The List outlines 9 clusters and 24 sub-clusters of distinct issues. The nine clusters identified are as follows:⁷⁴

Pre-Trial, including issues such as the format and content of the confirmation of charges decision; the necessary degree of precision of the legal characterization of facts and modes of liability; and the question of hearing witnesses during the confirmation hearing;

The relationship between pre-trial and trial, including the issue of standardization of processes between the divisions (disclosure, redactions, a common case record, etc.); a common approach on the relevance and admissibility of evidence, including its format of presentation; and a trial chamber's possibility to introduce previously recorded reliable testimony;⁷⁵

Specifically in relation to *trial*, the possibility to have a single judge handling the preparatory stages of the trial up to the beginning of the hearings;⁷⁶

On victim participation and reparations, the general need to streamline and harmonize the system (both regarding the application and participation) across all phases of the proceedings was identified; and whether principles on reparations should be addressed in a court-wide document or should be further developed on a case-by-case basis; and whether reparation proceedings may be dealt with by a single judge;

On appeals, issues of streamlining/simplifying processes were raised, e.g. the current certification procedure for certain interlocutory appeals⁷⁷ as well as the general processing of interlocutory appeals;

On interim release, the question of alternative options to the requirement to consult relevant states before granting interim release to an accused;

The possibility of simplifying the procedure for designating an alternative seat of the Court for the proceedings;⁷⁸

⁷² The List was subsequently shared with States Parties, see First Report (n 6).

⁷³ Other issues identified by the organs of the Court and the representative of counsel in the course of establishing the List were not included, as they could be addressed internally through adoption of best practices or amendments to the Regulations of the Court and thus did not need to be submitted to the Assembly for adoption.

⁷⁴ It bears noting that in the eyes of the Court, the List is not intended to be exhaustive.

⁷⁵ This item has since been disposed of; see amended Rule 68 ICC RPE, as amended by resolution ICC-ASP/12/Res.7, 27 November 2013 (Twelfth Plenary Meeting of the ASP).

⁷⁶ This item has since been disposed of; see Rule 132bis ICC RPE, as amended by resolution ICC/ASP/11/Res.2, 21 November 2012 (Eighth Plenary Meeting of the ASP).

⁷⁷ See Arts 82(1)(d) and 82(2) ICC Statute; Rule 155 ICC RPE. C Staker, 'Appeal and revision' in Triffterer (n 17), Art 82, para. 11.

⁷⁸ This item has since been disposed of; see amended Rule 100 of the Rules, as amended by resolution ICC-ASP/12/Res.7, 27 November 2013 (Twelfth Plenary Meeting of the ASP).

On *language issues*, the extent to which witness statements and other documents need to be translated; a possible simplification of the transcription system⁷⁹ as well as measures to streamline the transcript review system; and finally, *Organizational matters*, including options to facilitate the movement of judges between all three divisions within the remit of Article 39 of the Rome Statute; the possibility for a chamber to sit temporarily with only two judges (e.g. in the case of illness or temporary unavailability); and issues regarding judges' mandate extensions under Article 36(10) of the Rome Statute.⁸⁰

In order to facilitate internal discussions regarding possible Rule amendments based on the List, the Court established its 'Working Group on Lessons Learnt' ('WGLL'), comprising a number of interested judges under the leadership of Vice-President Sanji Monageng. The WGLL is designed to determine whether amendments to the Rules are required for a particular issue and to elaborate concrete proposals to the ACLT and the Study Group as a primary source of recommendations. At the start of 2013 the WGLL decided, on the basis of the judicial experience of the Court at that stage, to focus on three of the clusters identified in the List: Pre-trial; Pre-trial and trial relationship; and the seat of the Court.⁸¹ The amended Rules 68 and 100 of the Rules⁸² are a direct result of this prioritization.⁸³

50.3.2.2 The Roadmap

Upon creation of the WGLL and the finalization of the List in mid-2012, States Parties indicated that they also expected to receive a minimum number of detailed amendment proposals to the Rules, as well as an outline of the procedure the Court intends to follow during the lessons learnt process.⁸⁴

Some might have expected that the Court would soon be in a position to provide periodic suggestions for Rule amendments, following the example of the UN ad hoc Tribunals where multiple provisions of the Tribunals' Rules of Procedure and Evidence were amended on a rolling basis throughout the year. However, it is evident from the Court's institutional framework that there are considerable institutional obstacles to changes to either the Rules or the Statute, as both instruments were drafted and adopted by the States Parties and any amendment requires their approval and adoption.⁸⁵ To begin with, the ICC Statute and Rules are considerably more detailed than the regulatory framework of the UN ad hoc Tribunals,⁸⁶ due to the desire of states to

⁷⁹ See Rules 111 and 112 ICC RPE. ⁸⁰ Annex to First Report (n 6).

