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**Commentary on the Law of the International Criminal Court:
The Statute
Volume I**

Mark Klamberg, Jonas Nilsson and Antonio Angotti (editors)

Second Edition

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and Antonio Angotti (editors)**

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***Front cover:** A section of the beautiful stone wall around the compound of the Selimiye Mosque in Edirne (Adrianople), designed by the Ottoman architect Mimar Sinan (1489/1490–1588). Photograph: © CILRAP April 2014.*

***Back cover:** Morning light reflected in the pebble floor of a patio off Calle Judíos in the Judería neighbourhood in Córdoba old town. Many raised pebbles make up a useful and beautiful whole. This Commentary gathers contributions by experts from around the world. Put together, their texts offer a user-friendly guide to the understanding of the Statute and the Rules of Procedure and Evidence of the International Criminal Court, whether accessed in print, as an e-book, or online. Photograph: © CILRAP April 2017.*



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PREFACE BY THE EDITORS TO THE SECOND EDITION

The establishment of international criminal jurisdictions such as the International Criminal Court ('ICC') presents new challenges for legal practitioners as well as scholars in their legal research. High-quality legal commentaries can be of great assistance for both practitioners and scholars.

The *Commentary on the Law of the International Criminal Court* ('CLICC') has been designed with inspiration from commentaries on domestic law as well as international law. It now covers both the ICC Statute and Rules of Procedure and Evidence. Its basic idea is to address legal questions and issues in a clear and unconvoluted manner. It not only discusses ordinary and recurrent questions of interpretation and application of international criminal law. When legal issues are more complicated, CLICC informs on relevant preparatory works, case law, expert views and scholarship which may be consulted for further research.

Not all of the original contributors to the commentary were available for the completion of this second edition. Fortunately, we have found well-qualified replacement authors. Affected comments give due credit to the original authors where former contributions or considerations have been used.

The focus of CLICC is on case law and contentious issues already resolved or in need of resolution. Provisions that are deemed of greater importance have been covered in more detail.

If you wish to make a reference to the printed version of CLICC, please make the reference to the page and note in this way:

Nina H.B. Jørgensen, "Article 6", in Mark Klamberg, Jonas Nilsson and Antonio Angotti (eds.), *Commentary on the Law of the International Criminal Court: The Statute, Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2023, p. z.

If you wish to make a reference to the online version of CLICC, please do it in this way:

Nina H.B. Jørgensen, "Article 6", in Mark Klamberg, Jonas Nilsson and Antonio Angotti (eds.), *Commentary on the Law of the International Criminal Court: The Statute*, Lexsit-

CLICC (<http://cilrap-lexsis.org/en/clicc/6/6>, accessed on 1 November 2023).

Lexsitus-CLICC, the online version of CLICC (<https://cilrap-lexsis.org/en/clicc>), is continuously updated and can as such be considered the ‘master’ version of the commentary. It has functionality which allows the user to seamlessly use other online resources in the Lexsitus platform, which is certified by the Digital Public Goods Alliance. As the second English book edition is being published, Arabic and French versions are already available in Lexsitus thanks to financial support by the Norwegian Ministry of Foreign Affairs and the International Nuremberg Principles Academy. We note with satisfaction that the online version of CLICC and the first printed edition have since several years provided utility to scholars and practitioners in the field.

The Faculty of Law at Stockholm University and CILRAP have provided excellent practical and technical facilities for our work. Since the early days of designing and developing CLICC, several persons have contributed with editorial assistance, including Josef Svantesson, Liu Sijia, Camilla Lind, Hanna Szabo, Nikola Hajdin, Valentina Barrios, Virginie Lefèbvre, Fathi M.A. Ahmed and Rohit Gupta. Others have contributed to developing earlier and present technical platforms or providing other forms of technical assistance, including Ralph Hecksteden, Devasheesh Bais, Saurabh Sachan, Rajan Zaveri and Shikha Bhattacharjee. Funding has been provided in different stages by the International Nuremberg Principles Academy, the Foundation SJF (Stiftelsen Juridisk Fakultetslitteratur), the Board of Human Science at Stockholm University, the Norwegian Ministry of Foreign Affairs and CILRAP.

Finally, we wish to thank Morten Bergsmo for having CLICC as a part of CILRAP’s network, the Lexsitus platform and his continuous support.

Mark Klamberg, Jonas Nilsson and Antonio Angotti

FOREWORD BY JUDGE LENNART ASPEGREN TO THE FIRST EDITION

The Hague is often looked upon as the capital of international law. Aptly enough, it has a statue of the Dutch philosopher Baruch Spinoza, also known as Benedict de Spinoza (1632–1677). The statue can be seen outside his old house in Paviljoensgracht, in the Jewish quarter of the city. It shows him with his head cupped in his right hand and with a gentle look on his face – relaxed and contented. In his own lifetime, Spinoza was a highly controversial figure, assailed not least by people of various religious persuasions and maliciously ridiculed. But in recent centuries he has gained general recognition as a worthy campaigner for rationalism and intellectualism in the spirit of Socrates. The great German philosopher Friedrich Hegel (1770–1831), for example, commends him as a thinker who cast aside “all darkness, all mendacity and falsehood, all brooding and bewildering affectations”.

Spinoza’s discourse takes human history as its starting point, but with an eye to the future. In the year of his death, we find him writing in *Political Treatise* (1677):

I sedulously endeavoured neither to deride, nor to pity, nor to loathe human actions, but only to understand them.

Thus I have regarded human passion – such as love, hatred, wrath, envy, glory, mercy and other commotions of human soul – not as vices of human nature, but as qualities that pertain to it, just as warm, cold, tempest, thunder and similar phenomena pertain to weather. Even when they are uncomfortable, they are nevertheless necessary. They are grounded on specific causes.

Through these causes we try to understand their nature. And our mind draws from their true apprehension and understanding as much pleasure as from what is agreeable to our senses.

We think of the twentieth century as the century of democracy’s breakthrough and technological progress. But it is to no less a degree an unparalleled age of world wars and bombs – and, moreover, a period when oppression, persecution and terror cost millions of civilian lives. Mass out-

rages in the form of massacres, rape, torture and other nefarious deeds were perpetrated in many quarters: in the Ottoman Empire, in Nazi Germany and its vassal states, in the African colonies, in the Soviet Union, in Cambodia, in Yugoslavia, in Rwanda. Many of the international criminals have been brought to justice, but many more certainly remain at large. Sadly, offenders – in the Middle East, in Africa and elsewhere – are still committing new serious violations of human rights and international humanitarian law. In fact, in a wider perspective, the history of international criminal and procedural law is short.

Yet, against this background, an important development took place after the Second World War. Pioneers included the Polish lawyer Raphael Lemkin (1900–1959), who launched the concept of a United Nations (‘UN’) Convention against what he termed genocide. All over the world, and not least in the past few decades, human rights lawyers have been joining in efforts to keep the apparatus of law in trim, to disseminate knowledge of current law and to move legal development forward, both practically and academically. Many of their contributions have been in a spirit closely akin to the positive intellectual world of Spinoza.

Dr. Mark Klamberg, through his book *Evidence in International Criminal Trials* (Martinus Nijhoff, 2013), has already shed a commendable light on criminal procedure in the weightiest of post-war international fora: the two International Military Tribunals at Nuremberg and Tokyo, the UN *ad hoc* Tribunals for the former Yugoslavia (‘ICTY’, The Hague) and for Rwanda (‘ICTR’, Arusha), and the permanent International Criminal Court (‘ICC’, The Hague). His thesis portrays international judicial procedure as a legal system *sui generis*.

Klamberg is now, in 2017, bringing out a new contribution on a related subject as an editor: a *Commentary on the Law of the International Criminal Court* (‘CLICC’). This is another useful contribution, giving as it does a provision-by-provision analysis of the ICC Statute. Klamberg has for this purpose invited a group of eminent scholars and practitioners to provide comments. They have successfully combined a basically rational and humanist approach with extreme accuracy in every detail, including a huge number of case law references.

Legal commentaries such as CLICC provide for practitioners and scholars an overview of the topic in need of research, help to define the issues and refer to journal articles or primary sources. In addition to setting out general legal principles, CLICC can also provide useful analysis in areas where international criminal law is complex or unclear.

Rabindranath Tagore wrote in 1920: “Knowledge is precious to us, because we shall never have time to complete it”. True. But meanwhile we must be grateful for all serviceable contributions. This commentary is unquestionably of such calibre in the field of international criminal justice. Without any doubt it has good prospects of becoming a standard work of reference.

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Judge, International Criminal Tribunal for Rwanda*

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights, 1 June 1981 (https://www.legal-tools.org/doc/f0db44/)
ACHR	American Convention on Human Rights, 22 November 1969 (https://www.legal-tools.org/doc/1152cf/)
Agreement on Privileges and Immunities of the Court	Agreement on the Privileges and Immunities of the International Criminal Court, 9 September 2002 (https://www.legal-tools.org/doc/6eefbc/)
AP I or Additional Protocol I	Additional Protocol I to the Geneva Conventions, 8 June 1977 (https://www.legal-tools.org/doc/d9328a/)
AP II or Additional Protocol II	Additional Protocol II to the Geneva Conventions, 7 December 1978 (https://www.legal-tools.org/doc/fd14c4/)
AP III or Additional Protocol III	Additional Protocol III to the Geneva Conventions, 8 December 2005 (https://www.legal-tools.org/doc/ddefac/)
ASP	Assembly of States Parties
Code of Conduct for the Office of the Prosecutor	Code of Conduct for the Office of the Prosecutor, 5 September 2013 (https://www.legal-tools.org/doc/3e11eb/)
Code of Crimes against International Law	Germany, Gesetz zur Einführung des Völkerstrafgesetzbuches [Code of Crimes against International Law], 26 June 2002 (https://www.legal-tools.org/doc/a56805/)
Code of Judicial Ethics	Code of Judicial Ethics, 7 October 2022 (https://www.legal-tools.org/doc/j78b15/)
Code of Professional Conduct for Counsel	Code of Professional Conduct for Counsel, 2 December 2005 (https://www.legal-tools.org/doc/f9ed33/)
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968 (https://www.legal-tools.org/doc/4bd593/)

Convention on the Privileges and Immunities of the United Nations	Convention on the Privileges and Immunities of the United Nations, 13 February 1946 (https://www.legal-tools.org/doc/cc71a1/)
Convention on the Rights of the Child	Convention on the Rights of the Child, 20 November 1989 (https://www.legal-tools.org/doc/f48f9e/)
Convention on the Safety of United Nations and Associated Personnel	Convention on the Safety of United Nations and Associated Personnel, 9 December 1994 (https://www.legal-tools.org/doc/6bfa73/)
Convention Relating to the Status of Refugees	Convention Relating to the Status of Refugees, 28 June 1951 (https://www.legal-tools.org/doc/9b8e7a/)
ECCC ECCC Internal Rules	Extraordinary Chambers in the Courts of Cambodia Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, 27 October 2022 (https://www.legal-tools.org/doc/z3ae4o/)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (https://www.legal-tools.org/doc/8267cb/)
ECtHR	European Court of Human Rights
French Penal Code	France, Code Pénal, 1 March 1994 (https://www.legal-tools.org/doc/392ede/)
Geneva Conventions or GC I–IV	Geneva Conventions I–IV, 12 August 1949 (Geneva Convention (I) for the amelioration of the condition of the wounded and sick in armed forces in the field: https://www.legal-tools.org/doc/baf8e7/ ; Geneva Convention (II) for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea: https://www.legal-tools.org/doc/0d0216/ ; Geneva Convention (III) relative to the treatment of prisoners of war: https://www.legal-tools.org/doc/365095/ ; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War: https://www.legal-tools.org/doc/d5e260/)
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 (https://www.legal-tools.org/doc/498c38/)
German Criminal Code	Germany, Strafgesetzbuch – StGB [German Criminal Code], 13 November 1998 (https://www.legal-tools.org/doc/e71bdb/)
ICC	International Criminal Court

ICC Statute	Rome Statute of the International Criminal Court, 17 July 1998 (https://www.legal-tools.org/doc/7b9af9/)
ICC RPE	Rules of Procedure and Evidence of the International Criminal Court, 11 December 2018 (https://www.legal-tools.org/doc/13a64k/)
ICCPR	International Covenant on Civil and Political Rights, 16 December 1966 (https://www.legal-tools.org/doc/2838f3/)
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice, 26 June 1945 (https://www.legal-tools.org/doc/fdd2d2/)
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTR RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, 29 June 1995 (https://www.legal-tools.org/doc/c6a7c6/)
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda, 8 November 1994 (https://www.legal-tools.org/doc/8732d6/)
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, 6 October 1995 (https://www.legal-tools.org/doc/30df50/)
ICTY Statute	Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993 (https://www.legal-tools.org/doc/b4f63b/)
ILC	International Law Commission
IMT	International Military Tribunal (Nuremberg tribunal)
IMT Charter	Charter of the International Military Tribunal, 8 August 1945 (https://www.legal-tools.org/doc/64ffdd/)
IMTFE	International Military Tribunal for the Far East
IMTFE Charter	Charter of the International Military Tribunal for the Far East, 19 January 1946 (https://www.legal-tools.org/doc/a3c41c/)
Indonesia Penal Code	Indonesia, Penal Code of Indonesia, 9 May 1999 (https://www.legal-tools.org/doc/de6031/)
IRMCT	International Residual Mechanism for Criminal Tribunals
IRMCT RPE	Rules of Procedure and Evidence of the International Residual Mechanism for Criminal Tribunals, 8 June 2012

	(https://www.legal-tools.org/doc/cef176/)
IRMCT Statute	Statute of the International Residual Mechanism for Criminal Tribunals, 22 December 2010 (https://www.legal-tools.org/doc/30782d/)
OPCD	Office of Public Counsel for the Defence
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
OTP Regulations	Regulations of the Office of the Prosecutor, 23 April 2009 (https://www.legal-tools.org/doc/a97226/)
Portuguese Penal Code	Portugal, The Portuguese Penal Code, 23 September 1982 (https://www.legal-tools.org/doc/00d841/)
Regulations of the Court	Regulations of the International Criminal Court, 26 May 2004 (https://www.legal-tools.org/doc/2988d1/)
Regulations of the Registry	Regulations of the Registry of the International Criminal Court, 6 March 2006 (https://www.legal-tools.org/doc/429b80/)
Relationship Agreement between the International Criminal Court and the United Nations	Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004 (https://www.legal-tools.org/doc/5edc7c/)
RSCSL	Residual Special Court for Sierra Leone
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
SCSL Statute	Statute of the Special Court for Sierra Leone, 14 August 2000 (https://www.legal-tools.org/doc/aa0e20/)
SCSL RPE	Rules of Procedure and Evidence of the Special Court for Sierra Leone, 31 May 2012 (https://www.legal-tools.org/doc/4c2a6b/)
STL	Special Tribunal for Lebanon
STL Statute	Statute of the Special Tribunal for Lebanon, 30 May 2007 (https://www.legal-tools.org/doc/da0bbb/)
TFV	Trust Fund for Victims
Timor-Leste Penal Code	Timor-Leste, Código Penal de Timor-Leste, 30 March 2009 (https://www.legal-tools.org/doc/d3d691/)
Torture Convention	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (https://www.legal-tools.org/doc/713f11/)

UDHR	Universal Declaration of Human Rights, 10 December 1948 (https://www.legal-tools.org/doc/de5d83/)
UN	United Nations
UN Charter	Charter of the United Nations, 26 June 1945 (https://www.legal-tools.org/doc/6b3cd5/)
UNAMSIL	United Nations Mission in Sierra Leone
UNAMID	United Nations – African Union Hybrid Operation in Darfur
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
VCLT	Vienna Convention on the Law of Treaties, 23 May 1969 (https://www.legal-tools.org/doc/6bfcd4/)
VPRS	Victims Participation and Reparations Section
VWU	Victims and Witnesses Unit

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PREAMBLE

Preamble

The preamble sets the tone of the ICC Statute. Pursuant to Article 31 of the Vienna Convention on the Law of Treaties, the preamble is part of the context within which the ICC Statute should be interpreted and applied.

The Appeals Chamber has stated that when interpreting treaties, including the ICC Statute, the purposes may be gathered from “the wider aims of the law as may be gathered from its preamble and general tenor of the treaty”.¹

Operative articles are typically more detailed and thus have higher rank than the preamble. The first three paragraphs of the preamble are more moral and philosophical statements and do not set out prescriptive rules. Similarly, the ninth and eleventh paragraphs do not have real prescriptive significance. The remaining paragraphs are more prescriptive. To consider the preamble would normally only be necessary in cases of doubt.

Doctrine: For the bibliography, see the final comment on the Preamble.

Author: Mark Klamberg.

¹ ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 33 (<https://www.legal-tools.org/doc/a60023/>).

Preamble: Unity

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

The affirmation in this paragraph is a way to highlight the importance of cultures and the need for various peoples of the world to exercise respect and tolerance for one another. The references to “common bonds” and “shared heritage” recognize that humankind essentially is one despite differences between societies.

Doctrine: For the bibliography, see the final comment on the Preamble.

Author: Mark Klamberg.

Preamble: Victims

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

The second preambular paragraph which has a reference to the millions of victims of past atrocities is an effort to ensure that the memory of these atrocities remain as a part of the collective human conscience.

Doctrine: For the bibliography, see the final comment on the Preamble.

Author: Mark Klamberg.

Preamble: Grave Crimes

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

The third preambular paragraph uses the term “grave crimes”, clarifying that the “unimaginable atrocities” mentioned in paragraph 2 are not any crimes. Paragraphs 4 and 9 use the similar term “the most serious crimes of concern”, also to be found in Articles 1 and 5(1). The paragraph also mentions the values that international criminal law seeks to protect: peace, security and well-being of the world. This may be compared with the formula “peace and security” throughout the UN Charter. The addition of “well-being” was done to emphasize more than the narrow concept of security, but also the distribution of basic resources.

Doctrine: For the bibliography, see the final comment on the Preamble.

Author: Mark Klamberg.

Preamble: Affirmation of Aims to Be Achieved

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,

The fourth preambular paragraph asserts the rule to fight against impunity, an obligation repeated in the fifth and sixth preambular paragraphs. Although this paragraph stresses the need for national measures at the national level and international co-operation, it does not deal with the relationship between the jurisdiction of the ICC and national jurisdictions. This matter is instead dealt with in the tenth preambular paragraph, Articles 1 and 17.

Doctrine: For the bibliography, see the final comment on the Preamble.

Author: Mark Klamberg.

Preamble: End of Impunity

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

The fifth preambular paragraph is a continuation of the previous paragraph, and deals with the aim to end impunity. It covers two functions of international criminal law: both the aim of repressing crimes that have been perpetrated and the aim of preventing future crimes from happening.

Doctrine: For the bibliography, see the final comment on the Preamble.

Author: Mark Klamberg.

Preamble: Duty of States

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

The sixth preambular paragraph reminds the States of their duty to exercise criminal jurisdiction over those responsible for international crimes. It refers to “international crimes” which may be interpreted as a broader concept than the core crimes listed in Article 5. International crimes could also include terrorism, piracy and drug offences. The preamble thus includes a reminder for the states not to fight only core crimes but also other crimes in their common interest.

Doctrine: For the bibliography, see the final comment on the Preamble.

Author: Mark Klamberg.

Preamble: Reaffirmation of UN Charter Purposes and Principles

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

The seventh paragraph of the Preamble reminds the States of the Purposes and Principles of the Charter of the United Nations, in particular the obligations in Article 2(4) to refrain from the threat or use of force against the territorial integrity or political independence of any State. Article 1 of the UN Charter sets out the purposes of the United Nations:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

Article 2 of the UN Charter sets out the following principles:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

The paragraph appears to be directed to States; “interests of peace” arguably has less relevance for the Court’s activities. Article 16 affords discretion to consider questions of peace, but this is a responsibility of the UN Security Council, not the Court.

Doctrine: For the bibliography, see the final comment on the Preamble.

Author: Mark Klamberg.

Preamble: Non-Intervention

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Even though the Court may deal with individual criminal responsibility for acts committed in internal armed conflict, that does not mean that the Court will intervene in the internal affairs of the concerned state or the armed conflict. Moreover, the ICC Statute does not concern dispute settlement.

Doctrine: For the bibliography, see the final comment on the Preamble.

Author: Mark Klamberg.

Preamble: A Permanent Independent Institution

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

The ninth preambular paragraph reaffirms that the ICC is a permanent court as opposed to the temporary character of the military tribunals in Nuremberg, Tokyo and the *ad hoc* tribunals for the former Yugoslavia and Rwanda. The ICC is meant to address some of the complaints against its predecessors, namely them being a form of ‘victors’ justice’ and the alleged use of retroactive legislation. Although there is no specific provision concerning the cessation of the ICC Statute, the parties could consent to terminate the Statute in accordance with the relevant rules of the Vienna Convention on the Law of Treaties.

Doctrine: For the bibliography, see the final comment on the Preamble.

Author: Mark Klamberg.

Preamble: Complementarity

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

The tenth preambular paragraph describes one of the main features of the Court, namely that domestic criminal investigations and prosecutions have priority over the ICC provided that such domestic proceedings are genuine. This principle of complementarity may be contrasted with the jurisdictions of the *ad hoc* tribunals who have primacy over national courts. The principle of complementarity is repeated in Article 1, and Article 17 provides a more detailed standard.

Doctrine: For the bibliography, see the final comment on the Preamble.

Author: Mark Klamberg.

Preamble: International Justice

Resolved to guarantee lasting respect for and the enforcement of international justice,

The final preambular paragraph uses the broad term “international justice”, but from the context it should be understood to mean ‘international criminal justice’. The ICC fills a gap. While the International Court of Justice settles disputes between states, the ICC deals with individual criminal responsibility.

From this paragraph, it follows that international criminal justice includes the respect as well as the enforcement of international criminal law at both the domestic and international level.

Doctrine:

1. Tuiloma Neroni Slade and Roger S. Clark, “Preamble and Final Causes”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, pp. 425–29 (<https://www.legal-tools.org/doc/d71078/>).
2. Otto Triffterer, Morten Bergsmo and Kai Ambos, “Preamble”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1–13. (<https://www.legal-tools.org/doc/040751/>).
3. William A. Schabas, *The International Criminal Court: Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 31–58 (<https://www.legal-tools.org/doc/b7432e/>).
4. Eric David, “Preamble”, in Paul de Hert, Mathias Holvoet, Jean Flamme and Olivia Struyven (eds.), *Code of International Criminal Law and Procedure, Annotated*, Larcier Ghent/Brussels, 2013, pp. 7–10 (<https://www.legal-tools.org/doc/3f10e0/>).

Author: Mark Klamberg.

PART 1. ESTABLISHMENT OF THE COURT

Article 1

General Remarks:

Article 1 synthesizes the main features of the architecture of the International Criminal Court, namely (i) its permanence (ii) jurisdiction *ratione materiae* (iii) its relationship with national jurisdictions (complementarity). This provision serves a dual function: it is a declaratory norm, not unlike the Preamble, and, at the same time, it sets out a normative context for the operation of the Court – each element is elaborated in more detail in subsequent provisions. The symbolic effect of Article 1 is not to be underestimated.¹ While the Preamble is highly aspirational and answers the question of *why* the international community created the Court, Article 1 is more pragmatic and deals with the *how* question. Article 1 reflects the main points of consensus that emerged during the lengthy process of negotiating the creation of the ICC. It thus serves as a general reference point for the situations when broader questions of policy or purposes arise. Therefore Article 1 is not fully deprived of legal functionality.

Preparatory Works:

The first international criminal tribunal was proposed by the Treaty of Versailles, where the Allied and Associated Powers agreed to establish a “special tribunal” to try the accused for a “supreme offence against international morality and the sanctity of treaties”.² This project never came to fruition. The UN first recognized the need to establish an international criminal court to prosecute crimes such as genocide in 1948, when the General Assembly passed a resolution adopting the Convention on the Prevention and Punishment of the Crime of Genocide. At that time, the General Assembly invited the International Law Commission “to study the desirability and

¹ See William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 61 (<https://www.legal-tools.org/doc/b7432e/>), noting that Article 1 might well have been omitted from the ICC Statute, as it adds little or nothing in terms of legal consequences.

² Treaty of Peace between the Allied and Associated Powers and Germany, 28 June 1919, Article 227 (<https://www.legal-tools.org/doc/a64206/>).

possibility of establishing an international judicial organ for the trial of persons charged with genocide”.³ Following the ILC’s conclusion that the establishment of an international court was both desirable and possible, the General Assembly established a committee to that effect. The committee presented a draft statute in 1951 and a revised draft statute in 1953.⁴ The matter was put on hold, however, until 1990 when the General Assembly once again invited the ILC to return to its work on the draft statute, largely promoted by the request of Trinidad and Tobago to find an effective mechanism to fight drug trafficking.⁵

Article 1 of the initial draft, presented by the Special Rapporteur Doudou Thiam to the ILC in 1990 as a preliminary “questionnaire report” with the purpose to offer the Commission some choices pertaining to the establishment and jurisdiction of an international criminal court contained two options:

VERSION A There is established an International Criminal Court to try natural persons accused of crimes referred to in the Code of Crimes against the Peace and Security of Mankind.

VERSION B There is established an International Criminal Court to try natural persons accused of crimes referred to in the Code of Crimes against the Peace and Security of Mankind, or other offences defined as crimes by the other international instruments in force.⁶

Mr. Thiam showed preference for version B because it would have conferred the broadest possible jurisdiction upon the court. He correctly noted that the notion of an ‘international crime’ is broader than that of a ‘crime against peace and security of mankind’; thus, extending the jurisdic-

³ Prevention and Punishment of the Crime of Genocide, UN Doc. A/RES/260(III)A, 9 December 1948 (<https://www.legal-tools.org/doc/cee5ed/>).

⁴ Report of the Committee, UN Doc. A/AC.48/4, Annex I, 5 September 1951 (<https://www.legal-tools.org/doc/f8df95/>); Otto Triffterer and Michael Bohlander, “Article 1: The Court”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 16. (<https://www.legal-tools.org/doc/040751/>).

⁵ Roy S. Lee, “Introduction: The Rome Conference and Its Contributions to International Law” in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, Kluwer Law International, 1999, p. 2.

⁶ Eighth Report on the Draft Code of Crimes against Peace and Security of Mankind by Mr. Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/430 and Add.1, 20 July 1990, paras. 77–80 (‘Eighth Report, 1990’) (<https://www.legal-tools.org/doc/1aff7e/>).

tion of the court to other international crimes would have obviated the need for establishing two parallel criminal jurisdictions (Eighth Report, 1990, paras. 81–83; see also Schabas, 2016, pp. 12, 62). The ILC at that stage only submitted general observations on the “questionnaire report”. It considered different options for the court’s future jurisdictional regime, but highlighted a general major concern related to the possible curtailment of state sovereignty.⁷

Three years later Doudou Thiam revised Article 1 as follows:

There is established an International Criminal Court whose jurisdiction and functioning shall be governed by the provisions of the present Statute.

Thiam noted the selection of the word ‘criminal’ and not ‘penal’ to emphasize that the Court does not concern itself with ordinary offences.⁸ The Working Group on a draft statute for an international criminal court first changed ‘Court’ to ‘Tribunal’,⁹ (See also Schabas, 2016, p. 62) but returned back to ‘Court’ in the final draft statute adopted in 1994.¹⁰ The Commission regarded this term more appropriate to reflect the permanent nature of the institution. It further observed: “the term ‘court’ should be used to refer to the entity as a whole, and that where specific functions are intended to be exercised by particular organs [...] this would be specifically stated” (Draft Statute, 1994, p. 27). Contemporaries note that the 1994 ILC Draft Statute was more timid than the ICC Statute, eventually adopted in 1998, but also that it already contained a number of key features of the future court.¹¹ For example, the Preamble contained one of the first references to complementarity:

⁷ Report of the International Law Commission on the work of its 42nd session (1 May-20 July 1990), UN Doc.A/45/10, 20 July 1990, para. 119 (<https://www.legal-tools.org/doc/fl856/>).

⁸ Eleventh Report on the Draft Code of Crimes against Peace and Security of Mankind by Mr. Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/449 and Corr.1, 25 March 1995, para. 19 (<https://www.legal-tools.org/doc/7cc5dc/>).

⁹ Revised report of the Working Group on the draft statute for an International Criminal Court, UN Doc. A/CN.4/L.490 and Add.1, 19 July 1993, p. 101 (<https://www.legal-tools.org/doc/421b09/>).

¹⁰ “Draft Statute for an International Criminal Court with commentaries”, in Yearbook of the International Law Commission, Vol. 2, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), 22 July 1994 (‘Draft Statute, 1994’) (<https://www.legal-tools.org/doc/390052/>).

¹¹ James Crawford, “The Work of the International Law Commission”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 23–34.

Emphasizing further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective (Draft Statute, 1994, p. 27).

Suggestions to introduce additional elements to the text of Article 1 began to emerge during the work of the Preparatory Committee established by the UN General Assembly in December 1995 with the purpose of producing a consolidated text to be considered at a diplomatic conference to be held later.¹² A number of proposals were considered. One of the proposals was to include into Article 1 an express mentioning of the principle of complementarity by adding the phrase “which shall be complementary to national criminal justice systems” after the word ‘Court’.¹³ The other proposal by Norway added a reference to the “most serious crimes”.¹⁴ The Preparatory Committee incorporated both proposals into the final draft.¹⁵ The text of Article 1 now reads as follows:

There is established an International Criminal Court (“the Court”), which shall have the power to bring persons to justice for the most serious crimes of international concern, and which shall be complementary to national criminal jurisdictions. Its jurisdiction and functioning shall be governed by the provisions of this Statute.

The reference to complementarity was included to “meet certain concerns about the symbolism and image of the very first article of the Statute”.¹⁶

The reference to ‘persons’ stirred debate due to an unresolved concern about the Court’s jurisdiction over legal persons, or corporate entities – a question decided only during the final conference in Rome (Committee

¹² Adriaan Bos, “From the International Law Commission to the Rome Conference (1994–1998)”, in Cassese and Gaeta (eds.), 2002, pp. 35–65.

¹³ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II, UN Doc. A/51/22(SUPP), 14 September 1996, p. 3 (‘Compilation of Proposals, 1996’) (<https://www.legal-tools.org/doc/03b284/>).

¹⁴ Proposal submitted by Norway, UN Doc. A/AC.249/1998/WG.8/DP.1, 24 March 1998 (<https://www.legal-tools.org/doc/629e9e/>).

¹⁵ Report of the Preparatory Committee on the Establishment of the International Criminal Court, 14 April 1998, UN Doc. A/CONF.183/2/Add.1, p. 10 (<https://www.legal-tools.org/doc/816405/>).

¹⁶ Committee of the Whole: Summary Record of the 1st Meeting, UN Doc. A/CONF.183/C.1/SR.1, 20 November 1998, para. 10 (‘Committee of the Whole, 1st Meeting’) (<https://www.legal-tools.org/doc/2627ec/>).

of the Whole, 1st Meeting, paras. 46 and 95, 101, 106; see also Schabas, 2016, p. 63).

Cuba expressed concerns about the vagueness of the phrase “the most serious crimes of international concern”, which led to the addition of the words “as referred to in this Statute”¹⁷ (see also Schabas, 2016, p. 63). Finally, the text was sent to the Drafting Committee, which added a reference to “permanent institution” in line with one of the earlier proposals considered by the Preparatory Committee (Compilation of Proposals, 1996, p. 3). This term was transplanted into Article 1 from the proposed Article 4 of the 1994 ILC Draft Statute, dealing with the status and legal capacity of the Court, because it was felt to be a better fit for Article 1 (Triffterer and Bohlander, 2016, p. 18).

Doctrine: For the bibliography, see the final comment on Article 1.

Author: Marina Aksenova.

¹⁷ Committee of the Whole: Summary Record of the 6th Meeting, UN Doc. A/CONF.183/C.1/SR.6, 20 November 1998, para. 4 (<https://www.legal-tools.org/doc/244429/>).

Article 1: Establishment

An International Criminal Court (“the Court”) is hereby established.

The word ‘hereby’ refers to the mode of the International Criminal Court’s creation as a treaty-based court. The Draft Statute prepared by the Committee in 1951, and its revised 1953 version, used the wording “[there is] established”, which allowed for different modes of establishment by virtue of a treaty, resolutions by the UN Security Council or the UN General Assembly and other ways. ‘[There is]’ was thus seen as referring to aspects outside the document itself.¹ The 1994 ILC Draft Statute leaned towards this more neutral wording to avoid limiting its possibilities too early (Triffterer and Bohlander, 2016, p. 17). Since then all the relevant documents by the Preparatory Committee contained both versions, until the Rome Conference decided on a more narrow ‘hereby’ wording (p. 17).

The Court is established not from the date of the adoption of the Statute on 17 July 1998 by the Rome Conference but from the date of its entry into force on 1 July 2002 according to Article 126.

The term “Court” is not always used consistently in the Statute.² Article 1 refers to ‘Court’ as shorthand for the International Criminal Court. Article 34 describes “organs of the Court”, which also appears to be the understanding in Articles 2 and 16, while Article 44(4) distinguishes between the “Court” and “organs of the Court” (Schabas, 2016, p. 65). In several provisions of the ICC Statute, the term ‘Court’ is used to refer only to Chambers or judges. For example, Article 15(4) speaks of “determinations by the Court with regard to the jurisdiction and admissibility of a case” – a task performed only by the Chambers. Similarly, Articles 17(1), 19(4) and 19(8) also use the term ‘Court’ which implies the Chambers, or judges.

¹ Otto Triffterer and Michael Bohlander, “Article 1: The Court”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 16. (<https://www.legal-tools.org/doc/040751/>).

² William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., Oxford University Press, 2016, p. 65 (<https://www.legal-tools.org/doc/b7432e/>).

Doctrine: For the bibliography, see the final comment on Article 1.

Author: Marina Aksenova.

Article 1: A Permanent Institution

It shall be a permanent institution [...]

The ICC is a permanent court as opposed to the temporary character of the military tribunals in Nuremberg, Tokyo and the *ad hoc* tribunals for the former Yugoslavia and Rwanda. Although there is no specific provision concerning the cessation of the ICC Statute, the parties could consent to terminate the Statute in accordance with the relevant rules of the Vienna Convention on the Law of Treaties.

The preference for a permanent court emerged in the discussions of the ILC 1994 Draft Statute as many members of the Commission viewed permanence of the institution as a guarantee for independence and impartiality of the judges. This position is clear from the ILC commentary to Article 10 of the 1994 ILC Draft Statute, entitled “Independence of the Judges”.¹

Doctrine: For the bibliography, see the final comment on Article 1.

Author: Marina Aksenova.

¹ Draft Statute for an International Criminal Court with commentaries, in Yearbook of the International Law Commission, Vol. 2, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), 22 July 1994, p. 32 (<https://www.legal-tools.org/doc/390052/>).

Article 1: Power to Exercise Its Jurisdiction

power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute

The wording ‘persons’ implies that the Court only has jurisdiction over natural persons. There is no direct reference to ‘natural’ in Article 1, but such conclusion follows from other articles.¹ Consequently, the ICC’s jurisdiction applies only to individuals (Articles 1 and 25(1)) over the age of eighteen (Article 26) regardless of their official capacity under domestic law (Article 27).²

Doctrine: For the bibliography, see the final comment on Article 1.

Author: Marina Aksenova.

¹ Adriaan Bos, “From the International Law Commission to the Rome Conference (1994–1998)”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 41.

² M. Cherif Bassiouni, *Introduction to International Criminal Law: Second Revised Edition*, Martinus Nijhoff Publishers, Dordrecht, 2012, p. 660.

Article 1: Most Serious Crimes of International Concern

*for the most serious crimes of international concern, as referred to
in this Statute*

The Court's power is limited by the jurisdiction conferred to it. This means that it only has jurisdiction over the crimes listed in Article 5, which uses a slightly different wording referring to core international crimes – “most serious crimes of concern to international community as a whole”.

The Court's limited jurisdiction follows from the position widely shared by many delegations during the preparation of the ICC Statute that the subject-matter jurisdiction of the Court was to be restricted in scope and that the drafting committee should not undertake a progressive development of law.¹

Doctrine: For the bibliography, see the final comment on Article 1.

Author: Marina Aksenova.

¹ Adriaan Bos, “From the International Law Commission to the Rome Conference (1994–1998)”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 41.

Article 1: Complementary to National Criminal Jurisdictions

complementary to national criminal jurisdictions.

The Court is complementary to national criminal jurisdictions. The principle of complementarity is not defined in Article 1 but is addressed in paragraph 10 of the Preamble and Article 17. Article 17 entitled “Issues of Admissibility” refers to Article 1 in its first part, which reads as follows: “Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where [...]”.

One of the principal concerns of many states during the preparation of the ICC Statute was to maintain and preserve national criminal jurisdiction. Among the most challenging issues was therefore to find a way to supplement the exercise of national jurisdiction.¹ Complementarity was found to be the solution: the ICC acts only when national courts are ‘unable and unwilling’ to perform their tasks.

The issue of complementarity is to be distinguished from the questions of acceptance of jurisdiction and referrals to the Court under Articles 12 and 13. A UN Security Council referral does not imply that the ICC conducts no complementarity assessment. In the case of *Al Senussi* pertaining to the situation in Libya, the Court rendered the case inadmissible following the referral by the Security Council.²

The term ‘positive complementarity’ has been much in use in recent years and refers to the Court’s efforts to promote capacity building and domestic compliance (especially after the Kampala Review Conference). It may be conceptualized as a second pillar of the broader principle, the first one dealing strictly with admissibility assessment. ‘Positive complementarity’ is achieved via different routes including outreach activities, adjusting prosecutorial strategy, promoting States’ engagement, involving civil society and consolidating academic efforts to this effect.³ Fostering positive

¹ Roy S. Lee, “Introduction: The Rome Conference and Its Contributions to International Law” in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, Kluwer Law International, 1999, p. 27.

² ICC, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Appeals Chamber, Judgment, ICC-01/11-01/11 ICC, 24 July 2014 (<https://www.legal-tools.org/doc/ef20c7/>).

³ Morten Bergsmo, Olympia Bekou and Annika Jones, “Complementarity After Kampala: Capacity Building and the ICC’s Legal Tools”, in *Goettingen Journal of International Law*,

change from within the affected communities appears to be one of the key objectives for the ICC given its limited resources and overall legitimacy challenges posed by international intervention.⁴

The ICC Statute makes no provision on the Court's relationship with other international or hybrid criminal courts. It is however doubtful that one could simply apply the principle of complementarity to the matter (Triffterer and Bohlander, 2016, p. 20).

Doctrine: For the bibliography, see the final comment on Article 1.

Author: Marina Aksenova.

2010, vol. 2, no. 2, p. 793; see also Philipp Ambach, "A Look Towards the Future – the ICC and 'Lessons Learnt'", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2016, p. 1281.

⁴ Compare with Otto Triffterer and Michael Bohlander, "Article 1: The Court", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 20. (<https://www.legal-tools.org/doc/040751/>).

Article 1: Jurisdiction and Functioning of the Court

The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

This last phrase establishes the primacy of the ICC Statute in governing the operation of the Court. This statement emphasizes the view, widely shared by most delegations during the drafting of the Statute, that the proposed Court should be established as an independent judicial body by means of a multilateral treaty.¹

This position is confirmed in Article 21 dealing with applicable law, which places the Statute, Elements of Crimes and its Rules of Procedure and Evidence at the top of the hierarchy of legal sources at the ICC.

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 61–66 (<https://www.legal-tools.org/doc/b7432e/>).
2. Otto Triffterer and Michael Bohlander, “Article 1: The Court”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 15–21. (<https://www.legal-tools.org/doc/040751/>).
3. Roy S. Lee, “Introduction: The Rome Conference and Its Contributions to International Law”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, Kluwer Law International, 1999, pp. 1–39 (<https://www.legal-tools.org/doc/d71078/>).
4. Adriaan Bos, “From the International Law Commission to the Rome Conference”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 35–65 (<https://www.legal-tools.org/doc/01addc/>).

¹ Adriaan Bos, “From the International Law Commission to the Rome Conference (1994–1998)”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 40 (<https://www.legal-tools.org/doc/01addc/>).

5. James Crawford, “The Work of the International Law Commission”, in Cassese *et al.* (eds.), 2002, pp. 23–34.
6. Micaela Frulli, “Jurisdiction *rationae personae*”, in Cassese *et al.* (eds.), 2002, pp. 527–541.
7. Luigi Condorelli and Santiago Villalpando, “Referral and Deferral by the Security Council”, in Cassese *et al.* (eds.), 2002, p. 637.
8. John T. Holmes, “Complementarity: National Courts versus the ICC”, in Cassese *et al.* (eds.), 2002, pp. 667–668, 671–672.
9. Morten Bergsmo, Olympia Bekou, Annika Jones, “Complementarity After Kampala: Capacity Building and the ICC’s Legal Tools”, in *Goettingen Journal of International Law*, 2010 vol. 2, no. 2, pp. 791–811 (<https://www.legal-tools.org/doc/067928/>).
10. Philipp Ambach, “A Look Towards the Future – the ICC and ‘Lessons Learnt’” in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2016, pp. 1277–1295 (<https://www.legal-tools.org/doc/a940e9/>).
11. M. Cherif Bassiouni, *Introduction to International Criminal Law: Second Revised Edition*, Martinus Nijhoff, 2012, p. 660 (<https://www.legal-tools.org/doc/e24181/>).

Author: Marina Aksenova.

Article 2: Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

General Remarks:

As the Court is established by way of multilateral treaty it is an entirely separate institution *vis-à-vis* the UN. The International Criminal Court derives its power and authority from a treaty and not from the UN. As such the ICC is an independent international organization. However, the Court is a part of an international system where the United Nations is at the centre. There is a need to co-ordinate the responsibility of the United Nations to maintain peace and security with the Court's judicial role. This requires a structural link between the two institutions. Article 2 deals with the overall relationship between the Court and the United Nations. More specific matters are dealt with in other provisions. The Security Council can give the Court jurisdiction and trigger proceedings pursuant to Article 13(b). Article 16 provides that the Security Council may suspend or defer proceedings. The International Court of Justice, the principal judicial organ of the United Nations, may have a role according to Article 119(2) in settling disputes between States Parties. Finally, Article 115(b) provides that the United Nations may provide funds to the Court, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to Article 13(b) referrals by the Security Council.

Preparatory Works:

When the ILC in 1994 drafted its “Draft Statute for an International Criminal Court” there was an understanding that it would be an international criminal court established by a multilateral treaty separate from the UN and thus these organisations had to be brought into relationship with each other by an agreement. Draft Article 2 reads as follows:

The President, with the approval of the States parties to this Statute (“States parties”), may conclude an agreement estab-

lishing an appropriate relationship between the Court and the United Nations.¹

Draft Article 2 of the ILC draft statute was not uncontroversial. Other alternatives were considered, including a) amending the UN Charter making the Court a principal organ of the organisation, similar to the ICJ; b) adoption of a resolution by the UN General Assembly and/or the Security Council.²

Analysis:

On 4 October 2004 the Negotiated Relationship Agreement between the International Criminal Court and the United Nations was adopted and entered into force.³ Pursuant to Article 2 of the ICC Statute and reiterated in Article 23 of the agreement, the agreement was approved by the Assembly of States Parties on behalf of the ICC and the UN General Assembly. It differs in many relevant aspects from previous relationship agreements between the UN and other international organizations such as the International Atomic Energy Agency, the International Tribunal for the Law of the Sea or others (see Ambach, 2016, p. 30). The agreement is divided into four sections.

The first section contains general provisions (Articles 1–3), including the purpose of the agreement, principles governing the relationship between the ICC and the UN and the main obligations of the two parties.

The second section of the agreement deals with institutional relations and covers issues such as reciprocal representation (Article 4), exchange of information (Article 5), reports to the UN (Article 6), proposal from the Court for items for consideration at the UN (Article 7), personal arrangements (Article 8), administrative co-operation (Article 9), services and facilities (Article 10), access to the UN Headquarters (Article 11), *laissez-passer* (Article 12), financial matters (Article 13) and other agreements (Article 14).

¹ Draft Statute for an International Criminal Court with commentaries, in Yearbook of the International Law Commission, Vol. 2, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), 22 July 1994, p. 27 (<https://www.legal-tools.org/doc/390052/>).

² See Philipp Ambach, “Article 2: Relationship of the Court with the United Nations”, Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 25. (<https://www.legal-tools.org/doc/040751/>).

³ Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, 4 October 2004 (<https://www.legal-tools.org/doc/5edc7c/>).

The third section of the agreement turns to co-operation and judicial assistance and contains several provisions that may be of significant practical relevance. Article 15 of the agreement provides that the United Nations undertakes to co-operate with the Court and to provide to the Court such information or documents as the Court may request pursuant to Article 87(6) of the ICC Statute. Article 16 concerns the testimony of UN officials in court proceedings. Article 17 of the agreement addresses three different instances of interaction between the Court and the UN Security Council: (i) referrals from the Security Council to the Court pursuant to Article 13(b) of the ICC Statute; (ii) Security Council deferral of investigation or prosecution under Article 16 of the ICC Statute and notifications under Article 87(5)(b) or (7) of the ICC Statute on failure by states to co-operate. Article 18 of the agreement deals with co-operation between the UN and the Office of the Prosecutor. If the Court seeks to exercise its jurisdiction over a person suspected for ICC Statute crimes and that person enjoys privileges and immunities according to the Convention on the Privileges and Immunities of the United Nations, the UN undertakes pursuant to Article 19 of the agreement to co-operate fully with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any privileges and immunities. Article 20 protects the confidentiality of documents and information that the UN has obtained from States or other actors and the UN will only disclose such documents and information to the Court with the consent of the originator.

The fourth and final section of the agreement address issues of administrative nature, including supplementary arrangements, amendments and entry into force of the agreement.

Cross-references:

Articles 13(b), 16 and part 12.

Doctrine:

1. Luigi Condorelli and Santiago Villalpando, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 219–34 (<https://www.legal-tools.org/doc/01addc/>).
2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 67–91 (<https://www.legal-tools.org/doc/b7432e/>).

3. Philipp Ambach, “Article 2: Relationship of the Court with the United Nations”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 22–40. (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Article 3(1)

Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands (“the host State”).

Domestic laws and regulations of the host State do apply within ICC premises unless the parties have contracted otherwise. However, such laws and regulations cannot be enforced by that State without the ICC waiving its relevant immunity in that case.

Doctrine: For the bibliography, see the final comment on Article 3.

Author: Mark Klamberg.

Article 3(2)

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

In contrast to the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda the ICC is not an organ of the United Nations. Therefore, the General Convention of Privileges and Immunities of the UN of 1946 does not apply and thus a similar general agreement is necessary.¹ Other articles relevant to the Host State Agreement include Articles 48 and 103. On 19 November 2002 the Registrar of the Court and the Ministry of Foreign Affairs of the Kingdom of the Netherlands exchanged Notes embodying an *interim* agreement between the ICC and the Kingdom of the Netherlands concerning the headquarters of the Court. The arrangements will continue to apply until the entry into force of the Headquarters Agreement.²

Cross-references:

Articles 48 and 103.

Doctrine: For the bibliography, see the final comment on Article 3.

Author: Mark Klamberg.

¹ Convention on the Privileges and Immunities of the United Nations, 13 February 1946 (<https://www.legal-tools.org/doc/cc71a1/>).

² Headquarters Agreement between the International Criminal Court and the Host State, 1 March 2008, ICC-BD/04-01-08 (<https://www.legal-tools.org/doc/45e340/>).

Article 3(3)

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

It is possible for the Court to sit outside The Hague. According to Article 38(3)(a) it shall be for the Presidency to take decisions to arrange for sitting outside the Court.

Cross-reference:

Article 38(3)(a).

Doctrine:

1. Adrian Bos, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 19–22 (<https://www.legal-tools.org/doc/01addc/>).
2. Gerhard A.M. Strijards and Robert O. Harmsen, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 41–102. (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Article 4

Legal Status and Powers of the Court

General Remarks:

International institutional law does not contain a definite set of criteria by which to identify an international organization. Features that are commonly expected to be present include: the creation through an international agreement or other international instrument, having at least one organ with a will of its own, and being established under international law. Sometimes also the possession of international legal personality is mentioned as a separate criteria,¹ as well as the capacity to conclude treaties.²

Article 4 deals with the nature of the ICC as an international actor. It addresses two of the most fundamental (and intertwined) features that assert an institution as an international legal subject and define the extent of the activities of that subject: the possession of legal personality and the exercise of powers. As an institution the ICC displays a dual nature. The ICC is both a judicial entity and an international organization.³

Ever since the *Reparation for Injuries* case before the International Court of Justice, it has been unquestionable that international organizations can also be international legal subjects.⁴ Express assertion of legal personality is not a prerequisite for the acquisition of legal personality under international law. Nor can a set of prerequisites be identified by which to acquire international legal personality. Instead, a more pragmatic approach has been applied. As the ICJ concluded in respect of the United Nations,

¹ Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, Martinus Nijhoff, Leiden, 2003, pp. 21–37; Titles and texts of the draft articles on Responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001, Article 2 (<https://www.legal-tools.org/doc/8f3ca0/>).

² Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, Not yet in force, Article 6 (<https://www.legal-tools.org/doc/760ef5/>).

³ Independent Expert Review, “Review of the International Criminal Court and the Rome Status System, Final Report”, 30 September 2020 (<https://www.legal-tools.org/doc/cv19d5/>).

⁴ ICJ, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports, p. 179 (‘ICJ, 11 April 1949’) (<https://www.legal-tools.org/doc/f263d7/>).

when an organization “was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of [...] international legal personality”, the legal personality of the organization is confirmed (ICJ, 11 April 1949).⁵

As to the question of legal powers, Article 4 defines both the functional and territorial scope of the powers of the ICC. The totality of the powers of an international organization is a sum of the explicitly granted powers and those non-express powers that are conferred upon it: “The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers [...] known as ‘implied’ powers”.⁶

In respect of judicial bodies the non-express powers are commonly characterized as inherent powers or inherent jurisdiction.⁷ Whereas implied powers are derived from a perceived necessity for the performance of functions or attainment of objectives, the bulk of inherent powers of institutions are of a customary nature. As soon as an institution comes into existence, the logic is, it will enjoy all of these powers.⁸ However, while a distinction between implied and inherent powers can be upheld in principle, a separation of the two categories of non-express powers may be difficult to uphold in practice. For example in respect of international arbitral tribunals it has been noted that even if a distinction can be made between powers implied by the parties’ agreement and the rules and laws governing the arbitration, discretionary powers over procedure, and inherent powers necessary to preserve jurisdiction, maintain the integrity of proceedings, and render an

⁵ See also Jan Klabbers, *An Introduction to International Institutional Law*, Cambridge University Press, 2009, p. 50.