⁸¹ Study Group on Governance—Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, ICC-ASP/12/37/Add.1, 31 October 2013 (Twelfth Session of the ASP) ('Second Report'), para. 3. On 27 March 2013 the Study Group received the first version of a written report from the WGLL, indicating this prioritization notice, ICC-ASP/12/37, 15 October 2013, para. 12.

⁸² See Amendments to the Rules of Procedure and Evidence, ICC-ASP/12/Res.7, 27 November 2013 (Twelfth Plenary Meeting of the ASP).

⁸³ See Second Report (n 81) paras 8–13, Annex I.A, Annex II.A.

⁸⁴ First Report (n 6) paras 6 and 12.

⁸⁵ Art 51(2) ICC Statute for the Rules; for the Statute, Arts 121 and 122 ICC Statute foresee an even more complicated regime.

⁸⁶ ICC Statute: 128 articles; ICTY Statute: 34 articles; ICC Rules: 225 Rules; ICTY Rules: 127 Rules. See also B Broomhall, 'Rules of Procedure and Evidence' in Triffterer (n 17), Art 51, para. 47.

create a comprehensive, stable, and sufficiently rigid legal framework from the very start.⁸⁷ While in the context of the UN ad hoc Tribunals, the Security Council left the judges with a considerable amount of legislative freedom and authority in that it was conferred upon the judges to adopt—and amend—their respective rules of procedure and evidence,⁸⁸ no such liberty was given to the ICC judges: pursuant to Article 51 of the Rome Statute, the adoption as well as any amendments to the Rules are within the remit of the Assembly. This means that amendments to the Rules in the same volume and frequency as carried out by the UN ad hoc Tribunals was not foreseen by the founding fathers of the Rome Statute.

Regarding amendments to the Rome Statute, the procedure, governed by Articles 121 and 122 of the Rome Statute, is even more difficult. Article 121 as the default provision for Statute amendments stipulates a very high threshold for any amendment, requiring the ratification or acceptance by seven-eighths of all States Parties for an amendment to enter into force.⁸⁹ For any amendments to the crimes themselves, the regime is even more restrictive.⁹⁰ Only regarding amendments to a predefined set of provisions of an institutional nature can a mere two-thirds majority suffice (Article 122 of the Rome Statute).⁹¹ It follows that any change of the ICC regulatory framework regarding the Statute or Rules is by definition a lengthy process necessarily involving rounds of consultations not only amongst the organs of the Court internally but also amongst the Court's constituency, comprised of no less than 122 states at present.

Mindful of these statutory obstacles to amendments to the framework, the Assembly noted in 2012 that amendments to the Statute did not constitute a feasible means, at this stage, to provide timely redress to any problems relating to criminal procedure. The Assembly also noted that states, as the custodians of the Rome Statute, had a privileged role, both directly and indirectly under Article 51 of the Statute, in ensuring that any proposals were in accordance with the overarching strategic and policy considerations of the Rome Statute.⁹²

During the Court's prioritization exercise of legal items warranting institutional amendment, it transpired, however, that the Court's statutory and regulatory framework did not provide an appropriate platform for the Court and States Parties to have a structured dialogue on possible recommendations to amend the Rules.⁹³ The Court therefore drew up a roadmap (Roadmap) of steps to be taken to ensure timely discussions and actions to bring any such proposal to the attention of States Parties for a possible adoption at the ASP at year-end. The Roadmap tasked the WGLL to assess

⁸⁷ B. Broomhall, *ibid.*, paras 8 and 47; R Clark, 'Amendments', *ibid.*, Art 121, para. 4.

⁸⁸ For the adoption see Art 15 ICTY Statute; Art 14 ICTR Statute; Art 14 of the Statute of the SCSL. For amendments to the Rules of Procedure and Evidence, see Rule 6 of all respective Rules of Procedure and Evidence.

⁸⁹ Art 121(4) ICC Statute.