⁶ ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, ICJ Reports, para. 25 (<https://www.legal-tools.org/doc/691b47/>).

⁷ For example, ICC, *Prosecutor v. Katanga*, Presidency, Decision on ‘Defence Application for Reconsideration of the Presidency “Decision pursuant to article 108(1) of the Rome Statute”’ (ICC-01/04-01/07-3821-Red), 26 June 2019, ICC-01/04-01/07-3833, para. 27 (<https://www.legal-tools.org/doc/53f6f9/>).

⁸ Finn Seyersted, *Common Law of International Organizations*, Martinus Nijhoff, Leiden, 2008, p. 35.

enforceable award, these categories potentially overlap.⁹ Occasionally, the ICC seems to use the two concepts interchangeably.¹⁰

Doctrine: For the bibliography, see the final comment on Article 4.

Author: Viljam Engström.

⁹ International Law Association, Committee on Commercial Arbitration, “Inherent and Implied Powers of International Arbitral Tribunals”, Annex to Resolution no. 4/2016, 7th Conference, 7–11 August 2016.

¹⁰ For example, ICC, Pre-Trial Chamber II, Decision on a Request for Reconsideration or Leave to Appeal the “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’”, 22 September 2014, ICC-RoC46(3)-01/14-5, para. 6 (<https://www.legal-tools.org/doc/7ced5a/>).

Article 4(1): International Legal Personality

The Court shall have international legal personality.

The design and functions of the ICC confirm its status as an international legal person and as an international organization. The ICC is established through an international treaty, it has separate organs the will of which is independent from individual state parties (Article 34 and Article 112), and it has powers to conclude international agreements. The Statute confers upon the Court the powers to conclude an agreement with the UN (Article 2),¹ a headquarters agreement (Article 3),² an agreement on privileges and immunities (Article 48),³ and *ad hoc* agreements with non-party states (Article 87(5)(a)). The powers of the Court to conclude agreements are not even limited to these instances but extended to the conclusion of a variety of agreements with state parties, non-party states, and international institutions (the ICC has entered into agreements for example with the EU, the Red Cross, and the Organisation internationale de la Francophonie).⁴

The express inclusion in the constituent instrument of a provision granting international legal personality is a rarity among international organizations. It could also be thought of as superfluous given that the performance of functions and exercise of powers confirms the existence of an independent will and a capacity to act at the international level. The express confirmation of the international legal personality of the Court is however an expression of the consensus that was reached during the drafting process on establishing the ICC as an independent international organi-

¹ Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 20 August 2004, A/58/874 (<https://www.legal-tools.org/doc/9432c6/>).

² Headquarters Agreement between the International Criminal Court and the Host State, 1 March 2008, ICC-BD/04-01-08 (<https://www.legal-tools.org/doc/45e340/>).

³ Agreement on the Privileges and Immunities of the International Criminal Court, 9 September 2002, ICC-ASP/1/3 ('Agreement on the Privileges and Immunities of the ICC') (<https://www.legal-tools.org/doc/6eefbc/>).

⁴ Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, 10 April 2006, ICC-PRES/01-01-06 (<https://www.legal-tools.org/doc/4e8e0a/>); Agreement between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court, 13 April 2006, ICC-PRES/02-01-06 (<https://www.legal-tools.org/doc/fe9881/>). Agreements on enforcement of sentences have been concluded with several state parties. See the Official Journal of the Court.

zation rather than as a UN organ.⁵ The Agreement on the Privileges and Immunities of the International Criminal Court further confirms both the international and national legal personality of the ICC (Agreement on the Privileges and Immunities of the ICC, Article 2).

Legal personality indicates a capacity of possessing international rights and duties, but no specific powers (nor the scope of powers) can be derived from the possession of personality as such. This is the essential difference between states and organizations as legal subjects.⁶ This also means that the legal personality of the Court does not automatically grant it particular jurisdiction. Instead, the conditions for the exercise of the Court's jurisdiction are set out, first and foremost, in Articles 11, 12, 13, 14 and 15 of the Statute.⁷

The differences between states and organizations as legal subjects also affects the scope of their duties. In this respect Trial Chamber II has noted that the ICC is not able to implement the non-refoulement principle – a customary principle binding the Court due to its international legal personality – within its ordinary meaning.⁸

As no particular legal powers are bestowed upon an organization merely due to the possession of legal personality, the practical importance of that status rather follows from the obligation that is created for states to recognize the ICC as an autonomous actor. Member states hereby have a duty for example to recognize the binding effect of treaties concluded by the ICC, as well as to grant immunities to the Court.⁹ Pre-Trial Chamber I has noted that the objective legal personality of the Court means that, under

⁵ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 103 (<https://www.legal-tools.org/doc/b7432e/>).

⁶ ICJ, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports, p. 179 (<https://www.legal-tools.org/doc/f263d7/>).

⁷ ICC, Pre-Trial Chamber I, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, ICC-RoC46(3)-01/18, para. 49 (“Decision on the “Prosecution’s Request for a Ruling on Jurisdiction”, 6 September 2018”) (<https://www.legal-tools.org/doc/73aeb4/>).

⁸ ICC, *Prosecutor v. Katanga and Ngudjolo*, 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” (Articles 68 and 93(7) of the Statute), 9 June 2011, ICC-01/04-01/07-3003, para. 64 (<https://www.legal-tools.org/doc/e411d5/>).

⁹ Francesca Martines, “Legal Status and Powers of the Court”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 208–210.

particular circumstances, the Statute may have an effect on non-party States, consistent with principles of international law. Such effects may arise, first of all, because of certain general characteristics of the Statute (for example expressing customary law). Secondly, the application of certain provisions of the Statute may produce effects for States not Party to the Statute. Thirdly, such effects may manifest themselves as a result of the decision of non-party States to co-operate with the Court (Decision on the “Prosecution’s Request for a Ruling on Jurisdiction”, 6 September 2018, paras. 45–47).

Doctrine: For the bibliography, see the final comment on Article 4.

Author: Viljam Engström.

Article 4(1): Legal Capacity

It shall also have such legal capacity [...]

In the absence of personality, the ICC could not make contracts for goods and services, hire employees, or perform its operational activities. While some of these activities require international legal personality, others are performed under domestic law.¹ The inclusion of a clause in constituent instruments of organizations that explicitly bestows national legal personality is far more common than the inclusion of such a clause concerning international legal personality. Also preparatory work clearly indicates that the purpose of the passage is to bestow national legal personality.² The Headquarters Agreement further specifies the contents of the national legal personality by adding that the Court shall: “in particular, have the capacity to contract, to acquire and to dispose of immovable and movable property and to participate in legal proceedings”.³ Both expressions are standard phrases to be found in constituent instruments and headquarters agreements, confirming the status of an organization in the domestic legal systems of state parties.

Whereas the Headquarters Agreement is key to the proper functioning of the ICC in the host state (the Netherlands), an obligation to recognize acts of the ICC can also arise within the national legal systems of other state parties. The ICC may for example sit elsewhere than in the host state (Article 3(3)), the Court shall enjoy necessary privileges and immunities in the territory of each State Party (Article 48), the Prosecutor may in some cases act directly within the territory of a state party without having secured co-operation of that party (Article 54(2) and 57(3)), and the Court may decide on a place of trial other than the seat of the Court (Article 62). The fact that sentences of imprisonment can be served in a state other than the host state may also imply the national legal personality of the ICC (Ar-

¹ Kenneth S. Gallant, “The International Criminal Court in the System of States and International Organizations”, in *Leiden Journal of International Law*, 2003, vol. 16, no. 3, p. 556.

² Preparatory Committee, Draft Statute, p. 10; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 105–106 (<https://www.legal-tools.org/doc/b7432e/>).

³ Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, 1 March 2008, Article 3 (<https://www.legal-tools.org/doc/45e340/>).

ticle 103(4)).⁴ State parties have a duty to co-operate fully with the Court, to ensure that there are certain procedures available under national law, and to comply with requests of various kinds (Part 9 of the ICC Statute). This co-operation does not however require the exercise of the powers of the ICC on the territory of state parties.⁵ “Legal capacity” in the sense of Article 4(1) also includes issues of “competence, power, ability and capability”.⁶

Doctrine: For the bibliography, see the final comment on Article 4.

Author: Viljam Engström.

⁴ Gerard A.M. Strijards, “Article 103: Role of States in Enforcement of Sentences of Imprisonment”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 2185. (<https://www.legal-tools.org/doc/040751/>).

⁵ Wiebke Rückert, “Article 4: Legal Status and Powers of the Court”, in Otto Triffterer and Kai Ambos (eds.), 2016, p. 107.

⁶ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(a), Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2, 17 April 2014, para. 83 (<https://www.legal-tools.org/doc/e28d64/>).

Article 4(1): Implied Power

[...] as may be necessary for the exercise of its functions and the fulfilment of its purposes.

The obligation which the Statute lays upon state parties to recognize the Court as a legal person in domestic law, does not define the content of the legal capacity of the Court. In other words, the capacity for performing certain acts on the domestic level does not entail an automatic competence for the ICC to perform that act. The necessity assessment serves first of all to ensure that the ICC will enjoy such capacity that it needs for performing its functions and fulfilling its purposes. This means that although special mention is made in the Headquarters Agreement and the Agreement on Privileges and Immunities¹ of the capacity to contract, to acquire and to dispose of immovable and movable property, and to participate in legal proceedings, the list is not exhaustive. Instead, as defined by Trial Chamber V, Article 4(1) codifies the doctrine of implied power.² The necessity requirement also restricts the capacity of the ICC by requiring a link to the functions and purposes as defined in the Statute.³ The extent of the capacity of the ICC in domestic legal systems is also limited to the exercise of powers that are “provided in the Statute” (see note 11 on sub-paragraph 2; Schermers and Blokker, 2003, p. 1016).

Doctrine: For the bibliography, see the final comment on Article 4.

Author: Viljam Engström.

¹ Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, 1 March 2008 (<https://www.legal-tools.org/doc/45e340/>).

² ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(a), Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2, 17 April 2014, para. 83 (<https://www.legal-tools.org/doc/e28d64/>).

³ Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, Martinus Nijhoff, Leiden, 2003, p. 1011, note 111; Wiebke Rückert, “Article 4: Legal Status and Powers of the Court”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 106. (<https://www.legal-tools.org/doc/040751/>).

Article 4(2): Powers of the Court

The Court may exercise its functions and powers, as provided in this Statute [...]

The express powers of an organization are unquestionably “provided in the Statute”. However, also the implied powers of an organization can be characterized as derived from the Statute. Although international case law displays some variation in the semantic construction of implied powers, the link to the Statute basically derives from an implied power that can only be exercised when that power can be claimed to be necessary for the attainment of one of the objectives of the organization. The extent of the implied powers of an organization can range from powers that are necessary for the exercise of explicit powers (by which to attain the objectives of the organization), to completely new powers that supplement the means by which to attain the goals of the organization. Which implied powers an organization enjoys, depends on the “needs of the community”.¹

There are several ‘communities’ that interpret the ICC Statute. The first ‘community’ to interpret the extent of ICC powers was the Rome Conference. Authors seem to agree that the reference to “as provided in this Statute” was inserted in order to guard against expansion of the competence of the ICC through the use of implied powers.² Whether the inclusion of a reference to the Statute can prevent the use of implied powers if agreement on the necessity of such powers is attained is however uncertain. If a claim is made that the reference to the Statute does not exclude the use of more limited implied powers (necessary for the exercise of the expressly provided powers) (Rückert, 2016, pp. 108–108), this inevitably undermines

¹ ICJ, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports, p. 178 (<https://www.legal-tools.org/doc/f263d7/>); for a discussion, see Viljam Engström, *Constructing the Powers of International Institutions*, Martinus Nijhoff Publishers, Leiden, 2012, Chapter 2.

² Wiebke Rückert, “Article 4: Legal Status and Powers of the Court”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 108–109. (<https://www.legal-tools.org/doc/040751/>); Francesca Martines, “Legal Status and Powers of the Court”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 215; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 106 (<https://www.legal-tools.org/doc/b7432e/>).

any categorical denial of implied powers. Such a construction of the powers of the ICC turns express powers into purposes, the realization of which may allow for a range of different implied powers. Further, even if the reference to the Statute is read as an express exclusion of any implied powers, that exclusion can lose its limiting effect if agreement on the need for widening the competence of the ICC is later achieved.³

When dealing with judicial bodies, non-express powers are far more commonly presented as ‘inherent’ rather than ‘implied’. The idea of inherent powers has its origin in common law systems where it has been invoked by courts for a range of different purposes.⁴ Recourse to inherent powers can also be found in the case law of several international judicial bodies. The ICJ has noted that it:

[...] possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits [...] shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the ‘inherent limitations on the exercise of the judicial function’ of the Court, and to ‘maintain its judicial character’. Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of states, and is conferred upon it in order that its basic judicial function may be safeguarded.⁵

As to the relationship between the implied and inherent powers doctrines, the Appeals Chamber of the ICTY has held that the inherent powers notion would be preferable with respect to those non-express powers which are judicial in nature, whereas the implied powers doctrine seems better

³ See Nigel D. White, *The Law of International Organisations*, Manchester University Press, Manchester, 2005, pp. 73–74, discussing the OAS Charter. As a matter of treaty law, subsequent agreement and practice precedes the merely supplementary role of preparatory work in the interpretation and application of a treaty. Vienna Convention on the Law of Treaties, 23 May 1969, Articles 31 and 32 (<https://www.legal-tools.org/doc/6bfcd4/>).

⁴ See Chester Brown, “The Inherent Powers of International Courts and Tribunals”, in *British Yearbook of International Law*, 2005, vol. 76, pp. 205–206.

⁵ ICJ, *Nuclear Tests Case (New Zealand v. France)*, Advisory Opinion, 20 December 1974, ICJ Reports 1974, para. 23

suitable for describing the extension of the competence of political organizations.⁶

A suggestion that Article 4 would exclude the use of implied powers but not reliance on inherent powers raises the question of the nature of and relationship between the implied and inherent powers doctrines. On the face of it, the commonality of some powers of international organizations (to adopt a budget, to conclude treaties, or to bring claims), make them seem inherent in the possession of legal personality.⁷ As international courts and tribunals display considerably more functional and procedural similarities than international political organizations, it seems only natural that an array of powers can be assumed to follow from their mere existence, such as: the power to take interim measures, to request stays of proceedings or to stay its own proceedings, to order discontinuance of a wrongful act or omission, to appraise the credibility of a witness, to pronounce upon instances of contempt of the court, to order compensation, to consider matters or issue orders *proprio motu*, and to rectify material errors in a judgment.⁸

The Regulations of the Court recognizes the existence of inherent powers.⁹ As a point of departure inherent powers can be exercised by all organs of the ICC in carrying out their duties. However, the practice of other tribunals of exercising inherent powers is not automatically indicative of the existence of such inherent powers of the ICC. Somewhat at odds with the idea that inherent powers derive from the mere existence of a judicial body, the exercise and exact scope of any inherent power must always be determined in relation to the functions of the individual court.¹⁰ This also renders the eventual difference between the implied powers and inherent powers doctrines unclear.

⁶ ICTY, *Prosecutor v. Blaškić*, Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, IT-95-14-AR, para. 25, note 27 (<https://www.legal-tools.org/doc/c5e5ab/>).

⁷ Manuel Rama-Montaldo, “International Legal Personality and Implied Powers of International Organizations”, in *British Yearbook of International Law*, 1970, vol.44, pp. 111–155.

⁸ For a summary and references, see STL, *El Sayed*, Appeals Chamber, Decision on Appeal of Pre-Trial Judge’s Order regarding Jurisdiction and Standing, 10 November 2010, CH/AC/2010/02, para. 46 (<https://www.legal-tools.org/doc/d2385c/>). See also Brown, 2005.

⁹ ICC, Regulations of the Court, ICC-BD/01-01-04, 26 May 2004, paras. 28(3), and 29(2) (<https://www.legal-tools.org/doc/05fd20/>).

¹⁰ Brown, 2005, p. 229; Chittharanjan F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, Cambridge University Press, 2005, p. 99.

An element that may affect the use of inherent powers in the ICC when compared to the ICTY and ICTR is the more civil law-oriented approach to criminal law of the ICC, which brings with it a stricter requirement of codification.¹¹ Nevertheless, the case-law of the Court is rich with examples on invoking inherent and implied powers. By way of examples: the ICC Pre-Trial Chamber II has noted that the Chamber has an inherent power to make “necessary alterations to documents issued by the Chamber”.¹² The Appeals Chamber has indicated that the Chamber may exercise an inherent power to stay proceedings, if (i) the “essential preconditions of a fair trial are missing”, and (ii) there is “no sufficient indication that this will be resolved during the trial process”.¹³ Trial Chamber I has noted, by reference to the practice of the ICTY and ICTR, that a Chamber “can depart from earlier decisions that would usually be binding if they are manifestly unsound and their consequences are manifestly unsatisfactory”.¹⁴ Pre-Trial Chamber I has held, referring to the practice of the ICTY, that it possesses an inherent power to inform the UN Security Council on lack of co-operation of non-party states.¹⁵ However, in respect of state parties the ICC has relied on the express mechanism for informing the Security Council provided for by Article 87(7).¹⁶ Trial Chambers have also been found to

¹¹ Göran Sluiter, “Trends in the Development of a Unified Law of International Criminal Procedure”, in Carsten Stahn and Larissa van den Herik (eds.), *Future Perspectives on International Criminal Justice*, T.M.C. Asser Press, The Hague, 2010, pp. 588 (<https://www.legal-tools.org/doc/f7f9d3/>).

¹² ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on the Prosecutor’s Urgent Application Dated 26 September 2005, 27 September 2005, ICC-02/04-01/05 (<https://www.legal-tools.org/doc/a03b21/>).

¹³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, 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”, 21 October 2008, ICC-01/04-01/06-1486, para. 76 (<https://www.legal-tools.org/doc/485c2d/>); *Prosecutor v. Kenyatta*, Trial Chamber V, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, para. 74 (<https://www.legal-tools.org/doc/da5089/>).

¹⁴ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, 30 March 2011, ICC-01/04-01/06, para. 18 (<https://www.legal-tools.org/doc/998892/>).

¹⁵ ICC, *Prosecutor v. Harun et al.*, Pre-Trial Chamber I, Decision informing the United Nations Security Council about the lack of cooperation by the republic of the Sudan, 25 May 2010, ICC-02/05-01/07, p. 6 (<https://www.legal-tools.org/doc/565d18/>).

¹⁶ ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with

have an implied power to submit ‘no case to answer’ motions, and to declare a mistrial,¹⁷ and to reconsider their own decisions.¹⁸

As a more general characterization of the inherent powers of the ICC, Trial Chamber IV has stated that any inherent powers or incidental jurisdiction can only be invoked in a restrictive manner. The reason for this, especially in the case of procedural matters such as stay of proceedings, is that the exercise of non-express powers may contradict the object and purpose of the Court by frustrating the administration of justice.¹⁹ This echoes the concern of Judge Blattmann that the exercise of inherent powers imports a discretionary element to the decision-making, potentially undermining procedural certainty (especially if there is an alternative mechanism available in the Statute).²⁰ In this respect, whereas the Trial Chamber had found that it enjoys an implied power to compel the appearance of witnesses,²¹ the Appeals Chamber deemed the exercise of an implied power to compel witnesses “incorrect in circumstances where the Court’s legal framework provides for a conclusive legal basis”. Implied powers should in this view only be relied upon when there is a lacuna in the Statute or Rules of Procedure and Evidence.²²

the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011, ICC-02/05-01/09 (<https://www.legal-tools.org/doc/e2c576/>).

¹⁷ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Public redacted version of: Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, ICC-01/09-01/11, paras. 191–192 (<https://www.legal-tools.org/doc/6baecd/>).

¹⁸ ICC, *Prosecutor v. Katanga*, Decision on ‘Defence Application for Reconsideration of the Presidency “Decision pursuant to article 108(1) of the Rome Statute”’ (ICC-01/04-01/07-3821-Red), Presidency, 26 June 2019, ICC-01/04-01/07-3833, paras. 27–29 (<https://www.legal-tools.org/doc/53f6f9/>).

¹⁹ ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Trial Chamber IV, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09, para. 78 (<https://www.legal-tools.org/doc/414cc4/>).

²⁰ ICC, *Prosecutor v. Lubanga*, 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, 30 March 2011, ICC-01/04-01/06, paras. 1 and 7 (<https://www.legal-tools.org/doc/7600c1/>).

²¹ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/11, para. 87 (<https://www.legal-tools.org/doc/e28d64/>).

²² ICC, *Prosecutor v. Ruto and Sang*, Appeals Chamber, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled “Decision on Prosecutor’s Application for Witness Summonses and Re-

While the Trial Chamber found that it is inherent to the power of imposing and determining a sentence to also suspend such sentence,²³ the Appeals Chamber later noted that inherent powers should be invoked restrictively and in principle only with regards to procedural matters. As the ICC Statute and the related provision contain an exhaustive identification of types of penalties (not mentioning suspension of sentences), the notion of “inherent powers” cannot be invoked to add to this list: exercise of inherent powers, in other words, can also be *ultra vires*.²⁴

The question of powers has also arisen concerning the right to determine the extent of jurisdiction (*la compétence de la compétence*). “Jurisdiction to determine its own jurisdiction” has been noted to be a major part of the “incidental or inherent jurisdiction of any judicial or arbitral tribunal”.²⁵ This principle has also been consistently upheld by Chambers of the ICC.²⁶

Doctrine: For the bibliography, see the final comment on Article 4.

Author: Viljam Engström.

sulting Request for State Party Cooperation”, 9 October 2014, ICC-01/09-01/11-1598, para. 105 (<https://www.legal-tools.org/doc/e5eb09/>).

²³ ICC, *Prosecutor v. Bemba et al.*, Trial Chamber VII, Decision on Sentence pursuant to Article 76 of the Statute, 22 March 2017, ICC-01/05-01/13-2123-Corr, paras. 40–41 (<https://www.legal-tools.org/doc/78e278/>).

²⁴ ICC, *Prosecutor v. Bemba et al.*, Appeals Chamber, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”, 8 March 2018, ICC-01/05-01/13-2276-Red, paras. 75–77, 80 (<https://www.legal-tools.org/doc/ccfda0/>).

²⁵ ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1, paras. 18–19 (<https://www.legal-tools.org/doc/866e17/>); STL, *El Sayed*, Appeals Chamber, Decision on Appeal of Pre-trial Judge’s Order Regarding Jurisdiction and Standing, 10 November 2010, CH/AC/2010/02, para. 43 (<https://www.legal-tools.org/doc/289e65/>).

²⁶ ICC, Pre-Trial Chamber I, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, ICC-RoC46(3)-01/18, para. 32, and notes 47–49 with further references to ICC case-law (<https://www.legal-tools.org/doc/73aeb4/>); *Prosecutor v. Bett*, Pre-Trial Chamber A, Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence, 10 December 2020, ICC-01/09-01/15-61, para. 34 (<https://www.legal-tools.org/doc/kj5a16/>).

Article 4(2): Territorial Reach

[...] on the territory of any State Party and, by special agreement, on the territory of any other State.

The ICC can exercise its jurisdiction over the crimes enumerated in Article 5 both in relation to state parties and non-party states (Article 12). In respect of States Parties, the jurisdiction of the ICC is not only exercised vis-à-vis the state that has a special link with a crime, but all ICC State Parties, for example through the summoning of witnesses.¹ In respect of non-party states, it is a general rule of international law that a treaty cannot create obligations for third states without their consent.² Therefore, the possibility of extending the legal personality of the ICC also to non-party states is one of the more novel features of the ICC Statute. Non-party states can accept the jurisdiction of the ICC through a declaration (Article 12(3)), the Court can invite non-party states to provide assistance through *ad hoc* arrangements, agreements, or “any other appropriate basis” (Article 87), and the ICC may come to exercise its jurisdiction over non-party states through UN Security Council referral (Article 13(b)). The use of declarations and agreements for extending the jurisdiction of the ICC ensures a consensual basis for the extension. For example, Cote d’Ivoire had, prior to its ratification of the ICC Statute in 2013, accepted the jurisdiction of the Court already in 2005.³

The absence of such expressions of consent does not however necessarily prevent the Prosecutor from acting on a situation. Concluding a special agreement (Article 4(2)) is not a precondition for the ICC to operate in the territory of non-State Parties that have been referred by the UN Security Council, provided that these activities take place following prior consultation or notification.⁴ The possibility of extending the jurisdiction of the

¹ Francesca Martines, “Legal Status and Powers of the Court”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 214.

² Vienna Convention on the Law of Treaties, 23 May 1969, Articles 34–36 (<https://www.legal-tools.org/doc/6bfcd4/>).

³ ICC, “Registrar confirms that the Republic of Côte d’Ivoire has accepted the jurisdiction of the Court”, 15 February 2005, ICC-CPI-20050215-91 (<https://www.legal-tools.org/doc/c8ed71/>).

⁴ ICC, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, Pre-Trial Chamber II, Decision on Defence Requests and Procedural Challenges, 21 May 2021, ICC-02/05-01/20-402, para. 38 (<https://www.legal-tools.org/doc/22gbys/>).

ICC to non-party states even without their consent through UN Security Council referral is by some authors considered as a true expression of the ‘objective’ legal personality of the Court.⁵ The UN Security Council has, in referring situations to the ICC, emphasized that States not parties to the ICC Statute have no obligations under the Statute.⁶ The obligation for non-party states to co-operate with the Court rather derives from the UN Charter.⁷

Pre-Trial Chamber I has found that the Court has jurisdiction also on the territory of a non-state party, as long as, “at least one element” or “part of such a crime” is committed on the territory of a State Party. As the crime of deportation under Article 7(1)(d) was initiated in the territory of a state not party to the Rome Statute (Myanmar), and completed within the territory of a State Party (Bangladesh), the Court was found to have jurisdiction over the crime under Article 12(2)(a).⁸

Cross-references:

Articles 2, 3, 5, 12, 13, 34, 48, 54, 57, 62, 87, 89–92, 103 and 112.

⁵ On theories of legal personality, see for example Martines, 2002, pp. 206–208, and Jan Klabbers, *An Introduction to International Institutional Law*, Cambridge University Press, 2009, pp. 46–51.

⁶ UNSC, Resolution 1593 (2005) on the situation in Darfur, UN Doc. S/RES/1593 (2005), 31 March 2005, para. 2 (<https://www.legal-tools.org/doc/4b208f/>), and Resolution 1970 (2011) on the situation in Libya, UN Doc. S/RES/1970 (2011), 26 February 2011, para. 5 (<https://www.legal-tools.org/doc/00a45e/>).

⁷ Charter of the United Nations, 26 June 1945, 1 UNTS XVI, entered into force 24 October 1945, Article 25 (<https://www.legal-tools.org/doc/6b3cd5/>); Kenneth S. Gallant, “*The International Criminal Court in the System of States and International Organizations*”, in *Leiden Journal of International Law*, 2003, vol. 16, p. 583; William A. Schabas and Giulia Pecorella, “Article 13: Exercise of Jurisdiction”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, (3rd. edn), (C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016), pp. 696–702. (<https://www.legal-tools.org/doc/040751/>); and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 367–381 (<https://www.legal-tools.org/doc/b7432e/>).

⁸ ICC, Pre-Trial Chamber I, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, ICC-RoC46(3)-01/18, 6 September 2018, paras. 64–73 (<https://www.legal-tools.org/doc/73aeb4/>).

Doctrine:

1. Chittharanjan F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, Cambridge University Press, 2005 (<https://www.legal-tools.org/doc/a6fe01/>).
2. Chester Brown, “The Inherent Powers of International Courts and Tribunals”, in *British Yearbook of International Law*, 2005, vol. 76, pp. 195–244 (<https://www.legal-tools.org/doc/328380/>).
3. Viljam Engström, *Constructing the Powers of International Institutions*, Martinus Nijhoff Publishers, Leiden, 2012 (<https://www.legal-tools.org/doc/5b3b65/>).
4. Kenneth S. Gallant, “*The International Criminal Court in the System of States and International Organizations*”, in *Leiden Journal of International Law*, 2003, vol. 16, pp. 553–591 (<https://www.legal-tools.org/doc/320f6f/>).
5. Douglas Guilfoyle, “The ICC pre-trial chamber decision on jurisdiction over the situation in Myanmar”, in *Australian Journal of International Affairs*, 2019, vol. 73, no. 1, pp. 2–8.
6. Jan Klabbers, *An Introduction to International Institutional Law*, Cambridge University Press, 2009 (<https://www.legal-tools.org/doc/9f9f37/>).
7. Francesca Martines, “Legal Status and Powers of the Court”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 203–218 (<https://www.legal-tools.org/doc/01addc/>).
8. Manuel Rama-Montaldo, “International Legal Personality and Implied Powers of International Organizations”, in *British Yearbook of International Law*, 1970, vol.44, pp. 111–155 (<https://www.legal-tools.org/doc/55dd8f/>).
9. Wiebke Rückert, “Article 4: Legal Status and Powers of the Court”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 103–109. (<https://www.legal-tools.org/doc/040751/>).
10. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

11. Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, Martinus Nijhoff, Leiden, 2003 (<https://www.legal-tools.org/doc/727196/>).
12. Finn Seyersted, *Common Law of International Organizations*, Martinus Nijhoff, Leiden, 2008 (<https://www.legal-tools.org/doc/4f583a/>).
13. Gerard A.M. Strijards, “Article 103: Role of States in Enforcement of Sentences of Imprisonment”, in Otto Triffterer and Kai Ambos (eds.), 2016, pp. 2173–2186.
14. Göran Sluiter, “Trends in the Development of a Unified Law of International Criminal Procedure”, in Carsten Stahn and Larissa van den Herik (eds.), *Future Perspectives on International Criminal Justice*, T.M.C. Asser Press, The Hague, 2010, pp. 585–599 (<https://www.legal-tools.org/doc/f7f9d3/>).
15. Nigel D. White, *The Law of International Organisations*, Manchester University Press, Manchester, 2005 (<https://www.legal-tools.org/doc/a6e5f9/>).
16. William A. Schabas and Giulia Pecorella, “Article 13: Exercise of Jurisdiction”, in Otto Triffterer and Kai Ambos (eds.), 2016, pp. 690–702.

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PART 2.
JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5(1)

Article 5¹

Crimes within the Jurisdiction of the Court

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

[...]

¹ Paragraph 2 of article 5 (“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”) was deleted in accordance with RC/Res.6, annex I, of 11 June 2010.

The crimes mentioned in the present provision are considered to be the core crimes of international criminal law.

Doctrine: For the bibliography, see the final comment on Article 5.

Author: Mark Klamberg.

Article 5(1)(a)

(a) The crime of genocide;

See comments under Article 6.

Doctrine: For the bibliography, see the final comment on Article 5.

Author: Mark Klamberg.

Article 5(1)(b)

(b) Crimes against humanity;

See comments under Article 7.

Doctrine: For the bibliography, see the final comment on Article 5.

Author: Mark Klamberg.

Article 5(1)(c)

(c) War crimes;

See comments under Article 8.

Doctrine: For the bibliography, see the final comment on Article 5.

Author: Mark Klamberg.

Article 5(1)(d)

(d) The crime of aggression.

At the Rome Conference, the informal consultations did not bring the delegations to an agreement on the definition of the crime and under which conditions the Court shall exercise jurisdiction with respect to the crime. Thus, the Court may not exercise jurisdiction with respect to the crime of aggression.

The Court's jurisdiction over the crime was made dependent on the Assembly of State Parties ('ASP') agreeing on a definition in accordance with the now deleted Article 5(2). In 2002 the ASP decided to establish a Special Working Group on the Crime of Aggression ('SWGCA'), which was to submit proposed provisions to a future Review Conference.¹ The SWGCA draft amendments were the starting point for the discussions at the Kampala Review Conference in 2010, where Articles 8 *bis*, 15 *bis*, 15 *ter* and 25(3) *bis* were adopted. It follows from Articles 15 *bis*(3) and 15 *ter*(3) that the Court will first by 2017 have the power to exercise jurisdiction over the crime, provided that 30 States Parties have ratified or accepted the amendments.

Doctrine:

1. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 400–1, mn. 1184–85 (<https://www.legal-tools.org/doc/e35f82/>).
2. Herman von Hebel and Darryl Robinson, "Crimes Within the Jurisdiction of the Court", in Roy S. Lee (ed.), *The International Criminal Court: The Making off the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, pp. 81–85 (<https://www.legal-tools.org/doc/d71078/>).
3. Andreas Zimmerman, "Article 5: Jurisdiction, Admissibility and Applicable Law", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 111–126. (<https://www.legal-tools.org/doc/040751/>).

¹ ICC ASP, Continuity of Work in Respect of the Crime of Aggression, Resolution ICC-ASP/1/Res.1, 9 September 2002 (<https://www.legal-tools.org/doc/7ecd13/>).

Author: Mark Klamberg.

Article 6

Genocide

General Remarks:

i. Introduction:

An examination of the subject of genocide in international law may usefully begin by asking the question which of the following mass-atrocity events have been characterised as genocide in a judicial verdict: the killings of Armenians in the crumbling Ottoman Empire in 1915; the extermination of the European Jews at the hands of the Nazis during the Second World War; the ‘killing fields’ of Cambodia under Khmer Rouge rule from 1975–1979; the killings of Tutsi and moderate Hutu by the Hutu majority in Rwanda in 1994; the massacre of Bosnian Muslims by Bosnian Serbs at Srebrenica in 1995; the violence in Darfur in Western Sudan since 2003; the situation of the Yazidi minority in Iraq who came under attack by the Islamic State in 2014; and the violence against and displacement of the Rohingya Muslim minority in Myanmar since 2016. By explaining the answer to this question and tracking its evolution, this commentary aims to set out the legal precedents and doctrine that might inform the investigation, prosecution, defence, and judgement of situations and cases concerning genocide before the International Criminal Court.

Genocide is commonly labelled the ‘crime of crimes’.¹ This ‘crime of crimes’ has historical, philosophical, sociological and anthropological dimensions that are not fully captured by the legal definition.² Paul Behrens distinguishes between the ‘legal’ and the ‘ordinary’ concept of genocide, arguing that the ordinary concept has informed the legal approach in certain decisions of international courts and tribunals.³ As a legal concept,

¹ ICTR, *Prosecutor v. Kambanda*, Trial Chamber, Judgement and Sentence, 4 September 1998, ICTR-97-23-S, para. 16 (*Kambanda*, 4 September 1998”) (<https://www.legal-tools.org/doc/49a299/>); ICTY, *Prosecutor v. Stakić*, Trial Chamber, Judgment, 31 July 2003, IT-97-24-T, para. 502 (<https://www.legal-tools.org/doc/32ecfb/>); ICTR, *Prosecutor v. Niyitegeka*, Appeals Chamber, Judgment, 9 July 2004, ICTR-96-14-A, para. 53 (<https://www.legal-tools.org/doc/e59f0a/>).

² For a sociological perspective see, for example, Leo Kuper, *Genocide: Its Political Use in the Twentieth Century*, Yale University Press, 1981.

³ Paul Behrens, “Between Abstract Event and Individualised Crime: Genocidal Intent in the Case of Croatia”, in *Leiden Journal of International Law*, 2015, vol. 28, no. 4, referring to the *Case Concerning the Application of the Convention on the Prevention and Punishment*

genocide raises distinct normative issues. Verdicts turn on the fulfilment of a technical legal requirement, namely proof of a specific intent to destroy a protected group. Only four groups qualify for protection and the identification of these groups presents challenges. Genocide is often regarded as a collective crime on the basis that a “lone individual seeking to destroy a group as such”⁴ is incapable of wreaking the havoc of mass destruction envisaged by the concept. Thus, a state or organisational policy may be essential to prove the individual crime of genocide. States are “bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them”, but the “international responsibility of a State” for genocide is “quite different in nature from criminal responsibility”.⁵ At the current stage of development of international law, only individuals can be held criminally responsible for genocide.⁶ Further complexities are raised by the modes of participation in genocide, for example what it means to incite or be complicit in genocidal conduct.

As a consequence of the stringent legal requirements which are seen to reflect the gravity of the crime, the characterization of genocide is awarded sparingly in judicial verdicts. While the legal requirements “guard against a danger that convictions for this crime will be imposed lightly”, where they are satisfied “the law must not shy away from referring to the crime committed by its proper name”.⁷

ii. The Historical Context:

Towards the end of the Second World War, Raphael Lemkin published his treatise on *Axis Rule in Occupied Europe* and gave the name “genocide” to the phenomenon that Winston Churchill had labelled the “crime without a

of the Crime of Genocide (Croatia v. Serbia) before the International Court of Justice (‘ICJ’).

⁴ ICTY, *Prosecutor v. Jelišić*, Trial Chamber, Judgment, 14 December 1999, IT-95-10-T, para. 100 (‘*Jelišić*, 14 December 1999’) (<https://www.legal-tools.org/doc/b3ecce5/>).

⁵ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 43, para. 167 (<https://www.legal-tools.org/doc/5fcd00/>).

⁶ See further Nina H.B. Jørgensen, *The Responsibility of States for International Crimes*, Oxford University Press, 2000.

⁷ ICTY, *Prosecutor v. Krstić*, Appeals Chamber, Judgment, 19 April 2004, IT-98-33-A, para. 37 (‘*Krstić*, 19 April 2004’) (<https://www.legal-tools.org/doc/86a108/>).

name”.⁸ Lemkin derived the word genocide “from the Greek *genos*, meaning race or tribe, and the Latin *caedere*, meaning to kill”.⁹

While genocide was not included in the Nuremberg Charter as a distinct crime, the Indictment against the “major Axis war criminals” referred to: “deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others”.¹⁰ On 11 December 1946, the General Assembly adopted Resolution 96(1) on “The Crime of Genocide”, affirming the status of genocide as a crime under international law “for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable”.¹¹ Resolution 96(1) captured the essence of the crime in the phrase: “Genocide is a denial of the right of existence of entire human groups”. The “systematic program of genocide” and genocide as “the extermination of whole categories of human beings”, constituted part of the charges in the Subsequent Nuremberg Proceedings conducted in the Allied zones of occupation pursuant to Control Council Law No. 10.¹²

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by General Assembly Resolution 260 A (III) of 9 December 1948 and entered into force on 12 January 1951. The Convention has 152 ratifications (as of July 2019). Its Preamble recognises that “at

⁸ Rafael Lemkin, *Axis Rule in Occupied Europe*, Carnegie Endowment for International Peace, Washington, 1944. See also William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd. ed., Cambridge University Press, 2009, p. 17, referring to Kuper, 1981, p. 12.

⁹ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 114 (*‘Al Bashir*, 4 March 2009’) (<https://legal-tools.org/doc/e26cf4/>).

¹⁰ Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Vol. I, 1947, pp. 43–44 (<https://www.legal-tools.org/doc/388b07/>).

¹¹ *The Crime of Genocide*, UN Doc. A/RES/96(I), 11 December 1946 (<https://www.legal-tools.org/doc/f438af/>).

¹² See for example *The Einsatzgruppen Case*, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. IV, pp. 15 (Indictment), 30 (Opening Statement of the Prosecutor) (<https://www.legal-tools.org/doc/0e7313/>). For a detailed discussion of the origins of the prohibition of genocide, see Schabas, 2009, Chapter 1.

all periods of history genocide has inflicted great losses on humanity”. Article II of the Convention defines genocide as follows:

[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.¹³

The provisions of the Genocide Convention are considered to be part of customary international law and the norm prohibiting genocide is *jus cogens*. As the ICJ stated, “the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation”.¹⁴

In the *Eichmann* case, the “crime against the Jewish People” in Israeli law was defined by reference to the Genocide Convention and genocide was deemed to be a crime of universal jurisdiction.¹⁵

In 1979, after Vietnamese forces drove the Khmer Rouge out of Cambodia, Pol Pot and Ieng Sary were charged as “instigators and planners of genocidal crimes” before the Vietnam-backed People’s Revolutionary Tribunal (‘PRT’).¹⁶ The two accused were held liable as instigators and

¹³ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Article II (<https://www.legal-tools.org/doc/498c38/>).

¹⁴ See, for example, ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Reports 15, 23 (<https://www.legal-tools.org/doc/52868f/>). See also ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment, 26 February 2007, para. 161 (<https://www.legal-tools.org/doc/5fcd00/>).

¹⁵ Israel, *Attorney-General v. Eichmann*, 11 December 1961 (English translation, 1968), International Law Rep. vol. 36 (<https://www.legal-tools.org/doc/7519c3/>).

¹⁶ Howard J. De Nike, John Quigley and Kenneth J. Robinson (eds.), with the assistance of H. Jarvis and N. Cross, *Genocide in Cambodia: documents from the trial of Pol Pot and Ieng Sary*, University of Pennsylvania Press, Philadelphia, 2000, Indictment, p. 487.

planners, found to be responsible for all the consequences of their genocidal acts and sentenced to death in absentia (De Nike, 2000). Proceedings before the Extraordinary Chambers in the Courts of Cambodia have highlighted certain procedural deficiencies of the PRT.¹⁷ Substantively, the PRT applied a broader definition of genocide than the one provided in the Genocide Convention, describing the acts of genocide as: “planned massacres of groups of innocent people; expulsion of inhabitants of cities and villages in order to concentrate them and force them to do hard labour in conditions leading to their physical and mental destruction; wiping out religion; destroying political, cultural and social structures and family and social relations”.¹⁸

The crime of genocide was included in the International Law Commission’s 1994 Draft Statute for an International Criminal Court and the ILC took the view that the proposed court should have inherent jurisdiction over genocide “by virtue solely of the States participating in the statute, without any further requirement of consent or acceptance by any particular State” in view of the “fundamental significance” of the prohibition.¹⁹

At the time of the adoption of the ICC Statute in 1998, which included genocide as defined in Article II of the Genocide Convention on the same jurisdictional basis as crimes against humanity and war crimes, there was only limited jurisprudence clarifying the definition of genocide. Article 6 of the ICC Statute defines genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group

¹⁷ ECCC, *Case 002*, Decision on Ieng Sary’s Appeal Against the Closing Order, 11 April 2011, No. 002/19-09-2007-ECCC/OCIJ (PTC75), paras. 161–176 (<https://www.legal-tools.org/doc/d264ce/>).

¹⁸ Cambodia, Decree Law No. 1: Establishment of Peoples’ Revolutionary Tribunal at Phnom Penh to Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide, 15 July 1979, in De Nike, 2000, p. 45.

¹⁹ Report of the International Law Commission on the work of its forty-sixth session (2 May 1994–22 July 1994), UN Doc. A/49/10, Commentary, Part Three, Jurisdiction of the Court, para. 7, pp. 67–68 (<https://www.legal-tools.org/doc/f73459/>).

to another group”. The Genocide Convention and its *travaux préparatoires* continue to be relied upon for interpretative guidance.²⁰

iii. The Contemporary Context:

Article 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) and Article 2 of the Statute of the International Criminal Tribunal for Rwanda (‘ICTR’) reproduce verbatim the definition of genocide in Article II of the Genocide Convention. In the *Akayesu* case, the ICTR Trial Chamber established that “genocide was, indeed, committed in Rwanda in 1994 against the Tutsi as a group”.²¹ The former Rwandan Prime Minister, Jean Kambanda, pleaded guilty to genocide before the ICTR and the Trial Chamber imposed a sentence of life imprisonment which was upheld on appeal.²²

The ICTY found that genocide was committed by members of the leadership and army of the Republika Srpska in the town of Srebrenica in Bosnia and Herzegovina (‘BiH’) in July 1995.²³ Consistent with the ICTY jurisprudence, the ICJ has found that: “the acts committed at Srebrenica

²⁰ William A. Schabas, “Article 6: Genocide”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 129 (<https://www.legal-tools.org/doc/040751/>); for the *travaux préparatoires*, see Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, Brill, Nijhoff, 2008.

²¹ ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, para. 126 (<https://www.legal-tools.org/doc/b8d7bd/>).

²² *Kambanda*, 4 September 1998; ICTR, *Prosecutor v. Kambanda*, Appeals Chamber, Judgment, 19 October 2000, ICTR-97-23-A (<https://www.legal-tools.org/doc/9d7f75/>).

²³ ICTY, *Prosecutor v. Krstić*, Trial Chamber, Judgment, 2 August 2001, IT-98-33-T (<https://www.legal-tools.org/doc/440d3a/>); *Krstić*, 19 April 2004 (mode of liability changed to aiding and abetting); *Prosecutor v. Popović et al.*, Trial Chamber, Judgment, 10 June 2010, IT-05-88-T (<https://www.legal-tools.org/doc/481867/>); *Prosecutor v. Popović et al.*, Appeals Chamber, Judgment, 30 January 2015, IT-05-88-A (<https://www.legal-tools.org/doc/4c28fb/>); *Prosecutor v. Karadžić*, Trial Chamber, Judgment, 24 March 2016, IT-95-5/18-T (<https://www.legal-tools.org/doc/173e23/>); *Prosecutor v. Mladić*, Trial Chamber, Judgment, 22 November 2017, IT-09-92-T (<https://www.legal-tools.org/doc/96f3c1/>); *Prosecutor v. Tolimir*, Trial Chamber, Judgment, 12 December 2012, IT-05-88/2-T (<https://www.legal-tools.org/doc/445e4e/>); *Prosecutor v. Tolimir*, Appeals Chamber, Judgment, 8 April 2015, IT-05-88/2-A (<https://www.legal-tools.org/doc/010ecb/>), overturning convictions for genocide through causing serious bodily or mental harm to the Bosnian Muslim population of Žepa and through inflicting on the Bosnian Muslims from Eastern BiH conditions of life calculated to bring about their physical destruction, but upholding convictions for the killings of the men from Srebrenica and through the infliction of serious bodily or mental harm to the Bosnian Muslim population of Srebrenica.

falling within Article II(a) and (b) of the [Genocide] Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995”(*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 26 February 2007, para. 297).

The ECCC was established in 2006 and has considered whether genocide was committed in Cambodia during the period of Khmer Rouge rule from 1975–1979.²⁴ Charges of genocide were adjudicated in what became known as Case 002/02, referring to the second of two trials initially involving Khieu Samphan, Nuon Chea, Ieng Sary, and Ieng Thirith, but proceeding to the trial judgment stage only in respect of the former two defendants after the latter two passed away. On 16 November 2018, Khieu Samphan and Nuon Chea were convicted of genocide against the Vietnamese ethnic, national and racial group. Nuon Chea was also convicted of genocide against the Cham ethnic and religious group under the doctrine of superior responsibility.²⁵ Nuon Chea passed away on 4 August 2019 while the delivery of the appeal judgment was scheduled for 22 September 2022e.

A UN Commission of Inquiry on the situation in Darfur, Sudan (‘Darfur Commission’), concluded that: “the Government of the Sudan has not pursued a policy of genocide” and that although there was evidence that certain underlying acts of genocide had been committed, the “crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned”.²⁶

The situation in Darfur was subsequently referred to the ICC by the UN Security Council. The ICC Prosecutor sought a warrant of arrest on various charges, including genocide, for then President Omar Hassan Ahmad Al Bashir. The ICC Pre-Trial Chamber initially concluded that the Prosecutor had failed to provide reasonable grounds to believe that the

²⁴ See further, Nina H.B. Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia*, Edward Elgar Publishers, New York, 2018, pp. 252–257.

²⁵ ECCC, *Case 002*, Trial Chamber, Judgment, 16 November 2018, No. 002/19-09-2007-ECCC/TC, paras. 4198, 4200, 4326 and 4329 (<https://www.legal-tools.org/doc/8v76lk/>).

²⁶ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, p. 4 (‘Darfur Commission Report, 2005’) (<https://www.legal-tools.org/doc/e684bb/>).

Government of Sudan acted with the specific intent to destroy in whole or in part the Fur, Masalit, and Zaghawa groups (*Al Bashir*, 4 March 2009). This decision was overturned on appeal on the basis that an erroneous standard of proof had been applied.²⁷ A warrant of arrest was subsequently issued in respect of Bashir’s alleged criminal responsibility under Article 25(3)(a) of the ICC Statute for killing members of the Fur, Masalit, and Zaghawa ethnic groups, causing them serious bodily and mental harm, and deliberately inflicting on them conditions of life calculated to bring about the group’s physical destruction.²⁸ Following the recent political transition in Sudan, now former President Al Bashir has been tried domestically for financial crimes.

In 2016, the Human Rights Council issued a report in which it found that the Yazidis, as a protected religious group, were subjected to all the categories of underlying acts under the Genocide Convention at the hands of the Islamic State, with particular emphasis on rape and sexual enslavement, and that: “ISIS has committed, and is committing, the prohibited acts with the intent to destroy, in whole or in part, the Yazidis of Sinjar, and has, therefore, committed the crime of genocide”.²⁹ These findings have yet to be tested before an international court although national courts are starting to exercise jurisdiction over cases involving crimes against Yazidi victims.³⁰

The report of the independent international fact-finding mission on Myanmar found sufficient information to warrant an investigation into the conduct of senior officials in the Tatmadaw chain of command for genocide against the Rohingya (deemed to be a protected group under the definition of genocide) in Rakhine State. As it concerned the “critical element” of genocidal intent, the fact-finding mission indicated that factors pointing

²⁷ ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, 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’, 3 February 2010, ICC-02/05-01/09-73 (<https://www.legal-tools.org/doc/9ada8e/>).

²⁸ ICC, *Al Bashir*, Pre-Trial Chamber I, Second Decision on the Prosecution’s Application for a Warrant of Arrest, 12 July 2010, ICC-02/05-01/09-94 (<https://www.legal-tools.org/doc/50fbab/>).

²⁹ “They Came To Destroy”: ISIS Crimes against the Yazidis, UN Doc. A/HRC/32/CRP.2, 15 June 2016, para. 165 (<https://www.legal-tools.org/doc/24962f/>).

³⁰ See, for example, the case before the Higher Regional Court of Munich, *Jennifer W. and others*, Judgment, 25 October 2021; and the case before the Higher Regional Court of Frankfurt, *Taha Al J.*, Judgment, 30 November 2021.

towards the intent included: “the broader oppressive context and hate rhetoric; specific utterances of commanders and direct perpetrators; exclusionary policies, including to alter the demographic composition of Rakhine State; the level of organization indicating a plan for destruction; and the extreme scale and brutality of the violence committed”.³¹

On 14 November 2019, the ICC Pre-Trial Chamber authorized an investigation into the situation in Bangladesh and Myanmar with respect to the treatment of the Rohingya. The Pre-Trial Chamber focused its attention for the purpose of Article 15 proceedings on the alleged crimes of deportation and persecution without excluding the possibility that other alleged crimes (presumably including genocide) could be part of the Prosecutor’s future investigation.³²

iv. Relationship of Genocide to other Crimes:

The 1996 Draft Code of Crimes prepared by the ILC relates the Nuremberg category of crimes against humanity consisting of “persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal” to the development of the crime of genocide.³³

The Genocide Convention clearly establishes that unlike persecution as a crime against humanity in the framework of the Nuremberg proceedings, there is no requirement of a nexus to crimes against peace or war crimes in respect of genocide.

The ICC Pre-Trial Chamber has explained that in contrast to the specific intent required for genocide, the specific intent for persecution as a crime against humanity is: “persecutory intent consisting of the intent to discriminate on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law, against the members of a group, by reason of the identity

³¹ Report of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/64, 12 September 2018, para. 85 (<https://www.legal-tools.org/doc/61cb49/>).

³² ICC, *Situation in the People’s Republic of Bangladesh / Republic of the Union of Myanmar*, Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, ICC-01/19-27, para. 96 (<https://www.legal-tools.org/doc/kbo3hy/>).

³³ Report of the International Law Commission on the work of its forty-eighth session, 6 May 1996–26 July 1996, UN Doc. A/51/10, Part. I, Commentary, Article 17. Crime of genocide, paras. 2 and 3, p. 44 (<https://www.legal-tools.org/doc/f6ff65/>).

of the group” (*Al Bashir*, 4 March 2009, para. 141(ii)). Thus, the crime against humanity of persecution protects a broader range of groups from discrimination while the crime of genocide protects a narrower range of groups against elimination. It has been noted that the fact that the Genocide Convention: “seeks to protect the right to life of human groups, as such [...] makes genocide an exceptionally grave crime and distinguishes it from other serious crimes, in particular persecution, where the perpetrator selects his victims because of their membership in a specific community but does not necessarily seek to destroy the community as such” (*Krstić*, 2 August 2001, para. 553). The ICC Pre-Trial Chamber has stated that “ethnic cleansing”, which is often characterised as the crime against humanity of persecution, can result in genocide if all the elements of the latter crime are satisfied (*Al Bashir*, 4 March 2009, para. 145).

The *ad hoc* tribunal jurisprudence reflects a restrained use of the category of genocide in keeping with the narrow definition of the crime. Jurisprudential and scholarly opinion are divided over the question whether genocide is more serious than crimes against humanity or war crimes.³⁴ Article 77 of the ICC Statute stipulates the same maximum penalty in respect of all the crimes listed under Article 5. The Darfur Commission noted that: “International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide” (Darfur Commission Report, 2005, p. 4).

Cumulative convictions under different categories of crimes have been allowed where “each statutory provision involved has a materially distinct element not contained in the other”.³⁵ For example, there have been convictions for genocide and extermination as a crime against humanity on the basis of the same facts.³⁶

³⁴ See, for example, Bing Bing Jia, “The Differing Concepts of War Crimes and Crimes against Humanity in International Criminal Law”, in Guy S. Goodwin-Gill and Stefan Talmon (eds.), *The Reality of International Law, Essays in Honour of Ian Brownlie*, Clarendon Press, Oxford, 1999; Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime*, Cambridge University Press, Cambridge, 2012, Chapter 4.

³⁵ ICTY, *Prosecutor v. Delalić et al.*, Appeals Chamber, Judgment, 20 February 2001, IT-96-21-A, para. 412 (<https://www.legal-tools.org/doc/051554/>): “An element is materially distinct from another if it requires proof of a fact not required by the other”.

³⁶ ICTR, *Prosecutor v. Musema*, Appeals Chamber, Judgment, 16 November 2001, ICTR-96-13-A, para. 367 (<https://www.legal-tools.org/doc/786a69/>); *Krstić*, 19 April 2004, paras. 219–227.

v. *Retrospective Application of the Genocide Convention:*

The question whether the Genocide Convention can be applied retroactively in respect of mass-atrocity events occurring in ‘periods of history’ prior to its formal adoption has been raised in relation to the extermination of Armenians within the Ottoman Empire commencing on 24 April 1915. This issue remains unsettled although it is possible to make a strong case that the “Armenian Genocide” does indeed meet the legal definition of the crime set out in the Convention even if the principle of legality might preclude criminal prosecutions under this category of crime.³⁷ The issue was debated before the European Court of Human Rights which at least recognised “the rights of Armenians to respect for their and their ancestors’ dignity, including their right to respect for their identity constructed around the understanding that their community has suffered genocide”.³⁸

vi. *The Duality of State and Individual Responsibility*

The ICJ has stated that the duality of individual criminal responsibility and State responsibility “continues to be a constant feature of international law” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 26 February 2007, para. 173). This means that in a given situation of alleged genocide, a State may be held responsible for violations of its obligations under the Genocide Convention before the ICJ if a State refers a dispute to it under Article IX of that Convention, while individuals may be held criminally responsible for genocide before a competent court such as the ICC. The ICJ has further explained that: “Contracting Parties are bound by the obligation under the [Genocide] Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III”. Consequently, “if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 26 February 2007, para. 179).

On 11 November 2019, The Gambia instituted proceedings against Myanmar before the ICJ alleging that Myanmar had violated the Genocide

³⁷ See further Geoffrey Robertson, *An Inconvenient Genocide: Who Now Remembers the Armenians?*, Biteback Publishing, 2014, Chapter 4.

³⁸ ECtHR, *Perinçek v. Switzerland*, Grand Chamber, Judgment, 15 October 2015, para. 227 (<https://www.legal-tools.org/doc/719085/>).

Convention in its treatment of the Rohingya in Rakhine State.³⁹ In its Application, The Gambia pointed to the distinction as well as the connections between discrimination, ethnic cleansing, persecution, disappearance and torture, and referred to acts of genocide being part of a continuum (*Application for Provisional Measures*, 11 November 2019, para. 4). The Gambia also referred to the *jus cogens* nature of the prohibition of genocide and the *erga omnes* character of the obligations owed under the Genocide Convention (*Application for Provisional Measures*, 11 November 2019, para. 15). In its order on provisional measures, the ICJ concluded that, prima facie, it had jurisdiction to hear the case.⁴⁰ As it concerned The Gambia's standing, the ICJ affirmed that: "any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end" (*Application for Provisional Measures*, 23 January 2020, para. 41).

The Court found that the Rohingya appeared to constitute a protected group under Article II of the Genocide Convention (*Application for Provisional Measures*, 23 January 2020, para. 52). However, at the provisional measures stage, the Court was concerned with the protection of rights under the Genocide Convention rather than breaches thereof (*Application for Provisional Measures*, 23 January 2020, para. 66). Various provisional measures were ordered, including the requirement that Myanmar should take all measures within its power to prevent all acts of genocide (*Application for Provisional Measures*, 23 January 2020, para. 79) and to ensure the preservation of any evidence of related to allegations of genocide (*Application for Provisional Measures*, 23 January 2020, para. 81).

vii. The Contextual Element:

The ICC Elements of Crimes introduce a contextual element that does not appear in the Genocide Convention or in the Statutes and jurisprudence of

³⁹ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), Application Instituting Proceedings and Request for Provisional Measures, 11 November 2019, para. 2. ('*Application for Provisional Measures*, 11 November 2019') (<https://www.legal-tools.org/doc/69p376/>).

⁴⁰ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), Request for the Indication of Provisional Measures, Order, 23 January 2020, para. 37 ('*Application for Provisional Measures*, 23 January 2020') (<https://www.legal-tools.org/doc/in5d55/>).

the *ad hoc* tribunals. The Elements of Article 6(a), Genocide by killing, are listed as follows, with the contextual element appearing in Article 6(a)(4):

1. The perpetrator killed one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. 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 Introduction to Article 6 of the Elements of Crimes states with respect to the fourth element above that the term “‘in the context of’ would include the initial acts in an emerging pattern” while the term “‘manifest’ is an objective qualification”. This element follows from a US proposal to introduce into the definition of genocide a plan or policy requirement (Schabas, 2016, p. 130). However, it contradicted the evolving and now settled ICTY jurisprudence to the effect that genocide could be committed by an individual acting alone (*Jelisić*, 14 December 1999, para. 100).⁴¹ According to the ICTY jurisprudence, there is no requirement of a broader plan or policy under customary international law.⁴²

The ICC Pre-Trial Chamber has noted that according to the *ad hoc* tribunal jurisprudence, once the intent has been proven and an underlying act of genocide is carried out by an individual who possesses that intent, the crime of genocide is established. However, the additional contextual element in the ICC definition of genocide means that: “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”. Put differently: “the protection offered by the penal norm defining the crime of genocide – as an *ultima ratio* mechanism 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” (*Al Bashir*, 4 March 2009, para. 124). The ICC Pre-Trial Chamber defended (by a Majority) its construction of the definition of genocide, claiming that such a construction was not

⁴¹ Confirmed on appeal, ICTY, *Prosecutor v. Jelisić*, Appeals Chamber., Judgment, 5 July 2001, IT-95-10-A, para. 48 (<https://www.legal-tools.org/doc/477a30/>).

⁴² ICTY, *Prosecutor v. Kunarac et al.*, Appeals Chamber, Judgment, 12 June 2002, IT-96-23 and IT-96-23/1-A, para. 98, fn. 114 (<https://www.legal-tools.org/doc/029a09/>).

contrary to Article 6 of the ICC Statute; that it respected the requirements of Article 22(2) of the ICC Statute that the definition of the crimes shall be strictly construed and in case of ambiguity, interpreted in favour of the accused; and that it was “fully consistent with the traditional consideration of the crime of genocide as the ‘crime of crimes’” (*Al Bashir*, 4 March 2009, para. 133).

Doctrine: For the bibliography, see the final comment on Article 6.

Author: Nina H.B. Jørgensen.

Article 6: Specific Intent

with intent

The specific intent is the essence of genocide and the “distinguishing characteristic of this particular crime under international law”.¹

As the ICTY Appeals Chamber has stated: “Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent”.² The ICJ has also emphasised the importance of establishing what is variously described as the ‘additional intent’, ‘special intent’, ‘specific intent’ or ‘*dolus specialis*’: “It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words ‘as such’ emphasize that intent to destroy the protected group”.³

The Introduction to Article 6 of the ICC Elements of Crimes states in relation to the *mens rea* for genocide, viewed in the context of Article 30 of the ICC Statute which refers to “awareness that a circumstance exists” that: “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”.

The ICC Pre-Trial Chamber has referred to 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

¹ Report of the International Law Commission on the work of its forty-eighth session, 6 May 1996–26 July 1996, UN Doc. A/51/10, Part. I, Commentary, Article 17. Crime of genocide, para. 5, p. 44 (<https://www.legal-tools.org/doc/f6ff65/>).

² ICTY, *Prosecutor v. Krstić*, Appeals Chamber, Judgment, 19 April 2004, IT-98-33-A, para. 34 (“*Krstić*, 19 April 2004”) (<https://www.legal-tools.org/doc/86a108/>).

³ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 43, para. 187 (<https://www.legal-tools.org/doc/5fcd00/>).

genocidal acts must be carried out with the “intent to destroy in whole or in part” the targeted group.⁴

It is possible for another crime, such as persecution or deportation (‘ethnic cleansing’) to ‘escalate’ into genocide, in other words the specific intent is not present initially but is subsequently formed.⁵ It is not required to prove premeditation, but premeditation can be an aggravating factor in sentencing (*Krstić*, 2 August 2001, paras. 572, 705 and 711).

As it concerns proof of the specific intent, the jurisprudence of the ad hoc tribunals has established that in the absence of direct evidence, circumstantial evidence may suffice:

The specific intent may be inferred from the surrounding facts and circumstances which may include: the general context; the perpetration of other culpable acts systematically directed against the same group; the scale of the atrocities committed; the systematic targeting of victims on account of their membership in a particular group; proof of the mental state with respect to the commission of the underlying acts; the repetition of destructive and discriminatory acts; or the existence of a plan or policy.⁶

Several layers of proof may be required depending on the mode of liability charged. For example, in the *Karadžić* case, where it was alleged that the accused was responsible as a participant both in an “overarching” joint criminal enterprise (‘JCE’) and a more limited joint criminal enterprise relating to Srebrenica, “the accused needs to share genocidal intent with other members of the JCE”.⁷ The Trial Chamber found that Karadžić “shared the common purpose of eliminating the Bosnian Muslims in Srebrenica with the other members of the JCE” (*Karadžić*, 24 March 2016, 5814), and proceeded to consider whether he “intended to destroy the protected group, in whole or in part, as such” (*Karadžić*, 24 March 2016, para. 5825). The Trial Chamber noted that “indications of such intent are ‘rarely

⁴ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 139 (‘*Al Bashir*, 4 March 2009’) (<https://legal-tools.org/doc/e26cf4/>).

⁵ ICTY, *Prosecutor v. Krstić*, Trial Chamber, Judgment, 2 August 2001, IT-98-33-T, para. 619 (‘*Krstić*, 2 August 2001’) (<https://www.legal-tools.org/doc/440d3a/>).

⁶ ICTY, *Prosecutor v. Mladić*, Trial Chamber, Judgment, 22 November 2017, IT-09-92-T, para. 3457 (<https://www.legal-tools.org/doc/e6f43e/>).

⁷ ICTY, *Prosecutor v. Karadžić*, Trial Chamber, Judgment, 24 March 2016, IT-95-5/18-T, para. 549 (‘*Karadžić*, 24 March 2016’) (<https://www.legal-tools.org/doc/173e23/>).

overt” (*Karadžić*, 24 March 2016, para. 5825) Thus, although the Chamber was satisfied that Karadžić participated in the plan to eliminate the Bosnian Muslims in Srebrenica with discriminatory intent, it needed to: “determine whether, in light of his knowledge of the implementation of the plan to eliminate – particularly his knowledge of its killing aspect – it is satisfied that the only reasonable inference is that the Accused intended to destroy the Bosnian Muslims in Srebrenica as such” (*Karadžić*, 24 March 2016, para. 5827). The Trial Chamber concluded that Karadžić shared the intent for genocide (*Karadžić*, 24 March 2016, para. 5831).

It has been suggested that the approach in *Karadžić* blurs the boundaries between the mental elements of knowledge and intent.⁸ A knowledge-based understanding of genocidal intent has been discussed in the literature.⁹ However, the jurisprudence tends to draw a distinction between the mental element for direct commission of genocide (as a perpetrator, co-perpetrator or participant in a joint criminal enterprise) and for participation in genocide as an accomplice (see *Krstić*, 19 April 2004, para. 140). Indeed, the ICC Pre-Trial Chamber has examined the literature on the so-called ‘knowledge-based approach’, one version of which differentiates between high level and lower-level perpetrators, and noted that:

[T]he “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 physical 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 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)*

⁸ Carsten Stahn, *A Critical Introduction to International Criminal Law*, Cambridge University Press, 2019, pp. 42–43.

⁹ See Alexander Greenawalt, “Rethinking Genocidal Intent: The Case for a Knowledge-based Interpretation”, in *Columbia Law Review*, 1999, vol. 99; Nina H.B. Jørgensen, “The Definition of Genocide: Joining the Dots in the Light of Recent Practice”, in *International Criminal Law Review*, 2001, vol. 1, pp. 292–299; Claus Kress, “The Crime of Genocide under International Law”, in *International Criminal Law Review*, 2006, vol. 6, pp. 492–497; William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd. ed., Cambridge University Press, 2009, pp. 242–256; Stahn, 2019, pp. 43–44.

and 28 of the Statute (Al Bashir, 4 March 2009, note 154 (emphasis added)).

Doctrine: For the bibliography, see the final comment on Article 6.

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Article 6: Destroy

to destroy

The ILC adopted the view, consistently with the *travaux préparatoires* of the Genocide Convention, that the envisaged destruction must be by physical or biological means.¹ Thus, the words “to destroy” do not include “the destruction of the national, linguistic, religious, cultural or other identity of a particular group” (ILC Report, 1996, para. 12). As the ILC explained, “cultural genocide” refers to: “any deliberate act committed with the intent to destroy the language, religion or culture of a group, such as prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group or destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group” (ILC Report, 1996, para. 12). The notion of “cultural genocide” was not included in the final text of the Genocide Convention.²

This position that the “term ‘destroy’ is limited to the physical or biological destruction of the group”³ has been endorsed by the ICJ⁴ and both the ICTR and the ICTY as constituting customary international law.⁵ In *Krstić*, however, the ICTY Trial Chamber pointed out that: “where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group” (*Krstić*, 2 August 2001, para. 580).

¹ Report of the International Law Commission on the work of its forty-eighth session, 6 May 1996–26 July 1996, UN Doc. A/51/10, Part. I, Commentary, Article 17. Crime of genocide, para. 12, pp. 45–6 (‘ILC Report, 1996’) (<https://www.legal-tools.org/doc/f6ff65/>).

² ICTY, *Prosecutor v. Krstić*, Trial Chamber, Judgment, 2 August 2001, IT-98-33-T, para. 576 and fn. 1284 (‘*Krstić*, 2 August 2001’) (<https://www.legal-tools.org/doc/440d3a/>).

³ ICTY, *Prosecutor v. Mladić*, Trial Chamber, Judgment, 22 November 2017, IT-09-92-T, para. 3435 (<https://www.legal-tools.org/doc/96f3c1/>).

⁴ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 43, para. 344 (<https://www.legal-tools.org/doc/5fcd00/>).

⁵ ICTR, *Prosecutor v. Seromba*, Trial Chamber, Judgment, 13 December 2006, ICTR-2001-66-I, para. 319 (<https://www.legal-tools.org/doc/e0084d/>); *Krstić*, 2 August 2001, para. 580.

Doctrine: For the bibliography, see the final comment on Article 6.

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Article 6: In Whole or in Part

in whole or in part

The phrase “in whole or in part” establishes a quantitative threshold in the sense that isolated hate crimes do not constitute genocide, while at the same time making it clear that the intent need not relate to the whole group but only a substantial part of it. The “substantiality” requirement has been accepted in ICTY and ICTR jurisprudence.¹

The ICTY Appeals Chamber has clarified the factors to be taken into account in order to determine whether a substantial part of a group was targeted:

The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial (*Krstić*, 19 April 2004, para. 12).

Thus, the Bosnian Muslim population in Srebrenica – consisting of about 40,000 people – was considered to be a substantial part of the national group of Bosnian Muslims for the purposes of the definition of genocide.²

The ICJ has indicated that “the substantiality criterion is critical”.³ According to the ICJ, three matters are relevant to the determination of a part of the group: (1) since the object and purpose of the Genocide Convention is to prevent the intentional destruction of groups, the part of the group that is targeted “must be significant enough to have an impact on the group

¹ ICTY, *Prosecutor v. Krstić*, Appeals Chamber, Judgment, 19 April 2004, IT-98-33-A, paras. 8–9 (*Krstić*, 19 April 2004’) (<https://www.legal-tools.org/doc/86a108/>).

² See also ICTY, *Prosecutor v. Karadžić*, Trial Chamber, Judgment, 24 March 2016, IT-95-5/18-T, para. 5672 (<https://www.legal-tools.org/doc/173e23/>).

³ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 43, para. 201 (*Bosnia and Herzegovina v. Serbia and Montenegro*, 26 February 2007’) (<https://www.legal-tools.org/doc/5fcd00/>).

as a whole” (*Bosnia and Herzegovina v. Serbia and Montenegro*, 26 February 2007, para. 198); (2) genocide may be established where the intent is to destroy the group within a limited geographical area depending on the opportunity available to the perpetrator (*Bosnia and Herzegovina v. Serbia and Montenegro*, 26 February 2007, para. 199); and (3) a qualitative assessment may be carried out to determine whether the substantiality requirement is met when considered alongside other factors, for example, it may be sufficient to establish that a specific part of a group is essential to the group’s survival (*Bosnia and Herzegovina v. Serbia and Montenegro*, 26 February 2007, para. 200).

The ICJ’s assessment relied heavily on the ad hoc tribunal jurisprudence. For example, the ICTY Trial Chamber in *Jelisić* stated:

Genocidal intent may [...] be manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.⁴

In *Tolimir*, the ICTY Trial Chamber summed up the position as follows:

While there is no numeric threshold of victims required, the targeted portion must comprise a “significant enough [portion] to have an impact on the group as a whole”. Although the numerosity of the targeted portion in absolute terms is relevant to its substantiality, this is not dispositive; other relevant factors include the numerosity of the targeted portion in relation to the group as a whole, the prominence of the targeted portion, and whether the targeted portion of the group is “emblematic of the overall group, or is essential to its survival”, as well as the area of the perpetrators’ activity, control, and reach.⁵

⁴ ICTY, *Prosecutor v. Jelisić*, Trial Chamber, Judgment, 14 December 1999, IT-95-10-T, para. 82 (<https://www.legal-tools.org/doc/b3ece5/>).

⁵ ICTY, *Prosecutor v. Tolimir*, Trial Chamber II, Judgment, 12 December 2012, IT-05-88/2-T, para. 749 (<https://www.legal-tools.org/doc/445e4e/>).

Doctrine: For the bibliography, see the final comment on Article 6.

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Article 6: A National, Ethnical, Racial or Religious Group

a national, ethnical, racial or religious group

Article I(I) of the draft Convention on Genocide prepared by the UN Secretary-General on behalf of the Economic and Social Council in 1947 stated that: “The purpose of this Convention is to prevent the destruction of racial, national, linguistic, religious or political groups of human beings”.¹ This language was retained by an *ad hoc* drafting committee established by the Economic and Social Council, but the inclusion of political groups was regarded as problematic when the draft came before the Sixth Committee. Ultimately, the view prevailed that political groups should be excluded as they lacked homogeneity and stability.² Consequently, the annihilation by the Khmer Rouge of fellow Cambodians on political grounds – “widely considered a paradigmatic case of genocide” (Van Schaack, 1997, p. 2261) in the prelude to the establishment of the ECCC, does not meet the conventional definition of genocide.

The interpretation adopted by the ICTR Trial Chamber in the *Akayesu* case, according to which the Genocide Convention was designed to protect any stable and permanent group is today regarded as an anomaly.³ The *Akayesu* approach was, however, supported by the Darfur Commission.⁴

The negotiating history of the ICC Statute reveals a discussion over whether to include social and political groups in the definition of geno-

¹ Draft Convention on the Crime of Genocide, UN Doc. E/447, 26 June 1947, p. 3 (<https://www.legal-tools.org/doc/a2d995/>).

² For a summary of the discussion in the Sixth Committee, see Beth Van Schaack, “The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot”, in *Yale Law Journal*, 1997, vol. 106, no. 7, pp. 2264–2266.

³ Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 4th ed., Cambridge University Press, 2019, pp. 210–211, referring to ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, para. 511 (‘*Akayesu*, 2 September 1998’) (<https://www.legal-tools.org/doc/b8d7bd/>).

⁴ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, para. 501 (‘Darfur Commission Report’) (<https://www.legal-tools.org/doc/e684bb/>).

cide.⁵ However, the Preparatory Committee Working Group on the Definitions and Elements of Crimes preferred the original text of the Genocide Convention and there was no determined effort by States to expand the list of protected groups.⁶

There are no precise, generally and internationally accepted definitions of the groups protected by the Genocide Convention and in turn the ICC Statute.⁷ The ICTR faced difficulties in determining whether the Tutsi were an ethnic group and ultimately relied on factors outside its adopted definitions of the protected groups. The proposed definitions were as follows: a national group is “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties” (*Akayesu*, 2 September 1998, para. 512); an ethnic group is “a group whose members share a common language or culture” (*Akayesu*, 2 September 1998, para. 513); a racial group is defined with reference to “hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors” (*Akayesu*, 2 September 1998, para. 514); and a “religious group is one whose members share the same religion, denomination or mode of worship” (*Akayesu*, 2 September 1998, para. 515).

It has been suggested that, rather than searching for separate definitions, it is preferable to view the groups “as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection”.⁸ This echoes a comment by the ICTY Trial Chamber that the list of groups: “was designed more to describe a single phenomenon, roughly corresponding to [...] ‘national minorities’, rather than to refer to several distinct prototypes of human groups” and that “[t]o attempt to differentiate each of the named groups on the basis of scientifically objective

⁵ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, UN Doc. A/51/22, 14 September 1996, para. 60 (<https://www.legal-tools.org/doc/e75432/>).

⁶ William A. Schabas, “Article 6: Genocide”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 129, 135 (<https://www.legal-tools.org/doc/040751/>).

⁷ ICTR, *Prosecutor v. Rutaganda*, Trial Chamber., Judgment, 6 December 1999, ICTR-96-3-T, para. 56 (<https://www.legal-tools.org/doc/f0dbbb/>): “Each of these concepts must be assessed in the light of a particular political, social and cultural context”.

⁸ William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd. ed., Cambridge University Press, 2009, p. 129.

criteria would thus be inconsistent with the object and purpose of the Convention”.⁹

A related question is whether the protected groups and individuals who may fall victim to genocide should be identified by reference to objective or subjective criteria. The ICTY and ICTR settled on a position whereby the determination of a protected group is “to be assessed on a case-by-case basis by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators”.¹⁰

The Darfur Commission considered whether the Fur, Massalit, and Zaghawa constituted ethnic groups that were objectively distinct from those of the alleged perpetrators of genocide and found that the objective assessment alone did not reveal a clear answer. However, various elements demonstrated a “self-perception of two distinct groups” (Darfur Commission Report, para. 511) which permitted the conclusion that “victims of attacks and killings subjectively make up a protected group” (Darfur Commission Report, para. 512).

The ICC Pre-Trial Chamber referred to the findings of the Darfur Commission in reaching its own conclusion that the Fur, the Masalit, and the Zaghawa groups in Sudan were ethnic groups on the basis that each “has its own language, its own tribal customs and its own traditional links to its lands”.¹¹ The Pre-Trial Chamber noted that neither the ICC Statute nor international case law had provided a clear definition of an ethnic group and that the question remained open “whether a wholly objective (based on anthropological considerations), a wholly subjective (based only upon the perception of the perpetrators), or a combined objective/subjective approach to the definition of the relevant group should be adopted”.¹²

⁹ ICTY, *Prosecutor v. Krstić*, Trial Chamber, Judgment, 2 August 2001, IT-98-33-T, para. 556 (<https://www.legal-tools.org/doc/440d3a/>).

¹⁰ ICTR, *Prosecutor v. Semanza*, Trial Chamber, Judgment and Sentence, 15 May 2003, ICTR-97-20-T, para. 317 (<https://www.legal-tools.org/doc/7e668a/>).

¹¹ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 137 (*‘Al Bashir*, 4 March 2009’) (<https://www.legal-tools.org/doc/e26cf4/>).

¹² *Al Bashir*, 4 March 2009, fn. 152, referring to ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 43, para. 191 (<https://www.legal-tools.org/doc/5fcd00/>).

The ICC Pre-Trial Chamber has followed the ICTY Appeals Chamber in rejecting the idea of a “negative approach” to the identification of a protected group or its members whereby targeted groups are defined by “by reference to national, ethnical, racial, or religious characteristics that individuals lack”.¹³ The ICTY Appeals Chamber found that the elements of genocide had to be considered positively in relation to Bosnian Muslims and Bosnian Croats rather than negatively in relation to “non-Serbs”.¹⁴ The ICC Pre-Trial Chamber has stressed that “the targeted group must have particular positive characteristics (national, ethnic, racial or religious), and not a lack thereof”; thus, it is “a matter of who the targeted people are, not who they are not” (*Al Bashir*, 4 March 2009, para. 135).

Doctrine: For the bibliography, see the final comment on Article 6.

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¹³ ICTY, *Prosecutor v. Stakić*, Appeals Chamber, Judgment, 22 March 2006, IT-97-24-A, para. 16 (<https://www.legal-tools.org/doc/09f75f/>).

¹⁴ *Stakić*, 22 March 2006, paras. 16–28. See also ICTY, *Prosecutor v. Mladić*, Trial Chamber, Judgment, 22 November 2017, IT-09-92-T, para. 3436 (<https://www.legal-tools.org/doc/96f3c1/>).

Article 6: As Such

as such

The addition of the words “as such” when the Genocide Convention was being drafted reflected a compromise between negotiators who favoured an explicit motive requirement and those who preferred to make no reference to motive.¹ Motive *per se* is not relevant to the establishment of criminal responsibility, but the words “as such” encapsulate the requirement of a discriminatory purpose, for example that victims are targeted because of their membership of a protected group. In other words: “The intent to destroy a group as such, in whole or in part, presupposes that the victims were chosen by reason of their membership in the group whose destruction was sought”.²

The *ad hoc* tribunals have distinguished between personal motivation and the type of discriminatory purpose that is “intrinsic to the special intent”.³ The ICTY has clarified that while the “personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power”, a personal motive of this nature does not preclude the existence of a specific intent to commit genocide.⁴ It has also been noted that: “It is not a contradiction [...] that perpetrators who have the special intent to destroy the protected group may also be fuelled by multiple other motives such as capture of territory, economic advantage, sexual gratification, and spreading terror”.⁵

¹ William A. Schabas, “Article 6: Genocide”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 136. (<https://www.legal-tools.org/doc/040751/>); ICTR, *Prosecutor v. Niyitegeka*, Appeals Chamber, Judgment, 9 July 2004, ICTR-96-14-A, para. 53 (*‘Niyitegeka, 9 July 2004’*) (<https://www.legal-tools.org/doc/35cd4f/>).

² ICTY, *Prosecutor v. Krstić*, Trial Chamber, Judgment, 2 August 2001, IT-98-33-T, para. 561 (<https://www.legal-tools.org/doc/440d3a/>).

³ Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 4th. ed., Cambridge University Press, 2019, p. 225.

⁴ ICTY, *Prosecutor v. Jelisić*, Appeals Chamber., Judgment, 5 July 2001, IT-95-10-A, para. 49 (<https://www.legal-tools.org/doc/477a30/>).

⁵ “They Came To Destroy”: ISIS Crimes against the Yazidis, UN Doc. A/HRC/32/CRP.2, 15 June 2016, para. 10 (<https://www.legal-tools.org/doc/24962f/>).

The ICTR has explained the position as follows: “The term ‘as such’ has the *effet utile* of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term ‘as such’ clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context” (*Niyitegeka*, 9 July 2004, para. 53).

The phrase “as such” also serves to emphasise that “the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members”.⁶ This point has been reinforced in subsequent ICTY case law: “the words ‘as such’ underscore that something more than discriminatory intent is required for genocide; there must be intent to destroy, in whole or in part, the protected group ‘as a separate and distinct entity’”.⁷

Doctrine: For the bibliography, see the final comment on Article 6.

Author: Nina H.B. Jørgensen.

⁶ ICTY, *Prosecutor v. Sikirica et al.*, Trial Chamber, Judgment on Defence Motions to Acquit, 3 September 2001, IT-95-8-T, para. 89 (<https://www.legal-tools.org/doc/682ea1/>).

⁷ ICTY, *Prosecutor v. Popović et al.*, Trial Chamber, Judgment, 10 June 2010, IT-05-88-T, paras. 821 and 1177 (<https://www.legal-tools.org/doc/481867/>); see also *Prosecutor v. Brđanin*, Trial Chamber, Judgment, 1 September 2004, IT-99-36-T, para. 698 (<https://www.legal-tools.org/doc/4c3228/>).

Article 6(a)

(a) Killing members of the group;

It should be noted that the description of each underlying act refers to victims of the group in the plural, however, according to the ICC Elements of Crimes, there need only be a single victim so long as the other elements are fulfilled.¹ The Elements of Crimes refer to “one or more persons” in respect of each underlying act.

As it concerns the mental element: “Proof of the specific genocidal intent to destroy the targeted group in whole or in part is required in addition to proof of intent to commit the underlying act”.² As the ICJ has also noted, the acts listed in Article II of the Genocide Convention “themselves include mental elements”.³

According to Article 6(a), note 2 of the Elements of Crimes, “killed” is interchangeable with “caused death”. Following a debate in the ICTY and ICTR jurisprudence, it was eventually established that the meaning of “killing” in the English version of the Tribunals’ Statutes and “meurtre” in the French version was similar, and both terms would be construed as referring to intentional but not necessarily premeditated murder.⁴

The *mens rea* of “killing” in respect of genocide would therefore appear to be stricter than the *mens rea* for murder as a crime against humanity or war crime as the latter categories are generally considered to encompass both an intention to kill and an intention to cause serious bodily harm with the knowledge that causing such harm might lead to death. But see *Popović et al.*, 10 June 2010, paras. 788, 795, 810 and 842, where the ICTY Trial Chamber does not clearly distinguish the *mens rea* for killing as genocide

¹ Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 4th. ed., Cambridge University Press, 2019, pp. 214–215.

² ICTY, *Prosecutor v. Popović et al.*, Trial Chamber, Judgment, 10 June 2010, IT-05-88-T, para. 808 (‘*Popović et al.*, 10 June 2010’) (<https://www.legal-tools.org/doc/481867/>).

³ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 43, para. 186 (<https://www.legal-tools.org/doc/5fcd00/>).

⁴ ICTR, *Prosecutor v. Kayishema and Ruzindana*, Appeals Chamber, Judgment (Reasons), 1 June 2001, ICTR-95-1-A, para. 151 (<https://www.legal-tools.org/doc/9ea5f4/>); ICTY, *Prosecutor v. Stakić*, Trial Chamber, Judgment, 31 July 2003, IT-97-24-T para. 515 (<https://www.legal-tools.org/doc/32ecfb/>).

from the *mens rea* for murder as a crime against humanity or war crime. A similar approach was taken in the *Mladić* case, where the Trial Chamber indicated that “the material elements of killing are equivalent to the elements of murder”.⁵ However, confusingly, the relevant paragraph refers both to the definition of murder of the same judgment (“the act or omission was committed with intent to kill the victim or to wilfully cause serious bodily harm which the perpetrator should reasonably have known might lead to death”, *Mladić*, 22 November 2017, para. 3050) and in a footnote to paragraph 151 of the *Kayishema and Ruzindana* Appeal Judgment which establishes that the killing must be intentional.

Doctrine: For the bibliography, see the final comment on Article 6.

Author: Nina H.B. Jørgensen.

⁵ ICTY, *Prosecutor v. Mladić*, Trial Chamber, Judgment, 22 November 2017, IT-09-92-T, para. 3434 (<https://www.legal-tools.org/doc/96f3c1/>).

Article 6(b)

(b) Causing serious bodily or mental harm to members of the group;

According to the jurisprudence of the *ad hoc* tribunals: “serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life”.¹ The infliction of mental harm “must be of such a serious nature as to contribute or tend to contribute to the destruction of all or part of the group”.²

The Elements of Crimes explicitly note that causing serious bodily or mental harm “may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment” (Article 6(b), note 3). This reflects the ground-breaking finding by the ICTR in the *Akayesu* case that sexual violence and rape can constitute genocide provided the requirement of genocidal intent is met, and that: “rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even [...] one of the worst ways [to] inflict harm on the victim as he or she suffers both bodily and mental harm” (*Akayesu*, 2 September 1998, para. 731). According to the ICTY, “the bodily or mental harm caused must be of such a serious nature as to contribute or tend to contribute to the destruction of the group” and “may include torture; rape; and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs”.³

¹ ICTY, *Prosecutor v. Krstić*, Trial Chamber, Judgment, 2 August 2001, IT-98-33-T, para. 513 (<https://www.legal-tools.org/doc/440d3a/>); see also ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, para. 502 (*Akayesu*, 2 September 1998) (<https://www.legal-tools.org/doc/b8d7bd/>), stating that the bodily or mental harm need not be “permanent or irremediable”.

² ICTY, *Prosecutor v. Tolimir*, Appeals Chamber, Judgment, 8 April 2015, IT-05-88/2-A para. 203 (<https://www.legal-tools.org/doc/010ecb/>); see also ICTR, *Prosecutor v. Seromba*, Appeals Chamber, Judgment, 12 March 2008, ICTR-2001-66-A, para. 46 (<https://www.legal-tools.org/doc/b4df9d/>).

³ ICTY, *Prosecutor v. Mladić*, Trial Chamber, Judgment, 22 November 2017, IT-09-92-T, para. 3434 (<https://www.legal-tools.org/doc/96f3c1/>); see also *Prosecutor v. Karadžić*, Trial Chamber, Judgment, 24 March 2016, IT-95-5/18-T, paras. 543–545 (<https://www.legal-tools.org/doc/173e23/>).

Threats of death have been found to amount to serious mental harm under this category (*Tolimir*, 8 April 2015, para. 206). Forcible transfer may also qualify, although in this context there will need to be evidence of long-term consequences for the affected population as well as a link between the transfer operation and the physical destruction of the protected group as a whole.⁴

As it concerns the *mens rea*, the “harm must be inflicted intentionally” (*Mladić*, 22 November 2017, para. 3434).

Doctrine: For the bibliography, see the final comment on Article 6.

Author: Nina H.B. Jørgensen.

⁴ *Tolimir*, 8 April 2015, paras. 208–209, 217; see also ICTY, *Prosecutor v. Blagojević and Jokić*, Trial Chamber, Judgment, 17 January 2005, IT-02-60-T, paras. 644–654 (<https://www.legal-tools.org/doc/7483f2/>).

Article 6(c)

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

This category refers to the “methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction”.¹ The ICJ has rejected the idea that this category could include a type of ‘cultural genocide’, stating that: “the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group”.² However, the ICJ endorsed the jurisprudence of the ICTY according to which attacks on cultural and religious heritage which accompany acts of physical or biological destruction may properly be regarded as evidence of genocidal intent.³

The ICC Elements of Crimes state that: “The term ‘conditions of life’ may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes” (Article 6(c), note 4). According to the jurisprudence of the *ad hoc* tribunals, this category may include “methods of destruction apart from direct killings such as subjecting the group to a subsistence diet, systematic expulsion from homes and denial of the right to medical services”, and “the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion”.⁴ This category “does not require proof of a result” (*Stakić*, 31 July 2003, para. 517) as the conditions must simply

¹ ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, para. 505 (<https://www.legal-tools.org/doc/b8d7bd/>).

² ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 43, para. 344 (*‘Bosnia and Herzegovina v. Serbia and Montenegro, 26 February 2007’*) (<https://www.legal-tools.org/doc/5fed00/>).

³ *Bosnia and Herzegovina v. Serbia and Montenegro*, 26 February 2007, para. 344, referring to ICTY, *Prosecutor v. Krstić*, Trial Chamber, Judgment, 2 August 2001, IT-98-33-T, para. 580 (<https://www.legal-tools.org/doc/440d3a/>).

⁴ ICTY, *Prosecutor v. Stakić*, Trial Chamber, Judgment, 31 July 2003, IT-97-24-T, para. 517 (<https://www.legal-tools.org/doc/32ecfb/>).

be *calculated* to achieve a result.⁵ The mental element requires that the acts are carried out “deliberately”.⁶

The conduct described as “ethnic cleansing” – a type of forced migration – can potentially be characterised as genocide under Article 2(c) of the Genocide Convention “provided such action is carried out with the necessary specific intent (*dolus specialis*), that is to say with a view to the destruction of the group, as distinct from its removal from the region” (*Bosnia and Herzegovina v. Serbia and Montenegro*, 26 February 2007, para. 190).

Doctrine: For the bibliography, see the final comment on Article 6.

Author: Nina H.B. Jørgensen.

⁵ See Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 4th. ed., Cambridge University Press, 2019, p. 216; see also ICTY, *Prosecutor v. Karadžić*, Trial Chamber, Judgment, 24 March 2016, IT-95-5/18-T, para. 546 (<https://www.legal-tools.org/doc/173e23/>).

⁶ ICTY, *Prosecutor v. Mladić*, Trial Chamber, Judgment, 22 November 2017, IT-09-92-T, para. 3434 (<https://www.legal-tools.org/doc/96f3c1/>).

Article 6(d)

(d) Imposing measures intended to prevent births within the group;

This category refers to a form of biological genocide and includes “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages” as well as rape of a female victim belonging to one group by a man belonging to a different group in societies in which group membership is determined by the identity of the father.¹ Measures intended to prevent births within the group may be mental as well as physical, and can include rape, for example, when the victim “refuses subsequently to procreate” (*Akayesu*, 2 September 1998, para. 508).

As pointed out in the ILC’s Draft Code of Crimes, the phrase “imposing measures” suggests an element of coercion and the category would therefore “not apply to voluntary birth control programmes sponsored by a State as a matter of social policy”.²

The practice of forced sterilisation was a feature of the genocidal policy of the Nazis against the Jews and this crime was adjudicated in several of the post-Second World War trials, though often under charges relating to crimes against humanity and war crimes. For example, Ulrich Greifelt, who was Chief of the Main Staff Office and Himmler’s deputy, was found to be criminally responsible among other things for: “kidnapping of alien children; hampering the reproduction of enemy nationals; forced evacuations and resettlement of populations; forced Germanization of enemy nationals” and more specifically, “[a]bortions on Eastern workers; taking away infants of Eastern workers; and the punishment of foreign nationals for sexual intercourse with Germans”.³ Rudolf Hoess, Commandant of the Auschwitz camp, was convicted of a range of criminal acts committed at Auschwitz which were seen to come within the notion of the crime of genocide.⁴ Ac-

¹ ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, para. 507 (<https://www.legal-tools.org/doc/b8d7bd/>).

² Report of the International Law Commission on the work of its forty-eighth session, 6 May 1996–26 July 1996, UN Doc. A/51/10, Part. I, Commentary, Article 17. Crime of genocide, para. 16, p. 46 (<https://www.legal-tools.org/doc/f6ff65/>).

³ United States Military Tribunal at Nuremberg, *Trial of Ulrich Greifelt and others*, in *Law Reports of Trials of War Criminals, United Nations War Crimes Commission*, London, 1949, Vol. XIII, p. 28 (<https://www.legal-tools.org/doc/70e411/>).

⁴ Supreme National Tribunal of Poland, *Trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess*, in *Law Reports of Trials of War Criminals, United Nations War Crimes Commission*,

ording to the Notes on the Case, the medical experiments at Auschwitz, including castration and sterilization, “were obviously devised at finding the most appropriate means with which to lower or destroy the reproductive power of the Jews, Poles, Czechs and other non-German nations which were considered by the Nazi as standing in the way of the fulfilment of German plans of world domination. Thus, they were preparatory to the carrying out of the crime of genocide” (*Hoess* case, p. 25).

In accordance with the Elements of Crimes, intent is required as it concerns the implementation of the measures: “The measures imposed were *intended* to prevent births within that group” (ICC Elements of Crimes, Article 6(d)(4), emphasis added).

Doctrine: For the bibliography, see the final comment on Article 6.

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London, 1948, Vol. VII, p. 11, and see Notes on the Case, p. 24 (*‘Hoess case’*) (<https://www.legal-tools.org/doc/9e87ed/pdf/>).

Article 6(e)

(e) Forcibly transferring children of the group to another group

The ICC Elements of Crimes establish that “children” in this category refers to persons under the age of eighteen and that: “The term ‘forcibly’ is not restricted to physical force, but may include 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” (Article 6(e)(5) and note 5). This reflects the jurisprudence of the ad hoc tribunals which has established that “threats or trauma which would lead to the forcible transfer of children from one group to another” are included in addition to “direct act[s] of forcible physical transfer”.¹

This category is closely related to the notion of ‘cultural genocide’ and has been addressed in domestic jurisprudence. In Australia, for example, the separation, forcible transfer and assimilation of Aboriginal and Torres Strait Islander children into non-indigenous families was deemed to constitute genocide by the Australian Human Rights and Equal Opportunities Commission.² Referring to Lemkin’s work, the Commission found that: “the objective was ‘the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economical existence of’ Indigenous peoples and thus “genocidal because it aims to destroy the ‘cultural unit’ which the Convention is concerned to preserve”.³ Some domestic criminal codes refer to the transfer of both children and adults in this context. An example is Article 376(4) of the Guatemalan Criminal Code.⁴ The ILC considered that while the provision in the Genocide Convention does not extend to the transfer of adults, the latter conduct might amount to a crime against humanity or a war crime in certain circumstanc-

¹ ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, para. 509 (<https://www.legal-tools.org/doc/b8d7bd/>).

² Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, 1997 (‘Australia, National Inquiry Report, 1997’).

³ Australia, National Inquiry Report, 1997. For sources on related domestic jurisprudence, see William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed., Cambridge University Press, 2009, p. 205, note 186; Ben Saul, “The International Crime of Genocide in Australian Law”, in *Sydney Law Review*, 2000, vol. 22, no. 4.

⁴ Guatemala, Código Penal (Criminal Code), Decree no. 17-73, 5 July 1973, Article 376(4) (<https://www.legal-tools.org/doc/e828d2/>).

es, and that forcible transfer involving the separation of family members might constitute genocide under the category of “deliberately inflicting on the group conditions of life”.⁵

A series of cases in Argentina have addressed the transfer and forced disappearance of children as an underlying act of genocide during the Argentinian dictatorship (‘Dirty War’) from 1976 to 1983. For example, *The Prosecutor v. Miguel Osvaldo Etchecolatz* was the first case in which the “Proceso de Reorganización Nacional” was qualified as genocide, although in that case the relevant conduct was treated as “crimes against humanity committed during a genocide”.⁶

Additionally, the trials of Ríos Montt and Jose Mauricio Rodríguez Sánchez in Guatemala referred to the transfer of children in the context of a finding of genocide against the Maya Ixil population.⁷

Doctrine:

1. Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, Brill, Nijhoff, 2008.
2. Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime*, Cambridge University Press, 2012.
3. Anon., “Genocide: A Commentary on the Convention”, in *Yale Law Journal*, 1948–49, vol. 58, pp. 1142–1160.
4. Paul Behrens and Ralph Henham (eds.), *Elements of Genocide*, Routledge, New York, 2012 (<https://www.legal-tools.org/doc/e48e9a/>).
5. Paul Behrens, “Between Abstract Event and Individualised Crime: Genocidal Intent in the Case of Croatia”, in *Leiden Journal of International Law*, 2015, vol. 28, pp. 923–935.

⁵ Report of the International Law Commission on the work of its forty-eighth session, 6 May 1996–26 July 1996, UN Doc. A/51/10, Part. I, Commentary, Article 17. Crime of genocide, para. 17, p. 46 (<https://www.legal-tools.org/doc/f6ff65/>).

⁶ Argentina, Federal Criminal Tribunal of La Plata, *Argentina v. Etchecolatz*, Judgment, 19 September 2006 (<https://www.legal-tools.org/doc/38be2a/>). See also Margarita K. O’Donnell, “New Dirty War Judgments in Argentina, National Courts and Domestic Prosecutions of International Human Rights Violations”, in *New York University Law Review*, 2009, vol. 84, no. 1.

⁷ See Guatemala, First Tribunal of Criminal Sentencing, *Rodríguez Sanchez and Ríos Montt*, sentencing judgment, 10 May 2013, paras. 698–699, 706 (<https://www.legal-tools.org/doc/riztst/>), and *Rodríguez Sánchez*, sentencing judgment, 26 September 2018, para. 845 (<https://www.legal-tools.org/doc/67ckug/>).

6. Antonio Cassese, *International Criminal Law*, 2nd. ed., Oxford University Press, 2008, pp. 127–147.
7. Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 4th. ed., Cambridge University Press, 2019, Chapter 10.
8. Claus Kress, “The Darfur Report and Genocidal Intent”, in *Journal of International Criminal Justice*, 2005, vol. 3, pp. 562–578 (<https://www.legal-tools.org/doc/84fec6/>).
9. Claus Kress, “The Crime of Genocide under International Law”, *International Criminal Law Review*, 2006, vol. 6, p. 461 (<https://www.legal-tools.org/doc/8799cd/>).
10. Claus Kress, “The ICC’s First Encounter with the Crime of Genocide”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, Chapter 27 (<https://www.legal-tools.org/doc/0d8648/>).
11. Howard J. De Nike, John Quigley and Kenneth J. Robinson (eds.), with the assistance of H. Jarvis and N. Cross, *Genocide in Cambodia: documents from the trial of Pol Pot and Ieng Sary*, University of Pennsylvania Press, Philadelphia, 2000.
12. Mark A. Drumbl, “Genocide: The Choppy Journey to Codification”, in Morten Bergsmo and Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, Torkel Opsahl Academic EPublisher, Brussels, 2018, pp. 609–636 (<https://www.legal-tools.org/doc/63f10e/>).
13. Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary*, Oxford University Press, 2009 (<https://www.legal-tools.org/doc/ada57f-1/>).
14. Alexander Greenawalt, “Rethinking Genocidal Intent: The Case for a Knowledge-based Interpretation”, in *Columbia Law Review*, 1999, vol. 99, pp. 2259–2294.
15. Bing Bing Jia, “The Differing Concepts of War Crimes and Crimes against Humanity in International Criminal Law”, in Guy S. Goodwin-Gill and Stefan Talmon (eds.), *The Reality of International Law, Essays in Honour of Ian Brownlie*, Clarendon Press, 1999, 243–271.
16. Adam Jones, *Genocide: A Comprehensive Introduction*, 3rd. ed., Routledge, New York, 2017.