⁹⁰ Art 121(5) ICC Statute. In respect of a State Party that has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

⁹¹ The set of articles which can be amended through this procedure is defined in Art 122(1) ICC Statute.

⁹² Report of the Bureau on the Study Group on Governance, ICC-ASP/11/31, 23 October 2012 (Eleventh Session of the ASP), para. 11.

⁹³ *Ibid.*, para. 14.

from the issues identified in the List whether amendments to the Rules are required.⁹⁴ If a need to amend a Rule is identified, the WGLL drafts necessary proposals for amendments, including an explanatory note, and transmits it to the ACLT for further consultation.⁹⁵ If accepted by the ACLT, the proposal is transmitted to states in the Study Group and from there eventually to the Assembly.⁹⁶

In reaction to this, the Assembly held that, without prejudice to Article 51 of the Statute, states 'were encouraged to engage via the Roadmap, so as to avoid a disparate and unstructured approach to any proposals on amending the Rules'.⁹⁷ It was understood that this process was long term in outlook and that if the need arose over time, the Roadmap could be amended.⁹⁸ Consequently, the Roadmap and its implementation remained under review throughout 2013; by the end of that year, an amended, more flexible Roadmap was adopted by the Assembly.⁹⁹

As a concrete example of an amendment proposal following the procedure established through the Roadmap, the Court proposed the addition of Rule 132bis to the Rules enabling the Court to designate a single judge for the preparation of trial.¹⁰⁰ Further amendment proposals that had been established through the Roadmap followed in 2013, regarding Rule 68 (*Prior Recorded Testimony*)¹⁰¹ and Rule 100 of the Rules (*Place of the Proceedings*).¹⁰² The proposals were subsequently adopted by the Assembly.¹⁰³

50.3.3 Activities

50.3.3.1 Rule changes at the twelfth ASP

The Assembly of 2013 has demonstrated that the Roadmap still remains only *one* of many possible ways to put forward and bring to adoption amendment proposals for

⁹⁴ First Report (n 6) para. 13. ⁹⁵ Id.

⁹⁶ Should the Study Group decide to endorse any proposals they are transmitted to the Assembly's Working Group on Amendments for consideration at least 60 days prior to commencement of the next Assembly meeting at year-end. See Report of the Bureau on the Study Group on Governance, ICC-ASP/11/31, 23 October 2012 (Eleventh Session of the ASP), Annex I, Draft Roadmap on Reviewing the Criminal Procedures of the International Criminal Court.

⁹⁷ In its Report of the Bureau on the Study Group on Governance, the Assembly however pointed out that States, Judges, or the Prosecutor could still put forward proposals outside the auspices of the Roadmap if they so desired. *Ibid.*, para. 15.

⁹⁸ *Ibid.*, paras 15 and 17; Report of the Bureau on Study Group on Governance, ICC-ASP/12/37, 15 October 2013 (Twelfth Session of the ASP), para. 10.

⁹⁹ Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/12/Res.8, 27 November 2013 (Twelfth Session of the ASP), para. 39. The amendments contained two proposals of the ICC regarding a more flexible exchange of views between the Court and the Study Group on amendment proposals, including more flexible timelines. Report of the Bureau on Study Group on Governance, ICC-ASP/12/37, 15 October 2013 (Twelfth Session of the ASP), Annex I.

¹⁰⁰ Report of the Study Group on Governance on Rule 132bis of the Rules of Procedure and Evidence, ICC-ASP/11/41, 1 November 2012 (Eleventh Session of the ASP), its Annex I and the concrete proposal of the amendment in Annex II.

¹⁰¹ See First Report (n 6) Annex. The proposal thematically belonged to the 'Pre-trial and trial relations and common issues' cluster of the List.

¹⁰² Second Report (n 81) Annex, from the 'Seat of the Court' cluster of the List.