17. Nina H.B. Jørgensen, “State Responsibility and the 1948 Genocide Convention”, in Guy Goodwin-Gill and Stefan Talmon (eds.), *The Reality of International Law. Essays in Honour of Ian Brownlie*, Clarendon Press, Oxford, 1999, 273–291.
18. Nina H.B. Jørgensen, *The Responsibility of States for International Crimes*, Oxford University Press, 2000.
19. Nina H.B. Jørgensen, “The Definition of Genocide: Joining the Dots in the Light of Recent Practice”, 1 in *International Criminal Law Review*, 2001, vol. 1, pp. 285–313 (<https://www.legal-tools.org/doc/c0a300/>).
20. Nina H.B. Jørgensen, “Genocide as a Fact of Common Knowledge”, in *International and Comparative Law Quarterly*, 2007, vol. 56, pp. 885–898.
21. Nina H.B. Jørgensen, “Complicity in Genocide and the Duality of Responsibility”, in A. Zahar, B. Swart, G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, 2011, pp. 247–274.
22. Nina H.B. Jørgensen, ““The Next Darfur” and Accountability for the Failure to Prevent Genocide”, in *Nordic Journal of International Law*, 2012, vol. 81, pp. 407–436.
23. Nina H.B. Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia*, Edward Elgar Publishers, New York, 2018.
24. Mark D. Kielsgard, *Responding to Modern Genocide: At the Confluence of Law and Politics*, Routledge, New York, 2015.
25. Leo Kunz, “The United Nations Convention on Genocide”, *American Journal of International Law*, 1949, vol. 43, pp. 738–746.
26. Leo Kuper, *Genocide: Its Political Use in the Twentieth Century*, Yale University Press, 1981.
27. Rafael Lemkin, *Axis Rule in Occupied Europe*, Washington, 1944 (<https://www.legal-tools.org/doc/b989dd/>).
28. Rafael Lemkin, “Genocide as a Crime Under International Law”, in *American Journal of International Law*, 1947, vol. 41, p. 145.
29. Matthew Lippman, “The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later”, in *Arizona Journal of International and Comparative Law*, 1998, vol. 15, pp. 415–514 (<https://www.legal-tools.org/doc/38b311/>).

30. Larry May, *Genocide: A Normative Account*, Cambridge University Press, 2010.
31. Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, 2005, Chapter 6.
32. David L. Nersessian, *Genocide and Political Groups*, Oxford University Press, 2010.
33. Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective*, Oxford University Press, 2016.
34. Margarita K. O'Donnell, "New Dirty War Judgments in Argentina, National Courts and Domestic Prosecutions of International Human Rights Violations", in *New York University Law Review*, 2009, vol. 84, 333–374.
35. John B. Quigley, *The Genocide Convention: An International Law Analysis*, Aldershot, 2006 (<https://www.legal-tools.org/doc/1fa953/>).
36. Geoffrey Robertson, *An Inconvenient Genocide: Who Now Remembers the Armenians?*, Biteback Publishing, 2014.
37. Nehemiah Robinson, *The Genocide Convention: A Commentary*, New York, 1960 (<https://www.legal-tools.org/doc/6872cc/>).
38. Nehemiah Robinson, "The Genocide Convention: Its Origins and Interpretation", in *Case Western Reserve Journal of International Law*, 2008, vol. 40, p. 315.
39. Ben Saul, "The International Crime of Genocide in Australian Law", in *Sydney Law Review*, 2000, vol. 22, pp. 527–584.
40. Beth Van Schaack, "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot", in *Yale Law Journal*, 1997, vol. 106, no. 7, pp. 2259–2292 (<https://www.legal-tools.org/doc/1f3e74/>).
41. William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd. ed., Cambridge University Press, 2009 (<https://www.legal-tools.org/doc/28256f/>).
42. Malcolm N. Shaw, "Genocide and International Law", in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Dordrecht, 1989, p. 797.
43. Howard Shneider, "Political Genocide in Latin America: The Need for Reconsidering the Current Internationally Accepted Definition of Genocide in Light of Spanish and Latin American Jurisprudence", in *American University International Law Review*, 2010, vol. 25, pp. 314–355.

44. Carsten Stahn, *A Critical Introduction to International Criminal Law*, Cambridge University Press, 2019, pp. 32–51.
45. Christian J. Tams, Lars Berster and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, Hart, Oxford, 2014.
46. Cécile Tournaye, “Genocidal Intent before the ICTY”, in *International and Comparative Law Quarterly*, 2003, vol. 52, pp. 447–462 (<https://www.legal-tools.org/doc/c01804/>).
47. William A. Schabas, “Article 6: Genocide”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016. (<https://www.legal-tools.org/doc/040751/>).
48. Guglielmo Verdirame, “The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals”, in *International and Comparative Law Quarterly*, 2000, vol. 49, pp. 578–598.

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Article 7(1)

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

General Remarks:

The general elements in the chapeau of Article 7 elevate an ordinary crime or an inhumane conduct to a crime against humanity. The general elements were extensively dealt with during the drafting of the ICC Statute and are set out in Article 7(1) and (2) of the Statute, as well as in the Elements of Crimes.¹ In the ICC case law, the general elements were analysed by the Trial Chambers in the *Katanga*,² *Bemba*,³ and *Ntaganda* cases in addition to the Pre-Trial Chamber in several cases.⁴

Analysis:

i. Definition:

Crimes against humanity pursuant to the ICC Statute are any of the enumerated acts in Article 7 “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” (ICC Statute, Article 7(1)). According to Article 7(2)(a), an “attack directed against any civilian population” means “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or

¹ Herman Von Hebel and Darryl Robinson, “Crimes Within the Jurisdiction of the Court”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Kluwer Law International, Leiden, 1999, pp. 91–97 (<https://www.legal-tools.org/doc/d71078/>); Timothy L.H. McCormack, “Crimes Against Humanity”, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford, 2004, pp. 179–182, 186–189 (<https://www.legal-tools.org/doc/ba5c37/>).

² ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436 (*Katanga*, 7 March 2014’) (<https://www.legal-tools.org/doc/f74b4f/>).

³ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08 (*Bemba*, 21 March 2016’) (<https://www.legal-tools.org/doc/edb0cf/>).

⁴ ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Judgment, 8 July 2019, ICC-01/04-02/06-2359 (*Ntaganda*, 8 July 2019’) (<https://www.legal-tools.org/doc/80578a/>).

organizational policy to commit such attack”. These words are repeated in the Elements of Crimes.

For each of the underlying acts, the Elements of Crimes set out that the conduct must have been “committed as part of a widespread or systematic attack directed against a civilian population”. Further, they state that the perpetrator must have known “that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population”.

Based on the above, the Pre-Trial Chambers have identified five general elements: (i) an attack directed against any civilian population, (ii) a State or organizational policy, (iii) the widespread or systematic nature of the attack, (iv) a nexus between the individual act and the attack, and (v) knowledge of the attack.⁵

Notably, the general elements do not contain any requirement of a nexus to an armed conflict or any discriminatory element.⁶

ii. Requirements:

a. Material Elements:

With regard to the requirement of “attack”, the Elements of Crimes clarify that “[t]he acts need not constitute a military attack”. Although the ICC Statute itself defines “attack” as “course of conduct”, the Pre-Trial Chamber in the *Bemba* case considered that the term referred to ‘a campaign or operation’, although adding that the “appropriate terminology used in [the ICC Statute] being a ‘course of conduct’”.⁷ The Trial Chambers in *Katanga*

⁵ ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, para. 79 (‘*Situation in the Republic of Kenya*, 31 March 2010’) (<https://www.legal-tools.org/doc/338a6f/>); *Situation in the Republic of Côte d’Ivoire*, Pre-Trial Chamber III, 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, 3 October 2011, ICC-02/11-14, para. 29 (<https://www.legal-tools.org/doc/7a6c19/>).

⁶ von Hebel and Robinson, 1999, pp. 92–94; McCormack, 2004, pp. 184–186; Darryl Robinson, “The Context of Crimes Against Humanity”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 45–47 (<https://www.legal-tools.org/doc/e34f81/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 168–172 (<https://www.legal-tools.org/doc/b7432e/>).

⁷ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gom-

and *Ntaganda* stuck closely to the words in Article 7(2): “a course of conduct involving the multiple commission of acts referred to in paragraph 1” (*Katanga*, 7 March 2014, para. 1101; *Ntaganda*, 8 July 2019, paras. 662–663). The *Katanga* Trial Chamber added, however, that “a single event may well constitute an attack” (para. 1101).

According to the *Ntaganda* Trial Chamber, “course of conduct” is meant to “cover a series or overall flow of events, as opposed to a mere aggregate of random or isolated acts” (*Ntaganda*, 8 July 2019, para. 662; see also *Bemba*, 21 March 2016, para. 149). The *Bemba* Pre-Trial Chamber set out that it is the commission of the acts referred to in Article 7(1) that constitute the ‘attack’ and “beside the commission of the acts, no additional requirement for the existence of an ‘attack’ should be proven” (*Bemba*, 15 June 2009, para. 75). This does not necessarily mean that the element of ‘attack’ is proven, as soon as the underlying acts allegedly committed by the perpetrator are proven (para. 151). Presumably the Pre-Trial Chamber merely intended to say that an attack must be composed of acts enumerated in Article 7(1) (as opposed to other acts). In this respect, the Pre-Trial Chamber could have found support in the text of Article 7 itself, although it did cite the *Akayesu* Trial Judgment, which does not provide support for this: “The concept of attack maybe [sic] defined as a [sic] unlawful act of the kind enumerated in Article 3(a) to (I) of the Statute [...] An attack may also be non-violent in nature, like imposing a system of apartheid [...] or exerting pressure on the population to act in a particular manner”.⁸ That the acts are limited to those set out in Article 7(1) was confirmed by the *Ntaganda* Trial Chamber (*Ntaganda*, 8 July 2019, para. 663).

The *Katanga* Trial Chamber stated that the requirement of “directed against” means that “the civilian population must be the primary target of the attack and not the incidental victim of the attack”.⁹

bo, 15 June 2009, ICC-01/05-01/08-424, para. 75 (*Bemba*, 15 June 2009’) (<https://www.legal-tools.org/doc/07965c/>); see also *Bemba*, 21 March 2016, para. 149.

⁸ ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgement, 2 September 1998, ICTR-96-4, para. 581 (*Akayesu*, 2 September 1998’) (<https://www.legal-tools.org/doc/b8d7bd/>).

⁹ *Katanga*, 7 March 2014, para. 1104, citing *Bemba*, 15 June 2009, para. 76 and ICTY case law, in particular *Prosecutor v. Kunarac et al.*, Appeals Chamber, Judgement, 12 June 2002, IT-96-23 IT-96-23/1-A, paras. 91–92 (*Kunarac et al.*, 12 June 2002’) (<https://www.legal-tools.org/doc/029a09/>); see also *Bemba*, 21 March 2016, para. 154; *Ntaganda*, 8 July 2019, para. 668.

With regard to the element of “population”, the *Katanga* Trial Chamber implied a low threshold by stating that the Prosecutor must demonstrate “that the attack was not directed against a limited group of randomly selected persons”. It added that the entire population of the geographical area where the attack is taking place need not have been targeted (*Katanga*, 7 March 2014, para. 1105, citing -ICTY and ICTR case law, in particular the *Kunarac* Appeal Judgement (*Kunarac et al.*, 12 June 2002, para. 90); see also *Bemba*, 15 June 2009, para. 77; *Ntaganda*, 8 July 2019, para. 667).

The *Katanga* Trial Chamber noted that “civilian population” comprises all persons who are civilians as opposed to members of armed forces and other legitimate combatants (*Katanga*, 7 March 2014, para. 1102). In this respect, the Trial Chamber cited the confirmation decision in *Prosecutor v. Bemba* (*Bemba*, 15 June 2009, para. 78) and the Trial Judgement in the *Kunarac* case,¹⁰ although any reference to the ICTY Appeals Chamber’s later extensive analysis of this issue is notably absent.¹¹ The *Bemba* Trial Chamber, on the hand, refers to this case law and clarifies that the requirement of “civilian population” does not mandate that the individual victims of crimes against humanity be civilians. In its view, the notion of crimes against humanity must be construed so as not to exclude other protected persons (*Bemba*, 21 March 2016, para. 156; see also *Ntaganda*, 8 July 2019, para. 669).

The requirement of “widespread or systematic” is disjunctive (see *Situation in the Republic of Kenya*, 31 March 2010, para. 94). The issue of whether this should be a disjunctive or a conjunctive test was extensively debated by the drafters of the ICC Statute (see, *inter alia*, von Hebel and Robinson, 1999; Robinson, 1999, p. 47).

With regard to “widespread”, the Pre-Trial Chambers in the *Katanga and Ngudjolo* and *Gbagbo* cases and the Trial Chambers in *Katanga* and *Ntaganda* stated that it connotes “the large-scale nature of the attack and

¹⁰ ICTY, *Prosecutor v. Kunarac et al.*, Trial Chamber, Judgement, 22 February 2001, IT-96-23-T IT-96-23/1-T, para. 425 (<https://www.legal-tools.org/doc/fd881d/>).

¹¹ ICTY, *Prosecutor v. Martić*, Appeals Chamber, Judgement, 8 October 2008, IT-95-11, paras. 291–314 (<https://www.legal-tools.org/doc/ca5eff/>) and *Prosecutor v. Mrkšić and Šljivančanin*, Appeals Chamber, Judgement, 5 May 2009, IT-95-13/1, paras. 23–34 (<https://www.legal-tools.org/doc/40bc41/>).

the number of targeted persons”.¹² The Pre-Trial Chamber and Trial Chamber in the *Prosecutor v. Bemba* restricted it further by stating that it “connotes the large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims” (*Bemba*, 15 June 2009, para. 83, citing *Akayesu*, 2 September 1998, para. 580; *Bemba*, 21 March 2016, para. 163; see also *Ntaganda*, 8 July 2019, para. 691).

However, the *Bemba* and *Katanga and Ngudjolo* Pre-Trial Chambers also concluded that a widespread attack entailed “an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians” (*Bemba*, 15 June 2009, para. 83; *Katanga and Ngudjolo*, 30 September 2008, para. 395). Therefore, it appears that the main considerations are the geographical scope of the attack and the number of victims. Curiously, the *Ntaganda* Trial Chamber denies this, claiming that “[t]he assessment of whether the attack is widespread is neither exclusively quantitative nor geographical, but must be carried out on the basis of all the relevant facts of the case” (*Ntaganda*, 8 July 2019, para. 691). According to the *Katanga* Pre-Trial Chamber, even in the context of a systematic attack the requirement of “multiple acts” would ensure that the attack involves a multiplicity of victims (*Katanga and Ngudjolo*, 30 September 2008, para. 398).

As for “systematic”, the *Katanga and Ngudjolo* and the *Gbagbo* Pre-Trial Chambers stated that this element refers to “the organised nature of the acts of violence and the improbability of their random occurrence”.¹³ The *Katanga* and *Ntaganda* Trial Chamber adopted the same understanding of “systematic” (*Katanga*, 7 March 2014, para. 1123; *Ntaganda*, 8 July 2019, para. 692).

¹² *Katanga*, 7 March 2014, para. 1123; *Ntaganda*, 8 July 2019, para. 691; see also ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 394 (*Katanga and Ngudjolo*, 30 September 2008’) (<https://www.legal-tools.org/doc/67a9ec/>); *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges against Laurent Gbagbo, 12 June 2014, ICC-02/11-01/11-656-Red, para. 222 (*Gbagbo*, 12 June 2014’) (<https://www.legal-tools.org/doc/5b41bc/>).

¹³ *Katanga and Ngudjolo*, 30 September 2008, para. 394, citing ICTY, *Kordić and Čerkez*, Appeals Chamber, Judgement, 17 December 2004, IT-95-14/2, para. 94 (<https://www.legal-tools.org/doc/738211/>), which is citing *Kunarac et al.*, 12 June 2002, para. 94; *Gbagbo*, 12 June 2014, para. 223.

Regarding the element of “policy to commit such attack”, the Elements of Crimes set out “that the State or organization actively promote or encourage such an attack against a civilian population”. In a footnote, the drafters added that “a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack” but that “[t]he existence of such a policy cannot be inferred solely from the absence of governmental or organizational action”.

The Pre-Trial Chamber in the *Katanga and Ngudjolo* case correctly linked this element to the elements of widespread or systematic: “in the context of a widespread attack, the requirement of an organizational policy [...] ensures that the attack, [...] must still be thoroughly organised and follow a regular pattern” (*Katanga and Ngudjolo*, 30 September 2008, para. 396). The *Katanga* Trial Chamber went further and stated that “[a]ny attack [...] that may be considered ‘systematic’ will in principle presuppose the existence of a State or organisational policy”, but added quickly that the terms “policy” and “systematic” are not to be considered synonymous (*Katanga*, 7 March 2014, paras. 1111–1112).

The Pre-Trial Chamber in the *Gbagbo* stated:

the concept of “policy” and that of the ‘systematic’ nature of the attack [...] both refer to a certain level of planning of the attack. In this sense, evidence of planning, organisation or direction by a State or organisation may be relevant to prove both the policy and the systematic nature of the attack, although the two concepts should not be conflated as they serve different purposes and imply different thresholds under Article 7(1) and (2)(a) of the Statute (*Gbagbo*, 12 June 2014, para. 216).

Regardless of the statements by the *Gbagbo* Pre-Trial Chamber and the *Katanga* Trial Chamber, the definition of “attack directed against any civilian population” in Article 7(2) reduces the significance of the disjunctive, as opposed to a conjunctive test, for the characterization of the attack (“widespread or systematic”) (see Schabas, 2016, pp. 165–166).

The Pre-Trial Chamber in the *Bemba* case discussed the element of policy, stating that it implied that “the attack follows a regular pattern” but that the policy does not have to be formalised (*Bemba*, 15 June 2009, para. 81; see also *Katanga and Ngudjolo*, 30 September 2008, para. 396; *Katanga*, 7 March 2014, para. 1108; and *Bemba*, 21 March 2016, para. 160). A

number of Pre-Trial Chambers also pointed to two extremes, which does little to clarify the limits of the term ‘policy’: “an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion” (*Bemba*, 15 June 2009, para. 81; *Katanga and Ngudjolo*, 30 September 2008, para. 396; *Gbagbo*, 12 June 2014, para. 215). The *Katanga* and *Ntaganda* Trial Chambers, following the approach by the *Bemba* Pre-Trial Chamber, stated that “[a] policy may consist of a pre-established design or plan, but it may also crystallise and develop only as actions are undertaken by the perpetrators” (*Ntaganda*, 8 July 2019, para. 674; *Katanga*, 7 March 2014, para. 1110).

Article 7(2)(a) clarifies that it needs to be a *State* or *organizational* policy. One Pre-Trial Chamber declared that the term “State” was self-explanatory but added that the policy did not have to be conceived “at the highest level of the State machinery”.¹⁴ Therefore, also a policy adopted by regional or local organs of the State could satisfy this requirement (*Situation in the Republic of Kenya*, 31 March 2010, para. 89).

With regard to “organizational”, the Pre-Trial Chambers in the *Bemba* and the *Katanga and Ngudjolo* cases stated that the organization may be “groups of persons who govern a specific territory or [...] any organization with the capability to commit a widespread or systematic attack against a civilian population” (*Bemba*, 15 June 2009, para. 81; *Katanga and Ngudjolo*, 30 September 2008, para. 396). It is therefore not limited to State-like organizations.¹⁵ The Trial Chambers in the *Prosecutor v. Katanga*

¹⁴ *Situation in the Republic of Kenya*, 31 March 2010, para. 89, citing ICTY, *Prosecutor v. Blaškić*, Trial Chamber, Judgment, 3 March 2000, IT-95-14, para. 205 (<https://www.legal-tools.org/doc/e1ae55/>).

¹⁵ *Situation in the Republic of Kenya*, 31 March 2010, paras. 90–92; ICC, *Prosecutor v. Muthaura et al.*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11, para. 112 (<https://www.legal-tools.org/doc/4972c0/>); *Prosecutor v. Ruto et al.*, Pre-Trial Chamber, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11, para. 33 (<https://www.legal-tools.org/doc/96c3c2/>). See also Judge Kaul’s dissents to these decisions: *Prosecutor v. Ruto et al.*, Pre-Trial Chamber, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, 15 March 2011, ICC-01/09-01/11-2 (<https://www.legal-tools.org/doc/9da8a0/>), and *Prosecutor v. Muthaura et al.*, Pre-Trial Chamber, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, 15 March 2011, ICC-01/09-02/11-3 (<https://www.legal-tools.org/doc/521d6d/>).

and *Prosecutor v. Bemba* followed this approach (*Katanga*, 7 March 2014, paras. 1117–1122; *Bemba*, 21 March 2016, para. 158).

The *Katanga*, *Bemba*, and *Ntaganda* Trial Chambers stated that when determining whether the “part of” requirement was met consideration should be given to the characteristics, the aims, the nature or consequences of the act (*Katanga*, 7 March 2014, para. 1124; *Bemba*, 21 March 2016, para. 165; *Ntaganda*, 8 July 2019, para. 696; see also *Bemba*, 15 June 2009, paras. 83–84). The *Katanga* and *Bemba* Trial Chambers also stated the underlying offences must not be isolated (*Katanga*, 7 March 2014, para. 1124; *Bemba*, 21 March 2016, para. 165), although that ought to follow already from the fact that they have to be part of a widespread or systematic attack against a civilian population. The *Ntaganda* Trial Chamber added that temporal and geographical proximity of the acts are relevant considerations (*Ntaganda*, 8 July 2019, para. 696).

Doctrine: For the bibliography, see the comment “Article 7(1): Mental Element”.

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Article 7(1): Mental Element

with knowledge of the attack:

Article 7(1) sets out the mental element as “knowledge of the attack”. The Elements of Crimes clarify that this requirement: “should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization”.

As stated above, the Elements of Crimes state that the perpetrator must have known “that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population”. The intent clause is meant to address the situation of “an emerging widespread or systematic attack”, that is, a situation when the attack has not yet happened and knowledge of it therefore is impossible (Elements of Crimes, Article 7, Introduction).¹

Doctrine:

1. Christopher K. Hall and Kai Ambos, “Chapeau”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 155–178 (<https://www.legal-tools.org/doc/040751/>).
2. Herman Von Hebel and Darryl Robinson, “Crimes Within the Jurisdiction of the Court”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Kluwer Law International, Leiden, 1999, pp. 90–103 (<https://www.legal-tools.org/doc/d71078/>).
3. Timothy L.H. McCormack, “Crimes Against Humanity”, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford, 2004, pp. 179–189 (<https://www.legal-tools.org/doc/ba5c37/>).

¹ Darryl Robinson, “The Context of Crimes Against Humanity”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 73 (<https://www.legal-tools.org/doc/e34f81/>).

4. Jonas Nilsson, “Crimes Against Humanity”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, pp. 284–288 (<https://www.legal-tools.org/doc/7be65f/>).
5. Darryl Robinson, “The Context of Crimes Against Humanity”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 61–80 (<https://www.legal-tools.org/doc/e34f81/>).
6. Darryl Robinson, “Defining ‘Crimes Against Humanity’ at the Rome Conference”, in *American Journal of International Law*, 1999, vol. 43, p. 93 (<https://www.legal-tools.org/doc/08c8ea/>).
7. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 153–172 (<https://www.legal-tools.org/doc/b7432e/>).

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Article 7(1)(a)

(a) Murder

General Remarks:

Murder has been included as the first crime against humanity in every instrument defining crimes against humanity.¹ It was included in Article 7 of the ICC Statute without real controversy.² It was also deemed not to require a clarification of the intended meaning in Article 7(2).³ Murder as a crime against humanity has been dealt with in two of the judgements before the ICC.⁴

Analysis:

i. Definition

Murder as a crime against humanity within the meaning of Article 7(1)(a) is not defined in the ICC Statute. According to the Elements of Crimes, one element of murder is that the perpetrator killed, or caused the death of, one or more persons. Neither Article 7 nor the Elements of Crimes provides any clarification concerning the *mens rea*. Therefore, Article 30 applies and the material elements must be committed with intent and knowledge (*Katanga*, 7 March 2014, para. 780).

¹ Herman von Hebel and Darryl Robinson, “Crimes Within the Jurisdiction of the Court”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Kluwer Law International, Leiden, 1999, p. 178.

² von Hebel and Robinson, 1999, p. 98; Christopher K. Hall and Carsten Stahn, “Article 7 Crimes against humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 179 (<https://www.legal-tools.org/doc/040751/>).

³ Timothy L.H. McCormack, “Crimes Against Humanity”, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford, 2004, p. 189.

⁴ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436, paras. 765–782 (*‘Katanga, 7 March 2014’*) (<https://www.legal-tools.org/doc/f74b4f/>); *Prosecutor v. Bemba*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08, paras. 87–90 (*‘Bemba, 21 March 2016’*) (<https://www.legal-tools.org/doc/edb0cf/>).

ii. Requirements

a. Material Elements

According to the Trial Chamber in the *Katanga* case, to establish the crime of murder it must be proven that “an individual, by act or omission, caused the death or [sic] one or more persons” (*Katanga*, 7 March 2014, para. 767; see also *Bemba*, 21 March 2016, para. 87, which does not contain any reference to “act or omission”). In this respect, the Trial Chamber cited primarily the confirmation decision by the Pre-Trial Chamber in the case of *Bemba*, which set out that the material elements of murder are that the victim is dead and that the death “result from the act of murder”.⁵ The first element of the crime of murder is thus that the victim is dead. As for the second element, the Pre-Trial Chamber unhelpfully stated that the crime of murder requires “the act of murder”. It cited a number of ICTR and ICTY trial judgements,⁶ which all set out that the second element is that the death must have been caused by an act of the perpetrator, with the ICTR judgements adding that the death could also be caused by an omission. The Trial Chamber in the *Katanga* case also cited the judgment in the case *Prosecutor v. Delalić et al.*, as well as the judgment in the case of *Kordić and Čerkez*.⁷ Presumably the Trial Chamber meant to cite paragraph 236 of the *Kordić and Čerkez* Trial Judgment, which sets out the elements of murder, including that it can be committed through an act or omission.

The reliance of the Pre-Trial and Trial Chambers on various (seemingly random) ICTY and ICTR trial judgments in this respect is odd considering that the ICTY Appeals Chamber has set out the elements of murder as a crime against humanity. In the *Kvočka et al.* case, the Appeals

⁵ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 132 (*Bemba*, 15 June 2009’) (<https://www.legal-tools.org/doc/07965c/>).

⁶ ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, para. 589 (<https://www.legal-tools.org/doc/b8d7bd/>); *Prosecutor v. Rutaganda*, Trial Chamber, Judgment, 6 December 1999, ICTR-96-3-T, para. 80 (<https://www.legal-tools.org/doc/f0dbbb/>); ICTY, *Prosecutor v. Blaškić*, Trial Chamber, Judgment, 3 March 2000, IT-95-14-T, paras. 216–217 (<https://www.legal-tools.org/doc/e1ae55/>); *Prosecutor v. Delalić et al.*, Trial Chamber, Judgment, 16 November 1998, IT-96-21-T, para. 424 (<https://www.legal-tools.org/doc/6b4a33/>).

⁷ *Prosecutor v. Delalić et al.*, 16 November 1998; ICTY, *Prosecutor v. Kordić and Čerkez*, Trial Chamber, Judgment, 26 February 2001, IT-95-14/2-T, para. 233 (<https://www.legal-tools.org/doc/d4fedd/>).

Chamber set out that the first two elements are that the victim is dead and that the death was the result of an act or omission of the perpetrator.⁸

b. Mental Elements

According to the Pre-Trial Chamber in the *Katanga and Ngudjolo* case, the mental element of the crime against humanity of murder is that the perpetrator intended to kill one or more persons.⁹ It specified that this encompasses “first and foremost, cases of *dolus directus* of the first and second degree” (*Katanga and Ngudjolo*, 30 September 2008, para. 423). The Pre-Trial Chamber in *Bemba*, in its discussion of the mental element, do not use the words “first and foremost” and therefore limits the element to *dolus directus* in the first and second degree (*Bemba*, 15 June 2009, para. 135). The Pre-Trial Chamber elaborated further on these concepts. It set out that Article 30(2) and (3) embraces two degrees of *dolus*, namely *dolus directus* in the first degree, or direct intent, and *dolus directus* in the second degree, also known as oblique intention. However, the provision does not cover *dolus eventualis*, also referred to as subjective or advertent recklessness (paras. 352–369). The Trial Chambers in the *Katanga* and *Bemba* cases summarized the required mental elements in similar terms: “meant to kill or cause the death [...] or [...] were aware that the death(s) would occur in the ordinary course of events” (*Bemba*, 21 March 2016, para. 90; see also *Katanga*, 7 March 2014, para. 781). The author refers to the commentary of Article 30 for further discussion on this.

Cross-references:

Article 8(2)(a)(i) and 8(2)(c)(i).

Doctrine:

1. Christopher K. Hall and Carsten Stahn, “Article 7 Crimes against humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 178–186 (<https://www.legal-tools.org/doc/040751/>).

⁸ ICTY, *Prosecutor v. Kvočka et al.*, Appeals Chamber, Judgement, 28 February 2005, IT-98-30/1-T, para. 261 (<https://www.legal-tools.org/doc/006011/>).

⁹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 423 (*Katanga and Ngudjolo*, 30 September 2008’) (<https://www.legal-tools.org/doc/67a9ec/>).

2. Timothy L.H. McCormack, “Crimes Against Humanity”, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford, 2004, pp. 189–190 (<https://www.legal-tools.org/doc/ba5c37/>).
3. Darryl Robinson, “Article 7(a)-Crime Against Humanity of Murder”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 80–81 (<https://www.legal-tools.org/doc/e34f81/>).
4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 172–173 (<https://www.legal-tools.org/doc/b7432e/>).
5. Guénaél Mettraux, “Murder”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, pp. 426–427 (<https://www.legal-tools.org/doc/7be65f/>).

Author: Jonas Nilsson.

Article 7(1)(b)

(b) Extermination;

General Remarks:

The crime against humanity of extermination essentially consists of the large scale killing of members of a civilian population. It has been listed in all instruments concerning crimes against humanity since the Second World War.¹

Analysis:

i. Definition:

The crime against humanity of extermination is listed in Article 7(1)(b) of the ICC Statute. While Article 7(1)(b) does not elaborate on the definition of extermination, Article 7(2)(b) clarifies that it includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population. The Elements of Crimes provide further:

1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.
2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
5. The conduct could be committed by different methods of killing, either directly or indirectly.
6. The infliction of such conditions could include the deprivation of access to food and medicine.
7. The term “as part of” would include the initial conduct in a mass killing.

¹ Christopher K. Hall and Carsten Stahn, “Article 7 Crimes against humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 186 (<https://www.legal-tools.org/doc/040751/>).

ii. Distinction Between Extermination and Murder (both as Crimes against Humanity) and Genocide:

The only element that distinguishes murder as a crime against humanity from extermination as a crime against humanity is the requirement for extermination that the killings occur on a mass scale.² Murder as a crime against humanity does not contain a materially distinct element from extermination as a crime against humanity; each involves killing within the context of a widespread or systematic attack against the civilian population. Consequently, a conviction for murder as a crime against humanity and a conviction for extermination as a crime against humanity, based on the same set of facts, are impermissibly cumulative.³ While extermination differs from murder because extermination concerns a large number of victims, extermination differs from genocide because extermination covers situations in which a group of individuals who do not share any common characteristics are killed (whereas genocide requires a demonstration of the specific intent to destroy a defined group sharing common characteristics) (Hall, 2016, pp. 186–187).

iii. Requirements:

In addition to the contextual elements required for all crimes against humanity set out in elements 3 and 4 of the above-listed Elements of Crimes, the following needs to be proven:

a. Material Elements:

Elements 1 and 2 of the above-listed Elements of Crimes constitute the material elements of extermination.

1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.

The Elements of Crimes indicate that the killing may be carried out either directly or indirectly, which would include the infliction of conditions of life calculated to bring about the destruction of part of a population

² ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, Appeals Chamber, Judgment, 13 December 2004, ICTR-96-10-A and ICTR-96-17-A, para. 542 (‘*Ntakirutimana and Ntakirutimana*, 13 December 2004’) (<https://www.legal-tools.org/doc/af07be/>).

³ *Ntakirutimana and Ntakirutimana*, 13 December 2004, para. 542; ICTY, *Prosecutor v. Lukić and Lukić*, Trial Chamber III, Judgment, 20 June 2009, IT-98-32/1, para. 1045 (<https://www.legal-tools.org/doc/af5ad0/>).

as set out above. The only ICC decision to date to address the crime of extermination in any detail is the first arrest warrant decision in the *Al Bashir* case.⁴ Pre-Trial Chamber I found that there were reasonable grounds to believe that the crime of extermination was committed through acts such as the killing of over a thousand civilians in connection with an attack on a town (*Al Bashir*, 4 March 2009, para. 97). The Prosecution also alleged that the systematic destruction of the means of survival of civilian populations in Darfur constituted a form of extermination. However, Pre-Trial Chamber I did not explicitly refer to this means of carrying out extermination when finding reasonable grounds to believe that the crime of extermination was committed (paras. 91, 95–97).

In the second arrest warrant decision in the *Al Bashir* case, Pre-Trial Chamber I noted in passing that extermination can be committed through the “infliction of certain conditions of life upon one or more persons” where those conditions are “calculated to bring about the physical destruction of that group, in whole or in part”.⁵ Pre-Trial Chamber I concluded (in relation to the genocide charge) that “one of the reasonable conclusions that can be drawn is that the acts of contamination of water pumps and forcible transfer coupled by resettlement by member of other tribes, were committed in furtherance of the genocidal policy, and that the conditions of life inflicted on the Fur, Masalit and Zaghawa groups were calculated to bring about the physical destruction of a part of those ethnic groups” (*Al Bashir*, 12 July 2010, para. 38). It has been recognised at the ICTY and ICTR that the material elements of extermination include “subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death”.⁶

2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population.

⁴ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3 (‘*Al Bashir*, 4 March 2009’) (<https://www.legal-tools.org/doc/e26cf4/>).

⁵ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Second Decision on the Prosecution’s Application for a Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010, ICC-02/05-01/09-94, para. 33 (‘*Al Bashir*, 12 July 2010’) (<https://www.legal-tools.org/doc/50fbab/>).

⁶ ICTY, *Prosecutor v. Stakić*, Appeals Chamber, Judgment, 22 March 2006, IT-97-24, para. 259 (‘*Stakić*, 22 March 2006’) (<https://www.legal-tools.org/doc/09f75f/>); *Ntakirutimana and Ntakirutimana*, 13 December 2004, para. 522.

In the first arrest warrant decision in the *Al Bashir* case, Pre-Trial Chamber I repeated that the killings had to occur as part of a mass killing of a civilian population and noted that this mirrors the jurisprudence of the ICTY and ICTR on extermination (*Al Bashir*, 4 March 2009, para. 96). The Elements of Crimes clarify that the term “as part of” would include the initial conduct in a mass killing. Thus, already the first killings in a mass killing meet this requirement even though the requirement of a massive killing may not be satisfied until subsequent killings are perpetrated.⁷

At the ICTY and ICTR, the jurisprudence concerning the material elements of extermination has focused on the massiveness requirement, which “distinguishes the crime of extermination from the crime of murder”.⁸ It is well established that the massiveness requirement does not suggest a strict numerical approach with a minimum number of victims (*Lukić and Lukić*, 4 December 2012, para. 537). While extermination as a crime against humanity has been found in relation to the killing of thousands of victims, it has also been found in relation to fewer killings, including incidents of around 60 victims and less at the ICTY, ICTR, and SCSL (para. 537). The assessment of the massiveness requirement is made on a case-by-case basis, taking into account the circumstances in which the killings occurred. Relevant factors include, inter alia: the time and place of the killings; the selection of the victims and the manner in which they were targeted; and whether the killings were aimed at the collective group rather than victims in their individual capacity (para. 538).⁹ Where mass killings are committed on an extremely large scale, far surpassing the threshold for extermination, this can be taken into account as an aggravating factor in sentencing.¹⁰

⁷ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 174 (<https://www.legal-tools.org/doc/b7432e/>).

⁸ ICTY, *Prosecutor v. Lukić and Lukić*, Appeals Chamber, Judgment, 4 December 2012, IT-98-32/1, para. 536 (*‘Lukić and Lukić, 4 December 2012’*) (<https://www.legal-tools.org/doc/da785e/>); *Ntakirutimana and Ntakirutimana*, 13 December 2004, para. 542).

⁹ ECCC, *Co-Prosecutor v Nuon Chea and Khieu Samphan*, Trial Chamber, Case 002/02 Judgment, 16 November 2018, 002/19-09-2007/ECCC/TC (*‘ECCC Case 002/02, Judgment’*), para. 655 (<https://www.legal-tools.org/doc/8v76lk/>).

¹⁰ ICTR, *Prosecutor v. Ndindabahizi*, Appeals Chamber, Judgment, 16 January 2007, ICTR-01-71-0294/1, para. 135 (<https://www.legal-tools.org/doc/0f3219/>).

It has been recognised that several killing incidents can be accumulated together to constitute extermination.¹¹ Killings that are not part of the same attack on a civilian population, and instead are isolated acts, should not be accumulated together (*Tolimir*, 8 April 2015, para. 150).

b. Mental Elements:

In the absence of a specific provision defining the mental requirements for extermination, Article 30 of the ICC Statute applies. Accordingly, the material elements must be committed with intent and knowledge, as defined in Article 30.

At the ICTY and ICTR it has been held that the mental elements of extermination require the intention to kill on a large scale or to systematically subject a large number of people to conditions of living that would lead to their deaths and that this intent reflects the material elements of the crime. The Appeals Chambers of the ICTY and the ICTR have noted that there is no support in customary international law for the requirement of intent to kill a certain threshold number of victims. This is consistent with the fact that there is no numerical threshold established with respect to the material elements of extermination (*Stakić*, 22 March 2006, para. 260; *Ntakirutimana and Ntakirutimana*, 13 December 2004, paras. 516, 522). As noted above, in the *Al Bashir* case, Pre-Trial Chamber I noted in passing that where extermination is committed through the “infliction of certain conditions of life upon one or more persons”, it is necessary to show that those conditions were “calculated to bring about the physical destruction of that group, in whole or in part” (*Al Bashir*, 12 July 2010, para. 33). The ECCC Supreme Court Chamber has held that the *mens rea* of extermination as a crime against humanity requires direct intent to kill on a large scale; the crime is incompatible with the notion of *dolus eventualis* (Case 002/01 Appeal Judgement, para. 520). In relation to inflicting conditions of life calculated to bring about the destruction of part of a population, it is not necessary to show that the conditions would inevitably lead to the death of all people, as long as it is established that the perpetrator intended to

¹¹ ICTY, *Prosecutor v. Popović et al.*, Trial Chamber II, Judgment, 10 June 2010, IT-05-88-T, para. 805 (<https://www.legal-tools.org/doc/481867/>), holding that “in light of the temporal and geographical proximity of the killings, the similarities between them and the organized and coordinated manner in which the Bosnian Serb Forces conducted them, [...] they formed part of a single operation”; *Prosecutor v. Tolimir*, Appeals Chamber, 8 April 2015, IT-05-88/2, para. 147 (*Tolimir*, 8 April 2015’) (<https://www.legal-tools.org/doc/010ecb/>); ECCC Case 002/02, Judgement, para. 656.

create conditions of life in order to kill on a large scale; (ECCC Case 002/02, Judgement, para. 658).

Cross-references:

Articles 6; 7(1)(a); 7(2); 8(2)(a)(i); 8(2)(b)(xxv); 8(2)(c)(i); 30.

Doctrine:

1. Christopher K. Hall and Carsten Stahn, “Article 7 Crimes against humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 186–188 (<https://www.legal-tools.org/doc/040751/>).
2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 173–175 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Matthew Gillett (The views expressed are those of the author alone and do not necessarily reflect the views of the United Nations, the ICTY or the OTP of the ICTY).

Article 7(1)(c)

(c) Enslavement;

General Remarks:

Enslavement has been included as a crime against humanity in every instrument defining crimes against humanity.¹ There was a general agreement throughout the drafting process that enslavement should be included in Article 7 of the ICC Statute, although there was discussion about the exact meaning of the term (Hall and Stahn, 2016, p. 189). None of the judgments before the ICC has addressed the elements of this crime.

Analysis:

i. Definition:

According to one author, the crime of enslavement encompasses three components: slavery, servitude, and forced or compulsory labour (Hall and Stahn, 2016, p. 190). However, Article 7(2)(c) specifies that “Enslavement” means “the exercise of any or all of the powers attaching to the right of ownership over a person”. This reflects the definition of “slavery”, as set out in the Slavery Convention of 1926.² This would imply that “enslavement” for the purpose of the ICC Statute is limited to slavery in the traditional sense.

That said, the Elements of Crimes provides further specification by the words: “such as by purchasing, selling, lending or bartering [...] a person or persons or by imposing on them a similar deprivation of liberty”. It adds that “[i]t is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956”.³ Article 7(2)(c) adds that the definition “includes the

¹ Christopher K. Hall and Carsten Stahn, “Article 7 Crimes against humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 189 (<https://www.legal-tools.org/doc/040751/>).

² Convention to Suppress the Slave Trade and Slavery, 25 September 1926, Article 1(1) (‘Slavery Convention’) (<https://www.legal-tools.org/doc/12c9d8/>).

³ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956 (<https://www.legal-tools.org/doc/d038c8/>).

exercise of [any or all of the powers attaching to the right of ownership over a person] in the course of trafficking in persons, in particular women and children”, which is also repeated in the Elements of Crimes (Article 7(1)(c), footnote 11). The texts in Article 7(2)(c) and the Elements of Crimes appear to broaden the definition of “enslavement” beyond the traditional notion of slavery.

Neither Article 7 nor the Elements of Crimes give any guidance as to how the *mens rea* should be understood. Therefore Article 30 applies and the material elements must be committed with intent and knowledge.

ii. Requirements:

a. Material Elements:

As explained above, the main area of contention is whether “enslavement” includes something additional to the concept of slavery in the traditional sense. One author comments on the relevant provisions in the ICC Statute and the Elements of Crimes: “The enslavement provision is somewhat convoluted and inelegant, involving a broad general test, a restrictive-sounding list, and an expansive footnote. This reflects the contradictory pressures of the intense negotiations on these issues”.⁴ As of now, there is no ICC case law addressing this matter.

In the *Kunarac et al.* case, the Trial Chamber defined enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person” and that the *actus reus* of the crime therefore was “the exercise of any or all of the powers attaching to the right of ownership over a person”.⁵ Having reviewed international instruments and case law, the Trial Chamber added that the definition “may be broader than the traditional and sometimes apparently distinct definitions of either slavery, the slave trade and servitude or forced or compulsory labour found in the areas of international law” (*Kunarac et al.*, 22 February 2001, paras. 518–538, 541). The Appeals Chamber accepted the Trial Chamber’s “chief thesis [...] that the traditional concept of slavery, as defined in the 1926 Slavery Convention

⁴ Darryl Robinson, “The Context of Crimes Against Humanity”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 86 (<https://www.legal-tools.org/doc/e34f81/>).

⁵ ICTY, *Prosecutor v. Kunarac et al.*, Trial Chamber, Judgement, 22 February 2001, IT-96-23 IT-96-23/2, paras. 539–540 (‘*Kunarac et al.*, 22 February 2001’) (<https://www.legal-tools.org/doc/fd881d/>).

and often referred to as ‘chattel slavery’ [footnote omitted], has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership”.⁶ It added that “[i]n the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with ‘chattel slavery’, but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; [footnote omitted] the destruction is greater in the case of ‘chattel slavery’ but the difference is one of degree” (*Kunarac et al.*, 12 June 2002, para. 117). Thus, the ICTY Appeals Chamber found that not only enslavement but also slavery, as defined in the Slavery Convention of 1926, had a broader meaning than the traditional notion of slavery.

The Pre-Trial Chamber in the *Katanga and Ngudjolo* case hinted at a similar broad understanding of enslavement. When discussing “sexual slavery” (Article 7(1)(g)), it concluded that this crime may be regarded as a particular form of enslavement and therefore what is encompassed with “sexual slavery” must also be encompassed with “enslavement”.⁷ The Pre-Trial Chamber then listed a number of institutions and practices referred to the 1956 Supplementary Convention: “debt bondage, serfdom, forced marriage practices and forms of child labour” (*Katanga and Ngudjolo*, 30 September 2008, para. 430). It added that, in its view, sexual slavery (and therefore, presumably enslavement) also encompassed “situations where women and girls are forced into ‘marriage’, domestic servitude or other forced labour involving sexual activity, including rape, by their captors.[footnote omitted] Forms of sexual slavery can, for example, be ‘practices such as the detention of women in “rape camps” [footnote omitted] or “comfort stations”, forced temporary “marriages” to soldiers and other practices involving the treatment of women as chattel” (para. 430).

⁶ ICTY, *Prosecutor v. Kunarac et al.*, Appeals Chamber, Judgement, 12 June 2002, IT-96-23 IT-96-23/2, para. 117 (‘Kunarac et al., 12 June 2002’) (<https://www.legal-tools.org/doc/029a09/>).

⁷ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 430 (‘Katanga and Ngudjolo, 30 September 2008’) (<https://www.legal-tools.org/doc/67a9ec/>).

b. Mental Elements:

See the commentary of Article 30 for discussion on the *mens rea* for enslavement as a crime against humanity.

Cross-references:

Articles 8(2)(b)(xxi) and 8(2)(c)(ii).

Doctrine:

1. M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, 2011, pp. 374–381 (<https://www.legal-tools.org/doc/83b13d/>).
2. Christopher K. Hall and Carsten Stahn, “Article 7: Crimes Against Humanity, (c) ‘Enslavement’”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 188–192, 258–263 (<https://www.legal-tools.org/doc/040751/>).
3. Timothy L.H. McCormack, “Crimes Against Humanity”, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford, 2004, p. 191 (<https://www.legal-tools.org/doc/ba5c37/>).
4. Darryl Robinson, “Article 7(a) – Crime Against Humanity of Murder”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 84–86 (<https://www.legal-tools.org/doc/e34f81/>).
5. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 175–178 (<https://www.legal-tools.org/doc/b7432e/>).
6. Alexander Zahar, “Slavery”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, pp. 514–515 (<https://www.legal-tools.org/doc/7be65f/>).

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Article 7(1)(d)

(d) Deportation or forcible transfer of population;

General Remarks:

Article 7(1)(d) addresses forced displacement of persons from where they are lawfully present, without grounds permitted under international law. Deportation, which is commonly understood as forced displacement from one country to another, was already recognized as a crime against humanity in the Nuremberg Charter.¹ In addition to deportation, forcible transfer of population was included in the ICC Statute to make clear that forced displacement within a State's borders can also constitute a crime against humanity.² In contrast, the statutes of the ICTY and the ICTR only explicitly list deportation as a crime against humanity. However, the jurisprudence has recognized that forcible transfer can constitute the crime against humanity of “other inhumane acts” or an underlying act of persecution.³ The protected interests underlying the prohibition of deportation and forcible transfer include the rights of individuals “to live in their area of residence”, “to remain in their homes and communities unhindered”, not to be deprived of their property by forcible displacement to another location and – for deportation – “to live in the State in which they are lawfully present”.⁴

¹ Carsten Stahn, “Article 7 Crimes against humanity”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, pp. 183, 185.

² Darryl Robinson, “The Context of Crimes Against Humanity”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 86 (<https://www.legal-tools.org/doc/e34f81/>).

³ ICTY, *Prosecutor v. Stakić*, Appeals Chamber, Judgment, 22 March 2006, IT-97-24, para. 317 (‘*Stakić*, 22 March 2006’) (<https://www.legal-tools.org/doc/09f75f/>); *Prosecutor v. Krnojelac*, Appeals Chamber, Judgement, 17 September 2003, IT-97-25-A para. 218 (‘*Krnojelac*, 17 September 2003’) (<https://www.legal-tools.org/doc/46d2e5/>); *Prosecutor v. Naletilić and Martinović*, Appeals Chamber, Judgement, 3 May 2006, IT-98-34-A, paras. 153–154 (<https://www.legal-tools.org/doc/94b2f8/>); IRMCT, *Prosecutor v. Šešelj*, Appeals Chamber, Judgement, 11 April 2018, MICT-16-99-A, footnotes 538, 541 (‘*Šešelj*, 11 April 2018’) (<https://legal-tools.org/doc/96ea58/>).

⁴ ICC, *Request under Regulation 46(3) of the Regulations of the Court*, Pre-Trial Chamber I, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, ICC-RoC46(3)-01/18-37, para. 58 (‘*Bangladesh/Myanmar*, 6 September 2018’) (<https://www.legal-tools.org/doc/73aeb4/>). *Prosecutor v. Ntaganda*, Trial Chamber VI, Judgment, 8 July 2019, ICC-01/04-02/06-2359, para. 1069 (‘*Ntaganda*, 8

Analysis:

i. Definition:

According to Article 7(2)(d), “[d]eportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”. The Elements of Crimes provide:

1. The perpetrator deported or forcibly¹² transferred,¹³ without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

¹² The term ‘forcibly’ is not restricted to physical force, but may include 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.

¹³ ‘Deported or forcibly transferred’ is interchangeable with ‘forcibly displaced’.

ii. Distinction Between Deportation and Forcible Transfer

The wording and structure of Article 7(1)(d) – “[d]eportation or forcible transfer of population” – led ICC Pre-Trial Chamber I to consider whether it embodies a single crime or two separate crimes.⁵ Pre-Trial Chamber I

July 2019’) (<https://www.legal-tools.org/doc/80578a/>); *Stakić*, 22 March 2006, para. 277; see also Stahn, 2022, pp. 183, 184; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 178 (<https://www.legal-tools.org/doc/b7432e/>); see also *Krnjelac*, 17 September 2003, para. 218.