¹⁰³ Amendments to the Rules of Procedure and Evidence, ICC-ASP/12/Res.7, 27 November 2013 (Twelfth Plenary Meeting of the ASP).

the Rules. To be sure, Article 51(2) of the Statute foresees that amendments to the Rules may be brought forward by any State Party, the judges acting by an absolute majority, or the prosecutor. States' *rationale* to engage via the Roadmap so as to avoid a 'disparate and unstructured approach to any proposals on amending the Rules'¹⁰⁴ was only partly followed in 2013. While amendments of Rules 68 and 100 were brought before the Assembly following the Roadmap,¹⁰⁵ proposals regarding Rules 134bis, 134ter, and 134quater regarding an accused's presence at trial were brought before the Assembly by States Parties without any meaningful involvement of the Study Group, let alone the Court. It is noteworthy that the latter amendment proposals were the reaction of states to the Situation in the Republic of Kenya before the ICC.¹⁰⁶ Previous judicial developments in ongoing cases in this Situation had brought up the issue of the accused's presence at trial and the interpretation of Article 63(1) of the Statute,¹⁰⁷ in particular with regard to persons 'mandated to fulfill extraordinary public duties at the highest national level'.¹⁰⁸

The problem would appear to lie in the fact that there is a general rule for law-makers not to devise an abstract-general legal provision in order to fit the circumstances of a specific case. Such a procedure generally entails many risks, including fragmentation of the relevant legal text, possibly even its incoherence, as well as a loss of the abstract-general character constitutive of a law that is meant to apply to *any* situation regardless of specifics which have consciously been considered irrelevant for its application. It remains to be hoped that developments at the 12th ASP in November 2013 have not created a precedent devaluing the Roadmap in its revised form as it was adopted by States Parties during that very same Assembly meeting.¹⁰⁹

50.3.3.2 Other initiatives

The revised Roadmap foresees interaction between the Court and states to thoroughly reflect upon every proposal prior to submission for adoption by the Assembly at year-end. Further, the Study Group expressed an interest to take note, where appropriate, of the relevant work by external stakeholders.¹¹⁰

¹⁰⁴ Report of the Bureau on Study Group on Governance, ICC-ASP/12/37, 15 October 2013 (Twelfth Session of the ASP), para. 10.

¹⁰⁵ The Statutory trigger for the amendment proposals to be validly before the Assembly was a proposal by the judges to the Assembly by an absolute majority pursuant to Art 51(2)(b) ICC Statute. See Second Report (n 81) paras 10 and 13.

¹⁰⁶ ICC-01/09.

¹⁰⁷ See only Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1066, AC, ICC, 25 October 2013.

¹⁰⁸ See Rule 134quater ICC RPE.

¹⁰⁹ Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/12/Res.8, 27 November 2013 (Twelfth Session of the ASP), para. 39.

¹¹⁰ Report of the Bureau on Study Group on Governance, ICC-ASP/12/37, 15 October 2013 (Twelfth Session of the ASP), para. 15. For example, on 9 July 2014 the Hague Institute for Global Justice hosted a Seminar, 'Increasing the Efficiency of the Criminal Process at the ICC, While Preserving Individual Rights', at which a comprehensive research paper on the same topic by a group of practitioners and scholars in the field of international criminal law was announced for late 2014.

In 2014 the WGLL has prepared and submitted to the Study Group a new cycle of proposals to amend the Rules with a view to achieving efficiency gains. Thus far, it has proposed an amendment permitting a trial chamber to continue carrying out its functions, under limited circumstances, if a judge of the chamber is temporarily absent for unforeseen urgent personal reasons.¹¹¹ The WGLL has simultaneously expanded its focus to an examination of translation issues under the 'language issues' cluster and proposed a series of amendments.¹¹²

Concomitantly, the Court has intensified efforts to analyse and identify key issues under the 'Pre-trial' cluster and the 'Pre-trial and trial relationship and common issues' cluster. These issues are not only highly technical but also result from the combination of the common law and Romano-Germanic legal traditions which form the basis of the judicial procedures established by the Rome Statute. Discussions between Pre-Trial and Trial Division judges have focused on issues of disclosure, additional evidence at trial, presentation of evidence, the record of proceedings, and witness protection.¹¹³ In this process, the ICC is well advised to take a conservative approach—only where a Rule change is considered indispensable should the Court propose an amendment. In some instances, a technical solution can be found short of changing the written procedural framework.¹¹⁴ An all too ambitious approach of changing Rules may deprive this legal instrument of the stability that Article 51 of the Rome Statute meant to confer upon it.¹¹⁵

Finally, the WGLL has been coordinating an initial series of consultations, beginning with the Registry, related to the Victim Participation and Reparations cluster. Issues are being identified regarding the Court's regime of victim participation in the proceedings, including with respect to the use of application forms. It is understood that the different prevailing victim participation regimes across the chambers and divisions¹¹⁶ should ideally be harmonized, mindful, however, of the conditions specific to each and every case. Victim participation in the proceedings

¹¹¹ Cf. the corresponding Rule 15bis of the Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (adopted 11 February 1994, as amended 8 December 2010) UN Doc IT/32/Rev. 45.

¹¹² Second Report (n 81) para. 16. This work stems from an understanding that translation of witness statements and other important documents has proved extremely time-consuming at all stages of proceedings and poses a significant challenge to the Court's resources.

¹¹³ Ibid., paras 14–15.

¹¹⁴ For example, regarding common organizational issues between pre-trial and trial, by adopting a standardized redaction protocol, or by altering the numbering system used for evidence.

¹¹⁵ B Broomhall, 'Composition and Administration of the Court' in Triffterer (n 17), Art 51, para. 8.

¹¹⁶ See for pre-trial: Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, *L Gbagbo, Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-138, PTC I, ICC, 4 June 2012, taking a simplified approach from previous pre-trial proceedings and introducing a shortened, simplified victim application form; for trial: Decision on Victims' Participation, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1119, TC I, ICC, 18 January 2008; Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-807, TC III, ICC 30 June 2010; in contrast, in its Decision on Victims' Representation and Participation, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-460, TC V, ICC, 3 October 2012, Trial Chamber V developed a new, simplified application and participation scheme. See also for questions on the content of participatory rights Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II

is a highly sensitive issue, as it contains fundamental elements of the ICC's restorative justice function. It is therefore imperative to consult extensively and thoroughly with all major stakeholders to the proceedings with a view to determining whether amendments to the Rules may be warranted in order to harmonize the system.

50.4 Conclusion

The ICC has come a long way in the past decade, but a number of major challenges will have to be vigorously tackled in order to make headway. Challenges are heavily shaped by external factors and players, particularly in the areas of universality, cooperation, and complementarity. A number of measures can be taken to improve the *status quo*.

In order to increase membership and improve the relationship to non-States Parties, the Assembly, as well as States Parties, could intensify their dialogue with major non-States Parties, encouraging the latter to identify reasons for non-ratification so that misunderstandings and administrative obstacles can be addressed. States Parties who are in regional partnerships could use these political fora to encourage ratification, be that vis-à-vis members of the regional group which are non-States Parties, or initiatives as a regional group directed at third states (e.g. the European Union).¹¹⁷ In the UN system, the UPR process at the UN Human Rights Council could be used as a platform for States Parties to issue periodic recommendations to others to join the Rome Statute. Finally, the Assembly, through its President,¹¹⁸ in addition to being an active focal point,¹¹⁹ could take further action to encourage States Parties, international/regional organizations, as well as NGOs to organize targeted workshops and conferences with a view to informing and engaging non-States Parties that are considering ratification.¹²⁰

Additional steps can be taken to enhance cooperation. One measure is the establishment of a standard operating procedure (on technical details, logistics, lines of communication, specificity of cooperation requests, country-related specifics, etc.),

of 22 January 2010 entitled 'Decision on the Modalities of Victim Participation at Trial', *Katanga and Chui, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-2288, AC, ICC, 16 July 2010.

¹¹⁷ See only the European Union's 'Council Common Position', 2003/444/CFSP of 16 June 2003, *Official Journal of the European Union* L 150/67, and 'Action Plan for the ICC' <http://ec.europa.eu/external_relations/human_rights/icc/> accessed 18 August 2014.

¹¹⁸ For the Assembly President's activities in this field see the Assembly Plan of Action for Achieving Universality and Full Implementation of the Rome Statute, Annex to ICC-ASP/5/Res.3, 1 December 2006 (Seventh Plenary Meeting of the ASP); Promotion by the President of the Universality of the Rome Statute, Office of the President of the Assembly of States Parties, 9 July 2014.

¹¹⁹ See Report of the Bureau on the Plan of Action for Achieving Universality and Full Implementation of the Rome Statute of the International Criminal Court, ICC-ASP/12/26, 15 November 2013 (Twelfth Session of the ASP), as well as the *ad country* focal points for the Plan of Action, *ibid*.