⁵ *Bangladesh/Myanmar*, 6 September 2018, para. 52; see also Guido Acquaviva, “*Forced Displacement and International Crimes*”, UNHCR Legal and Protection Policy Research

concluded that deportation and forcible transfer are two separate crimes: “[T]he displacement of persons lawfully residing in an area to another State amounts to deportation, whereas such displacement to a location within the borders of a State must be characterized as forcible transfer”. It reached this conclusion based on the ordinary meaning of the provision (referring to the word “or”), the Elements of Crimes (which link the conduct and the destinations), the independent existence of the crimes of deportation and forcible transfer in international law, the object and purpose of the ICC Statute (to give effect to the different legal interests) and prior ICC case law.⁶

This definition suggests that at the ICC deportation and forcible transfer might be viewed as mutually exclusive. At the *ad hoc* tribunals, for forcible transfer “the displacement *may* take place within national boundaries but is not so restricted”.⁷ According to that definition, the ultimate location does not form part of the elements of forcible transfer. Deportation thus has an additional element: the displacement across a border.⁸

At the *ad hoc* tribunals, deportation does not require displacement across a *de jure* State border. Rather, under certain circumstances, displacement across a *de facto* border suffices. This is examined on a case-by-case basis in light of customary international law, which, for example, recognizes displacement from occupied territory as deportation (see Article

Series, Division of International Protection, June 2011, p. 18 (<https://www.legal-tools.org/doc/0e1ea8/>).

⁶ *Bangladesh/Myanmar*, 6 September 2018, paras. 52–60 with reference to ICC, *Prosecutor v. Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11, para. 268 (*Ruto et al.*, 23 January 2012’) (<https://www.legal-tools.org/doc/96c3c2/>); for this distinction see also Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 4th. ed., Oxford University Press, 2020, p. 406; Stahn, 2022, pp. 183, 184, 188, 277; Schabas, 2016, p. 178.

⁷ ICTY, *Prosecutor v. Đorđević*, Appeals Chamber, Judgement, 27 January 2014, IT-05-87/1-A, footnote 2159, emphasis in the original (*Đorđević*, 27 January 2014’) (<https://www.legal-tools.org/doc/e6fa92/>), referring to *Stakić*, ‘22 March 2006, para. 317; see also *Šešelj*, 11 April 2018, footnote 538 and IRMCT, *Prosecutor v. Stanišić and Simatović*, Trial Chamber, Judgement, 30 June 2021, para. 304 (<https://www.legal-tools.org/doc/b7ryu1/>); see however ICTY, *Prosecutor v. Stanišić and Župljanin*, Appeals Chamber, Judgement, 30 June 2016, IT-08-91-A, para. 917 (*Stanišić and Župljanin*, 30 June 2016’) (<https://www.legal-tools.org/doc/e414f6/>).

⁸ ICTY, *Prosecutor v. Popović et al.*, Trial Chamber II, Judgment, Volume I, 10 June 2010, IT-05-88-T (public redacted version), paras. 892, 904 (*Popović et al.*, 10 June 2010’) (<https://www.legal-tools.org/doc/481867/>).

8(2)(b)(viii)), while displacement across constantly changing frontlines is not sufficient.⁹

While the ICC Trial Chamber may ultimately have to draw a distinction between deportation and forcible transfer, at the confirmation of charges stage Pre-Trial Chamber II saw “no apparent prejudice caused” by the formulation of the charges as “deportation or forcible transfer of population” (*Ruto et al.*, 23 January 2012, para. 268). Similarly, in *Muthaura et al.* Pre-Trial Chamber II confirmed charges for “deportation or forcible transfer of population”¹⁰ and issued warrants of arrests for Alfred Yekatom and Patrice-Edouard Ngaïssona for alleged responsibility for “deportation or forcible transfer of population”.¹¹

In other cases, the legal characterization was already limited to forcible transfer at the pre-trial stage. In *Al Bashir, Harun and Kushayb*, and *Hussein*, Pre-Trial Chamber I issued warrants of arrest (and in *Kushayb* confirmed charges) for alleged responsibility for forcible transfer as a crime against humanity.¹² Similarly, in *Ntaganda* Pre-Trial Chamber II con-

⁹ *Stakić*, 22 March 2006, paras. 278, 300–303; *Prosecutor v. Prlić et al.*, Appeals Chamber, Judgement, Volume I, 29 November 2017, IT-04-74-A, para. 300 (‘*Prlić et al.*, 29 November 2017’) (<https://www.legal-tools.org/doc/00b491/>); *Šešelj*, 11 April 2018, footnote 538; for a critique of a ‘broad interpretation’ of deportation at the ICC, see Werle and Jessberger, 2020, pp. 406–407; see also Kai Ambos, *Treatise on International Criminal Law, Volume II: The Crimes and Sentencing*, Oxford University Press, 2014, p. 86, footnote 305 (<https://legal-tools.org/doc/jjcr50/>); the required nature of the border was left open in *Bangladesh/Myanmar*, 6 September 2018, footnote 101.

¹⁰ ICC, *Prosecutor v. Muthaura et al.*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red (public redacted version), paras. 21, 241, 298, 428 (‘*Muthaura et al.*, 23 January 2012’) (<https://www.legal-tools.org/doc/4972c0/>).

¹¹ ICC, *Prosecutor v. Yekatom*, Pre-Trial Chamber II, Public Redacted Version of “Warrant of Arrest for Alfred Yekatom”, 11 November 2018, ICC-01/14-01/18-1-US-Exp, 17 November 2018, ICC-01/14-01/18-1-Red, p. 21 (<https://legal-tools.org/doc/00c4fc/>); *Prosecutor v. Ngaïssona*, Pre-Trial Chamber II, Public Redacted Version of “Warrant of Arrest for Patrice-Edouard Ngaïssona”, 13 December 2018, ICC-01/14-02/18-2-Red, p. 37 (<https://legal-tools.org/doc/5185e5/>). In the Decision on the confirmation of charges, Pre-Trial Chamber II found displacement within the country and to another country and confirmed charges of forcible transfer and deportation, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Pre-Trial Chamber II, Corrected version of ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’, 28 June 2021, ICC-01/14-01/18-403-Corr-Red (public redacted version), paras. 92, 109, 129–134 and pp. 105, 109 (‘*Yekatom and Ngaïssona*, 28 June 2021’) (<https://www.legal-tools.org/doc/ruddqn/>).

¹² ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-

firmed charges for forcible transfer of population as a crime against humanity.¹³

iii. Requirements:

In addition to the contextual elements required for all crimes against humanity set out in elements 4 and 5 of the above-listed Elements of Crimes, the following needs to be proven:

a. Material Elements:

Elements 1 and 2 of the above-listed Elements of Crimes constitute the material elements of deportation and forcible transfer.

1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.

The persons concerned have to be displaced to another State or location (see above *ii.*). The ICTY Appeals Chamber in *Prlić et al.* rejected the Defence’s claim that displacement required removal to a location suffi-

02/05-01/09-3 (public redacted version), p. 92 (<https://www.legal-tools.org/doc/e26cf4/>); *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-1, pp. 7–8 (<https://www.legal-tools.org/doc/814cca/>); *Prosecutor v. Harun and Kushayb*, Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr, pp. 45, 48, 56 (<https://www.legal-tools.org/doc/e2469d/>); *Prosecutor v. Harun and Kushayb*, Pre-Trial Chamber I, Warrant of Arrest for Ahmad Harun, 27 April 2007, ICC-02/05-01/07-2-Corr, pp. 7, 10, 15–16 (<https://www.legal-tools.org/doc/acafe8/>); *Prosecutor v. Harun and Kushayb*, Pre-Trial Chamber I, Warrant of Arrest for Ali Kushayb, 27 April 2007, ICC-02/05-01/07-3-Corr, pp. 8, 10, 16–17 (<https://www.legal-tools.org/doc/31b680/>); *Prosecutor v. Hussein*, Pre-Trial Chamber I, Public redacted version of “Decision on the Prosecutor’s application under article 58 relating to Abdel Raheem Muhammad Hussein”, ICC-02/05-01/12-1-Red, 1 March 2012, pp. 29–30 (<https://www.legal-tools.org/doc/fe1687/>); *Prosecutor v. Hussein*, Pre-Trial Chamber I, Warrant of Arrest for Abdel Raheem Muhammad Hussein, 1 March 2012, ICC-02/05-01/12-2, pp. 8, 11; see also *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010, ICC-02/05-01/09-95, p. 6 (<https://www.legal-tools.org/doc/50fbab/>); *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, Pre-Trial Chamber II, Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’), 9 July 2021, ICC-02/05-01/20-433, 9 July 2021, para. 94 and p. 68 (<https://www.legal-tools.org/doc/sdt0eb/>).

¹³ ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309, paras. 36, 64–68, p. 63 (‘*Ntaganda*, 9 June 2014’) (<https://www.legal-tools.org/doc/5686c6/>).

ciently remote from the original location (*Prlić et al.*, 29 November 2017, para. 492).

The displacement has to be done forcibly, by expulsion or other coercive acts. According to the Elements of Crimes, “[t]he term ‘forcibly’ is not restricted to physical force, but may include 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” (Elements of Crimes, footnote 12). Likewise, at the ICTY forced displacement “is not ‘limited to physical force but includes the 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’” (*Dorđević*, 27 January 2014, para. 727, quoting *Stakić*, 22 March 2006, para. 281). What matters is that the victims had no genuine choice whether to remain or to leave (*Ntaganda*, 8 July 2019, para. 1056; *Dorđević*, 27 January 2014, para. 727; *Stakić*, 22 March 2006, para. 279). “While individuals may agree, or even request, to be removed from an area, ‘consent must be real in the sense that it is given voluntarily and as a result of the individual’s free will’” (*Ntaganda*, 8 July 2019, para. 1056, quoting *Stakić*, 22 March 2006, para. 279). The ICTY has stressed that military or political leaders cannot consent to the displacement on behalf of the individuals, nor does the involvement of the International Committee of the Red Cross or another neutral organisation render it lawful.¹⁴

To demonstrate that the persons had no genuine choice to remain, it is not necessary to establish an unlawful attack designed to coerce their departure; rather “the Chamber will take into account the prevailing situation and atmosphere, as well as all other relevant circumstances”.¹⁵ Similar-

¹⁴ *Popović et al.*, 10 June 2010, para. 897; *Stakić*, 22 March 2006, para. 286; ICTY, *Prosecutor v. Simić*, Appeals Chamber, Judgement, 28 November 2006, IT-95-9-A, para. 180 (<https://legal-tools.org/doc/28524b/>).

¹⁵ *Ntaganda*, 8 July 2019, para. 1056. See also in the context of Article 8(2)(a)(vii), ICC, *Situation in Georgia*, Pre-Trial Chamber I, Public redacted version of ‘Corrected version of the “Arrest warrant for Mikhail Mayramovich Mindzaev”’, 30 June 2022, ICC-01/15-40-Red, para. 36 (<https://www.legal-tools.org/doc/u8b65i/>); *Situation in Georgia*, Pre-Trial Chamber I, Public redacted version of ‘Arrest warrant for Gamlet Guchmazov’, 30 June 2022, ICC-01/15-41-Red, para. 35 (<https://www.legal-tools.org/doc/uyuuwn/>); *Situation in Georgia*, Pre-Trial Chamber I, Public redacted version of ‘Arrest warrant for David Georgiyevich Sanakoev’, 30 June 2022, ICC-01/15-42-Red, para. 23 (<https://www.legal-tools.org/doc/3notyi/>).

ly, ICTY jurisprudence does not require that the displacement results from acts that are criminal as such (*Stanišić and Župljanin*, 30 June 2016, para. 918). However, “incidental displacement as a result of an entirely lawful attack, or collateral consequences of a lawful attack would not amount to forcible transfer or displacement”.¹⁶

Deportation and forcible transfer are “open-conduct” crimes. Thus, different types of conduct can amount to “expulsion or other coercive acts” (*Ruto et al.*, 23 January 2012, para. 244; *Bangladesh/Myanmar*, 6 September 2018, para. 61; *Ntaganda*, 8 July 2019, para. 1047). Such conduct can include “deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting”.¹⁷

A link needs to be established between the perpetrator’s conduct and the resulting effect of displacing the victim to another State or location (*Ruto et al.*, 23 January 2012, para. 245; *Ntaganda*, 8 July 2019, para. 1047; see also *Popović et al.*, 10 June 2010, para. 893). Since the *actus reus* of deportation spans an international border, the ICC may exercise jurisdiction over deportation as a crime against humanity when the victim is displaced from a non-State Party to a State Party.¹⁸

Although Article 7(1)(d) refers to deportation or forcible transfer of *population*, the Elements of Crimes clarify that the displacement of one person can suffice (Werle and Jessberger, 2020, p. 406). Provided the contextual element is met—that the conduct was committed as part of a widespread or systematic attack directed against a civilian population—ICTY Trial Chamber II in *Popović et al.* opined that there is no additional requirement that the victims of forcible displacement are civilians (*Prosecutor v.*

¹⁶ *Ntaganda*, 8 July 2019, para. 1056, internal reference omitted; for an analysis of military attacks as the required coercive act see also *Dorđević*, 27 January 2014, paras. 704–705; ICTY, *Prosecutor v. Gotovina and Markač*, Appeals Chamber, Judgement, 16 November 2012, IT-06-90-A, para. 114 and footnote 330 (<https://www.legal-tools.org/doc/03b685/>).

¹⁷ *Bangladesh/Myanmar*, 6 September 2018, para. 61; see also *Ruto et al.*, 23 January 2012, paras. 251, 255, 260–261, 265–266, 277; *Muthaura et al.*, 23 January 2012, paras. 244, 279; ICC, *Situation in Georgia*, Decision on the Prosecutor’s request for authorization of an investigation, Pre-Trial Chamber I, 27 January 2016, ICC-01/15-12, paras. 21–22, 31 (<https://www.legal-tools.org/doc/a3d07e/>); *Ntaganda*, 8 July 2019, paras. 1057–1068.

¹⁸ ICC, *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, ICC- ICC-01/19-27, para. 62 (‘*Situation in Bangladesh/Myanmar*, 14 November 2019’) (<https://www.legal-tools.org/doc/kbo3hy/>).

Popović et al., 10 June 2010, para. 910). However, “the status of the victims may be very relevant to distinguish lawful acts from criminal ones” (para. 912). As the ICTY Appeals Chamber noted in *Popović et al.* “forcible displacement of enemy soldiers is not prohibited under international humanitarian law”.¹⁹

The displacement has to occur without grounds permitted under international law. The ICTY Appeals Chamber pointed out that – as with all other elements of the crime – this is for the Prosecution to prove (*Dorđević*, 27 January 2014, para. 705). In *Ntaganda* ICC Trial Chamber VI found this element proven, since “the evidence on the record d[id] not reveal any grounds permitting the forcible displacement [...] under international law” (*Ntaganda*, 8 July 2019, para. 1073; see also *Yekatom and Ngaïssona*, 28 June 2021, footnote 238). International humanitarian law, for example, permits displacement for certain reasons, such as for the security of the population/civilians involved or for imperative military reasons, and under certain conditions (for example Article 49 Geneva Convention IV, Article 17 Additional Protocol II).²⁰ Such evacuations can only be temporary and provisional measures.²¹ Pre-Trial Chamber II in *Ntaganda* considered that the acts of displacement “were not justified by the security of the civilians involved or by military necessity, as there [was] no indication of any precautionary measures having been taken before these acts of displacement were carried out or any reasons linked to the conduct of military operations” (*Ntaganda*, 9 June 2014, para. 68). Displacement can further be permitted for humanitarian reasons unrelated to an armed conflict such as epidemics or natural disasters (*Popović et al.*, 10 June 2010, para. 903). While displacement for humanitarian reasons is permitted in certain situations, this does not apply where the humanitarian crisis causing the displacement is the result of the accused’s unlawful activity (*Situation in Bangladesh/Myanmar*, 14 November 2019, para.98; *Stakić*, 22 March 2006, para. 287).

¹⁹ ICTY, *Prosecutor v. Popović et al.*, Appeals Chamber, Judgement, 30 January 2015, IT-05-88-A (public redacted version), para. 774 (<https://www.legal-tools.org/doc/4c28fb/>).

²⁰ Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 49 (<https://legal-tools.org/doc/d5e260/>); Protocol (II) additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts, 7 December 1978, Article 17 (<https://www.legal-tools.org/doc/fd14c4/>).

²¹ ICTY, *Prosecutor v. Blagojević and Jokić*, Trial Chamber I, Judgement, 17 January 2005, IT-02-60-T, para. 597 (<https://legal-tools.org/doc/7483f2/>).

Human rights instruments foresee further reasons permitting restrictions to the liberty of movement or the freedom to choose residence (see, for example, Article 12(3) of the International Covenant on Civil and Political Rights; Stahn, 2022, p. 283; Werle and Jessberger, 2020, pp. 407–408).

2. Such person or persons were lawfully present in the area from which they were so deported or transferred.

The question of whether the lawfulness of the victims' presence is to be determined under national or international law was debated during the negotiations of the ICC Statute, but was ultimately left for the Court to decide (Robinson, 2001, p. 87 setting out the different positions during the negotiations). ICC Trial Chamber VI in *Ntaganda* focused on the lawfulness under international law, not on domestic legal requirements. It pointed out that "'lawful presence' does not mean that the victim must have had legal residence in the area". Rather, the "protection extends to individuals who, for whatever reason, have come to live in a community, including internally displaced persons who have established temporary homes after being uprooted from their original communities" (*Ntaganda*, 8 July 2019, paras. 1069, 1071 with reference to ICTY jurisprudence; see also *Situation in Bangladesh/Myanmar*, 14 November 2019, para. 99). ICTY Trial Chamber II in *Popović et al.* had opined that 'lawfully present' "should not be equated to the legal concept of lawful residence", but understood in its common meaning (*Popović et al.*, 10 June 2010, para. 900). In the context of confirming the charges, ICC Pre-Trial Chamber II noted that the evidence did not indicate that the persons were not lawfully present (*Yekatom and Ngaissona*, 28 June 2021, footnote 238).

b. Mental Elements

With respect to the first material element, Article 30 applies (Robinson, 2001, p. 88). This requires proof that "[t]he perpetrator's conduct was deliberate and the perpetrator: (i) meant to cause the consequence; or was (ii) aware that it would occur in the ordinary course of events" (*Ntaganda*, 8 July 2019, para. 1046). At the *ad hoc* tribunals, the intent to displace the victim permanently is not required for deportation or forcible transfer (*Stakić*, 22 March 2006, paras. 278, 307, 317; *Šešelj*, 11 April 2018, footnote 538; see also for the ICC: *Ntaganda*, 8 July 2019, para. 1188; Stahn, 2022, p. 190; see however Werle and Jessberger, 2020, p. 409).

Consistent with the view that deportation has an additional element not required for forcible transfer – the transfer across a border – ICTY Trial Chamber II held in *Popović et al.*: “In the case of forcible transfer, as the ultimate location does not form part of the elements of the offence, the *mens rea* is established with proof of the intent to forcibly displace the person. In the case of deportation, as displacement across a border is a constituent element, the *mens rea* for the offence must encompass this component of the crime” (*Popović et al.* 10 June 2010, para. 904, internal reference omitted; see however *Stanišić and Župljanin*, 30 June 2016, para. 917).

With respect to the second material element, element 3 of the Elements of Crimes clarifies that awareness of the factual circumstances establishing the lawfulness of the victims’ presence suffices. It is not required that the perpetrator make any legal evaluation of the lawfulness of the victims’ presence (Robinson, 2001, p. 88; Hall and Stahn, 2016, pp. 265, 267).

Cross-references:

Articles 7(2)(d), 8(2)(a)(vii), 8(2)(b)(viii), 8(2)(e)(viii), 30.

Doctrine:

1. Guido Acquaviva, “*Forced Displacement and International Crimes*”, in UNHCR Legal and Protection Policy Research Series, Division of International Protection, June 2011 (<https://www.legal-tools.org/doc/0e1ea8/>).
2. Kai Ambos, *Treatise on International Criminal Law, Volume II: The Crimes and Sentencing*, Oxford University Press, 2014, pp. 85–87 (<https://legal-tools.org/doc/jjcr50/>).
3. Carsten Stahn, “Article 7: Crimes Against Humanity”, B. I. 2. d) “Deportation or forcible transfer of population”, and B. II. 4. “Prohibited movements of population”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, pp. 183–191, 277–284.
4. Darryl Robinson, “Article 7 (1)(d)-Crime Against Humanity of Deportation Or Forcible Transfer of Population”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley/New York, 2001, pp. 86–88 (<https://www.legal-tools.org/doc/e34f81/>).

5. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 178–180 (<https://www.legal-tools.org/doc/b7432e/>).
6. Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 4th. ed., Oxford University Press, 2020, pp. 405–406.

Author: Laurel Baig, updating the previous version by Barbara Goy (the views expressed are those of the authors alone and do not necessarily reflect the views of the IRMCT, the ICTY, the ICTR or the United Nations in general).

Article 7(1)(e)

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

General Remarks:

Although imprisonment was not included in the Nuremberg and Tokyo Charters, it has been included as a crime against humanity in subsequent instruments, including the ICTY and ICTR statutes.¹ None of the judgments before the ICC have addressed the elements of this crime.

Analysis:

i. Definition:

The full text of Article 7(1)(e) reads “Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law”. There is no provision in Article 7(2) further addressing this crime.

ii. Requirements:

a. Material Elements:

The two alternatives of “imprisonment” and “severe deprivation of physical liberty” seem to suggest that the term “imprisonment” should be understood in a narrow sense, as imprisonment after conviction by a court (Hall and Stahn, 2016, p. 200). However, according to the definition, this imprisonment has to be in violation of fundamental rules of international law. Together the two concepts cover a broad range of arbitrary deprivations of liberty (Hall and Stahn, 2016, p. 201).

The Statute does not contain any clear guidance as to what constitute a “severe” deprivation of liberty. The use of the word “other” indicates that “imprisonment” already meets the threshold for “severe” and this might be of some assistance in interpreting the term. Furthermore, according to the Elements of Crimes, one of the elements are that “[t]he gravity of the conduct was such that it was in violation of fundamental rules of international law”. Presumably the drafters did not intend to introduce a new gravity-element that was not foreseen in the Statute (see Hall and Stahn, 2016, p.

¹ Christopher K. Hall and Carsten Stahn, “Article 7 Crimes against humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 198 (<https://www.legal-tools.org/doc/040751/>).

203). Therefore, this element must be a reference to “severe” in the Statute. The meaning of the term “severe” is then merely that the severe deprivation of liberty (including imprisonment) must be in violation of fundamental rules of international law.

Neither the Statute nor the Elements of Crimes specify which the fundamental rules of international law are.

b. Mental Elements:

Article 7 does not give any guidance as to how the *mens rea* should be understood. In this respect, Article 30 applies and the material elements must be committed with intent and knowledge. The author refers to the commentary of Article 30 for discussion on the *mens rea* for imprisonment as a crime against humanity.

In addition, the Elements of Crimes specifies that the perpetrator must have been “aware of the factual circumstances that established the gravity of the conduct”. In this respect, one author commented that there was general agreement among the drafters “that the prosecutor need not prove that the perpetrator made any legal evaluation that the imprisonment was in violation of fundamental rules of international law”.²

Cross-references:

Article 8(2)(a)(vii).

Doctrine:

1. M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, 2011, pp. 443–445 (<https://www.legal-tools.org/doc/83b13d/>).
2. Christopher K. Hall and Carsten Stahn, “Article 7: Crimes Against Humanity, (e) ‘Imprisonment or other severe deprivation of physical liberty’”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 198–204. (<https://www.legal-tools.org/doc/040751/>).

² Darryl Robinson, “The Context of Crimes Against Humanity”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 89 (<https://www.legal-tools.org/doc/e34f81/>).

3. Timothy L.H. McCormack, “Crimes Against Humanity”, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford/Portland, 2004, p. 193 (<https://www.legal-tools.org/doc/ba5c37/>).
4. Darryl Robinson, “Article 7(1)(e) – Crime Against Humanity of Imprisonment or Other Severe Deprivation of Physical Liberty”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 88–89 (<https://www.legal-tools.org/doc/e34f81/>).
5. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 180–181 (<https://www.legal-tools.org/doc/b7432e/>).

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Article 7(1)(f)

(f) Torture;

General Remarks:

According to one author, there was a general support throughout the drafting process for the inclusion of torture as a crime against humanity; there was, however, a considerable debate about the definition of this crime.¹

Analysis:

i. Definition:

According to Article 7(2)(e) and Elements of Crimes, torture means “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.

Notably, the definition in the Statute does not include a requirement that the infliction of pain or suffering was done for a specific purpose (Elements of Crimes, footnote 14). Such a requirement is included in the torture definition in the Torture Convention, as well as in the definition of torture as a war crime in the Statute. Further, the definition does not include a requirement of a connection to a public official.²

ii. Requirements:

a. Material Elements:

The two material elements are: (i) the infliction of severe physical or mental pain or suffering, and (ii) that this infliction is on a person in custody or under the control of the perpetrator. With regard to the severity requirement, the Pre-Trial Chamber in the *Bemba* case considered that “it is constantly accepted in applicable treaties and jurisprudence that an important

¹ Christopher K. Hall and Carsten Stahn, “Article 7 Crimes against humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 205 (<https://www.legal-tools.org/doc/040751/>).

² Herman Von Hebel and Darryl Robinson, “Crimes Within the Jurisdiction of the Court”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Kluwer Law International, Leiden, 1999, p. 99 (<https://www.legal-tools.org/doc/d71078/>).

degree of pain and suffering has to be reached”.³ Arguably, this adds very little or nothing to the understanding of the word “severe” in the definition.

Torture in the sense of the ICC Statute does not include infliction of pain or suffering that arises only from, are inherent in or incidental to, lawful sanctions. According to one author, “lawful” refers to international law or national law, which is consistent with international law and standards (Hall and Stahn, 2016, p. 272). However, the Statute itself, as well as the Elements of Crimes, are silent on this issue.

b. Mental Elements:

Article 7(2)(e) includes the word “intentional”, which means that Article 30, stating “[u]nless otherwise provided”, is not applicable with regard to the crime of torture. The Pre-Trial Chamber in the *Bemba* case concluded that the use of the term “intentional” excluded the separate requirement of knowledge set out in Article 30(2) of the Statute and that it was therefore not necessary to demonstrate that the perpetrator knew that the harm inflicted was severe (*Bemba*, 15 June 2009, para. 194).

Cross-references:

Articles 8(2)(a)(ii) and 8(2)(c)(i).

Doctrine:

1. M. Cherif Bassiouni, *Crimes Against Humanity – Historical Evolution and Contemporary Application*, Cambridge University Press, 2011, pp. 411–419 (<https://www.legal-tools.org/doc/83b13d/>).
2. Christopher K. Hall and Carsten Stahn, “Article 7 Crimes Against Humanity, (f) ‘Torture’ and (e) ‘Torture’”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 204–206, 269–273 (<https://www.legal-tools.org/doc/a9e9f7/>).
3. Timothy L.H. McCormack, “Crimes Against Humanity”, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing,

³ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 193 (*Bemba*, 15 June 2009’) (<https://www.legal-tools.org/doc/07965c/>).

- Oxford/Portland, 2004, pp. 194–195 (<https://www.legal-tools.org/doc/ba5c37/>).
4. Darryl Robinson, “Article 7(1)(f)-Crime Against Humanity of Torture”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 90–92 (<https://www.legal-tools.org/doc/e34f81/>).
 5. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 181–185 (<https://www.legal-tools.org/doc/b7432e/>).
 6. Alexander Zahar, “Torture”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, pp. 537–538 (<https://www.legal-tools.org/doc/7be65f/>).

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Article 7(1)(g)-1

(g) Rape,

Rape is considered the most severe form of sexual violence. Sexual violence is a broad term that covers all forms of acts of a sexual nature under coercive circumstances, including rape. The key element that separates rape from other acts is penetration. The Elements of Crimes provide a more specific definition of the criminal conduct. Rape falls under the chapeaus of genocide, crimes against humanity or war crimes under specific circumstances, confirmed both through the ICC Statute and through the case law of the ICTR and the ICTY. In order for rape to rise to the level of a crime against humanity, it must be perpetrated within the context of a widespread or systematic attack aimed at a civilian population. Combatants cannot thus be victims of rape as a crime against humanity. The attack must also aim at a significant number of victims. This does not preclude a single rape from constituting a crime against humanity, if perpetrated within the context of a widespread or systematic attack. The underlying act, such as rape, does not have to be the same as the other acts committed during the attack.

For the mental element of rape Article 30 applies. The perpetrator has to have knowledge of the act being part of a systematic attack or of the factual circumstances of a widespread attack. It is sufficient if he or she intended to further such an attack. He or she must also have intended to penetrate the victim's body and be aware that the penetration was by force or threat of force.

The definition of rape is the same regarding rape as genocide, crimes against humanity and war crimes, albeit the contextual elements of the chapeaus differ. The *actus reus* of the violation is found in the Elements of Crimes. The definition focuses on penetration with (i) a sexual organ of any body part, or (ii) with the use of an object or any other part of the body of the anal or genital opening of the victim, committed by force or threat of force or coercion. "Any part of the body" under point 1 refers to vaginal, anal and oral penetration with the penis and may also be interpreted as ears, nose and eyes of the victim. Point 2 refers to objects or the use of fingers, hands or tongue of the perpetrator. Coercion may arise through fear of violence, duress, detention, psychological oppression or abuse of power. These situations are provided as examples, apparent through the use of the term "such as". Consent is automatically vitiated in such situations. The defini-

tion is intentionally gender-neutral, indicating that both men and women can be perpetrators or victims. The definition of rape found in the Elements of Crimes is heavily influenced by the legal reasoning in cases regarding rape of the ICTY and the ICTR. Such cases can thus further elucidate the interpretation of the elements of the crime, meanwhile also highlighting different approaches to the main elements of rape, including ‘force’ and ‘non-consent’. See, for example, the *Furundžija* case, in which the Trial Chamber of the ICTY held that force or threat of force constitutes the main element of rape.¹ To the contrary, the latter case of *Kunarac* emphasized the element of non-consent as the most essential in establishing rape, in that it corresponds to the protection of sexual autonomy.² As to the term “coercion” the ICTR Trial Chamber in *Akayesu* held that a coercive environment does not require physical force. It also adopted a broad approach to the *actus reus*, including also the use of objects, an approach that has been embraced also by the ICTY and the ICC.³

Rule 63 is of importance which holds that the Court’s Chambers cannot require corroboration to prove any crime within its jurisdiction, particularly crimes of sexual violence. Rule 70 further delineates the possibility of introducing evidence of consent as a defense. This is highly limited, emphasizing that consent cannot be inferred in coercive circumstances. Rule 71 forbids evidence of prior sexual conduct.

Several cases at the ICC include charges of rape as a crime against humanity. This includes Pre-Trial Chamber III in *Bemba*, for crimes committed in the Central African Republic between 2002 and 2003. Bemba was charged with rape as a crime against humanity and war crime. In the 2009 confirmation of charges decision in the *Bemba* case, Pre-Trial Chamber II dismissed charges of rape as torture and outrages upon personal dignity, solely confirming charges of rape. The Chamber held that including the distinctive charges would constitute cumulative charging and be “detrimental to the rights of the Defence”.⁴

¹ ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Judgement, 10 December 1998, IT-95-17/1-T (<https://www.legal-tools.org/doc/e6081b/>).

² ICTY, *Prosecutor v. Kunarac, Kovač and Vuković*, Trial Chamber, Judgement, 22 February 2001, IT-96-23 IT-96-23/1 (<https://www.legal-tools.org/doc/fd881d/>).

³ ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, para. 598 (*‘Akayesu, 2 September 1998’*) (<https://www.legal-tools.org/doc/b8d7bd/>).

⁴ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gom-

In *Katanga*, the Chamber referred to the *Akayesu* judgment on the interpretation of a coercive environment. It held that “threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence”.⁵

In *Kenyatta*, the Chamber confirmed that there were substantial grounds to believe widespread rapes had been perpetrated sufficient to rise to the level of crimes against humanity.⁶

Several arrest warrants confirmed reasonable grounds to believe that rape as crimes against humanity have been committed.⁷

Cross-references:

Articles 8(2)(b)(xxii) and 8(2)(e)(vi).

bo, 15 June 2009, ICC-01/05-01/08-424, para. 202 (<https://www.legal-tools.org/doc/07965c/>).

⁵ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 440 (<https://www.legal-tools.org/doc/67a9ec/>). See also *Akayesu*, 2 September 1998, para. 688. The Chamber found sufficient evidence to confirm charges that members of the FNI and FRPI by force or threat invaded the body of women and girls abducted in the village of Bogoro, see para. 442.

⁶ ICC, *Prosecutor v. Kenyatta*, Pre-Trial Chamber I, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute Against Kenyatta, ICC-01/09-02/11, 23 January 2012, para. 257 (<https://www.legal-tools.org/doc/4972c0/>).

⁷ See, for example, ICC, *Prosecutor v. Gbagbo*, Warrant of arrest for Laurent Koudou Gbagbo, 23 November 2011, ICC-02/11-01/11-1, para. 8 (<https://www.legal-tools.org/doc/80881e/>); *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Decision on the Prosecutor’s Application under Article 58, 13 July 2012, ICC-01/04-02/06-36-Red (public redacted version), para. 38 (<https://www.legal-tools.org/doc/18c310/>): “reasonable grounds to believe, that crimes of rape and sexual slavery were committed as part of the attacks in different locations in Ituri”; *Prosecutor v. Harun and Kushayb*, Pre-Trial Chamber I, Warrant of Arrest, 27 April 2007, ICC-02/05-01/07-2-Corr (<https://www.legal-tools.org/doc/acafe8/>) found reasonable grounds to believe that Harun and Kushayb, through the direction of the Sudanese Armed Forces and the Janjaweed committed rapes of women and girls of certain ethnic groups. In *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Second Decision on the Prosecution’s Application for a Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010, ICC-02/05-01/09-94 (<https://www.legal-tools.org/doc/50fbab/>), the Pre-Trial Chamber found reasonable grounds to establish rape as a crime against humanity. In *Prosecutor v. Kony*, Pre-Trial Chamber II, Warrant of Arrest, 27 September 2005, ICC-02/04-01/05 (<https://www.legal-tools.org/doc/b1010a/>), the Chamber also found reasonable grounds to establish rape and sexual slavery as crimes against humanity.

Doctrine:

1. Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 374–375.
2. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 248–250, mn. 723–727 (<https://www.legal-tools.org/doc/e35f82/>).
3. Christopher K. Hall, Joseph Powderly and Niamh Hayes, “Article 7 Crimes against humanity, (g) ‘Rape’ “, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 209–214. (<https://www.legal-tools.org/doc/040751/>).
4. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, Mortsel, 2005, pp. 103–135 (<https://www.legal-tools.org/doc/43fca9/>).
5. M. Cherif Bassiouni, *Crimes Against Humanity, Historical Evolution and Contemporary Application*, Cambridge University Press, 2011, pp. 440–442 (<https://www.legal-tools.org/doc/83b13d/>).

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Article 7(1)(g)-2

sexual slavery,

Sexual slavery is a particular form of enslavement which includes limitations on one's autonomy, freedom of movement and power to decide matters relating to one's sexual activity. Although it is listed as a separate offence in the ICC Statute, it is regarded as a particular form of enslavement. However, whereas enslavement is solely considered a crime against humanity, sexual slavery may constitute either a war crime or a crime against humanity. It is partly based on the definition of enslavement identified as customary international law by the ICTY in the *Kunarac* case.¹ Sexual slavery is thus considered a form of enslavement with a sexual component. Its definition is found in the Elements of Crimes and includes the exercise of any or all of the powers attached to the right of ownership over one or more persons, "such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty". The person should have been made to engage in acts of a sexual nature. The crime also includes forced marriages, domestic servitude or other forced labour that ultimately involves forced sexual activity. In contrast to the crime of rape, which is a completed offence, sexual slavery constitutes a continuing offence.

In *Katanga and Ngudjolo*, the Pre-Trial chamber held that "sexual slavery also encompasses situations where women and girls are forced into "marriage", domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors. Forms of sexual slavery can, for example, be practices such as the detention of women in 'rape camps' or 'comfort stations', forced temporary 'marriages' to soldiers and other practices involving the treatment of women as chattel, and as such, violations of the peremptory norm prohibiting slavery".² The Chamber found sufficient evidence to affirm charges of sexual slavery as crimes against humanity in the form of women being abducted for the purpose of using them as wives, being forced or threatened to engage in sexual inter-

¹ ICTY, *Prosecutor v. Kunarac, Kovać and Vuković*, Trial Chamber, Judgment, 22 February 2001, IT-96-23, para. 543 (<https://www.legal-tools.org/doc/fd881d/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 431 ('*Katanga and Ngudjolo*, 30 September 2008') (<https://www.legal-tools.org/doc/67a9ec/>).

course with combatants, to serve as sexual slaves and to work in military camps servicing soldiers (*Katanga and Ngudjolo*, 30 September 2008, para. 434).

The SCSL Appeals Chamber in the *Brima* case has found the abduction and confinement of women to constitute forced marriage and consequently a crime against humanity. The Chamber concluded that forced marriage was distinct from sexual slavery. Accordingly,

While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife”, which could lead to disciplinary consequences for breach of this exclusive arrangement.³

In 2012 the Court in a decision on the *Taylor* case declared its preference for the term ‘forced conjugal slavery’. The Trial Chamber did not find the term ‘marriage’ to be helpful in describing the events that had occurred, in that it did not constitute marriage in the universally understood sense.⁴

Several arrest warrants at the ICC confirm reasonable grounds to believe that sexual slavery has been committed as part of attacks on civilian population and thus constituting crimes against humanity.⁵

³ See SCSL, *Prosecutor v. Brima*, Appeals Chamber, Judgment, 22 February 2008, SCSL-2004-16-A, para. 195 (<https://www.legal-tools.org/doc/4420ef/>).

⁴ SCSL, *Prosecutor v. Taylor*, Judgment, 18 May 2012, SCSL-03-01-T, para. 427 (<https://www.legal-tools.org/doc/8075e7/>).

⁵ See ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Decision on Prosecutor’s Application under Article 58, 13 July 2012, ICC-01/04-02/06-36-Red (public redacted version), (<https://www.legal-tools.org/doc/18c310/>); *Prosecutor v. Kony, Otti and Odhiambo*, Warrant of arrest for Joseph Kony issued on 8th July 2005 as amended on 27th September 2005, Pre-Trial Chamber II, 27 September 2005, ICC-02/04-01/05, para. 38 (<https://www.legal-tools.org/doc/b1010a/>); and *Prosecutor v. Kony, Otti and Odhiambo*, Warrant of Arrest for Vincent Otti, 8 July 2005, ICC-02/04-01/05-54, para. 17 (<https://www.legal-tools.org/doc/f7c78c/>).

Cross-references:

Articles 8(2)(b)(xxii) and 8(2)(e)(vi).

Doctrine:

1. Christopher K. Hall, Joseph Powderly and Niamh Hayes, “Article 7 Crimes against humanity, (g) ‘Sexual Slavery’ “, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 212–214. (<https://www.legal-tools.org/doc/040751/>).
2. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press. The Hague, 2005, pp. 250–251, mn. 728 (<https://www.legal-tools.org/doc/e35f82/>).
3. Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 2nd. ed., Cambridge University Press, 2010, p. 256 (<https://www.legal-tools.org/doc/f691a2/>).
4. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, Antwerpen/Oxford, 2005, pp. 137–141 (<https://www.legal-tools.org/doc/43fca9/>).

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Article 7(1)(g)-3

enforced prostitution,

The Elements of Crimes requires the (i) causing a person to engage in acts of a sexual nature (ii) by force or threat of force or under coercive circumstances and (iii) the perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts. Primarily the last point distinguishes it from sexual slavery. It can also be distinguished in that sexual slavery requires the exercise or any or all of the powers attaching to the rights of ownership. Enforced prostitution could, however, rise to the level of sexual slavery, should the elements of both crimes exist. In comparison with rape and sexual slavery, enforced prostitution can either be a continuing offence or constitute a separate act. Enforced prostitution is prohibited in the Geneva Convention (IV) as an example of an attack on a woman's honour and in Additional Protocol I as an outrage upon personal dignity.¹

Cross-references:

Articles 8(2)(b)(xxii) and 8(2)(e)(vi).

Doctrine:

1. Christopher K. Hall, Joseph Powderly and Niamh Hayes, "Article 7 Crimes against humanity, (g) 'Enforced prostitution' ", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 214–215. (<https://www.legal-tools.org/doc/040751/>).
2. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, p. 251, mn. 729–730 (<https://www.legal-tools.org/doc/e35f82/>).
3. Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 2nd. ed., Cambridge University Press, 2010, pp. 256–257 (<https://www.legal-tools.org/doc/f691a2/>).

¹ Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, (<https://legal-tools.org/doc/d5e260/>); Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/d9328a/>).

4. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, Antwerpen/Oxford, 2005, pp. 141–142 (<https://www.legal-tools.org/doc/43fca9/>).

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Article 7(1)(g)-4

forced pregnancy,

According to Article 7(2)(f) forced pregnancy means the unlawful confinement of a woman forcibly made pregnant. Unlawful confinement should be interpreted as any form of deprivation of physical liberty contrary to international law. The deprivation of liberty does not have to be severe and no specific time frame is required. The use of force is not required, but some form of coercion. To complete the crime, it is sufficient if the perpetrator holds a woman imprisoned who has been impregnated by someone else. The forcible impregnation may involve rape or other forms of sexual violence of comparable gravity. In addition to the mental requirements in Article 30, the perpetrator must act with the purpose of affecting the ethnic composition of any population or carrying out other grave violations of international law. National laws prohibiting abortion do not amount to forced pregnancy.

Cross-references:

Articles 8(2)(b)(xxii) and 8(2)(e)(vi).

Doctrine:

1. Christopher K. Hall, Joseph Powderly and Niamh Hayes, “Article 7 Crimes against humanity, (g) ‘Forced pregnancy’ “, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 215–216. (<https://www.legal-tools.org/doc/040751/>).
2. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 251–252, mn. 731–732 (<https://www.legal-tools.org/doc/e35f82/>).
3. Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 2nd. ed., Cambridge University Press, 2010, p. 257 (<https://www.legal-tools.org/doc/f691a2/>).
4. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, Antwerpen/Oxford, 2005, pp. 143–146 (<https://www.legal-tools.org/doc/43fca9/>).

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Article 7(1)(g)-5

enforced sterilization,

Enforced sterilization is a form of “[i]mposing measures intended to prevent births within the group” within the meaning of Article 6(d). It is carried out without the consent of a person. Genuine consent is not given when the victim has been deceived. Enforced sterilization includes depriving a person of their biological reproductive capacity, which is not justified by the medical treatment of the person. It does not include non-permanent birth-control methods. It is not restricted to medical operations but can also include the intentional use of chemicals for this effect. It arguably includes vicious rapes where the reproductive system has been destroyed. The Elements of Crimes provide a more specific definition of the criminal conduct. For the mental element Article 30 applies. Enforced sterilization may also fall under the chapeau of genocide if such intent is present.

Cross-references:

Articles 8(2)(b)(xxii) and 8(2)(e)(vi).

Doctrine:

1. Christopher K. Hall, Joseph Powderly and Niamh Hayes, “Article 7 Crimes against humanity, (g) ‘Enforced sterilization’ “, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 216. (<https://www.legal-tools.org/doc/040751/>).
2. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, p. 252, mn. 733 (<https://www.legal-tools.org/doc/e35f82/>).
3. Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 2nd. ed., Cambridge University Press, 2010, pp. 257–258 (<https://www.legal-tools.org/doc/f691a2/>).
4. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, Antwerpen/Oxford, 2005, p. 146 (<https://www.legal-tools.org/doc/43fca9/>).

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Article 7(1)(g)-6

or any other form of sexual violence of comparable gravity;

The provision has a catch-all character and requires that the conduct is comparable in gravity to the other acts listed in Article 7(1)(g). It concerns acts of a sexual nature against a person through the use of force or threat of force or coercion. The importance of distinguishing the different forms of sexual violence primarily lies in the level of harm to which the victim is subjected and the degree of severity, and therefore becomes a matter of sentencing.

It is generally held to include forced nudity, forced masturbation or forced touching of the body. The ICTR in *Akayesu* held that “sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact”.¹ The Trial Chamber in the case confirmed that forced public nudity was an example of sexual violence within its jurisdiction (*Akayesu*, 2 September 1998, para. 10 A). Similarly, the Trial Chamber of the ICTY in its *Kvočka* decision declared: “sexual violence is broader than rape and includes such crimes as sexual slavery or molestation”, and also covers sexual acts that do not involve physical contact, such as forced public nudity.² To the contrary, in the decision on the Prosecutor’s application for a warrant of arrest in the *Bemba* case, the Pre-Trial Chamber of the ICC did not include a charge of sexual violence as a crime against humanity in the arrest warrant, which had been based on allegations that the troops in question had forced women to undress in public in order to humiliate them, stating that “the facts submitted by the Prosecutor do not constitute other forms of sexual violence of comparable gravity to the other forms of sexual violence set forth in Article 7(1)(g)”.³

In the *Lubanga* case of the ICC, evidence of sexual violence was presented during the trial, including various forms of sexual abuse of girl sol-

¹ ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, para. 688 (*‘Akayesu, 2 September 1998’*) (<https://www.legal-tools.org/doc/b8d7bd/>).

² ICTY, *Prosecutor v. Kvočka*, Trial Chamber, Judgment, 2 November 2001, IT-98-30/1-T, para. 180 (<https://www.legal-tools.org/doc/34428a/>).

³ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber I, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08, para. 40 (<https://www.legal-tools.org/doc/fb80c6/>).

diers who were forcefully conscripted. However, no charges of sexual violence were brought. The Prosecution rather encouraged the Trial Chamber to consider evidence of sexual violence as an integral element of the recruitment and use of child soldiers.⁴ In the confirmation of charges in the *Muthaura and Kenyatta* case, Pre-Trial Chamber II chose not to charge forced male circumcision and penile amputation as sexual violence, but rather as inhumane acts. The Chamber held that “the evidence placed before it does not establish the sexual nature of the acts of forcible circumcision and penile amputation. Instead, it appears from the evidence that the acts were motivated by ethnic prejudice”.⁵ It argued that “not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence” (*Muthaura and Kenyatta*, 23 January 2012, para. 265).

Cross-references:

Articles 8(2)(b)(xxii) and 8(2)(e)(vi).

Doctrine:

1. Christopher K. Hall, Joseph Powderly and Niamh Hayes, “Article 7 Crimes against humanity, (g) ‘any other form of sexual violence’ “, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 216–218. (<https://www.legal-tools.org/doc/040751/>).
2. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 252–253, mn. 734 (<https://www.legal-tools.org/doc/e35f82/>).
3. Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 2nd. ed., Cambridge University Press, 2010, pp. 258–259 (<https://www.legal-tools.org/doc/f691a2/>).

⁴ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Prosecution’s Closing Brief, 1 June 2011, ICC-01/04-01/06-2748-Red, paras. 139, 142 and 205 (<https://www.legal-tools.org/doc/92ecf9/>).

⁵ ICC, *Prosecutor v. Muthaura and Kenyatta*, Pre-Trial Chamber I, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 266 (*Muthaura and Kenyatta*, 23 January 2012’) (<https://www.legal-tools.org/doc/4972c0/>).

4. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, Antwerpen/Oxford, 2005, pp. 147–152 (<https://www.legal-tools.org/doc/43fca9/>).

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Article 7(1)(h)

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

General Remarks:

Persecution has been included in every instrument defining crimes against humanity. Arguably, it is central to the concept of crimes against humanity, as being an act not criminalized also as a war crime or as an ordinary crime. Persecution seeks to criminalize massive violations of human rights, committed on discriminatory grounds. There was controversy among the drafters with regard to including persecution as a crime against humanity in the ICC Statute, as well as to the crime's exact definition.¹ The crime of persecution has been extensively dealt with in the case law of the ICTY.² None of the judgments before the ICC have addressed the elements of this crime.

Analysis:

i. Definition:

The full text of the definition of persecution in Article 7(1)(h) reads: “Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”. Article 7(2)(g) sets out that persecution means “the intentional and severe deprivation of fundamental

¹ Herman von Hebel and Darryl Robinson, “Crimes Within the Jurisdiction of the Court”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Kluwer Law International, Leiden, 1999, p. 101 (<https://www.legal-tools.org/doc/d71078/>).

² See Jonas Nilsson, “The Crime of Persecution in the ICTY Case-Law”, in Bert Swart, Alexander Zahar and Göran Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, 2011 (<https://www.legal-tools.org/doc/5b18fa/>).

rights contrary to international law by reason of the identity of the group or collectivity”.

In this respect, the ICC Statute differs significantly from other legal instruments, which include a considerably more succinct provision. For example, the equivalent provision in the Nuremberg Charter (reproduced in the ICTY and ICTR Statutes), reads: “persecutions on political, racial or religious grounds”.³ The reason for the more elaborate definition was a concern among many delegations at the Rome Conference that persecution might be interpreted to include any kind of discriminatory practices.⁴ The Elements of Crimes clarifies that the perpetrator must have targeted “one or more persons” (Elements of Crimes, Article 7(1)(h), nos. 1–2). Besides that, the Elements of Crimes do not add anything to the text in the Statute.

ii. Requirements:

a. Material Elements:

The material elements of persecution are: (i) severe deprivation of fundamental rights contrary to international law; (ii) on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law; and (iii) in connection with any act referred to in Article 7(1) or any crime within the jurisdiction of the Court. According to one commentator, the requirement of connection with other crimes means in practice war crimes, as “[p]rosecuting persecution in the presence of genocide would also be totally redundant”.⁵ Another commentator argues that “[i]n practical terms, the requirement should not prove unduly restrictive, as a quick review of historical acts of persecution shows that persecution is inevitably accompanied by such inhumane acts”.⁶ With regard to the element of “se-

³ Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945 (<https://www.legal-tools.org/doc/64ffdd/>).

⁴ Georg Witschel and Wiebke Rückert, “Article 7(1)(h) – Crime Against Humanity of Persecution”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, New York, 2001, pp. 94–95 (<https://www.legal-tools.org/doc/e34f81/>).

⁵ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., Oxford University Press, 2016, p. 199 (<https://www.legal-tools.org/doc/b7432e/>).