¹²⁰ The focal point could bring civil society and other actors willing to organize activities promoting ratification of the Rome Statute together with possible funders in an organized fashion. For example, since 1995 the European Union has funded a large array of NGO activities and campaigns geared at promoting the ratification of the Rome Statute through its European Instrument for Democracy and Human Rights (EIDHR).

in cooperation between the ICC and the Assembly focal point. State-to-state assistance by States Parties could be enhanced through regular interaction with the Court and other states as to the logistics and structural issues of cooperation under Part IX and X of the Rome Statute. Moreover, incentives for compliance might be strengthened through organized and targeted (political and diplomatic) pressure by supportive States Parties on States (Parties) who fail to cooperate, and strict application of the Assembly's non-cooperation procedure¹²¹ and continuous assessment of its effectiveness.

Domestic implementation of the Rome Statute can be enhanced through further technical assistance. For instance, States Parties who have successfully enacted Rome Statute provisions in their national legislation can actively assist other States Parties in need. The Assembly could strengthen the role of its focal point and enhance its assistance portfolio. Useful measures might include the creation of databases including pertinent documentation and the issuance of a handbook on steps and legal guidelines on how best to enact Rome Statute provisions into national legislation and strengthen the local judicial infrastructure.

In relation to the efficiency of the ICC's criminal process, the Court together with States Parties have created a useful mechanism to tackle some of the most relevant challenges in an efficient manner. The Roadmap is based on two premises that are fundamental to a meaningful process and results:

- i. First, that *generally* states prefer to reach agreement on the amendment of Rules: (i) based on the expertise and wisdom of the principal user, the Court itself; (ii) in an orderly and formalized process, including the consultation of all relevant stakeholders; and (iii) at a pace that provides for due reflection and assures that no hasty fixes are inserted into the Rules for a concrete situation at hand.¹²²
- ii. Second, that Rome Statute amendments are not being discussed at this stage.¹²³

To achieve a sustainable streamlining of the criminal process in a reasonable time frame, it is—for the time being—most conducive to focus on the assessment of current procedural practices and regulations and, as the next higher set of norms in the Court's regulatory framework, its Rules of Procedure and Evidence, while leaving out Rome Statute provisions for the time being. Discussing Rome Statute provisions bears risks. Apart from re-assessing Rome Statute provisions which may in hindsight benefit from some clarifying language, many *other* provisions can be expected to be brought back to the discussion table—provisions like Article 27 of the Rome Statute on the absence of head-of-state immunity for

¹²¹ Assembly Procedures Relating to Non-Cooperation', ICC-ASP/10/Res.5, Annex, 420.

¹²² It is hoped that the procedure leading to the introduction of Rules 134bis to *quater* in November 2013 (Amendments to the Rules of Procedure and Evidence, ICC-ASP/12/Res.7, 27 November 2013) remains an exception.

¹²³ The Study Group considered a proposal to introduce into the Roadmap the possibility to consider proposals for amendments to the articles of the Rome Statute of an institutional nature. However, it decided not to amend the Roadmap in this regard but to keep the matter under review. Report of the Bureau on Study Group on Governance, ICC-ASP/12/37, 15 October 2013 (Twelfth Session of the ASP), paras 23–5.

international crimes before an international court which contains established wisdom and an agreed legal standard since Nuremberg.¹²⁴

The Study Group's operations have illustrated that the call by some for quick results in the shape of multiple amendments of the Rules on a rolling basis throughout a year proved overly ambitious. The preparatory involvement of all essential stakeholders dictates a certain—slow—speed at which results can be achieved. From the standpoint of those who wanted to create a rather rigid, solid Rome Statute system not subject to hasty changes in its procedural framework, this is a welcome feature.

Ultimately, when considering the future of the ICC, it is important to keep in mind what Chief Prosecutor Robert Jackson said in 1946 in his opening statement before the IMT in Nuremberg: 'The usefulness of this effort to do justice is not to be measured by considering the law or your judgment in isolation. This trial is part of the great effort to make the peace more secure.'¹²⁵

¹²⁴ N Musau and S Jennings, 'Kenya Continues Push for ICC Changes', Institute for War and Peace Reporting (4 June 2014) <<http://iwpr.net/report-news/kenya-continues-push-icc-changes>> accessed 18 August 2014.

¹²⁵ R Jackson, 'Opening Address for the United States at the International Military Tribunal', *Nazi Conspiracy & Aggression* vol. I (Washington: Office of the United States Chief Counsel for Prosecution of Axis Criminality, United States Government Printing Office 1946), Chapter VII, 171 <<http://fcit.usf.edu/holocaust/resource/document/DocIac17.htm>> accessed 18 August 2014.

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