⁶ Darryl Robinson, “Developments in International Criminal Law: Defining Crimes Against Humanity at the Rome Conference”, in *American Journal of International Law*, 1999, no. 93, p. 55.

vere deprivation of fundamental rights”, the charges confirmed before the ICC until now have been limited to such crimes which have also been charged separately as other crimes against humanity.⁷

b. Mental Elements:

The definition in Article 7 sets out that the severe deprivation of fundamental rights must be committed intentionally. In addition, it expresses that the deprivation must be committed on discriminatory grounds. Finally, with regard to the third material element mentioned above (“in connection with any act referred to in Article 7(1) or any crime within the jurisdiction of the Court”), the Elements of Crimes clarifies that no additional mental element is necessary (Elements of Crimes, Article 7(1)(h) footnote 22).

Doctrine:

1. Dermot Groome, “Persecution”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, pp. 453–454 (<https://www.legal-tools.org/doc/7be65f/>).
2. Christopher K. Hall, Joseph Powderly and Niamh Hayes, “Article 7 Crimes against humanity, (h) ‘Persecution’”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 219–226, 275–282. (<https://www.legal-tools.org/doc/040751/>).
3. Herman Von Hebel and Darryl Robinson, “Crimes Within the Jurisdiction of the Court”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Kluwer Law International, Leiden, 1999, pp. 90–103 (<https://www.legal-tools.org/doc/d71078/>).

⁷ ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges against Laurent Gbagbo, 12 June 2014, ICC-02/11-01/11-656-Red (public redacted version), para. 204, compared with paras. 193–199 (<https://www.legal-tools.org/doc/5b41bc/>); *Prosecutor v. Muthaura et al.*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red (public redacted version), para. 283, compared with paras. 233, 243, 257, 270–271, 275–277 (<https://www.legal-tools.org/doc/4972c0/>); *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, paras. 271–272, compared with paras. 225–226, 228–239, 241–242, 248–251, 253–266 (<https://www.legal-tools.org/doc/96c3c2/>).

4. Timothy L.H. McCormack, “Crimes Against Humanity”, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford/Portland, 2004, pp. 196–197 (<https://www.legal-tools.org/doc/ba5c37/>).
5. Jonas Nilsson, “The Crime of Persecution in the ICTY Case-Law”, in Bert Swart, Alexander Zahar and Göran Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, Oxford, 2011, pp. 219–246 (<https://www.legal-tools.org/doc/5b18fa/>).
6. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 194–202 (<https://www.legal-tools.org/doc/b7432e/>).
7. Georg Witschel and Wiebke Rückert, “Article 7(1)(h) – Crime Against Humanity of Persecution”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 94–97 (<https://www.legal-tools.org/doc/e34f81/>).
8. Darryl Robinson, “Developments in International Criminal Law: Defining ‘Crimes Against Humanity’ at the Rome Conference”, in *American Journal of International Law*, 1999, no. 93, p. 43.

Author: Jonas Nilsson.

Article 7(1)(i)

(i) Enforced disappearance of persons;

General Remarks:

The “systematic practice” of enforced disappearance was considered “the nature of crimes against humanity” by the UN General Assembly through a resolution in 1992.¹ Similarly, the International Convention for the Protection of All Persons from Enforced Disappearance states that enforced disappearance “in certain circumstances defined in international law” constitutes a crime against humanity.² None of the judgments before the ICC have addressed the elements of this crime. The complex nature of the crime is acknowledged in the Elements of Crimes: “it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose” (Elements of Crimes, Article 7(1)(i), footnote 23).

Analysis:

i. Definition

According to Article 7(2)(i), enforced disappearance of persons means “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time”. The Elements of Crimes clarifies that both the deprivation of liberty and the refusal to acknowledge this deprivation or to give information on the fate or whereabouts of such person or persons must have been carried out by, or with the authorization, support or acquiescence of, a State or political organization.

¹ Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/47/133, 18 December 1992, Preamble (<https://www.legal-tools.org/doc/534c27/>).

² International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, Preamble (<https://www.legal-tools.org/doc/0d0674/>).

ii. Requirements

a. Material Elements

The two central material elements are: (i) an arrest, detention or abduction of a person or persons, and (ii) a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons. According to the Elements of Crimes, there must be an objective nexus between these material elements (Elements of Crimes, Article 7(1)(i), item 2).

Furthermore, the deprivation of liberty needs to have been carried out by, or with the authorization, support or acquiescence of, a State or political organization. In this respect, there is an overlap with one of the general elements of crimes against humanity: “part of a widespread or systematic attack directed against any civilian population”, with “attack” being defined as “a course of conduct [...] pursuant to or in furtherance of a State or organizational policy to commit such attack” (Article 7(1), and 7(2)(a)).

b. Mental Elements

According to the Elements of Crimes, the perpetrator must be aware that the deprivation of liberty “would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons” or that “[s]uch refusal was preceded or accompanied by that deprivation of freedom”.

In addition, the definition adds a specific intent for this crime: “the intention of removing [the person or persons deprived of their liberty] from the protection of the law for a prolonged period of time”.

Doctrine:

1. M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, 2011, pp. 448–452 (<https://www.legal-tools.org/doc/83b13d/>).
2. Christopher K. Hall and Larissa van den Herik, “Article 7 Crimes Against Humanity, (i) ‘Enforced Disappearance of Persons’”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 226–232, 286–292 (<https://www.legal-tools.org/doc/040751/>).
3. Timothy L.H. McCormack, “Crimes Against Humanity”, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent In-*

- ternational Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford/Portland, 2004, pp. 197–198 (<https://www.legal-tools.org/doc/ba5c37/>).
4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 202–205 (<https://www.legal-tools.org/doc/b7432e/>).
 5. Marieke Wierda and Thomas Unger, “Enforced Disappearances”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, pp. 309–310 (<https://www.legal-tools.org/doc/7be65f/>).
 6. Georg Witschel and Wiebke Rückert, “Article 7(1)(i)-Crime Against Humanity of Enforced Disappearance of Persons”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 98–103 (<https://www.legal-tools.org/doc/e34f81/>).

Author: Jonas Nilsson.

Article 7(1)(j)

(j) The crime of apartheid;

General Remarks:

The crime of apartheid was condemned as a crime against humanity by the UN General Assembly through a resolution in 1966¹ and in the International Convention on the Suppression and Punishment of the Crime of Apartheid.² None of the judgments before the ICC have addressed the elements of this crime. A number of authors have criticized the inclusion of ‘the crime of apartheid’ in the list of crimes against humanity in the ICC Statute as legally unsound.³ These authors argue that the crime is fully covered by the crime of persecution as a crime against humanity and that there is therefore no need for it.

Analysis:

i. Definition:

According to Article 7(2)(h), the crime of apartheid encompasses “inhumane acts of a character similar to those referred to in paragraph 1 [of Article 7], committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime”. The Elements of Crimes clarifies that the crime may be committed by an act against one or more persons, that “character” refers to the nature and gravity of the act, and that the perpetrator need to be aware of the factual circumstances that established the character of the act.

¹ The policies of apartheid of the Government of the Republic of South Africa, UN Doc. A/RES/2202(XXI), 16 December 1966, para. 1 (<https://www.legal-tools.org/doc/317152/>).

² International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973 (<https://www.legal-tools.org/doc/d9644f/>).

³ Alexander Zahar, “Apartheid as an International Crime”, in Antonio Cassese (ed.), in *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, pp. 245–246 (<https://www.legal-tools.org/doc/7be65f/>) and Timothy L.H. McCormack, “Crimes Against Humanity”, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford-Portland, 2004, pp. 198–200 (<https://www.legal-tools.org/doc/ba5c37/>).

ii. Requirements:**a. Material Elements:**

The material elements of the crime of apartheid bear similarities with the crimes of persecution and other inhumane acts, in that it overlaps substantially with other crimes against humanity. With regard to which acts it encompasses, the definition itself refers to the other crimes against humanity. The act or acts of the crime of apartheid must be of “a character similar to those referred to in paragraph 1 [of Article 7]”, meaning of the same nature and gravity as those acts. Therefore, the acts of the crime of apartheid could also be one of those listed acts, for example murder and torture. According to the definition, the act or acts must be “committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups”. With regard to this element there is a clear overlap with one of the general elements of crimes against humanity: “part of a widespread or systematic attack directed against any civilian population”, with “attack” being defined as “a course of conduct [...] pursuant to or in furtherance of a State or organizational policy to commit such attack” (Article 7(1) and (2)(a)). It is difficult to imagine any scenario in which the general elements have been proven (which they have to for the act to qualify as a crime against humanity), but the specific element of the crime of apartheid has not. Therefore, at least in practice, this element of the crime of apartheid does not amount to a distinct element of the crime.

b. Mental Elements:

Besides the mental elements of the crime, as set out in Article 30 of the Rome Statute, the definition adds a specific intent for this crime: “the intention of maintaining [the institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups]”.

Doctrine:

1. M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, 2011, pp. 448–452 (<https://www.legal-tools.org/doc/83b13d/>).
2. Christopher K. Hall and Larissa van den Herik, “Article 7: Crimes Against Humanity, (j) ‘The Crime of Apartheid’”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal*

- Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 232–235, 282–286 (<https://www.legal-tools.org/doc/040751/>).
3. Timothy L.H. McCormack, “Crimes Against Humanity”, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford/Portland, 2004, pp. 198–200 (<https://www.legal-tools.org/doc/ba5c37/>).
 4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 205–206 (<https://www.legal-tools.org/doc/b7432e/>).
 5. Georg Witschel and Wiebke Rückert, “Article 7(1)(j) – Crime Against Humanity of Apartheid”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 103–106 (<https://www.legal-tools.org/doc/e34f81/>).
 6. Alexander Zahar, “Apartheid as an International Crime”, in Antonio Cassese (ed.), in *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, pp. 245–246 (<https://www.legal-tools.org/doc/7be65f/>).

Author: Jonas Nilsson.

Article 7(1)(k)

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

General Remarks:

The definitions of crimes against humanity in the Nuremberg Charter, Control Council Law No. 10, and the ICTY and ICTR Statutes, have all included a residual provision of this kind, indicating that the list of expressly named acts is not exhaustive. It reflects the sentiment that it is not possible to create such an exhaustive list. According to one Author: “The capacity of human beings to concoct novel forms of atrocity is a constant source of discomfort and shame and it is critical that provisions exist to facilitate prosecution of such actions not currently known or experienced”.¹ The risk of creating an open-ended definition was countered in the drafting of the ICC Statute by clarifying the terms with the *ejusdem generis* rule.² By linking it with the other crimes against humanity, the drafters sought to achieve a more precise definition and thus consistency with the principle of *nullum crimen sine lege*.³

Analysis:

i. Definition:

The definition in Article 7(1)(k) reads: “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”. Article 7(2) does not contain any further clarification of the provision. The Elements of Crimes clarifies that “character” refers to the nature and gravity of the act (Elements of Crimes, footnote

¹ Timothy L.H. McCormack, “Crimes Against Humanity”, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford-Portland, 2004, p. 201 (<https://www.legal-tools.org/doc/ba5c37/>).

² Herman von Hebel and Darryl Robinson, “Crimes Within the Jurisdiction of the Court”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Kluwer Law International, Leiden, 1999, p. 102 (<https://www.legal-tools.org/doc/d71078/>).

³ Georg Witschel and Wiebke Rückert, “Article 7(1)(h) – Crime Against Humanity of Persecution”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, New York, 2001, p. 107 (<https://www.legal-tools.org/doc/e34f81/>).

30). Further, the perpetrator must be aware of the factual circumstances that established the character of the act.

ii. Requirements:

a. Material Elements:

There are two material elements for this crime: (i) an act causing great suffering, or serious injury to body or to mental or physical health; and (ii) an act of similar character (nature and gravity) to any other act in Article 7(1).

The Pre-Trial Chamber in *Katanga and Ngudjolo* contrasted the provision in the ICC Statute with the equivalent provision in the Nuremberg Charter and the ICTY and ICTR Statutes:

the [ICC] Statute has given to ‘other inhumane acts’ a different scope than its antecedents like the Nuremberg Charter and the ICTR and ICTY Statutes. The latter conceived ‘other inhumane acts’ as a ‘catch all provision’, leaving a broad margin for the jurisprudence to determine its limits. In contrast, the Rome Statute contains certain limitations, as regards to the action constituting an inhumane act and the consequences required as a result of that action.⁴

In this respect, it first clarified that none of the acts constituting crimes against humanity according to Article 7(1)(a) to (j) could simultaneously be considered as an other inhumane act (*Katanga and Ngudjolo*, 30 September 2008, para. 452). Referring to the principle of *nullum crimen sine lege*, it added that inhumane acts are to be considered “as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law” (para. 448). Whether a particular act meets these requirements has to be determined with considerations given to all the factual circumstances (para. 449).

In this respect, the Pre-Trial Chamber referred primarily to ICTY case law,⁵ which might appear odd considering that the Pre-Trial Chamber

⁴ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, para. 450 (‘*Katanga and Ngudjolo*, 30 September 2008’) (<https://www.legal-tools.org/doc/67a9ec/>).

⁵ ICTY, *Prosecutor v. Kupreškić et al.*, Trial Chamber, Judgement, 14 January 2000, IT-95-16, para. 566 (<https://www.legal-tools.org/doc/5c6a53/>); *Prosecutor v. Stakić*, Trial Chamber, Judgement, 31 July 2003, IT-97-24, para. 721 (<https://www.legal-tools.org/doc/32ecfb/>); *Prosecutor v. Vasiljević*, Appeals Chamber, Judgment, 25 February 2004, IT-98-32, para. 165 (<https://www.legal-tools.org/doc/e35d81/>).

expressly attempted to distinguish the ICTY provision from that in the ICC Statute. With regard to consequences, the Pre-Trial Chamber merely reiterated the words from the Statute: “great suffering, or serious injury to body or to mental or physical health” (*Katanga and Ngudjolo*, 30 September 2008, para. 453).

The Pre-Trial Chamber in *Muthaura et al.* did not contrast the provision on “other inhumane acts” with the equivalent provisions in other legal instruments. It did, however, consider that the provision “must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity”.⁶ It also considered that if a conduct could be charged as another crime against humanity, its charging as other inhumane acts would be impermissible (*Muthaura et al.*, 23 January 2012, para. 269). The Pre-Trial Chamber confirmed charges of acts causing physical injury (including forcible circumcision, penile amputation, and mutilations) and acts causing mental suffering on the part of victims whose family members were killed in front of their eyes (paras. 267–268, 270–277). However, with regard to the destruction or vandalizing of property and businesses the Pre-Trial Chamber did not consider that this conduct caused “serious injury to mental health” within the definition of other inhumane acts.

b. Mental Elements:

The definition in the Statute and the Elements of Crimes sets out that the perpetrator must have inflicted great suffering, or serious injury to body or to mental or physical health intentionally. Further, the perpetrator must have been aware of the factual circumstances that established the character similar to any other act referred to in Article 7(1) of the ICC Statute.

The Pre-Trial Chamber in the case *Prosecutor v. Katanga and Ngudjolo* declined to confirm charges of attempted murder under the provision of other inhumane acts, for reasons of lack of *mens rea*: “the clear intent to kill persons cannot be transformed into intent to severely injure persons by means of inhumane acts solely on the basis that the result of the conduct was different from that which was intended and pursued by the perpetrators” (*Katanga and Ngudjolo*, 30 September 2008, para. 463).

⁶ ICC, *Prosecutor v. Mathaura et al.*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red (public redacted version), para. 269 (*Mathaura et al.*, 23 January 2012’) (<https://www.legal-tools.org/doc/4972c0/>).

Cross-references:

Starvation in Articles 6(c); 7(1)(b) and (j); 7(2)(b); 8(2)(a)(iii); 8(2)(b)(ii), (v), (xiii) and (xxv); and 8(2)(c)(i).

Doctrine:

1. Christopher Hall and Carsten Stahn, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Court: A Commentary*, 3rd ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 235–242 (<https://www.legal-tools.org/doc/040751/>).
2. Herman Von Hebel and Darryl Robinson, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Kluwer Law International, Leiden, 1999, pp. 90–103 (<https://www.legal-tools.org/doc/d71078/>).
3. Timothy L.H. McCormack, “Crimes Against Humanity”, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford/Portland, 2004, pp. 200–201 (<https://www.legal-tools.org/doc/ba5c37/>).
4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., Oxford University Press, 2016, pp. 206–209 (<https://www.legal-tools.org/doc/b7432e/>).
5. Georg Witschel and Wiebke Rückert, “Article 7(1)(k)-Crime Against Humanity of Other Inhumane Acts”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 106–108 (<https://www.legal-tools.org/doc/e34f81/>).
6. Alexander Zahar, “Other Inhumane Acts”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, p. 448 (<https://www.legal-tools.org/doc/7be65f/>).

Author: Jonas Nilsson.

Article 7(2)(a)

2. For the purpose of paragraph 1:

(a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

The author refers to the commentary on Article 7(1).

Doctrine: For the bibliography, see the comment “Article 7(1): Mental Element”.

Author: Jonas Nilsson.

Article 7(3)

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

In United Nations usage, the term ‘gender’ refers to socially constructed roles played by women and men that are ascribed to them based on their sex. While ‘sex’ refers to physical and biological characteristics of women and men, ‘gender’ is used to refer to the explanations for observed differences between men and women based on socially assigned roles.¹ According to some commentators, the definition in Article 7(3) seeks to balance both aspects (Hall, Powderly and Hayes, 2016, p. 293). None of the judgments before the ICC has addressed the definition.

Doctrine:

1. Christopher Hall *et al.*, “Article 7”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden- Baden, 2016, pp. 144–294 (<https://www.legal-tools.org/doc/040751/>).
2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 209–211 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Jonas Nilsson.

¹ Christopher Hall, Joseph Powderly and Niamh Hayes, “Article 7 Crimes against humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 293 (<https://www.legal-tools.org/doc/040751/>).

Article 8(1)

Article 8²

War Crimes

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

[...]

² Paragraphs 2 (e) (xiii) to 2 (e) (xv) were amended by resolution RC/Res.5 of 11 June 2010 (adding paragraphs 2 (e) (xiii) to 2 (e) (xv)).

In contrast to crimes against humanity, plan, policy, and scale are not elements of war crimes. One single act may constitute a war crime. However, it is unlikely that a single act would meet the gravity threshold in Article 17(1)(d).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 380–81 (<https://www.legal-tools.org/doc/01addc/>).
2. Michael Cottier, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 321–322 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C Asser Press, The Hague, 2005, p. 269 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(a)

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

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

General Remarks:

War crimes are crimes committed in time of armed conflict. As there is no general definition of an armed conflict in the ICC Statute or the Elements of Crimes the Court has relied on ICTY jurisprudence to define ‘armed conflict’: “an armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State”.¹

The crimes listed in Article 8(2) can be perpetrated in both international and non-international armed conflicts.² Whilst Articles 8(2)(a) and (b) cover acts committed in an international armed conflict, Articles 8(2)(c) and (e) refer to acts committed in a non-international armed conflict.

Following the *Tadić* jurisprudence of the ICTY that refers to mixed conflicts, that is, conflicts that are both international and non-international,³ the ICC has stated that (1) the nature of a conflict can change over time⁴ and (2) conflicts of different nature can take place on the same territory.⁵ As a result any determination of the qualification of an armed conflict must be based on an evaluation of the facts at the relevant time.

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment, 14 March 2012, ICC-01/04-01/06-2842, para. 533 (*‘Lubanga, 14 March 2012’*) (<https://www.legal-tools.org/doc/677866/>).

² ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 216 (*‘Bemba, 15 June 2009’*) (<https://www.legal-tools.org/doc/07965c/>).

³ ICTY, *Tadić*, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-A, para. 77 (*‘Tadić, 2 October 1995’*) (<https://www.legal-tools.org/doc/866e17/>).

⁴ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgment, 7 March 2014, ICC-01/04-01/07-3436, para. 1181 (*‘Katanga, 7 March 2014’*) (<https://www.legal-tools.org/doc/f74b4f/>).

⁵ ICC, *Prosecutor v. Lubanga*, 14 March 2012, para. 540 (<https://www.legal-tools.org/doc/677866/>); *Katanga*, 7 March 2014, paras. 1174 and 1182; *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Decision on the Confirmation of Charges, 9 June 2014, ICC-01/04-02/06-309, para. 33 (<https://www.legal-tools.org/doc/5686c6/>).

Analysis:

Article 8(2)(a) states that “For the purpose of this Statute, ‘war crimes’ means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention [...]”.⁶

i. Scope of Application:

The four Geneva Conventions of 1949 apply in international armed conflict. Neither the ICC Statute nor the Elements of Crimes define the concepts of ‘armed conflict’ and ‘international armed conflict’ and thus recourse must be had to the principal rules of international law, and more specifically, Common Article 2 of the Geneva Conventions which state that international armed conflicts involve two or more State parties to the conventions and do not necessitate a threshold of violence to apply (*Lubanga*, 14 March 2012, para. 541; *Katanga*, 7 March 2014, para. 1177).

The concept of an international armed conflict also includes military occupation (footnote 34 of the Elements of Crimes; *Katanga*, 7 March 2014, para. 1179). Whether the initial intervention that led to the occupation is lawful and whether the occupation was met with resistance is of no relevance:⁷ a “territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised”.⁸ In *Katanga* the ICC developed a list of elements to be taken into consideration when applying this definition (*Katanga*, 7 March 2014, para. 1180).

Following the *Tadić* jurisprudence of the ICTY⁹ the ICC has interpreted the definition of an international armed conflict to include conflicts in which a State faces an armed opposition group when “(i) another State

⁶ Geneva Conventions I-IV, 12 August 1949 (‘GC I-IV’) (GC I: <https://www.legal-tools.org/doc/baf8e7/>; GC II: <https://www.legal-tools.org/doc/0d0216/>; GC III: <https://www.legal-tools.org/doc/365095/>; GC IV: <https://www.legal-tools.org/doc/d5e260/>).

⁷ ICC OTP, “Report on Preliminary Examination Activities 2016”, 14 November 2016, para. 158 (<https://www.legal-tools.org/doc/f30a53/>).

⁸ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803, para. 212 (‘*Lubanga*, 29 January 2007’) (<https://www.legal-tools.org/doc/b7ac4f/>); *Lubanga*, 14 March 2012, para. 542; *Katanga*, 7 March 2014, para. 1179.

⁹ ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Judgement, 15 July 1999, IT-94-1-A, para. 84 (‘*Tadić*, 15 July 1999’) (<https://www.legal-tools.org/doc/8efc3a/>).

intervenes in that conflict through its troops (direct intervention), or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention”);¹⁰ in this instance the conflict is internationalised. However, assistance provided by foreign States to the State fighting an armed opposition group does not lead to the internationalisation of the conflict.¹¹ The same applies if foreign States support an armed group fighting on the State's side or with the consent of the State.¹² Likewise, armed opposition groups siding with the State do not internationalise the conflict.¹³ To determine whether a situation falls within situation (ii) the ICC follows the “overall control” test that was devised by the ICTY in *Tadić* (*Tadić*, para. 137; see also *Lubanga*, 29 January 2007, para. 211; *Lubanga*, 14 March 2012, para. 541; *Bemba*, 21 March 2016, para. 130; *Ongwen*, 4 February 2021, para. 2687). It specifies that when a State plays 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” then the conflict becomes international (*Lubanga*, 29 January 2007, para. 211; *Lubanga*, 14 March 2012, para. 541; *Katanga*, 7 March 2014, para. 1178; *Bemba*, 21 March 2016, para. 655). In *Ntaganda* the Court added that there was no need to show that specific orders or instructions relating to single military actions were given (*Ntaganda*, 8 July 2019, para. 727).

To sum up, “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*, 15 June 2009, para. 223; *Katanga*, 7 March 2014, para. 1177).

¹⁰ *Lubanga*, 14 March 2012, para. 541; *Bemba*, 15 June 2009, para. 220; *Katanga*, 7 March 2014, para. 1177; see also ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Judgment, 4 February 2021, ICC-02/04-01/15-1762-Red (public redacted version), para. 2686 (*Ongwen*, 4 February 2021’) (<https://www.legal-tools.org/doc/kv27ul/>).

¹¹ *Bemba*, 15 June 2009, para. 246; ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red (public redacted version), para. 101 (<https://www.legal-tools.org/doc/63028f/>).

¹² ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Judgment, 8 July 2019, ICC-01/04-02/06-2359, para. 726 (*Ntaganda*, 8 July 2019’) (<https://www.legal-tools.org/doc/80578a/>).

¹³ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Judgment, 21 March 2016, ICC-01/05-01/08-3343, paras. 653–654 (*Bemba*, 21 March 2016’) (<https://www.legal-tools.org/doc/edb0cf/>).

ii. Concept of Grave Breaches:

Each Geneva Convention has its own list of grave breaches (Article 50 GC I, Article 51 GC II, Article 130 GC III and Article 147 GC IV). The ICC Statute is an accurate reflection of the grave breaches provisions of the four Geneva Conventions.

iii. Acts against Persons or Property Protected under the Geneva Conventions:

For the grave breaches regime under the Geneva Conventions to apply the acts must have been committed against protected persons (for example, wounded, injured, sick and/or shipwrecked combatants, prisoners of war and civilians in occupied territory) and property (for instance, movable and non-movable property in occupied territory).¹⁴ This is repeated in footnote 35 of the Elements of Crimes: “all victims must be ‘protected persons’ under one or more of the Geneva Conventions of 1949”. In *Katanga and Ngudjolo*, the ICC defined protected persons as civilians who are “in the hands of a party to the conflict or occupying power of which they are not nationals”.¹⁵

Whilst the GC I, II and III do not refer to the nationality of the member of the armed forces, Article 4 GC IV explicitly considers protected persons as those who “find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict of Occupying Power of which they are not nationals”. Footnote 33 of the Elements of Crimes explains that “[w]ith respect to nationality, it is understood that the perpetrator needs only to know that the victim belonged to an adverse party to the conflict” thereby seemingly adopting the broad definitional approach of the ICTY whereby allegiance, rather than nationality, is key to determining whether the individual is to be granted protection under the GC IV (*Tadić*, 2 October 1995, para. 76; *Tadić*, 15 July 1999, paras. 164–166). In *Katanga and Ngudjolo* the ICC endorsed this approach, specifying that “individual civilians [...] automatically become protected persons within the meaning of Article 4 GC IV, provided they do not claim allegiance to the party in question” (*Katanga and Ngudjolo*, 30 September 2008, para. 293).

¹⁴ See, for example, ICTY, *Prosecutor v. Blaškić*, Trial Chamber, Judgement, 3 March 2000, IT-95-14, para. 157 (<https://www.legal-tools.org/doc/e1ae55/>).

¹⁵ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, para. 289 (*Katanga and Ngudjolo*, 30 September 2008”) (<https://www.legal-tools.org/doc/67a9ec/>).

So far no such cases have been decided by the ICC. Generally, it is rather rare for international criminal tribunals to deal with violations of the first three Geneva Conventions.

iv. Awareness:

Unlike for crimes prosecuted before the ICTY, which require that the perpetrator was aware that his or her acts were linked to a conflict of an international nature,¹⁶ the ICC Statute only requires 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”” (Elements of Crimes, Article 8, Introduction) and this was repeated in *Ongwen* (*Ongwen*, 4 February 2021, para. 2692). Whilst there is no need to show that the individual knew there was an armed conflict (*Lubanga*, 14 March 2012, para. 1016) it must be proven that the individual had sufficient awareness of elements indicating the existence of fighting (*Ntaganda*, 8 July 2019, para. 733). There must however be a nexus between the act and the conflict, which means that “the armed conflict must play a major part in the perpetrator’s decision, in his or her ability to commit the crime or the manner in which the crime was ultimately committed” (*Katanga*, 7 March 2014, para. 1176; see also *Ntaganda*, 8 July 2019, para. 731).

However, both courts require that the individual was aware that the individuals or property were protected under one or more of the Geneva Conventions (Elements of Crimes, Article 8(2)(a)(i), footnote 32). It is sufficient to show that the perpetrator was aware of the “factual circumstances that established [the] status [of the individuals]” (*Katanga and Ngudjolo*, 30 September 2008, para. 297).

Doctrine:

1. Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, pp. 32–79 (<https://www.legal-tools.org/doc/415188/>).
2. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 379–426 (<https://www.legal-tools.org/doc/01addc/>).

¹⁶ ICTY, *Prosecutor v. Naletilić and Martinović*, Appeals Chamber, Judgement, 3 May 2006, IT-98-34-A, paras. 110–120 (<https://www.legal-tools.org/doc/94b2f8/>).

3. Knut Dörmann, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 322–329 (<https://www.legal-tools.org/doc/040751/>).
4. Antonio Cassese, *International Criminal Law*, 3rd. ed., Oxford University Press, 2013, pp. 63–83 (<https://www.legal-tools.org/doc/7ca295/>).
5. Robert Cryer, Darryl Robinson and Sergey Vasiliev (eds.), *An Introduction to International Criminal Law and Procedure*, 4th. ed., Cambridge University Press, 2019, pp. 259–296.
6. Anthony Cullen, “War Crimes”, in William A. Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law*, Routledge, London, 2011, pp. 139–154 (<https://www.legal-tools.org/doc/780dbc/>).
7. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2002, pp. 17–37 (<https://www.legal-tools.org/doc/b07fe3/>).
8. William A. Schabas, *An Introduction to the International Criminal Court*, 6th. ed., Cambridge University Press, 2020, pp. 125–127 (<https://www.legal-tools.org/doc/e9fb2f/>).
9. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 213–300 (<https://www.legal-tools.org/doc/b7432e/>).

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Article 8(2)(a)(i)

(i) *Wilful killing;*

General Remarks:

The wilful killing of a protected person is a grave breach under all four Geneva Conventions of 1949. According to the Commentary to Article 51 of Geneva Convention (II) of August 12, 1949, for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, there is no difference between the notion of ‘wilful killing’ in the grave breaches provisions and the notion of ‘murder’ as prohibited under Common Article 3 of the Geneva Conventions of 1949.¹

Analysis:

Material Elements:

The *actus reus* of this crime is defined in the Elements of Crimes as: (i) the perpetrator killed one or more persons; and (ii) such person or persons were protected under one or more of the Geneva Conventions of 1949.

The Elements of Crimes provides that the term ‘killed’ is interchangeable with the term “caused death”. The crime can be committed by either an act or omission.² In *Katanga and Ngudjolo*, Pre-Trial Chamber I adopted the same approach as the ICTY that the conduct of the accused must be a substantial cause of the death of the victim.³

Those persons that parties to the conflict are obliged to protect under the Geneva Conventions of 1949 are defined in Articles 13, 24, 25 and 26 Geneva Convention I, Articles 13, 36 and 37 Geneva Convention II, Article 4 Geneva Convention III and Articles 4, 13 and 20 Geneva Convention IV.⁴

¹ International Committee of the Red Cross, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Cambridge, 2017, para. 3060.

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 287 (‘*Katanga and Ngudjolo*, 30 September 2008’) (<https://www.legal-tools.org/doc/67a9ec/>).

³ *Katanga and Ngudjolo*, 30 September 2008, para. 296; see also ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Judgement, 16 November 1998, IT-96-21-T, para. 424 (<https://www.legal-tools.org/doc/6b4a33/>).

⁴ Geneva Conventions I-IV, 12 August 1949 (‘GC I-IV’) (GC I: <https://www.legal-tools.org/doc/baf8e7/>; GC II: <https://www.legal-tools.org/doc/0d0216/>; GC III: <https://www.legal-tools.org/doc/365095/>; GC IV: <https://www.legal-tools.org/doc/d5e260/>). See also Protocol

Protected persons include the wounded, sick and shipwrecked, medical, humanitarian and religious personnel, prisoners of war, and civilians not directly participating in the hostilities. The definition of protected persons under Article 4 GC IV provides that protected persons include individual civilians who find themselves “in the hands of a Party to the Conflict or Occupying Power of which they are not nationals”. According to the Commentary to Article 4 GC IV, “in the hands of” is used in an extremely general sense and should be understood to mean the person is in the territory which is under the control of a party to the conflict.⁵ Article 50(1) AP I extended the definition of civilians (and as such, protected persons) to those who do not belong to any categories referred to in Article 43 AP I (armed forces). In addition, Article 50(1) AP I establishes a presumption in favour of civilian status in cases of doubt. Accordingly, the Elements of Crimes notes in respect to nationality that the perpetrator need only know that the victim belonged to an adverse party to the conflict. The *ad hoc* Tribunals also interpreted this requirement as allegiance to a party to the conflict and correspondingly, control by this party over persons in a given territory, as being regarded “as the crucial test”, rather than “nationality”.⁶ This approach was adopted by the ICC in *Katanga and Ngudjolo*, (*Katanga and Ngudjolo*, 30 September 2008, paras. 289–292). In this decision, Pre-Trial Chamber I noted that Article 8(2)(a)(i) applies to those cases in which protected civilians are killed “in the hands of” a party to the conflict. Accordingly, as the attacking forces of a party to the conflict gradually gain control of a targeted village, individual civilians in these successive areas automatically become protected persons within the meaning of Article 4 GC IV, provided they do not claim allegiance to the party in question (para. 293). In addition, the Pre-Trial Chamber noted that Article 8(2)(a)(i) of the ICC Statute also applies to the wilful killing of the protected persons by an attacking force, when such killings occur after the overall attack has ended,

(I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977, Articles 10, 11, 15, 17, 71, 74–77, and 79 (‘AP I’) (<https://www.legal-tools.org/doc/d9328a/>).

⁵ Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949 Commentary – IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva 1958, p. 47 (<https://www.legal-tools.org/doc/7d971f/>). See also ICTY, *Prosecutor v. Naletilić and Martinović*, Trial Chamber, Judgement, 31 March 2003, IT-98-34-T, paras. 203, 208, 221 (<https://www.legal-tools.org/doc/f2cfeb/>).

⁶ ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Judgement, 15 July 1999, IT-94-1-A, para. 166 (<https://www.legal-tools.org/doc/8efc3a/>).

and defeat or full control of the targeted village has been secured (para. 294).

Mental Elements:

In addition to the first two elements, the Prosecution must establish that: (iii) the perpetrator was aware of the factual circumstances that established that protected status; and (iv) the conduct took place in the context of and was associated with an international armed conflict. As no specific mental element is established in the Elements of Crimes, reference should be made to Article 30 requirements of intent and knowledge (*Katanga and Ngudjolo*, 30 September 2008, para. 295). The *ad hoc* Tribunals interpreted the term ‘wilfully’ as including both intention or recklessly, sometimes referred to as *dolus eventualis*, that is, the perpetrator intended to cause serious bodily harms and was reasonably aware that death was a likely consequence of their actions.⁷ However, in *Katanga and Ngudjolo*, Pre-Trial Chamber I held that the offence includes the *mens rea* of “first and foremost, *dolus directus* in the first degree” (*Katanga and Ngudjolo*, 30 September 2008, para. 295). *Dolus directus* refers those situations in which the suspect (i) knows that his or her actions or omissions will bring about the objective elements of the crime, and (ii) undertakes such actions or omissions with the concrete intent to bring about the objective elements of the crime. This definition was set forth by Pre-Trial Chamber I in *Lubanga*,⁸ and was later endorsed by the majority of Pre-Trial Chamber I (*Katanga and Ngudjolo*, 30 September 2008, para. 251 fn. 329). In *Katanga and Ngudjolo*, the Pre-Trial Chamber did not hold that the crime of wilful killing under Article 8(2)(a)(i) included *dolus directus* in the second degree or *dolus eventualis*, unlike other war crimes within the charges brought (see, for example, *Katanga and Ngudjolo*, 30 September 2008, paras. 251–252 in relation to the war crime of using children under the age of fifteen years to participate directly in the hostilities).

In the Introduction to Article 8 in the Elements of Crimes, it is provided that 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

⁷ See for example ICTY, *Prosecutor v. Kordić and Čerkez*, Appeals Chamber, Judgement, 17 December 2004, IT-95-14/2-A, para. 36 (<https://www.legal-tools.org/doc/738211/>).

⁸ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 351 (<https://www.legal-tools.org/doc/b7ac4f/>).

non-international, or a requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict. This is applicable to the last two elements of all crimes identified under Article 8, and was confirmed in relation to Article 8(2)(a)(i) (*Katanga and Ngudjolo*, 30 September 2008, para. 297).

Charges before the ICC:

At the confirmation stage in the *Katanga and Ngudjolo* case, the Prosecution argued that charges were brought under both Articles 8(2)(a) and (b), as well as (c) and (e) relevant to conduct taking place in non-international armed conflicts, as the conduct proscribed was the same, so would constitute a war crime regardless of whether the conduct took place in the context of an international or a non-international conflict (*Katanga and Ngudjolo*, 30 September 2008, para. 234). Although Pre-Trial Chamber I found that the evidence established substantial grounds to believe that the conflict was of an international character (paras. 239–241), this was not upheld by Trial Chamber II in the *Katanga* judgment.⁹ *Katanga* was found guilty of murder as a war crime under Article 8(2)(c)(i) instead. *Ngudjolo* was acquitted of all charges.¹⁰

Cross-references:

Article 7(1)(a), 8(2)(c)(i) and 30.

Doctrine:

1. Knut Dörmann, “Article 8, War Crimes, Grave Breaches in Detail”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., Beck/Hart, Oxford, 2016, pp. 329–331 (<https://www.legal-tools.org/doc/040751/>).
2. Michael Boothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 392.

⁹ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07, para. 738 (<https://www.legal-tools.org/doc/f74b4f/>).

¹⁰ ICC, *Prosecutor v. Ngudjolo*, Trial Chamber II, Judgment pursuant to article 74 of the Statute, 18 December 2012, ICC-01/04-02/12-3-tENG (<https://www.legal-tools.org/doc/2c2cde/>).

3. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2003, pp. 38–43.
4. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009 (<https://www.legal-tools.org/doc/78a250/>).

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Article 8(2)(a)(ii): Torture

(ii) Torture

General Remarks:

The prohibition of torture in international humanitarian law is a well-established rule of custom. Torture is listed as a grave breach in all four of the Geneva Conventions of 1949.¹ The prohibition of torture is also listed in the provisions on fundamental guarantees in Protocols (I) and (II) Additional to the Geneva Conventions.² Torture is also prohibited under international human rights law and the prohibition was considered a rule of *jus cogens* by the ICTY in *Furundžija*.³

Analysis:

i. Material Elements:

The Elements of Crimes sets out the *actus reus* of this crime as: (1) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; (2) the perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind; and (3) such person or persons were protected under one or more of the Geneva Conventions of 1949.

The Introduction to Article 8 in the Elements of Crimes provides that it is not necessary that the perpetrator completed a particular value judgment for terms involving value judgments such as “inhumane” or “severe”, unless otherwise indicated. In determining the severity, the *ad hoc* Tribunals identified both subjective and objective factors needed to be taken into

¹ Geneva Conventions I-IV, 12 August 1949 (“GC I-IV”) (GC I: <https://www.legal-tools.org/doc/baf8e7/>; GC II: <https://www.legal-tools.org/doc/0d0216/>; GC III: <https://www.legal-tools.org/doc/365095/>; GC IV: <https://www.legal-tools.org/doc/d5e260/>).

² Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977 (“AP I”) (<https://www.legal-tools.org/doc/d9328a/>); Protocol (II) additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts, 7 December 1978 (<https://www.legal-tools.org/doc/fd14c4/>).

³ ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Judgment, 10 December 1998, IT-95-17/1-T, paras. 155–157 (<https://www.legal-tools.org/doc/e6081b/>).

consideration.⁴ This is consistent with the approach taken by human rights courts.⁵

The list of purposes for which the severe pain or suffering was inflicted broadly reflects that contained in the definition of torture under Article 1 of the Torture Convention 1984.⁶ As with the Torture Convention, this list of purposes is non-exhaustive. Unlike the Torture Convention, such pain or suffering need not be inflicted by or at the instigation, consent or acquiescence of a public official or other person acting in an official capacity. The Elements provide clarity on the jurisprudence of the *ad hoc* Tribunals, which included differing interpretations as to whether the purposes listed were exhaustive or illustrative under customary international law.⁷ The judgments of the ICTY considered that it is sufficient that the prohibited purpose be part of the motivation for the conduct and need not be the predominant or sole purpose.⁸

The purposes requirement is the only different element compared with the elements for the war crime of inhuman treatment under Article 8(2)(a)(ii). Both crimes require the infliction of severe pain or suffering. This differs from the findings of the *ad hoc* Tribunals, which consistently held that the war crime of torture required the infliction of “severe” pain or suffering, whereas the war crime of inhuman treatment required the infliction of “serious” pain or suffering (*Delalić et al.*, 16 November 1998, para. 543).

As noted in relation to the war crime of wilful killing under Article 8(2)(a)(i), protected persons are the wounded, sick and shipwrecked, medical, humanitarian and religious personnel, prisoners of war, and civilians not directly participating in the hostilities further to Articles 13, 24, 25 and

⁴ See ICTY, *Prosecutor v. Brđanin*, Trial Chamber, Judgement, 1 September 2004, IT-99-36-T, para. 484 (<https://www.legal-tools.org/doc/4c3228/>).

⁵ See, for example, European Court of Human Rights, *Ireland v. The United Kingdom*, Judgment, 18 January 1978, Application No. 5310/71, para. 162 (<https://www.legal-tools.org/doc/f65137/>) and *Selmouni v. France*, Judgment, 28 July 1999 Application No. 25803/94, para. 160 (<https://www.legal-tools.org/doc/3e7b94/>).

⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (‘Torture Convention’) (<https://www.legal-tools.org/doc/713f11/>).

⁷ ICTY, *Prosecutor v. Kunarac et al.*, Trial Chamber, Judgment, 22 February 2001, IT-96-23-T and IT-96-23/1-T, paras. 483–496 (<https://www.legal-tools.org/doc/fd881d/>).

⁸ ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Judgement, 16 November 1998, IT-96-21-T, para. 471 (‘*Delalić et al.*, 16 November 1998’). (<https://www.legal-tools.org/doc/6b4a33/>).

26 GC I, Articles 13, 36 and 37 GC II, Article 4 GC III and Articles 4, 13 and 20 GC IV (see also Articles 10, 11, 15, 17, 71, 74–77, and 79 AP I). In relation to protected civilian status, the ICC adopted the same approach as the *ad hoc* Tribunals in considering allegiance to a Party to the conflict and control of the other Party over territory in which the individual(s) are in.⁹

There are differences definition of torture in the Elements of Crimes for Article 8(2)(a)(ii) and the definition of ‘torture’ for the purposes of crimes against humanity under Article 7(1)(f). Whilst both include the intentional infliction of severe pain or suffering, and both include physical or mental pain or suffering, the crime of torture as a crime against humanity is restricted to such pain or suffering inflicted “upon a person in the custody or under the control of the accused” and does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions. Torture as a war crime is broader in this regard, as it may be inflicted on persons who are not detained, the requirement only being that the victims are protected under one or more of the Geneva Conventions of 1949. As noted in the commentary to wilful killing as a war crime under Article 8(2)(a)(i), the ICC has adopted the same approach as the *ad hoc* Tribunals in assessing allegiance to a party to the conflict and correspondingly, control by this party over persons in a given territory in determining if civilians are entitled to protection under the law of armed conflict. Furthermore, torture as a crime against humanity does not require that the severe pain or suffering be inflicted for any purposes, unlike the war crime of torture.

ii. Mental Element:

The Elements of Crimes provide that: (4) the perpetrator was aware of the factual circumstances that established that protected status; (5) the conduct took place in the context of and was associated with an international armed conflict; and (6) the perpetrator was aware of factual circumstances that established the existence of an armed conflict. It was confirmed in the *Bemba* case¹⁰ that the perpetrator must have committed the crime of torture with intent and knowledge pursuant to Article 30 of the ICC Statute, must

⁹ See ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras. 289–292 (<https://www.legal-tools.org/doc/67a9ec/>).

¹⁰ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 293 (*Bemba*, 15 June 2009’) (<https://www.legal-tools.org/doc/07965c/>).

have inflicted the pain or suffering for such purposes as set out in the Elements of Crimes, and must have been aware of the factual circumstances that established the status of the person concerned. The intent to inflict the pain or suffering for the purposes constitutes a specific intent, which the Prosecution must prove (*Bemba*, 15 June 2009, para. 294).

iii. Charges before the ICC:

The Prosecutor brought charges for torture as a war crime under Article 8(2)(a)(ii) against Bemba, but these were not confirmed by the Pre-Trial Chamber (*Bemba*, 15 June 2009, paras. 297–300).

Cross-references:

Articles 7(1)(f), 7(2)(e), 8(2)(a)(i), 8(2)(c)(i), 30.

Doctrine:

1. Knut Dörmann, “Article 8, War Crimes – Torture”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 332–335 (<https://www.legal-tools.org/doc/040751/>).
2. Michael Boothe, “War Crimes”, in Antonio Cassese, John R.W.D. Jones and Paola Gaeta (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 392–393.
3. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2003, pp. 44–75.
4. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009 (<https://www.legal-tools.org/doc/78a250/>).

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Article 8(2)(a)(ii): Inhuman Treatment

or inhuman treatment,

General Remarks:

The prohibition of inhumane treatment is intricately linked with the wide range of provisions imposing positive obligations on parties to the armed conflict to guarantee humane treatment of protected persons under international humanitarian law. Inhuman treatment is listed as a grave breach in all four Geneva Conventions of 1949¹ and the prohibition of inhuman treatment is also included in international human rights law treaties.

Analysis:

i. Material Elements:

The Elements of Crimes provides that the *actus reus* of this war crime requires that: (1) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; and (2) such person or persons were protected under one or more of the Geneva Conventions of 1949.

This war crime may be committed by action or omission.² The key difference between inhumane treatment and torture as a war crime under Article 8(2)(a) is the purposive element in the commission of torture. Unlike the *ad hoc* Tribunals, the Elements of Crimes do not make any difference for severity in the pain or suffering between inhuman treatment or torture. The jurisprudence of the *ad hoc* Tribunals differentiated inhumane treatment as the infliction of “serious” pain or suffering, compared with torture which involved the higher standard of “severe” pain or suffering.³ This can also be contrasted with the elements of crime for other inhumane acts under Article 7(1)(k), the first of which provides that the perpetrator inflicted “great suffering, or serious injury” to body or to mental or physical health, by means of an inhumane act. The *ad hoc* Tribunals also includ-

¹ Geneva Conventions I-IV, 12 August 1949 (‘GC I-IV’) (GC I: <https://www.legal-tools.org/doc/baf8e7/>; GC II: <https://www.legal-tools.org/doc/0d0216/>; GC III: <https://www.legal-tools.org/doc/365095/>; GC IV: <https://www.legal-tools.org/doc/d5e260/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 357 (‘*Katanga and Ngudjolo*, 30 September 2008’) (<https://www.legal-tools.org/doc/67a9ec/>).

³ ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Judgment, 16 November 1998, IT-96-21-T, paras. 442 and 543 (<https://www.legal-tools.org/doc/6b4a33/>).

ed measures which seriously violate the human dignity of protected persons within the definition of “inhuman treatment”.⁴ In the drafting of the ICC Statute, States took the view that such conduct would be included under Article 8(2)(b)(xxi) of the Statute.⁵

In *Katanga and Ngudjolo*, Pre-Trial Chamber I took the same approach to protected status as it did in relation to the war crime of wilful killing (*Katanga and Ngudjolo*, 30 September 2008, para. 357). As such, persons protected under the Geneva Conventions of 1949 include persons entitled to protected status under Articles 13, 24, 25 and 26 GC I, Articles 13, 36 and 37 GC II, Article 4 GC III and Articles 4, 13 and 20 GC IV.⁶ The Pre-Trial Chamber held that Article 8(2)(a)(ii) of the ICC Statute applies to those situations in which protected civilians are inhumanely treated “in the hands of” a party to the conflict, and thus also applies to the inhuman treatment of the protected persons by an attacking force, when such conduct occurs after the overall attack has ended, and defeat or full control of the targeted village has been secured (*Katanga and Ngudjolo*, 30 September 2008, para. 358). In addition, Article 8(2)(a)(i) prohibits perpetrators from inflicting inhuman treatment on protected persons as these forces move toward areas of enemy resistance in a targeted village (para. 358). It was not necessary in the decision for the Court to make a determination as to the status of the individuals (para. 357).

ii. Mental Element:

There is no specific intent requirement for this war crime, and as such reference to Article 30 requirements of intent and knowledge should be made. Pre-Trial Chamber I held that the war crime of inhuman treatment encompassed both cases of *dolus directus* of the first degree and *dolus directus* in the second degree (*Katanga and Ngudjolo*, 30 September 2008, para. 359). *Dolus directus* in the first degree refers to “those situations in which the suspect (i) knows that his or her actions or omissions will bring about the objective elements of the crime, and (ii) undertakes such actions or omis-

⁴ See ICTY, *Prosecutor v. Prlić et al.*, Trial Chamber III, Judgement, 29 May 2013, IT-04-74-T, paras. 113–120 (<https://www.legal-tools.org/doc/2daa33/>).

⁵ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2003, pp. 63–64.

⁶ See also Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977, Articles 10, 11, 15, 17, 71, 74–77, and 79 (‘AP I’) (<https://www.legal-tools.org/doc/d9328a/>).

sions with the concrete intent to bring about the objective elements of the crime”.⁷ *Dolus directus* in the second degree refers to those situations in which the suspect, without having concrete intent to bring about the objective elements of the crime, is aware that such elements will be the necessary outcome of his or her actions or omissions (*Lubanga*, 29 January 2007, para. 352).

In addition to establishing a nexus between the crime and an international armed conflict, the Elements of Crimes provides that the perpetrator must have been aware of the factual circumstances that established the protected status of the person(s), and must have been aware of the factual circumstances that established the existence of an international armed conflict (see further Elements of Crimes, Introduction to Article 8). It is not necessary for the perpetrator to have evaluated and concluded that the victim was a legally a protected person under any of the four Geneva Conventions, but rather that the perpetrator knows that “the victim belonged to an adverse party to the conflict” (see Elements of Crimes fn. 33, and *Katanga and Ngudjolo*, 30 September 2008, para. 360). In the Introduction to Article 8 in the Elements of Crimes, it is noted that mental elements associated with elements involving value judgement, such as those using the terms “inhuman” or “severe”, do not require that the perpetrator personally completed a particular value judgement, unless otherwise indicated.

iii. Charges before the ICC:

Pre-Trial Chamber I did not confirm the charges brought by the Prosecutor against either Katanga or Ngudjolo in relation to the war crime of inhuman treatment under Article 8(2)(a)(ii) (*Katanga and Ngudjolo*, 30 September 2008, paras. 361–364, 570–572 and 577).

Cross-references:

Article 7(1)(k), 8(2)(c)(i) and 30.

Doctrine:

1. Knut Dörmann, “Article 8, War Crimes, Grave Breaches in Detail”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the Interna-*

⁷ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 351 (*Lubanga*, 29 January 2007’) (<https://www.legal-tools.org/doc/b7ac4f/>), endorsed by the majority of Pre-Trial Chamber I in *Katanga and Ngudjolo*, 30 September 2008, para. 251 fn. 329.

tional Criminal Court: A Commentary, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 335–336 (<https://www.legal-tools.org/doc/040751/>).

2. Michael Boothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 392–393.
3. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2003, pp. 44–75.
4. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009 (<https://www.legal-tools.org/doc/78a250/>).

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Article 8(2)(a)(ii): Biological Experiments

including biological experiments;

General Remarks:

The grave breach was included in the Geneva Conventions of 1949 following criminal practices during World War II in which civilian prisoners and prisoners of war were subjected to biological experiments.¹ However, no case law has developed since this time.²

Analysis:

i. Material Elements:

The Elements of Crimes provides that the *actus reus* of this crime requires: (1) the perpetrator subjected one or more persons to a particular biological experiment; (2) the experiment seriously endangered the physical or mental health or integrity of such person or persons; (3) the intent of the experiment was non-therapeutic and it was neither justified by medical reasons nor carried out in such person's or persons' interest; and (4) such person or persons were protected under one or more of the Geneva Conventions of 1949.

It is not required that death or serious bodily or mental harm be caused by subjecting the person(s) to the biological experiment.³ The requirement is that the biological experiment “seriously endangered the physical or mental health or integrity of such person or persons” in line with Article 11(4) Additional Protocol I to the Geneva Conventions.⁴ The third

¹ Geneva Conventions I-IV, 12 August 1949 (“GC I-IV”) (GC I: <https://www.legal-tools.org/doc/baf8e7/>; GC II: <https://www.legal-tools.org/doc/0d0216/>; GC III: <https://www.legal-tools.org/doc/365095/>; GC IV: <https://www.legal-tools.org/doc/d5e260/>).

² United States Military Government for Germany, Military Tribunal I, *United States of America v. Brandt et al.*, Judgment, 20 August 1947, pp. 296–298 (<https://www.legal-tools.org/doc/c18557/>), carrying out of medical experiments on prisoners of war; Military Tribunal II, *United States of America v. Milch et al.*, Judgment, 15 April 1947, pp. 355 *et seq.* (<https://www.legal-tools.org/doc/bb7fb0/>).

³ Knut Dörmann, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 337 (<https://www.legal-tools.org/doc/040751/>).

⁴ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977 (“AP I”) (<https://www.legal-tools.org/doc/d9328a/>).

element distinguishes the crime as aiming to prevent non-therapeutic medical interventions not justified on medical grounds or carried out against the interests of the affected person. This intention relates to the nature of the experiment, and not the mental element of the crime. Although it is not specified in the elements, under the Geneva Conventions the victim cannot validly consent to biological experiments. Whilst there is overlap in the *actus reus* with the war crime of mutilation under Article 8(2)(b)(x), Article 8(2)(a)(i) is drafted narrower than Article 8(2)(b)(x).

In line with torture and inhuman treatment under Article 8(2)(a)(ii), it may be assumed that the Court will use the same definition of protected persons, that is, persons entitled to protected status under Articles 13, 24, 25 and 26 GC I, Articles 13, 36 and 37 GC II, Article 4 GC III and Articles 4, 13 and 20 GC IV, and civilians not directly participating in the hostilities “in the hands of” a party to the conflict (see also Articles 10, 11, 15, 17, 71, 74–77, and 79 AP I).

ii. Mental Element:

There is no specific intent requirement for this war crime, and as such reference to Article 30 requirements of intent and knowledge should be made. In addition to establishing a nexus between the crime and an international armed conflict, the Elements of Crimes provides that the perpetrator must have been aware of the factual circumstances that established the protected status of the person(s), and must have been aware of the factual circumstances that established the existence of an international armed conflict (see further Elements of Crimes, Introduction to Article 8). In the General Introduction to the Elements of Crimes, it is noted that mental elements associated with elements involving value judgement, such as those using the terms ‘inhumane’ or ‘severe’, do not require that the perpetrator personally completed a particular value judgement, unless otherwise indicated.

iii. Charges before the ICC:

No charges have been brought by the ICC for the commission of this crime to date.

Cross-references:

Articles 8(2)(b)(x), 8(2)(c)(i), 8(2)(e)(xi), 30.

Doctrine:

1. Knut Dörmann, “Article 8, War Crimes, Grave Breaches in Detail”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 336–337 (<https://www.legal-tools.org/doc/040751/>).
2. Michael Boothe, “War Crimes”, in Antonio Cassese, John R.W.D. Jones and Paola Gaeta (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 393 (<https://www.legal-tools.org/doc/01addc/>).
3. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2003, pp. 44–75.
4. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009 (<https://www.legal-tools.org/doc/78a250/>).

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Article 8(2)(a)(iii)

(iii) Wilfully causing great suffering, or serious injury to body or health;

General Remarks:

Acts or omissions wilfully causing great suffering or serious injury to body or health constitute grave breaches under all four of the Geneva Conventions of 1949.¹

Analysis:

i. Material Elements:

The *actus reus* of this war crime is established in the Elements of Crimes as (1) the perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons; and (2) such person or persons were protected under one or more of the Geneva Conventions of 1949.

Unlike torture, the pain and suffering caused under this war crime need not be inflicted for a specific purpose. There is also a difference in severity indicated in the Elements of Crimes compared with torture and inhuman treatment under Article 8(2)(a)(ii). The war crimes of torture and inhuman treatment require “severe” physical or mental pain or suffering. Under Article 8(2)(a)(iii), the war crime of wilfully causing great suffering requires “great” physical or mental pain or suffering, or “serious” injury to body or health. Similarly, compared with the war crime of outrages upon human dignity under Article 8(2)(b)(xxi), the distinction with this war crime relates to the degree of physical or mental harm or injury suffered. The level of severity indicated in Article 8(2)(a)(iii) is greater in comparison to Article 8(2)(b)(xxi). The *ad hoc* Tribunals considered that the harm suffered need not be permanent, but must reach a level of severity beyond temporary unhappiness or humiliation.² The level of severity will be determined based on both objective and subjective factors, taking into account the factual circumstances.

¹ Geneva Conventions I-IV, 12 August 1949 (‘GC I-IV’) (GC I: <https://www.legal-tools.org/doc/baf8e7/>; GC II: <https://www.legal-tools.org/doc/0d0216/>; GC III: <https://www.legal-tools.org/doc/365095/>; GC IV: <https://www.legal-tools.org/doc/d5e260/>).

² See, for example, ICTY, *Prosecutor v. Krstić*, Trial Chamber, Judgment, 2 August 2001, IT-98-33-T, para. 513 (<https://www.legal-tools.org/doc/440d3a/>).

In line with torture and inhuman treatment under Article 8(2)(a)(ii), it may be assumed that the Court will use the same definition of protected persons, that is, persons entitled to protected status under Articles 13, 24, 25 and 26 GC I, Articles 13, 36 and 37 GC II, Article 4 GC III and Articles 4, 13 and 20 GC IV, and civilians not directly participating in the hostilities “in the hands of” a party to the conflict.³

ii. Mental Element:

As with the other war crimes listed under Article 8(2)(a), there is no specific intent requirement for this war crime, and reference to Article 30 requirements of intent and knowledge should be made. In addition to establishing a nexus between the crime and an international armed conflict, the Elements of Crimes provides that the perpetrator must have been aware of the factual circumstances that established the protected status of the person(s), and must have been aware of the factual circumstances that established the existence of an international armed conflict (see further Elements of Crimes, Introduction to Article 8). In the General Introduction of the Elements of Crimes, it is noted that mental elements associated with elements involving value judgement, such as those using the terms “inhumane” or “severe”, do not require that the perpetrator personally completed a particular value judgement, unless otherwise indicated. This is also applicable in relation to determining levels of “great” or “serious” suffering or injury.

iii. Charges before the ICC:

No charges have been brought by the ICC for the commission of this crime to date.

Cross-references:

Article 8(2)(c)(i) and 30.

Starvation in Articles 6(c); 7(1)(b), (j) and (k); 7(2)(b); 8(2)(b)(ii), (v), (xiii) and (xxv); and 8(2)(c)(i).

Doctrine:

1. Knut Dörmann, “Article 8, War Crimes, Grave Breaches in Detail”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the Interna-*

³ See also Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977, Articles 10, 11, 15, 17, 71, 74–77, and 79 (<https://www.legal-tools.org/doc/d9328a/>).

- tional Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart./Nomos, Munich/Oxford/Baden-Baden, 2015, pp. 338–339.
2. Michael Boothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.) *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 393.
 3. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2003, pp. 76–80.

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Article 8(2)(a)(iv)

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

General Remarks:

These acts are listed as a grave breach in Article 50 Geneva Convention I, Article 51 Geneva Convention II and Article 147 Geneva Convention IV, although only GC IV includes the notion of “appropriation of property”.¹ There were difficulties in drafting the elements of this crime due to the different levels of protections provided to property in the respective Geneva Conventions.² This war crime is narrower than the war crime included at Article 8(2)(b)(xiii).

Analysis:

i. Material Elements:

The *actus reus* for this war crime is established in the Elements of Crimes as (1) the perpetrator destroyed or appropriated certain property; (2) the destruction or appropriation was not justified by military necessity; (3) the destruction or appropriation was extensive and carried out wantonly; and (4) such property was protected under one or more of the Geneva Conventions of 1949.

The destruction or appropriation need not be total, but may be partial, so long as it is “extensive”. This requirement may vary depending on the type of property destroyed or appropriated. There is no requirement that the perpetrator personally completed a value judgment as to the “extensiveness” of the destruction or appropriation (see Introduction to Article 8 in the Elements of Crimes, para. 4).

Where the destruction or appropriation of certain property is deemed to be a military necessity, it must be carried out in accordance with the laws of armed conflict. Military necessity cannot be invoked as a justification to

¹ Geneva Conventions I, II and IV, 12 August 1949 (‘GC I, II and IV’) (GC I: <https://www.legal-tools.org/doc/baf8e7/>; GC II: <https://www.legal-tools.org/doc/0d0216/>; GC IV: <https://www.legal-tools.org/doc/d5e260/>).

² Knut Dörmann, “Article 8(2)(iv)”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 311–312 (<https://www.legal-tools.org/doc/040751/>).

go against the rules regulating the conduct of hostilities, and means and methods of warfare. As such, unless the destruction or appropriation of the property can be carried out lawfully under the law of armed conflict, military necessity alone cannot justify the act (see further Introduction to Article 8 in the Elements of Crimes, para. 6).

Protected property under the Geneva Conventions includes fixed medical establishments and mobile medical units, hospital ships, medical transports including medical aircraft, civilian hospitals, real or personal property in occupied territory, and hospitals in occupied territory (see GC I, Articles 19, 20, 33, 34–36; GC II, Articles 18, 21, 22, 53, 57; and GC IV, Article 59 GC IV).³ Crimes committed under this war crime are distinguished from the war crimes involving unlawful attacks, namely the war crime of attacking civilian objects (Article 8(2)(b)(ii)), the war crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission (Article 8(2)(b)(iii)), the war crime of causing excessive incidental damage (Article 8(2)(b)(iv)), the war crime of attacking undefended places (Article 8(2)(b)(v)), and the war crime of attacking protected objects (Article 8(2)(b)(ix)). There is potentially overlap with the war crime of destroying or seizing the enemy's property (Article 8(2)(b)(xiii)), but a distinguishing feature is that under Article 8(2)(a)(iii), the property itself is designated as protected under the Geneva Conventions, whereas under Article 8(2)(b)(xiii) the property is only protected from destruction or seizure under the international law of armed conflict. As such, Article 8(2)(b)(xiii) could potentially apply to a broader range of property.

As noted above, in addition to establishing protected status under the Geneva Conventions of 1949, this provision requires reference to further rules of laws of armed conflict to determine whether the conduct was lawful or not (see further Introduction to Article 8 in the Elements of Crimes, para. 6). For example, protected property can lose its protected status in circumstances where it is used to commit acts harmful to the enemy, outside its humanitarian duties. However, further specific requirements may be applicable before any attack is deemed lawful (see, for example, GC IV, Articles 18 and 19). The appropriation of property in situations of occupation would also need reference to the requirements set out in Hague Con-

³ See also Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977, Articles 12, 21, 52 and 70(4) ('AP I') (<https://www.legal-tools.org/doc/d9328a/>).

ventions IV of 1907, which provides grounds for which property may be lawfully appropriated by an occupying power.⁴

ii. Mental Element:

As with other war crimes included in Article 8(2)(a), there is no specific intent requirements for this war crime, and reference to Article 30 requirements of intent and knowledge should be made. In addition to establishing a nexus between the crime and an international armed conflict, the Elements of Crimes provides that the perpetrator must have been aware of the factual circumstances that established the protected status of the property, and must have been aware of the factual circumstances that established the existence of an international armed conflict (see further Introduction to Article 8 in the Elements of Crimes). The jurisprudence of the *ad hoc* Tribunals recognised that this crime could also be committed with reckless disregard of the likelihood of the destruction.

iii. Charges before the ICC:

No charges have been brought by the ICC for the commission of this crime to date. Cases before the *ad hoc* Tribunals include *Kordić and Čerkez* and *Naletilić and Martinović* at the ICTY.⁵

Cross-references:

Articles (8)(b)(xiii), 8(2)(b)(xvi), 8(2)(e)(v), 8(2)(e)(xii), 30.

Doctrine:

1. Knut Dörmann, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 339–342 (<https://www.legal-tools.org/doc/040751/>).

⁴ Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Articles 48, 49, 52 and 53 (<https://www.legal-tools.org/doc/fa0161/>).

⁵ ICTY, *Prosecutor v. Kordić and Čerkez*, Trial Chamber, Judgement, 26 February 2001, IT-95-14/2-T, paras. 335–347 (<https://www.legal-tools.org/doc/d4fedd/>); *Prosecutor v. Naletilić and Martinović*, Trial Chamber, Judgement, 31 March 2003, IT-98-34-T, paras. 574–580 (<https://www.legal-tools.org/doc/f2efeb/>).

2. Michael Boothe, “War Crimes”, in Antonio Cassese, John R.W.D. Jones and Paola Gaeta (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 394.
3. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2003, pp. 81–96.

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Article 8(2)(a)(v)

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

The expression “forces” should be given a broad interpretation.

Cross-reference:

Article 8(2)(b)(xv).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 394 (<https://www.legal-tools.org/doc/01addc/>).
2. Knut Dörmann, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 342–344 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 316–17, mn. 924–928 (<https://www.legal-tools.org/doc/e35f82/>).

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Article 8(2)(a)(vi)

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

The Elements of Crimes refers to the guarantees laid down in Geneva Conventions III and IV,¹ stating that the right to fair trial include: the right to an independent and impartial court (Article 84(2) of GC III), the right to timely notification by the detaining power about any planned trial of a prisoner of war (Article 104 of GC III), the right to immediate information on the charges (Article 104 of GC III and Article 71(2) of GC IV), the prohibition of collective punishment (Article 87(3) of GC III and Article 33 of GC IV), the principle of legality (Article 99(1) of GC III and Article 67 of GC IV), the *ne bis in idem* principle (Article 86 of GC III and Article 117(3) of GC IV), the right to appeal or petition and information on the possibility thereof (Article 106 of GC III and Article 73 of GC IV), the possibility of presenting a defence and having assistance of qualified counsel (Article 99(3) of GC III), the right to receive the charges and other trial documents in good time and in understandable language (Article 105(4) of GC III), the right of an accused prisoner of war to assistance by one of his prisoner comrades (Article 105(1) of GC III), the defendant's right to representation by an advocate of his own choice (Article 105(1) of GC III and Article 72(1) of GC IV), the right of the defendant to present necessary evidence and especially to call and question witnesses (Article 105(1) of GC III and Article 72(1) of GC IV), and the right to the services of an interpreter (Article 105(1) of GC III and Article 72(3) of GC IV). The death penalty may only be imposed under specific circumstances (Article 100 of GC III and Article 68 of GC IV), and prisoners of war must be tried in the same courts and according to the same procedure as members of the armed forces of the detaining power (Article 102 of GC III). These rules should be supplemented by the rules on a fair trial contained in Article 75(3) and (4) of Additional Protocol I.² The mental element requires at least recklessness.

¹ Geneva Conventions I, III, 12 August 1949 ('GC I, III') (GC I: <https://www.legal-tools.org/doc/baf8e7/>; GC III: <https://www.legal-tools.org/doc/365095/>).

² Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/d9328a/>).

Cross-references:

Articles 8(2)(b)(xiv) and 8(2)(c)(iv).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 394–95 (<https://www.legal-tools.org/doc/01addc/>).
2. Knut Dörmann, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 344–46 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, the Hague, 2005, pp. 320–22, mn. 938–943 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(a)(vii)-1

(vii) Unlawful deportation or transfer

The material element requires the transfer of persons from one territory to another. The difference between deportation and forcible transfer lies only in whether a border is crossed. Deportation requires that a border is crossed, whereas forcible transfer means the transfer of one or more persons within the same state's territory. For the mental element, Article 30 applies.

Cross-references:

Articles 7(1)(d), 8(2)(b)(viii) and 8(2)(e)(viii).

Doctrine:

1. Michael Bothe, "War Crimes", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 395.
2. Knut Dörmann, "Article 8, War Crimes, Grave Breaches", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 346–48 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 327–28, mn. 963–867 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(a)(vii)-2***or unlawful confinement;***

In certain circumstances confinement of protected persons may be legitimate, for example if a civilian threatens one of the parties in a conflict.

Cross-reference:

Article 7(1)(e).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 395.
2. Knut Dörmann, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 348–351 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, pp. 323–25, mn. 950–954 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(a)(viii)

(viii) Taking of hostages

Hostage taking involves the seizure and detainment of one or more protected persons and a threat to kill, injure or continue to detain such person or persons. In addition to the general mental requirement in Article 30, the purpose of the hostage taking is 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.

Cross-reference:

Article 8(2)(c)(iii).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 393 (<https://www.legal-tools.org/doc/01addc/>).
2. Knut Dörmann, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 352–53 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 325–27, mn. 958–962 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(b)

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

General Remarks:

Along with Article 8(2)(a), Article 8(2)(b) lists war crimes that take place in the context of an international armed conflict.

Analysis:

Article 8(2)(b) reads: “Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts”.

i. Scope of Application:

The scope of subparagraph (b) is the same as subparagraph (a): it is applicable in times of an international armed conflict. This is supported by the Elements of Crimes that repeat that “[t]he conduct took place in the context of and was associated with an international armed conflict” (Article 8(2)(b)) and by the case-law.¹ In fact, in *Katanga and Ngudjolo*, the ICC, after stating that the conflict was international, proceeds to examine offences charged under Article 8(2)(a) and (b) (*Katanga and Ngudjolo*, 30 September 2008, para. 243).

ii. Prohibited Acts:

The use of the word “other” indicates that this list of prohibited acts is additional to the grave breaches (which are also “serious violations of the laws and customs applicable in international armed conflict”) list included in subparagraph (a). Yet, whilst some of the grave breaches of the Protocol (I) Additional to the Geneva Conventions of 12 August 1949² are referred to in Article 8(2)(b). For example, AP I, Article 85(3)(b): “launching an indiscriminate attack affecting the civilian population or civilian objects in

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 244 (‘*Katanga and Ngudjolo*, 30 September 2008’) (<https://www.legal-tools.org/doc/67a9ec/>).

² Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977 (‘AP I’) (<https://www.legal-tools.org/doc/d9328a/>).

the knowledge that such attack will cause excessive loss of life, injury to civilians, or damage to civilian objects, as defined in Article 57 paragraph 2(a)(iii)” is reflected in Article 8(2)(b)(iv), while others are not (for instance, AP I, Article 85(4)(b):”unjustifiable delay in the repatriation of prisoners of war or civilians”). This lack of full incorporation in the ICC Statute of the grave breaches mentioned in AP I may be due to the fact that AP I enjoys far less unanimity with States than the Geneva Conventions do. In fact, the acts enumerated under Article 8(2) (b) are a patchwork of 26 serious violations of international law. Such acts are prohibited by either or both treaty and customary international law. For example, some sub-provisions expressly mention the Geneva Conventions (for example, Articles (2)(b)(xxii) and (xxv)); others are drawn from AP I. For example, Article 8(2)(b)(xxvi) that refers to the crime of recruiting and using children under the age of 15 years is based on AP I, Article 77(2).³ Most of the sub-provisions relate to means and methods of warfare and are drawn from the Convention Relating to the Laws and Customs of War on Land.⁴ Yet there are also a number of new crimes under Article 8(2)(b) such as the prohibition of attacks against humanitarian or peacekeeping missions (Article 8(2)(b)(iii)) and against the environment (Article 8(2)(b)(iv)). Unlike for Article 8(2)(a) there is no requirement for the victims or objects to have protected status.

iii. Awareness:

Similar to Article 8(2)(a) the Elements of Crimes only require the perpetrator to have been “aware of factual circumstances that established the existence of an armed conflict”. The ICC specifically explains that this element of the crime is “common to all war crimes provided for in Article 8(2)(a) and (b) of the Elements of Crimes” (*Katanga and Ngudjolo*, 30 September 2008, para. 244).

Doctrine:

1. Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classi-*

³ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment, 14 March 2012, ICC-01/04-01/06, para. 542 (‘*Lubanga*, 14 March 2012’) (<https://www.legal-tools.org/doc/677866/>).

⁴ Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (<https://www.legal-tools.org/doc/fa0161/>).

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- fication of Conflicts*, Oxford University Press, 2012, pp. 32–79 (<https://www.legal-tools.org/doc/415188/>).
2. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 395–97 (<https://www.legal-tools.org/doc/01addc/>).
 3. Antonio Cassese, *International Criminal Law*, 3rd. ed., Oxford University Press, 2013, pp. 62–83 (<https://www.legal-tools.org/doc/7ca295/>).
 4. Robert Cryer, Darryl Robinson and Sergey Vasiliev (eds.), *An Introduction to International Criminal Law and Procedure*, 4th. ed., Cambridge University Press, 2019, pp. 259–296.
 5. Anthony Cullen, “War Crimes”, in William A. Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law*, Routledge, London, 2011, pp. 139–54 (<https://www.legal-tools.org/doc/780dbc/>).
 6. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2002, pp. 17–37 (<https://www.legal-tools.org/doc/b07fe3/>).
 7. Knut Dörmann, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 353–54 (<https://www.legal-tools.org/doc/040751/>).
 8. Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court*, Cambridge University Press, 2014, pp. 279–85 (<https://www.legal-tools.org/doc/b7505c/>).
 9. William A. Schabas, *An Introduction to the International Criminal Court*, 6th ed., Cambridge University Press, 2020, pp. 127–136 (<https://www.legal-tools.org/doc/e9fb2f/>).
 10. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 213–300 (<https://www.legal-tools.org/doc/b7432e/>).

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Article 8(2)(b)(i)

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

General Remarks:

The war crime of attacking the civilian population and civilians not taking direct part in hostilities “is the first in the series of war crimes for which one essential element is that the crime must be committed during the conduct of hostilities (commonly known as ‘conduct of hostilities crimes’)”.¹ Under international humanitarian law the act of “making the civilian population or individual civilians the object of attack” “when committed wilfully [...] and causing death or serious injury to body or health” is a grave breach.²

Article 8(2)(b)(i) is a reflection of the principle of distinction in attack in an international armed conflict. Whilst the principle is enshrined in AP I, Articles 48 and 51, it is also of customary nature.³ The International Court of Justice has stressed that deliberate attacks on civilians are absolutely prohibited by international humanitarian law.⁴ Further, as the ICTY highlighted “the principles underlying the prohibition of attacks on civilians, namely the principles of distinction and protection [...] incontrovertibly form the basic foundation of international humanitarian law and constitute ‘intransgressible principles of international customary law’” (*Galić*, 30 November 2006, para. 87).

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 267 (*Katanga and Ngudjolo*, 30 September 2008’) (<https://www.legal-tools.org/doc/67a9ec/>).

² Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977, Article 85(3)(a) (*‘AP I’*) (<https://www.legal-tools.org/doc/d9328a/>).

³ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009, Rule 1 (<https://www.legal-tools.org/doc/78a250/>); ICTY, *Prosecutor v. Galić*, Appeals Chamber, Judgement, 30 November 2006, IT-98-29-A, para. 87 (*‘Galić*, 30 November 2006’) (<https://www.legal-tools.org/doc/c81a32/>).

⁴ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports, para. 78 (<https://www.legal-tools.org/doc/d97bc1/>).

Analysis:

Article 8(2)(b)(i) states that the ICC has jurisdiction over acts of “[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”.

i. Material Elements:**a. Definition of an Attack:**

The first element of the Elements of Crimes requires that “the perpetrator directed an attack”. Yet, neither the Statute nor the Elements of Crimes define the term “attack”. The Court has used AP I, Article 49(1) to define an attack as “acts of violence against the adversary, whether in offence or in defence” (*Katanga and Ngudjolo*, 30 September 2008, para. 266).

As the ICC Statute does not provide for a specific offence of acts whose primary purpose is to spread terror among the civilian population, it is likely that such acts fall within the broad scope of Article 8(2)(b)(i). As Article 8(2)(b)(i) is a reflection of the principle of distinction enshrined in AP I, Articles 48 and 51, and Article 8(2)(b) must be read “within the established framework of international law” it is likely that it will also cover the second sentence of AP I, Article 51(2): “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”. This approach was espoused by the ICTY inasmuch as it explained that the prohibition of terror amounts to “a specific prohibition within the general (customary) prohibition of attack on civilians”.⁵

To establish the link between the attack and the conduct of the hostilities, the Court has stipulated that these civilians must be those “who [have] not fallen yet into the hands of the adverse or hostile party to the conflict to which the perpetrator belongs” (*Katanga and Ngudjolo*, 30 September 2008, para. 267). Following the ICTY case law, the Court has stated that the litmus test is whether the individual is under the control of the members of the hostile party to the conflict (para. 268). Acts committed against civilians who have fallen into the hands of the enemy cannot be classified as attacks as they are not methods of warfare. They can however be prosecuted under other appropriate legal provisions (para. 269).

⁵ ICTY, *Prosecutor v. Galić*, Trial Chamber, Judgment and Opinion, 5 December 2003, IT-98-29-T, para. 98 (<https://www.legal-tools.org/doc/eb6006/>), upheld in *Galić*, 30 November 2006, para. 87.

There must be a causal link between the perpetrator's conduct and the consequence of the attack.⁶ That being said, the attack does not need to lead to civilian casualties; it is sufficient to prove that the author launched the attack towards the civilian population or individual civilians. As the Court explained 'it does not require any material result or a "harmful impact on the civilian population or on the individual civilians targeted by the attack"' (*Katanga and Ngudjolo*, 30 September 2008, para. 270). It is the intention that counts as the third element of the Elements of Crimes requires that "the perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack". As noted by the Court in *Katanga and Ngudjolo* (para. 270) this stands in contrast to AP I, Article 85(3) that requires "death or serious injury to body or health" and the jurisprudence of the ICTY.⁷

b. Object of the Attack Is a Civilian Population and Civilians not Taking Direct Part in the Hostilities:

The second element of the Elements of Crimes specifies that "the object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities". This is an absolute prohibition that cannot be counterbalanced by military necessity.⁸ This position is reinforced by the fact that in the context of a non-international armed conflict (and thus likely to apply in an international armed conflict too) the ICC has indicated that reprisals are prohibited in all circumstances.⁹

Civilians are defined by reference to AP I, Article 50(1) and the civilian population by reference to AP I, Articles 50(2) and (3) (*Katanga and Ngudjolo*, 30 September 2008, footnotes 366 and 368 respectively; *Mbarushimana*, 16 December 2011, para. 148 in relation to the civilian popula-

⁶ By analogy, in relation to Article 8(2)(e)(i), see ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red (public redacted version), para. 66 (<https://www.legal-tools.org/doc/cb3614/>).

⁷ For example, see ICTY, *Prosecutor v. Kordić and Čerkez*, Trial Chamber, Judgment, 26 February 2001, IT-95-14/2-T, para. 328 (<https://www.legal-tools.org/doc/d4fedd/>) as reiterated in *Prosecutor v. Kordić and Čerkez*, Appeals Chamber, Judgment, 17 December 2004, IT-95-14/2-A, para. 40 (<https://www.legal-tools.org/doc/738211/>).

⁸ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgement pursuant to Article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-T, para. 800 ('*Katanga*, 7 March 2014') (<https://www.legal-tools.org/doc/f74b4f/>).

⁹ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red (public redacted version), para. 143 ('*Mbarushimana*, 16 December 2011') (<https://www.legal-tools.org/doc/63028f/>).

tion). Generally, civilians are persons who are not members of State and non-State armed forces (*Katanga*, 7 March 2014, paras. 788 and 801). In case of doubt an individual must be considered a civilian,¹⁰ though the burden is on the Prosecution to show that the victim was not taking a direct part in the hostilities.¹¹ The presence amongst the civilian population of individuals who do not fit within the definition of a civilian, however, does not deprive the entire population of its civilian character (*Katanga and Ngudjolo*, 30 September 2008, footnote 375; *Mbarushimana*, 16 December 2011, para. 148).

Article 8(2)(b)(i) refers to “individual civilians not taking direct part in direct hostilities”, thereby introducing the concept of direct participation in hostilities in the context of an international armed conflict. Although the adjective “active”, rather than “direct”, appears in international humanitarian law in relation to participation in hostilities the Court treats them as synonyms (*Katanga and Ngudjolo*, 30 September 2008, footnote 367; see also *Katanga*, 7 March 2014, para. 789). In relation to a situation in a non-international armed conflict, the ICC has defined the concept of direct participation in hostilities “as acts of war that by their nature or purpose strike at the personnel and matériel of enemy armed forces”.¹² To determine whether these civilians were indeed not taking part in the hostilities, the ICC, relying on ICTY case-law¹³ has spelled, though in the context of a non-international armed conflict, the following factors: “the location of the [individuals], whether the victims were carrying weapons, and the clothing, age, and gender of the victims” (*Bemba*, 21 March 2016, para. 94; see also *Ntaganda*, 8 July 2019, para. 884 though in the context of a non-international armed conflict). The Court explains that such participation

¹⁰ *Katanga and Ngudjolo*, 30 September 2008, footnotes 366 and 375; *Mbarushimana*, 16 December 2011, para. 148; ICC, *Prosecutor v. Bemba*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08, para. 94 (*‘Bemba*, 21 March 2016’) (<https://www.legal-tools.org/doc/edb0cf/>).

¹¹ ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Judgment, 8 July 2019, ICC-01/04-02/06-2359, para. 883 (*‘Ntaganda*, 8 July 2019’) (<https://www.legal-tools.org/doc/80578a/>); ICC, *Prosecutor v. Yekatom and Ngaïssona*, Trial Chamber V, Decision on Yekatom Defence Motion for Additional Details, 13 July 2020, ICC-01/14-01/18-585, para. 29 (<https://www.legal-tools.org/doc/nsfrmm/>).

¹² *Ntaganda*, 8 July 2019, para. 883; ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Judgment, 4 February 2021, ICC-02/04-01/15-1762-Red (public redacted version), para. 2697 (*‘Ongwen*, 4 February 2021’) (<https://www.legal-tools.org/doc/kv27ul/>).

¹³ For example, ICTY, *Prosecutor v. Halilovic*, Trial Chamber, Judgment, 16 November 2005, IT-01-48-T, paras. 33–34 (<https://www.legal-tools.org/doc/abda04/>).

leads to a temporary loss of protection of civilian status “for such time [such individuals] take direct part in the hostilities” (*Katanga and Ngudjolo*, 30 September 2008, footnote 375; *Mbarushimana*, 16 December 2011, para. 148). Examples of such acts are when a “civilian uses weapons or other means to commit violence against human or material enemy forces” but not when the civilians are supplying food and shelter or sympathising with a belligerent party (para. 148). Moreover, the status is not lost when a civilian is defending him or herself (see by analogy in a non-international armed conflict *Ongwen*, 4 February 2021, para. 2697).

The ICC has explained that in cases where the attack is directed towards a legitimate military objective within the meaning of AP I, Articles 51–52 and simultaneously the civilian population or civilians not taking direct part in the hostilities, the perpetrator can still be prosecuted under Article 8(2)(b)(i) (*Katanga and Ngudjolo*, 30 September 2008, para. 273). This situation must nonetheless be distinguished from attacks against military objectives with the awareness that they will or may result in the incidental loss of life or injury to civilians (*Katanga and Ngudjolo*, 30 September 2008, para. 274). The Court has thus distinguished between a violation of the principle of discrimination and a violation of the principle of proportionality, the latter being prosecuted under Article 8(2)(b)(iv) of the ICC Statute.

ii. Subjective Elements:

a. “[I]ntentionally” Directing an Attack:

The crime must be committed with intention and knowledge, as indicated in Article 30 ICC Statute. Additionally, the third element of the Elements of Crimes requires the perpetrator to have “intended” the attack, and this means selecting the target and deciding to attack it (see by analogy *Ntaganda*, 8 July 2019, para. 744 in the situation of a non-international armed conflict). The Court has specified that this intention to attack the civilian population is in addition to the standard *mens rea* requirement provided in Article 30 ICC Statute: there must be a *dolus directus* of first degree, that is, a concrete intent.¹⁴ In more recent case-law, albeit relating to non-international armed conflict, the Court has argued that the third element in

¹⁴ ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red (public redacted version), para. 93 (<https://www.legal-tools.org/doc/cb3614/>); *Katanga and Ngudjolo*, 30 September 2008, para. 271.

the Elements of Crimes does not constitute a specific *dolus* (*Katanga*, 7 March 2014, para. 806; see Commentary to Article 8(2)(e)(i)). According to the Elements of Crimes and the case-law so far recklessness does not appear to suffice to fulfil the test. That being said, the Office of the Prosecutor has indicated that “[a]n argument could be made that a pattern of indifference and recklessness with respect to civilian life and property should eventually satisfy the intent requirements of Articles 30 and 8(2)(b)(i) and (ii)”.¹⁵

The Court nonetheless distinguishes two situations:

1. The civilian population is the sole target of the attack. In this case the moment the attack is launched the crime is committed (*Katanga and Ngudjolo*, 30 September 2008, para. 272); and
2. The attack is launched simultaneously against two distinct aims: a military objective (according to AP I, Articles 51–52) and a civilian population. In this case a number of requirements must be fulfilled for the crime to be committed. First, the village must have a significant military value and second it must contain two distinct targets: the defending forces of the adverse or hostile party in control of the village and the civilian population of the village which shows allegiance to the adverse or hostile party (*Katanga and Ngudjolo*, 30 September 2008, para. 273).

b. Intention that the Object of the Attack Is the Civilian Population or Civilians:

This requirement, which is the second element in the Elements of Crimes (Elements of Crimes, page 18), must be analysed as a behaviour.¹⁶ “[T]he crime described in Article 8(2)(b)(i) of the Statute [...] is a crime of mere action” (*Katanga and Ngudjolo*, 30 September 2008, footnote 374).

Elements assisting in ascertaining the intention of attacking the civilian population or civilians are the means and methods used during the attack (for example, blocking roads to and from the village and order to kill civilians attempting to flee (*Katanga and Ngudjolo*, 30 September 2008,

¹⁵ ICC OTP, *Situation in the Republic of Korea*, Article 5 Report, 23 June 2014, para. 65 (‘*Situation in the Republic of Korea*, 23 June 2014’) (<https://www.legal-tools.org/doc/ef1f7f/>).

¹⁶ ICC, *Prosecutor v. Ngudjolo*, Pre-Trial Chamber I, Décision concernant les éléments de preuve et les renseignements fournis par l’Accusation aux fins de délivrance d’un mandat d’arrêt à l’encontre de Germain Katanga, 6 July 2007, ICC-01/04-01/07-4-tFRA, para. 41 (<https://www.legal-tools.org/doc/5fbd8a/>).

para. 281), the number and status of victims (killing of women and children (para. 282), the discriminatory character of the attack (for example, chanting songs with lyrics indicating that specific groups should be killed whilst others shown mercy (para. 280) and the nature of the act (for example, killing civilians and destroying their property (paras. 277 and 282).

c. Awareness of the Civilian Status of the Population or Individuals:

By analogy with the requirements for the crime of attacking the civilian population or individual civilians not taking direct part in the hostilities in a non-international armed conflict under Article 8(2)(e)(i) it can be argued that the Court further requires that the perpetrator must be aware of the civilian status of the victims (*Mbarushimana*, 16 December 2011, paras. 151 and 219; *Katanga*, 7 March 2014, para. 808). In the report of the Office of the Prosecutor (OTP) on the *Situation in the Republic of Korea*, the OTP noted that the ICTY had explained that “[The] attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity” (*Situation in the Republic of Korea*, 23 June 2014, para. 62).

d. Awareness of the Circumstances that Established the Existence of the Armed Conflict:

According to element 5 of the Elements of Crimes for the war crime of attacking civilians, the perpetrator must be aware of factual circumstances that established the existence of an armed conflict. This has been reiterated by the Court (*Katanga and Ngudjolo*, 30 September 2008, para. 265).

Cross-references:

Article 8(2)(b)(ii), 8(2)(b)(ix) and 8(2)(e)(i).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 397 (<https://www.legal-tools.org/doc/01addc/>).
2. Knut Dörmann, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Mu-

nich/Oxford/Baden-Baden, 2016, pp. 355–62 (<https://www.legal-tools.org/doc/040751/>).

3. Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, pp. 475–485, mn. 1278–1304.
4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 213–300 (<https://www.legal-tools.org/doc/b7432e/>).

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Article 8(2)(b)(ii)

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

General Remarks:

The war crime of attacking civilian objects is a crime committed during the conduct of hostilities. Unlike attacks on the civilian population and individual civilians taking a direct part in the hostilities (see Article 8(2)(b)(i)) the crime of attacking civilian objects is not a grave breach of the Protocol Additional to the Geneva Conventions of 12 August 1949.¹ Further there is no equivalent provision in the Statute that deals with non-international armed conflict.²

Article 8(2)(b)(ii) is a reflection of the principle of distinction in attack in an international armed conflict. Whilst the principle is enshrined in AP I, Articles 48 and 52, it is also of customary nature.³ The International Court of Justice has stressed that deliberate attacks on civilian objects are absolutely prohibited by international humanitarian law.⁴

Analysis:

Article 8(2)(b)(ii) states that the ICC has jurisdiction over acts of “[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives”.

i. Material Elements:

a. Definition of an Attack:

The first element of the Elements of Crimes requires that “the perpetrator directed an attack”. Yet, neither the Statute nor the Elements of Crimes de-

¹ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977 (‘AP I’) (<https://www.legal-tools.org/doc/d9328a/>).

² ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red (public redacted version), para. 85 (‘*Abu Garda*, 8 February 2010’) (<https://www.legal-tools.org/doc/cb3614/>).

³ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009, Rule 7 (‘ICRC Study on Customary International Law’) (<https://www.legal-tools.org/doc/78a250/>).

⁴ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports, para. 78 (<https://www.legal-tools.org/doc/d97bc1/>).

fine the term “attack”. Although the Court has not defined the concept of “attack” in the context of Article 8(2)(b)(ii) it is likely that, alike for Article 8(2)(b)(i), it will refer to AP I, Article 49(1) which asserts that an attack are “acts of violence against the adversary, whether in offence or in defense”.⁵ In its report on the Situation on Registered Vessels of Comoros, Greece and Cambodia, the Office of the Prosecutor found that an “attack includes all acts of violence against an adversary”.⁶

There must be a causal link between the perpetrator’s conduct and the consequence of the attack. As in the case with the war crime of attacking the civilian population and civilians not taking a direct part in hostilities (see Commentary to Article 8(2)(b)(i)) there does not seem to be a requirement that the attack results in some damage or destruction.⁷ It is the intention that counts as the third element of the Elements of Crimes requires that “the perpetrator intended such civilian objects to be the object of the attack” (Elements of Crimes). In contrast Article 8(2)(b)(xiii) which covers both military and civilian objects requires the destruction, by action or omission, of the property (*Katanga and Ngudjolo*, 30 September 2008, para. 310).

b. Object of the Attack Is Civilian Objects:

The second element of the Elements of Crimes specifies that “the object of the attack was civilian objects, that is, objects which are not military objectives”. In *Gotovina* the ICTY had explained that the targeting of civilian objects may never be justified by military necessity.⁸ Given that the ICC has also dismissed the justification of military necessity, though in the context of attacks on civilians,⁹ it is likely that it will espouse the same approach with regard to objects and follow the *Gotovina* jurisprudence.

⁵ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 266 (*‘Katanga and Ngudjolo*, 30 September 2008’) (<https://www.legal-tools.org/doc/67a9ec/>).

⁶ ICC OTP, *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Article 53(1) Report, 6 November 2014, para. 93 (<https://www.legal-tools.org/doc/43e636/>).

⁷ See discussion in ICTY, *Prosecutor v. Kordić and Čerkez*, Appeals Chamber, Judgment, 17 December 2004, IT-95-14/2-A, paras. 59–62 (<https://www.legal-tools.org/doc/738211/>).

⁸ ICTY, *Prosecutor v. Gotovina, Čermak and Markač*, Trial Chamber, Judgment, 15 April 2011, IT-06-90-T, para. 1766 (<https://www.legal-tools.org/doc/7c85bd/>).

⁹ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgement pursuant to Article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-T, para. 800 (*‘Katanga*, 7 March 2014’) (<https://www.legal-tools.org/doc/f74b4f/>).

Civilian objects are defined in Article 8(2)(b)(ii) in the negative, as “objects which are not military objectives”, thereby espousing the international humanitarian law approach (see AP I, Article 52(1) and ICRC Study on Customary International Humanitarian Law, Rule 8). Military objectives are thus “limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage” (AP I, Article 52(2)). It must be noted that the Court has found that this definition also applies in the context of a non-international armed conflict in relation to attacks on “installations, material, units or vehicles involved in a peacekeeping mission” (*Abu Garda*, 8 February 2010, para. 89).

There are three elements in assessing whether an object is a military objective:

- The object’s nature, location, purpose or use makes a contribution to military action. Usually weapons, military equipment, military transport, military communication centres and army headquarters fulfil his requirements. Other objects that are often called ‘dual-use objects’ (for example bridges, airports, power plants, manufacturing plants, and integrated power grids) must be examined on a case-by-case basis. As for objects that normally serve civilian purposes such as schools and hospitals they must also be assessed on a case-by-case basis. That being said, referring to *Galić*¹⁰ the Court has explained that in case of doubt an object that is “normally dedicated to civilian purposes” must be considered civilian (*Abu Garda*, 8 February 2010, footnote 131). This again reflects the approach taken by international humanitarian law in AP I, Article 52(3).
- The object must make an effective contribution to military action. This means that there must be a proximate nexus between the object and the military action.
- The attack on the military objective must offer a definite military advantage in the sense that it is not potential or indeterminate. It is however unclear whether the definition of military advantage relates to one specific military operation or can be viewed in light of a wider operation or military action more generally. Military advantage usu-

¹⁰ ICTY, *Prosecutor v. Galić*, Trial Chamber, Judgment and Opinion, 5 December 2003, IT-98-29-T, para. 51 (<https://www.legal-tools.org/doc/eb6006/>).

ally includes gaining ground or weakening the military forces of the adversary.

Examples of civilian objects falling within the purview of Article 8(2)(b)(ii) are houses and parts thereof, personal items and furniture.¹¹

Article 8(2)(b)(ii) must be distinguished from attacks against military objectives with the awareness that they will or may result in the incidental destruction of civilian property as this is covered by Article 8(2)(b)(iv) which reflects the principle of proportionality.

ii. Subjective Elements:

a. “[I]ntentionally” Directing an Attack:

The crime must be committed with intention and knowledge, as indicated in Article 30 ICC Statute. Additionally, the third element of the Elements of Crimes requires the perpetrator to have “intended” the attack. In relation to Article 8(2)(b)(i) (see Commentary on Article 8(2)(b)(i)) the Court has specified that this intention is in addition to the standard *mens rea* requirement provided in Article 30 ICC Statute, that is, there must be a *dolus directus* of first degree, that is, a concrete intent (*Abu Garda*, 8 February 2010, para. 93; *Katanga and Ngudjolo*, 30 September 2008, para. 271). As the same terminology is used and Article 8(2)(b)(ii) also deals with civilian status (of objects rather than persons) it is likely that the Court will adopt the same approach. However, in more recent case-law, albeit relating to attack on civilians in the context of a non-international armed conflict, the Court has argued that the third element in the Elements of Crimes does not constitute a specific *dolus* (*Katanga*, 7 March 2014, para. 806; see Commentary to Article 8(2)(e)(i)).

According to the Elements of Crimes and the case-law so far recklessness does not appear to suffice to fulfil the test. That being said, the Office of the Prosecutor has indicated that “[a]n argument could be made that a pattern of indifference and recklessness with respect to civilian life and

¹¹ See ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06, 3 July 2008, ICC-01/04-504 (<https://www.legal-tools.org/doc/1c41b4/>).

property should eventually satisfy the intent requirements of Articles 30 and 8(2)(b)(i) and (ii).¹²

b. Intention that the Object of the Attack Is Civilian Objects:

The second element in the Elements of Crimes, that is, that the object of the attack was civilian objects, must be analysed as a behaviour.¹³

c. Awareness of the Civilian Status of the Object:

In the report of the OTP on the *Situation in the Republic of Korea*, the OTP noted that the ICTY had explained that “[the] attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity” (*Situation in the Republic of Korea*, 23 June 2014, para. 62).

d. Awareness of the Circumstances that Established the Existence of the Armed Conflict:

According to element 5 of the Elements of Crimes for the war crime of attacking civilian objects, the perpetrator must be aware of factual circumstances that established the existence of an armed conflict.

Cross-references:

Article 8(2)(b)(i), 8(2)(b)(ix) and 8(2)(e)(i).

Starvation in Articles 6(c); 7(1)(b), (j) and (k); 7(2)(b); 8(2)(a)(iii); 8(2)(b)(v), (xiii) and (xxv).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 397–398 (<https://www.legal-tools.org/doc/01addc/>).
2. Knut Dörmann, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International*

¹² ICC OTP, *Situation in the Republic of Korea*, Article 5 Report, 23 June 2014, para. 65 (*Situation in the Republic of Korea*, 23 June 2014’) (<https://www.legal-tools.org/doc/ef1f7f/>).

¹³ ICC, *Prosecutor v. Ngudjolo*, Pre-Trial Chamber I, Décision concernant les éléments de preuve et les renseignements fournis par l’Accusation aux fins de délivrance d’un mandat d’arrêt à l’encontre de Germain Katanga, 6 July 2007, ICC-01/04-01/07-4-tFRA, para. 41 (<https://www.legal-tools.org/doc/5556a6/>).

- Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/ Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 362–65 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, pp. 486–488, mn. 1305–1312.
 4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 213–300 (<https://www.legal-tools.org/doc/b7432e/>).
 5. Daniel Frank, “The Elements of War Crimes – Article 8(2)(b)(ii)”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 143–144 (<https://www.legal-tools.org/doc/e34f81/>).

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Article 8(2)(b)(iii)

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

General Remarks:

Attacking personnel or objects involved in humanitarian assistance or peacekeeping missions, entitled to the protection of civilians or civilian objects, is not a new crime under international humanitarian law. It is rather evidence of the need to specify a group of civilians that because of its missions deserves a specific protection.¹ During the negotiations of the ICC Statute, the Convention on the Safety of United Nations and Associated Personnel provided the basis in the Draft Statute for one out of three treaty crimes.² When decided that no treaty crime would be included in the ICC Statute the delegations began to concentrate on treating and including attacks against UN personnel as a war crime. The crime of attacking peacekeepers was the only one of the three treaty crimes that ‘survived’ this change, which is evidence of its strong symbolic character. A crime with the same definition as in the ICC Statute was included in the Statute of the Special Court for Sierra Leone.

Analysis:

a. Objective Elements:

i. The Perpetrator Directed an Attack:

The Elements of Crimes do not include a definition of the term ‘attack’. The ICC Pre-Trial Chamber has, by reference *inter alia* to the “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict” in Article

¹ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para. 16 (<https://www.legal-tools.org/doc/4af5d2/>).

² Convention on the Safety of United Nations and Associated Personnel, 9 December 1994 (<https://www.legal-tools.org/doc/6bfa73/>).

21(1)(b) of the Statute found guidance in Additional Protocol I,³ applicable in international armed conflicts ('IACs') where the term "attack" is defined as "acts of violence against the adversary, whether in offence or in defence". The term has been given the same definition in Additional Protocol II,⁴ applicable in non-international armed conflicts ('NIACs'). There is no requirement of any harmful impact on the personnel or material. There is a need to establish a causal link between the conduct of the perpetrator and the consequence "so that the concrete consequence, the attack in this case, can be seen as having been caused by the perpetrator".⁵

ii. The Object of the Attack Was Personnel, Installations, Material, Units or Vehicles Involved in a Humanitarian Assistance or Peacekeeping Mission in Accordance with the Charter of the United Nations:

There is no generally accepted definition on the notion 'humanitarian assistance', but it includes measures taken with the purpose of preventing or alleviating human suffering of victims of an armed conflict. In practice the object of attacks has so far been personnel and objects involved in a peacekeeping mission. The term 'peacekeeping' is not mentioned in the UN Charter but has developed in practice. The reference to "in accordance with the Charter of the United Nations" does not mean that the mission needs to be established by the UN but includes also missions established by regional organisations (*Abu Garda*, 8 February 2010, para. 124). While the term lacks a simple definition three basic principles are accepted as constituting a peacekeeping mission: consent of the parties; impartiality; and use of force only in self-defence (para. 71), although there is now a change in UN doctrine regarding definition of such missions.⁶ Consent of the host state is a legal requirement but in practice the consent of the main parties to the conflict is also sought to ensure the effectiveness of the operation. Regard-

³ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977 ('AP I') (<https://www.legal-tools.org/doc/d9328a/>).

⁴ Protocol (II) additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts, 7 December 1978, Article 13(2) (<https://www.legal-tools.org/doc/fd14c4/>).

⁵ ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red (public redacted version), paras. 64–66 ('*Abu Garda*, 8 February 2010') (<https://www.legal-tools.org/doc/cb3614/>).

⁶ SCSL, *Prosecutor v. Sesay, Kallon and Gbao*, Judgement, 2 March 2009, SCSL-04-15-T, paras. 224–225 ('*RUF*, 2 March 2009') (<https://www.legal-tools.org/doc/7f05b7/>).

ing impartiality, the Report of the Panel of the United Nations Peace Operations states, *inter alia*, that “impartiality for such operations must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles.⁷ Such impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement” (Brahimi Report, para. 50; *Abu Garda*, 8 February 2010, para. 73). The Majority in the ICC Pre-Trial Chamber noted that peacekeeping missions were only entitled to use force in self-defence compared to peace enforcement missions decided under Chapter VII of the UN Charter which may use force beyond the concept of self-defence in order to achieve their mandates (*Abu Garda*, 8 February 2010, para. 74). In UN doctrine the right of self-defence includes a “right to resist attempts by forceful means to prevent the peacekeeping operation from discharging its duties under the mandate of the Security Council” although it is doubtful if it has developed to become settled law (international or national) (*RUF*, 2 March 2009, para. 228).

The development in practice where operations are often authorized by the Security Council under Chapter VII to use all necessary measures for certain purposes is reflected in the UN doctrine by references to robust peacekeeping. Recent UN doctrine considers that the tendency to refer to peacekeeping operations as Chapter VI operations and peace enforcement operations as Chapter VII operations is somewhat misleading. It is now the usual practice, both in peacekeeping and in peace enforcement, “for a Chapter VII mandate to be given” and a distinction is instead made between “operations in which the robust use of force is integral to the mission from the outset [...] and operations in which there is a reasonable expectation that force may not be needed at all”.⁸ The Capstone Doctrine, as it is known, draws a distinction between peace enforcement and robust peacekeeping. Peacekeeping operations with a robust mandate have been authorized to “use all necessary means to deter forceful attempts to disrupt the political process, and/or assist the national authorities in maintaining law and order. The concept of robust peacekeeping is defined as involving “the use of force at the tactical level with the authorization of the Security Council and consent of the host nation and/or the main parties to the con-

⁷ Report of the Panel of the United Nations Peace Operations, UN Doc. A/55/305-S/2000/809, 21 August 2000 (‘Brahimi Report’) (<https://www.legal-tools.org/doc/20lxve/>).

⁸ A More Secure World: Our Shared Responsibility, UN Doc. A/59/565 (2004), para. 211 (<https://www.legal-tools.org/doc/b7add1/>).

flict”. A peace enforcement operation on the other hand “does not require the consent of the main parties and may involve the use of military force at the strategic level, which is generally prohibited for Member States under Article 2(4) of the Charter, unless authorized by the Security Council”.⁹

The difference between these types of operation is thus not whether they have been established under Chapter VII of the UN Charter, but whether they are dependent on the existence of consent and the use of force at a strategic level. The concept of robust peacekeeping therefore challenges the traditional borders between the concepts of peacekeeping and peace enforcement (traditionally regarded as Chapter VI operations and Chapter VII operations). This may ultimately have an effect on the interpretation of the term peacekeeping mission in the ICC Statute. It is telling that the Trial Chamber in the *RUF* case found that the mandate of the UN Mission in Sierra Leone even after it has been expanded through UNSC Resolution 1289 which clearly was decided under Chapter VII and included the expression “take necessary action”¹⁰ was regarded a peacekeeping mission for the purpose of the crime of attacking personnel in such missions (*RUF*, 2 March 2009, para. 1888).

iii. Such Personnel, Installations, Material, Units or Vehicles Were Entitled to the Protection Given to Civilians or Civilian Objects under the International Law of Armed Conflict:

Personnel in humanitarian assistance and peacekeeping missions are presumed to be entitled to the protection of civilians. This is particularly so regarding humanitarian assistance personnel. The authority to use force by peacekeepers, in self-defence or based on a resolution adopted under Chapter VII of the UN Charter (depending on the definition of a peacekeeping mission) naturally raise questions if the use of force by peacekeepers could affect their protection as civilians under international humanitarian law. Personnel in humanitarian assistance and peacekeeping missions are entitled to the protection of civilians as long as they are not taking a direct part in hostilities. Their protection would not be affected by exercising their individual right of self-defence – nor the use of force “in self-defence in the discharge of their mandate, provided that it is limited to such use” (*RUF*, 2

⁹ United Nations Peacekeeping Operations: Principles and Guidelines, United Nations Secretariat, New York, 2008, p. 34

¹⁰ Resolution 1289 (2000), UN Doc. S/RES/1289, 7 February 2000 (<https://www.legal-tools.org/doc/ca385f/>).

March 2009, para. 233). It should in this respect be noted that the use of force in defence of the mandate is inherently difficult to define. Determining whether peacekeeping personnel or objects of such a mission were entitled to the protection of civilians or civilian objects, the Trial Chamber in the *RUF* case found that it needed to consider the totality of circumstances existing at the time of the alleged offence including “inter alia, the relevant Security Council resolutions for the operation, the specific operational mandates, the role and practices actually adopted by the peacekeeping mission during the particular conflict, their rules of engagement and operational orders, the nature of the arms and equipment used by the peacekeeping force, the interaction between the peacekeeping force and the parties involved in the conflict, any use of force between the peacekeeping force and the parties in the conflict, the nature and frequency of such force and the conduct of the alleged victim(s) and their fellow personnel” (para. 234). It can be questioned if indeed all these aspects are valid for the determination whether personnel or objects are entitled to the protection of civilians since this a question decided under international humanitarian law.

The Majority in the ICC Pre-Trial exemplified “direct participation in hostilities” to include “bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for immediate use of a belligerent, and transporting weapons in proximity to combat operations” (*Abu Garda*, 8 February 2010, para. 81). The determination of whether a person is directly participating in hostilities requires a case-by-case analysis (para. 83).

Based on the definition of civilian objects in Article 52(2) of AP I and the International Committee of the Red Cross customary law study,¹¹ the Majority in the ICC Pre-Trial Chamber found that “installations, material, units or vehicles involved in a peacekeeping mission the context of an armed conflict not of an international character shall not be considered military objectives, and thus shall be entitled to the protection given to civilian objects, unless and for such time as their nature, location, purpose or use make an effective contribution to the military action of a party to a conflict and insofar as their total or partial destruction, capture or neutralization, in

¹¹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009 (<https://www.legal-tools.org/doc/78a250/>).

the circumstances ruling at the time, offers a definite military advantage” (*Abu Garda*, 8 February 2010, para. 89).

Given the military structure and organisation of peacekeeping missions it may in fact be questioned if such personnel should be regarded as civilians taking direct part in hostilities if they become involved in armed conflict. Military personnel organised and commanded by a state or an intergovernmental organisation within a traditional military structure may rather be regarded as members of a military force under command of party to an armed conflict than civilians directly participating in an armed conflict. The former has also the legal effect of a change in status of the personnel in a more permanent manner than the latter where civilians directly participating in hostilities only temporarily.

b. Subjective Elements:

i. The Perpetrator Intended Such Personnel, Installations, Material, Units or Vehicles So Involved to Be the Object of the Attack:

The Majority in the ICC Pre-Trial Chamber found that this subjective element was of similar character to that of the Elements of the Crimes for Articles 8 (2)(b)(i) and 8 (2)(e)(i) dealing with attacks on civilians in both international and non-international armed conflicts. The offence first and foremost encompasses *dolus directus* of the first degree. The finding of the Majority was also applicable in NIACs (*Abu Garda*, 8 February 2010, para. 93).

ii. The Perpetrator Was Aware of the Factual Circumstances that Established the Protection:

The necessary knowledge required by the perpetrator pertains to the facts establishing that the installations, materials, units or vehicles and personnel were involved in a peacekeeping mission but there is no need of legal knowledge regarding their protection.

iii. The Perpetrator Was Aware of Factual Circumstances that Established the Existence of an Armed Conflict:

There is no requirement on behalf of the perpetrator to conclude “on the basis of a legal assessment of the said circumstances, that there was an armed conflict” (*Abu Garda*, 8 February 2010, para. 96; *RUF*, 2 March 2009, para. 235).

Cross-reference:

Article 8(2)(e)(iii).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 412 (<https://www.legal-tools.org/doc/01addc/>).
2. Michael Cottier, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 365–75 (<https://www.legal-tools.org/doc/040751/>).
3. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, International Committee of the Red Cross/Cambridge University Press, 2003, pp. 453–456 (<https://www.legal-tools.org/doc/b07fe3/>).
4. Ola Engdahl, “Prosecution of Attacks against Peacekeepers in International Courts and Tribunals”, in *Military Law and Law of War Review*, 2012, vol. 249, p. 51.
5. Daniel Frank, “Article 8(2)(b)(iii) – Attacking Personnel or Objects Involved in a Humanitarian Assistance or Peacekeeping Mission”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 146 (<https://www.legal-tools.org/doc/e34f81/>).
6. Herman von Hebel and Darryl Robinson, “Crimes within the Jurisdiction of the Court”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, p. 110 (<https://www.legal-tools.org/doc/d71078/>).

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Article 8(2)(b)(iv)

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

The provision reflects the principle of proportionality¹ and brings environment into the equation (AP I, Articles 35(3) and 55).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 398–401 (<https://www.legal-tools.org/doc/01addc/>).
2. Roberta Arnold and Stefan Wehrenberg, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 375–80 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 349–352, mn. 1040–1047 (<https://www.legal-tools.org/doc/e35f82/>).

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¹ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977, Articles 51(5)(b) and 85(3)(b) (‘API’) (<https://www.legal-tools.org/doc/d9328a/>).

Article 8(2)(b)(v)

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

A place is considered undefended when it is inhabited, located in a war zone or nearby, and open to occupation by an adverse party. Thus, the provision does not cover objects behind enemy lines, even if there are no combatants or weapons located in or nearby the objects.

Cross-references:

Starvation in Articles 6(c); 7(1)(b), (j) and (k); 7(2)(b); 8(2)(a)(iii); 8(2)(b)(ii), (xiii) and (xxv).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 401–402 (<https://www.legal-tools.org/doc/01addc/>).
2. Roberta Arnold and Stefan Wehrenberg, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 380–82 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 352–354, mn. 1049–1052 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(b)(vi)

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

The scope of the provision protecting combatants not involved in combat, *hors de combat*, covers to a large extent the war crime of declaring that no quarter will be given, Article 8(2)(b)(xii). The mental element requires at least recklessness.

Cross-reference:

Article 8(2)(b)(xii).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 405–406 (<https://www.legal-tools.org/doc/01addc/>).
2. Michael Cottier and Emilia Richard, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 382–391 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 304–305, mn. 879–884 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(b)(vii)-1

(vii) Making improper use of a flag of truce,

Envoys, identifying themselves by a white flag, authorized to negotiate with the enemy are protected.

Cross-references:

Articles 8(2)(b)(xi) and 8(2)(e)(ix).

Doctrine: For the bibliography, see the comment “Article 8(2)(b)(vii)-5”.

Author: Mark Klamberg.

Article 8(2)(b)(vii)-2

of the flag or of the military insignia and uniform of the enemy

According to the Elements of Crimes the use of enemy flags, military insignias, and uniforms is prohibited while engaged in an attack, which makes the prohibition less strict in comparison with the use of protective emblems.

Cross-references:

Articles 8(2)(b)(xi) and 8(2)(e)(ix).

Doctrine: For the bibliography, see the comment “Article 8(2)(b)(vii)-5”.

Author: Mark Klamberg.

Article 8(2)(b)(vii)-3

or of the United Nations,

According to the wording only UN military insignia is included, which appears to be an editorial error. It is submitted that the provision also includes non-military UN personnel.

Cross-references:

Articles 8(2)(b)(xi) and 8(2)(e)(ix).

Doctrine: For the bibliography, see the comment “Article 8(2)(b)(vii)-5”.

Author: Mark Klamberg.

Article 8(2)(b)(vii)-4

as well as of the distinctive emblems of the Geneva Conventions,

The distinctive emblems of the Geneva Conventions are the red cross, the red crescent, the red lion and sun, and the red crystal. The latter emblem was added by the adoption of a third Additional Protocol to the Geneva Conventions.¹ The Protocol was partly adopted in response to the Israeli argument that it should be able to use the red shield of David in national operations. The third additional Protocol enables the Israeli Society, member of the International Federation of Red Cross and Red Crescent Societies, to continue to use its red shield of David as its sole emblem inside Israel. When working outside Israel the Society would need to work according to the requirements of the host country. Normally this would mean that it could display the red shield of David incorporated within the red crystal, or use the red crystal alone (AP III, Article 3). The emblems mark medical and spiritual personnel, medical units and transports, equipment or supplies. The emblems may in principle only be used by persons who do not themselves participate in hostilities.

Cross-references:

Articles 8(2)(b)(xi) and 8(2)(e)(ix).

Doctrine: For the bibliography, see the comment “Article 8(2)(b)(vii)-5”.

Author: Mark Klamberg.

¹ Protocol (III) additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, 8 December 2005 (‘AP III’) (<https://www.legal-tools.org/doc/ddefae/>).

Article 8(2)(b)(vii)-5

resulting in death or serious personal injury;

The conduct is only criminal under Article 8(2)(b)(vii) when it led to a person's death or injury.

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 403–405 (<https://www.legal-tools.org/doc/01addc/>).
2. Michael Cottier and Julia Grignon, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 391–404 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 358–360, mn. 1064–1072 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(b)(viii)

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

General Remarks:

The idea of criminalizing the transfer of a population into occupied territory can be traced back to the Nuremberg Trials, where the International Military Tribunal ('IMT') found two of the accused guilty of attempting the "Germanization" of certain territories.¹ This war crime, as defined by the Tribunal, included the forced deportation of inhabitants who were predominantly non-German and the introduction of German 'colonists'. When Article 49(6) of the Geneva Convention (IV) was drafted,² reference was made to this practice. In its 1991 Draft Code of Crimes against the Peace and Security of Mankind,³ the International Law Commission listed the "establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory" as an "exceptionally serious" war crime. Article 20(c)(1) of the 1996 Draft Code defined "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies" as a war crime when committed "wilfully in violation of international humanitarian law".⁴

Preparatory Works:

The general inclusion of population transfers into the ICC Statute seemed not to be very controversial among state parties, except for the Israeli delegation, which expressed fierce opposition towards the provision. The Preparatory Commission's negotiations over the exact wording, however, proved to be extremely difficult for the other states as well. The Arab states

¹ IMT, *Trial of the Major War Criminals*, Judgment, 1 October 1946, pp. 238, 261, 295 and 335 (<https://www.legal-tools.org/doc/f21343/>).

² Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 ('GC IV') (<https://www.legal-tools.org/doc/d5e260/>).

³ Report of the International Law Commission on the work of its forty-third session (29 April-19 July 1991), UN Doc. A/746/10, Vol. II, 19 July 1991, p. 104 (<https://www.legal-tools.org/doc/9a05b8/>).

⁴ Yearbook of the International Law Commission, UN Doc. A/CN.4/SER.A/1996/Add.1, Volume II, Part 2, 22 July 1994 (<https://www.legal-tools.org/doc/bb5adc/>).

lobbied for a definition that would have expressly included the encouragement, facilitation and promotion of transfers, including the failure to prevent the population from organizing such transfers themselves, whereas the majority preferred a wording based on Article 85(4)(a) of Additional Protocol I to the Geneva Conventions.⁵

Doctrine: For the bibliography, see the comment “Article 8(2)(b)(viii)-2”.

Author: Mark Klamburg, updating the previous version by Hannes Jöbstl.

⁵ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977 (‘AP I’) (<https://www.legal-tools.org/doc/d9328a/>).

Article 8(2)(b)(viii)-1

The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies

Analysis:

i. Material Elements:

The Elements of Crimes make clear the term ‘transfer’ needs to be interpreted according to the relevant rules of international humanitarian law. Article 49(6) GC IV provides that “[t]he Occupying Power shall not deport or transfer parts of its own population into the territory it occupies”. Two core rationales can be identified in Article 49(6) GC IV. Occupation by its very concept was always meant to be a temporary situation and introducing parts of the occupying power’s own population might facilitate a potential process of illegal annexation. Another rationale is the protection of civilians living in occupied territory by prohibiting the occupying power from altering the fundamental demographic composition of that territory. Reference to this concept of forced demographic changes in connection with an Article 49(6) violation can be found in various UN Security Council Resolutions.¹ It is further clear from the context that the term ‘transfer’ in contrast to ‘deport’ lacks the compulsory element. Nationals of the occupying power may decide to settle in occupied territory on their own free will. Nevertheless, governmental authorities can play an active role in organizing and supporting such settler movements. This could be done for example by investment in infrastructure, tax exemptions or, as confirmed by the ICJ,² simply by encouraging people to settle in occupied land. Private settlement without any support or inducement by the occupying power, and in accordance with local laws, does not amount to “transfer” and falls outside the scope of Article 49(6). Contrary to other norms of international humanitarian law, the provision thus only binds the occupying power and cannot be violated by private actors.³

¹ Resolution 446(1979), UN Doc. S/Res/446 (1979), 22 March 1979, para. 3 (<https://www.legal-tools.org/doc/70334f/>); Resolution 465(1980), UN Doc. S/Res/465 (1980), 1 March 1980, para. 5 (<https://www.legal-tools.org/doc/d96c52/>).

² ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 120 (<https://www.legal-tools.org/doc/e5231b/>).

³ France, Cour d’Appel de Versailles, *Association France-Palestine Solidarité “AFPS” c. Société Alstom Transport SA*, Judgment, 21 March 2013, R.G. N° 11/05331, 22.

Based on the plain wording of Article 49(6) GC IV the provision covers only civilian nationals of the occupying power and not those of any third state who could be equally used to bring about demographic changes. However, some scholars have argued that this reading of Article 49(6) might be too narrow in light of the object and purpose of the provision. Finally, the provision does not cover the transfer of civil servants or officials in charge of military affairs or the administration of the territory.

The main difference to Article 49(6) GC IV and Article 85(4)(a) AP I is the inclusion of the phrase “directly or indirectly”. Direct transfers cover the construction of housing by the state or the provision of official settlement plans. Indirect transfers include the implementation of policy measures to induce and facilitate settlement in the occupied territory, for example through subsidies and tax cuts. In both instances and contrary to forced transfer, however, the population still migrates on its own free will. Cottier and Baumgartner note that the phrase “parts of its own civilian population” indicates that the commission of the offense has to involve the actual settlement of a certain number of individuals.⁴ Zimmermann therefore argues that indirect measures can only be covered by the scope of Article 8(2)(b)(viii) if they actually lead to a physical transfer, which he considers to be core *actus reus*.⁵ However, it has been argued that such interpretation would exclude actions taken after the physical displacement of settlers has been completed, such as the regularisation of constructions built without the required authorisation or other inducements to stay in occupied territory.⁶ Most commentators agree that the transfer needs to be of a certain duration to qualify as illegal transfer. It is further unclear if there has to be a minimum number of transferred individuals. Whereas some authorities suggest that a small number might suffice (Cottier and Baumgartner, 2016, p. 410), others argue that the amount should be substantial due to

⁴ Michael Cottier and Elisabeth Baumgartner, “Article 8(2)(b)(viii)” in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 410 (<https://www.legal-tools.org/doc/040751/>).

⁵ Andreas Zimmermann, “Palestine and the International Criminal Court Quo Vadis? – Reach and Limits of Declarations under Article 12(3)”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 2, p. 324 (<https://www.legal-tools.org/doc/cbb3a9/>).

⁶ Hannes Jöbstl, “An Unlikely Day in Court? Legal Challenges for the Prosecution of Israeli Settlements under the Rome Statute”, in *Israel Law Review*, 2018, vol. 51, no. 3, p. 344 (<https://www.legal-tools.org/doc/65d24b/>).

the fact that the provision is intended to prevent forced demographic changes.⁷

ii. Mental Elements:

No special intent or motive is required for the crime of population transfer. According to the Elements of Crimes, the perpetrator only needs to “wilfully” transfer the parts of the population while being aware of the factual circumstances that established the armed conflict.

iii. Modes of Perpetration and Personal Scope of the Provision:

Article 8(2)(b)(viii) directly addresses the Occupying Power and therefore requires the involvement of its authorities. It is unclear whether private actors, such as the director of a company moving the population to settle in occupied territory or a company constructing houses, could be held criminally responsible. Such responsibility could only arise for aiding and abetting under Article 25(3)(c) of the ICC Statute. In *Richardson and another v. Director of Public Prosecutions* the Supreme Court of the United Kingdom briefly considered whether private individuals could be responsible for aiding and abetting the transfer of Israeli civilians under the International Criminal Court Act of 2001.⁸ The case concerned a company manufacturing cosmetics in a factory in the West Bank that also employed Israeli citizens. While generally acknowledging that a private individual could be aiding and abetting the crime of population transfer, the Court held that taking advantage of such transfer by employing settlers could not amount to aiding and abetting the Israeli Government in the transfer of civilians. This seems reasonable in light of the fact that under the Statute the contribution to an offence has to be “substantial”.

Doctrine: For the bibliography, see the comment “Article 8(2)(b)(viii)-2”.

Author: Mark Klamberg, updating the previous version by Hannes Jöbstl.

⁷ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 275 (<https://www.legal-tools.org/doc/b7432e/>).

⁸ Supreme Court of the United Kingdom, *Richardson and another v Director of Public Prosecutions*, Judgment, 5 February 2014, UKSC 8, para. 17.

Article 8(2)(b)(viii)-2

or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

The second limb of Article 8(2)(b)(viii) essentially criminalizes the same conduct as Article 8(2)(a)(vii). As with the transfer of the Occupying Power's own population, the provision is meant to prevent forced changes to the demographic composition of the territory concerned and to protect the affected population from the accompanying hardships.

Analysis:

i. Material Elements:

The deportation or transfer must be forcible, either through physical force or other forms of coercion. Nevertheless, Article 49(2) GC IV allows the Occupying Power to undertake total or partial evacuation of a given area if necessary to maintain the security of the population or imperative military reasons. It is disputed whether there exists a difference between 'deportation' and 'transfer'. In its analysis of the two terms within the meaning of Article 7(1)(d) an ICC Pre-Trial Chamber has clarified that "deportation" refers to relocation to another State, whereas "transfer" refers to a displacement within the borders of the same State.¹ By analogy, this reasoning could similarly be applied to 'transfers' within Occupied Territory and 'deportations' to the Occupying State or third States.

The expression "all or parts of the population" implies that a certain number of individuals must be transferred. Although some authorities suggest that already a small number might suffice (Cottier and Baumgartner, 2016, p. 215) it is unclear whether this is justifiable in light of the object and purpose of the provision (Cottier and Baumgartner, 2016, fn. 1).

ii. Mental Elements:

The provision does not require any special intent. The perpetrator must have been "aware of the factual circumstances that established the existence of an armed conflict".

¹ ICC, Pre-Trial Chamber I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18, 6 September 2018, para. 55 (<https://www.legal-tools.org/doc/73aeb4/>).

Cross-references:

Articles 7(1)(d), 8(2)(a)(vii) and 8(2)(e)(viii).

Doctrine:

1. Michael Cottier and Elisabeth Baumgartner, “Article 8(2)(b)(viii)”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 403–416 (<https://www.legal-tools.org/doc/040751/>).
2. Christian Tomuschat, “The Prohibition of Settlements”, in Andrew Clapham and Paola Gaeta (eds.), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, pp. 1551–53 (<https://www.legal-tools.org/doc/3666f5/>).
3. Jean Pictet *et al.* (eds.), *The Geneva Conventions of 12 August 1949: Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, International Committee of the Red Cross, Geneva, 1958, p. 283 (<https://www.legal-tools.org/doc/7d971f/>).
4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 271–275 (<https://www.legal-tools.org/doc/b7432e/>).
5. Knut Dörmann (ed.), *Elements of War Crimes under The Rome Statute of The International Criminal Court*, Cambridge University Press, 2002, p. 208 (<https://www.legal-tools.org/doc/b07fe3/>).
6. Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, 2009, pp. 238–42 (<https://www.legal-tools.org/doc/3865a1/>).
7. Hannes Jöbstl, “An Unlikely Day in Court? Legal Challenges for the Prosecution of Israeli Settlements under the Rome Statute”, in *Israel Law Review*, 2018, vol. 51, no. 3, pp. 339–363 (<https://www.legal-tools.org/doc/65d24b/>).
8. Andreas Zimmermann, “Palestine and the International Criminal Court Quo Vadis? – Reach and Limits of Declarations under Article 12(3)”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 2, p. 324 (<https://www.legal-tools.org/doc/cbb3a9/>).

Author: Mark Klamberg, updating the previous version by Hannes Jöbstl.

Article 8(2)(b)(ix)

Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

General Remarks:

With this article the drafters of the ICC Statute included a provision criminalizing violations of the rules protecting cultural property, which have been established by international humanitarian law as well as several UNESCO treaties over the years. The purpose of this provision is to specifically criminalize the destruction of cultural property as opposed to civilian property and therefore, it constitutes a *lex specialis* to Articles 8(2)(a)(iv), 8(2)(b)(ii) and 8(2)(b)(xiii).

Analysis:

i. Definition:

Pursuant to the ICC Elements of Crimes, the following criteria need to be met in order to fulfil the Article at hand:

1. The perpetrator directed an attack.
2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.
3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

ii. Requirements:

a. Material Elements:

The object of the offence has to be specially protected. The institutions enlisted in the ICC Statute can be classified into four main categories: cultur-

al objects, places for the collection of those in need (for example, hospitals), institutions dedicated to religion and others dedicated to education. The ICTY defined ‘cultural objects’ by referring the definition of cultural property in treaty law (for example, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict).¹ According to the case law of the ICTY, religious and educational institutions are protected as long as they meet the special requirement of “cultural heritage of people”, meaning “objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people”.² Additionally, these institutions must “clearly be identified as dedicated to religion or education”.³

Furthermore, the object of the offence cannot be a military objective. Military objectives are defined by Article 52(3) Additional Protocol I as objects “which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.⁴

Concerning the nature of the offence the ICC Statute penalizes the directing of attacks against such institutions. The term ‘attack’ is defined in Article 49(1) of Additional Protocol I and means “acts of violence against the adversary, whether in offence or in defence”. Hence, the scope of the Article is extremely broad and almost all acts of hostility fall under this provision. Furthermore, no actual damage to the protected institutions is required. In order for the article at hand to be fulfilled it is sufficient that the attack was directed against the respective protected institution.

¹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954 (<https://www.legal-tools.org/doc/6d6697/>); ICTY, *Prosecutor v. Strugar*, Trial Chamber, Judgment, 31 January 2005, IT-01-42, para. 230 (<https://www.legal-tools.org/doc/927ba5/>).

² ICTY, *Prosecutor v. Martić*, Trial Chamber, Judgment, 12 June 2007, IT-95-11, para. 97 (<https://www.legal-tools.org/doc/06634c/>).

³ ICTY, *Prosecutor v. Blaškić*, Trial Chamber, Judgment, 3 March 2000, IT-95-14, para. 185 (<https://www.legal-tools.org/doc/e1ae55/>).

⁴ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/d9328a/>).

b. Mental Elements:

In addition to the mental elements concerning the general requirements of war crimes, the perpetrator has to fulfil the mental elements of the underlying offence at hand. Namely, the attack against the protected institutions has to be committed “intentionally”. A controversial issue while drafting the ICC Statute was whether the term “intentionally” was related solely to the directing of an attack or also to the object of the attack. The *travaux préparatoires* adopted the latter approach. Therefore, the ICC Elements of Crimes require that the perpetrator must have known about the protected status of the institution. Additionally the perpetrator must have knowledge of the institution’s failure to qualify as a military objective, and nevertheless carry out the attack. However, he does not have to make a legal assessment of the protected status of the institutions. He merely needs to know the factual circumstances, which give the object a special status (see *Blaškić*, 3 March 2000, para. 185).

Cross-references:

Article 8(2)(b)(i), 8(2)(b)(ii), 8(2)(e)(i) and 8(2)(e)(iv).

Doctrine:

1. Roberta Arnold and Stefan Wehrenberg, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 416–21 (<https://www.legal-tools.org/doc/040751/>).
2. Gideon Boas *et al.*, *International Criminal Law Practitioner Library, Vol. II, Elements of Crime under International Criminal Law*, Cambridge University Press, 2008 (<https://www.legal-tools.org/doc/4d3bb5/>).
3. Caroline Ehlert, *Prosecuting the Destruction of Cultural Property in International Criminal Law*, Martinus Nijhoff Publishers, Leiden, 2014, pp. 121–140 (<https://www.legal-tools.org/doc/b945d6/>).
4. Micaela Frulli, “The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest of Consistency”, in *European Journal of International Law*, 2011, vol. 22, pp. 203–217 (<https://www.legal-tools.org/doc/5e5e95/>).
5. Mireille Hector, “Enhancing Individual Criminal Responsibility for Offences Involving Cultural Property – The Road to the Rome Statute and

- the 1999 Second Protocol”, in Nout Van Woudenberg and Liesbeth Lijnzaad (eds.), *Protecting Cultural Armed Conflict – An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Koninklijke Brill, Leiden, 2010, pp. 375–380 (<https://www.legal-tools.org/doc/721068/>).
6. Theodor Meron, “The Protection of Cultural Property in the Event of Armed Conflict within the Case-law of the International Criminal Tribunal for the Former Yugoslavia”, in *Museum International*, 2005, vol. 57, pp. 41–59 (<https://www.legal-tools.org/doc/0b8bb2/>).
 7. Roger O’Keefe, “Protection of Cultural Property under International Criminal Law”, in *Melbourne Journal of International Law*, 2010, vol. 11, pp. 1–54 (<https://www.legal-tools.org/doc/f2bd0b/>).
 8. Rüdiger Wolfrum, “Protection of Cultural Property in Armed Conflict”, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008 (<https://www.legal-tools.org/doc/e727e0/>).

Author: Caroline Ehlert.

Article 8(2)(b)(x)-1

(x) Subjecting persons who are in the power of an adverse party to physical mutilation

The term “physical mutilation” cover acts such as amputations, injury to limbs, removal of organs, and forms of sexual mutilations. The victim’s consent is not an excusable defence.

Cross-references:

Articles 8(2)(c)(i) and 8(2)(e)(xi).

Doctrine: For the bibliography, see the comment “Article 8(2)(b)(x)-3”.

Author: Mark Klamberg.

Article 8(2)(b)(x)-2

or to medical or scientific experiments

The prohibition of medical or scientific experiments covers the use of therapeutic methods which are not justified on medical grounds and not carried out in the interest of the affected person. The consent of the victim is not relevant.

Cross-references:

Article 8(2)(a)(ii) and 8(2)(e)(xi).

Doctrine: For the bibliography, see the comment “Article 8(2)(b)(x)-3”.

Author: Mark Klamberg.

Article 8(2)(b)(x)-3

of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

The acts in Article 8(2)(b)(x) can only be justified if undertaken in the interest of the person concerned, for example amputations may be lawful if performed to save the life or overall health of the patient.

Cross-reference:

Article 8(2)(e)(xi).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 395–397 (<https://www.legal-tools.org/doc/01addc/>).
2. Andreas Zimmerman and Robin Geiß, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 421–25 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 307–310, mn. 895–902 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(b)(xi)

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

Treachery, also synonymous with perfidy, involves a breach of good faith of the combatants. In practice, it is typically cases in which the accused in deception claims a right to protection for him or herself, and uses this for his or her advantage in the combat. It includes:

- pretending to be a civilian;
- fake use of a flag of truce, the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions;
- fake use of the protective emblem of cultural property;
- fake use of other internationally recognized protective emblems, signs or signals;
- pretending to surrender;
- pretending to be incapacitated by wounds or sickness;
- pretending to belong to a neutral state or other State not party to the conflict by the use of their signs;
- pretending to belong to the enemy by the use of their signs.

The wording of the provision indicates that the prohibition of treachery protects enemy combatants, as well as civilians. Perfidious acts are only punishable if the perpetrator intentionally killed or wounded an adversary.

Cross-references:

Articles 8(2)(b)(vii) and 8(2)(e)(ix).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 405 (<https://www.legal-tools.org/doc/01addc/>).
2. Michael Cottier and Julia Grignon, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of*

the International Criminal Court: A Commentary, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 425–32 (<https://www.legal-tools.org/doc/040751/>).

3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 354–356, mn. 1054–1058 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(b)(xii)

(xii) Declaring that no quarter will be given;

The offence covers ‘take no prisoners’ warfare. The material element will typically be fulfilled by a declaration that any surrender by the enemy shall be refused even if it is reasonable to accept. In addition to declarations, the provision should include orders and threats that no quarter shall be given. Combatants are not required to provide the enemy with the opportunity to surrender.

Cross-references:

Article 8(2)(b)(vi) and 8(2)(e)(x).

Doctrine:

1. Michael Cottier and Julia Grignon, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 432–36 (<https://www.legal-tools.org/doc/040751/>).
2. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 360–362, mn. 1074–1079 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(b)(xiii)

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

The individual elements of the prohibition should be interpreted in light of the relevant rules of customary international law, such as those embodied, *inter alia*, in Articles 46, 52, 53, 54, 55 and 56 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land.¹ Acts otherwise prohibited may be justified if “imperatively demanded by the necessities of war”. The exception should be interpreted restrictively, not every situation of military necessity is covered.

In *Katanga and Ngudjolo*, the Pre-Trial Chamber held “that the property in question – whether moveable or immovable, private or public – must belong to individuals or entities aligned with or with allegiance to a party to the conflict adverse or hostile to the perpetrator. Article 8(2)(b)(xiii) of the Statute applies not only when the attack is specifically directed at a military objective but also when it targets and destroys civilian property”.² Pre-Trial Chamber I also stated that “in the view of the Chamber, the provision does not apply to incidental destruction of civilian property during an attack specifically directed at a military objective, as long as the destruction does not violate the proportionality rule provided for in Article 51 AP I and in Article 8(2)(b)(iv) of the Statute” (*Katanga and Ngudjolo*, 30 September 2008, para. 313).

Cross-references:

Articles 8(2)(a)(iv), 8(2)(b)(xvi), 8(2)(e)(v) and 8(2)(e)(xii).

Starvation in Articles 6(c); 7(1)(b), (j) and (k); 7(2)(b); 8(2)(a)(iii); 8(2)(b)(ii), (v) and (xxv).

¹ Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (<https://www.legal-tools.org/doc/fa0161/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras. 310–311 (*Katanga and Ngudjolo*, 30 September 2008’) (<https://www.legal-tools.org/doc/67a9ec/>).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 403 (<https://www.legal-tools.org/doc/01addc/>).
2. Andreas Zimmerman and Robin Geiß, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 436–44 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 338–340, mn. 1000–1004 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(b)(xiv)

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

The term “actions” is referring to the right of access to courts of law. This provision is similar Article 8(2)(a)(vi). The difference between the provisions would appear that the present provision covers civil claims as opposed to criminal cases.

Cross-references:

Articles 8(2)(a)(vi) and 8(2)(c)(iv).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 396 (<https://www.legal-tools.org/doc/01addc/>).
2. Michael Cottier/Julia Grignon, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 444–48 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 340–341, mn. 1005–1007 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(b)(xv)

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

This offence can also be charged under Article 8(a)(v). There is disagreement whether the prohibition covers more than compelling nationals to serve in the armed forces of the adversary, for example war-related work.

Cross-reference:

Article 8(a)(v).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 394 (<https://www.legal-tools.org/doc/01addc/>).
2. Michael Cottier, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 448–51 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 316–318, mn. 924–931 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(b)(xvi)

(xvi) Pillaging a town or place, even when taken by assault;

The term ‘pillage’ means appropriation of property for private, personal use and embraces acts of plundering, looting and sacking. There is no substantive difference between appropriation and confiscation. Article 8(2)(e)(v) is an identical provision to the present provision, but applies in non-international armed conflicts. In comparison with Articles 8(2)(a)(iv), 8(2)(b)(xiii) and 8(2)(e)(xii), pillage differs from appropriation and confiscation in regard to the perpetrator’s intent to obtain the property for private or personal use.

In *Katanga and Ngudjolo*, the Pre-Trial Chamber stated that the “war crime of pillaging under Article 8(2)(b)(xvi) of the Statute requires that the property subject to the offence belongs to an ‘enemy’ or ‘hostile’ party to the conflict”.¹

Cross-references:

Articles 8(2)(a)(iv), 8(2)(b)(xiii), 8(2)(e)(v) and 8(2)(e)(xii).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 413 (<https://www.legal-tools.org/doc/01addc/>).
2. Michael Cottier and David Křivánek, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 451–57 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 334–338, mn. 986–999 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 329 (<https://www.legal-tools.org/doc/67a9ec/>).

Article 8(2)(b)(xvii)

(xvii) Employing poison or poisoned weapons;

This offence could, for example, include the poisoning of water supplies. The production and storage of poison is not prohibited. There is no agreement whether the prohibition on the use of poison covers poison gas. The provision does not prohibit chemical and biological weapons of mass destruction. Instead, this is covered by Article 8(2)(b)(xx), which is not yet in force. This may be explained the lack of agreement on the prohibition on of nuclear weapons and a following compromise during the Rome conference, with the result that weapons of mass destruction are not subject to an explicit and binding provision in the ICC Statute.

Cross-references:

Article 8(2)(b)(xviii) and 8(2)(b)(xx).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 406 (<https://www.legal-tools.org/doc/01addc/>).
2. Michael Cottier and David Křivánek, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 457–59 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 369–372, mn. 1100–1106 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(b)(xviii)

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

The wording of the present provision is basically identical the Geneva Protocol of 17 June 1925 for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare.¹ It is generally understood that the wording “asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” in the 1925 Geneva Protocol includes chemical weapons which nullifies the compromise mentioned in the previous commentary (Article 8(2)(b)(xvii)). Even though biological weapons are covered by the Geneva Protocol of 17 June 1925, it is doubtful that the present provision covers these weapons. This is supported by the fact that the relevant passage on biological weapons in the Geneva Protocol of 17 June 1925 was not included in Article 8(2)(b)(xvii).

Cross-reference:

Article 8(2)(b)(xvii).

Doctrine:

1. Michael Cottier and David Křivánek, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 459–65 (<https://www.legal-tools.org/doc/040751/>).
2. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 373–373, mn. 1107–1110 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

¹ Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare, 17 June 1925 (<https://www.legal-tools.org/doc/a68438/>).

Article 8(2)(b)(xix)

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

General Remarks:

The issue of weapons was highly controversial during the drafting of the ICC Statute, this was mainly – but not exclusively – related to the issue of inclusion of weapons of mass destruction. It was only upon on the last days of the Rome conference that an agreement was reached on which provisions on means of warfare (weapons) was to be adopted as part of the Statute. The original ICC Statute adopted in 1998 therefore included only a few provisions on prohibited weapons – only applicable in international armed conflicts; one of these was Article 8(2)(b)(xix) which states the war crime of employing prohibited bullets. The use of bullets which expand or flatten easily in the human body is prohibited under customary international law and The Hague Declaration IV of 1899.¹

Preparatory Works:

The ILC’s 1994 Draft Statute did not contain any draft provision on weapons,² but the ILC’s 1996 Draft Code of Crimes against the Peace and Security of Mankind contained a draft provision in Article 20(e)(i) on “employment of poisonous weapons or other weapons calculated to cause unnecessary suffering”.³ The 1996 Preparatory Committee (‘PREPCOM’) sessions presented two options for provisions on weapons offences; one option on poisonous weapons or other weapons calculated to cause unnecessary suffering,⁴ and another option in the form of a list of several prohib-

¹ Declaration on the Use of Bullets Which Expand or Flatten Easily in the Human Body, 29 July 1899 (‘The Hague Declaration IV’) (<https://www.legal-tools.org/doc/3bea0d/>).

² Draft Statute for an International Criminal Court with commentaries, in *Yearbook of the International Law Commission*, Vol. 2, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), 22 July 1994 (<https://www.legal-tools.org/doc/390052/>).

³ Draft Code of Crimes against the Peace and Security of Mankind with commentaries, in *Yearbook of the International Law Commission*, Vol. 2, Part 2, 1996, Article 20(e)(i) (<https://www.legal-tools.org/en/doc/5e4532/>).

⁴ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II, UN Doc. A/51/22(SUPP), 14 September 1996, p. 60 (2a) and p. 62 (2a) (‘PREPCOM II, 1996’) (<https://www.legal-tools.org/doc/03b284/>).

ited weapons (PREPCOM II, 1996, p. 64, on, for example, projectiles which are explosive, chemical weapons, asphyxiating, poisonous gases and bacteriological methods – and, see in particular (k) on expanding bullets). The latter explicitly mentioned specific treaties on weapons and in regard to expanding bullets it referred to The Hague Declaration IV. The 1997 December PREPCOM session added to the options and presented four options on weapons provisions.⁵ The issue was decided upon only at the final stages of the Rome Conference.⁶ Both the form and what weapons would be included were controversial during the negotiations, though the offence of employing prohibited bullets seems to have been one of the least problematic means of warfare discussed by the ILC and the PREPCOM. It was often considered to be covered by options formulated in terms of ‘weapons calculated to cause unnecessary suffering’ without specifically mentioning which weapons were covered.⁷

Analysis:

The provision is based on customary international law as well as the Hague Declaration IV, and its wording is almost identical to the latter. The 1899 Hague Declaration IV states: “The Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions”. The connection to the Hague Declaration was again emphasized in 1999 when the original French wording adopted at the Rome Conference was changed (corrected) to the wording of the authentic French text of the 1899 Hague Declaration IV (Cottier and Křivánek, 2016, p. 465 fn. 954).

The Hague Declaration IV builds on and gives reference to the St. Petersburg Declaration of 1868, which expresses: “That the progress of

⁵ Decisions taken by the Preparatory Committee at its Session held from 1 to 12 December 1997, UN Doc. A/AC.249/1997/L.9/Rev.1, 18 December 1997 (<https://www.legal-tools.org/doc/787a4d/>).

⁶ Michael Cottier/David Křivánek, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 455–56 (<https://www.legal-tools.org/doc/040751/>).

⁷ See, for example, Decisions taken by the Preparatory Committee on the Establishment of an International Criminal Court at its Session held from 11 to 21 February 1997, UN Doc. A/AC.249/1997/L.5, 13 March 1997 (<https://www.legal-tools.org/doc/c0d16c/>) and Part 2, Jurisdiction, Admissibility and Applicable Law: Bureau Proposal, UN Doc. A/CONF.183/C.1/L.59, 11 July 1998 (<https://www.legal-tools.org/doc/3a3c70/>).

civilization should have the effect of alleviating as much as possible the calamities of war; That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity”.⁸ Given the reference in The Hague Declaration IV to the St. Petersburg Declaration, both instruments may provide some guidance in determining which specific bullets are covered by this war crime. In accordance with the St. Petersburg Declaration’s objectives, The Hague Declaration was drafted with the intention of preventing the use of a specific projectile, the so called ‘dum-dum bullet’, developed by the United Kingdom for use in India.⁹

The prohibition of expanding bullets which expand or flatten easily in the human body is generally considered as a rule of customary international law, applicable in both international and non-international armed conflicts.¹⁰ The prohibition is further expressed in numerous military manuals (see practice relating to Rule 77, ICRC CIHL Study) and has been included in other instruments relating to the law of armed conflict.¹¹

However, expanding bullets are lawful in peacetime and used by several States’ law enforcement agencies to avoid harming bystanders in,

⁸ Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles, 11 December 1868 (‘St. Petersburg Declaration’) (<https://www.legal-tools.org/doc/c951bc/>).

⁹ Stefan Oeter, “Methods and Means of Combat”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd. ed., Oxford University Press, 2013, para. 407.

¹⁰ See, for example, William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 278 (<https://www.legal-tools.org/doc/b7432e/>), Cottier and Krivánek, 2016, pp. 465–66, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009, Rule 77 (‘ICRC CIHL Study’) (<https://www.legal-tools.org/doc/78a250/>). For a sceptical view as to the customary nature of the ban, see W. Hays Parks, “Conventional Weapons and Weapons Review”, in *Yearbook of International Humanitarian Law*, 2005, vol. 8, p. 89.

¹¹ See, for example, Oxford Manual of the Laws of Naval War, 9 August 1913; Report of the Commission on the Responsibility of the Authors of Tile War and on Enforcement of Penalties, 29 March 1919; Observance by United Nations forces of international humanitarian law, UN Doc. ST/SGB/1999/13, 6 August 1999; UNTAET Regulation No. 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences, 6 June 2000; Taormina Declaration on the Rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts, 7 April 1990.

for example, riot control situations or avoid dangerous ricochets in confined spaces such as airplanes and ships. While determining whether the use of expanding bullets constitute a war crime may be complex in international armed conflicts (for example in regard to terrorists or peace operations, see Cottier and Křivánek, 2016, p. 466).

In addition to The Hague Declaration and the customary rule, this provision has been considered to follow from the principle banning the use of weapons which inflicts unnecessary suffering and superfluous injury, and as such it has been held to have some overlap with the subsequent provision.¹²

i. Material Elements:

The material Elements of Crimes to Article 8(2)(b)(xix) of the ICC Statute require that the perpetrator used certain prohibited bullets which were prohibited because they expand or flatten easily in the human body.

a. The Perpetrator Employed certain Prohibited Bullets (Element 1):

The wording “employed” demonstrates that the bullets must have been used. While the provision and the Elements of Crimes use the plural term (“bullets”), it is unclear if this should be read as a requirement that more than one bullet are in fact employed for criminal liability. Cryer has noted that plural is not used in the weapon provisions of Articles 8(2)(b)(xvii) or (xviii) but saw no reason for a requirement that several bullets have been used.¹³ Most likely the plural form is simply a result of using the same formulation as in The Hague Declaration IV.

b. The Bullets Were Such that Their Use Violates the International Law of Armed Conflict Because They Expand or Flatten Easily in the Human Body (Element 2):

The wording of the provision, the origin of the prohibition (as described above) and the material elements of the crime demonstrate that the offence is based on the (designated or modified) *effect* of the bullets or projectiles. The second element entails that the Court examines whether the used bul-

¹² Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, p. 408 (<https://www.legal-tools.org/en/doc/01addc/>).

¹³ Robert Cryer, “Hague law comes home: Prosecuting weapons offences at the International Criminal Court”, in *Acta Juridica*, 2003, vol. 238, p. 245 fn. 36.

lets are indeed prohibited under international law of armed conflict, and for the reason that they expand or flatten easily inside the human body.

The war crime thus covers only bullets which have the effect of expanding or flatten easily inside the human body. The word “easily” serves as a threshold and to distinguish lawful bullets which malfunction upon penetrating a human body. The war crime includes the ‘dum-dum’ bullet as well as other bullets which expand or flatten easily in the human body, for example (most) soft-nosed or hollow-point bullets. The wording “such as” demonstrates that the provision is not exhaustively limited to “bullets with a hard envelope which does not entirely cover the core” or bullets which “is pierced with incisions”; these are rather examples of prohibited bullets. It has been argued that the prohibition of the use of such bullets includes shotguns, projectiles of a nature to burst or deform while penetrating the human body, projectiles of a nature to tumble early in the human body, projectiles of a nature to cause shock waves leading to extensive tissue damage or even lethal shock. (Oeter, 2013, para. 407). Which bullets are covered by the war crime is still unclear, though it should be assessed based on the wounding effects that they have inside the human body, and whether they are construed (for example, sufficiently jacketed) to prevent that they expand or flatten easily inside the human body. The provision covers both bullets which are produced with the designated effect of expanding or flatten within the human body in its normal and expected use, and standard bullets which have later been modified or converted to have such effects (for instance if an ordinary soldier removes the cover of a full-metal jacketed bullet at the battlefield).¹⁴

The insertion in element 2 of “*violates the international law of armed conflict*” has also been seen as a manner of excluding lawful use of expanding bullets for law enforcement operations unrelated to the armed conflict.¹⁵

ii. Mental Elements:

The crime includes the two common mental elements required for war crimes and one which is specific to this offence. Element 2 require no

¹⁴ Cottier and Křivánek, 2016, p. 465; Christine Byron, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court*, Manchester University Press, 2009, p. 134.

¹⁵ Knut Dörmann, *Elements of war crimes under the Rome statute of the International Criminal Court: sources and commentary*, Cambridge University Press, 2003, p. 292. See also the *nexus* requirement below.

knowledge by the perpetrator as regards to their illegality, simply that the bullets are prohibited under international law because they expand or flatten easily in the human body; an objective assessment. It seems as the ‘default’ *mens rea* (on intent and knowledge) in Article 30 of the Statute is replaced with awareness of the nature of the bullets, by element 3 (that is, not their illegality).

a. The Perpetrator Was Aware that the Nature of the Bullets Was Such that Their Employment Would Uselessly Aggravate Suffering or the Wounding Effect (Element 3):

The third element was meant to formulate a *mens rea* which is balanced with what an individual soldier can be expected to know about specific bullets and their damaging effects. There is thus no strict liability for using prohibited bullets. The necessary knowledge required by the perpetrator relates to the nature of the bullets; that it was such that their employment would uselessly aggravate suffering or the wounding effect. No knowledge is required pertaining to the illegality of the bullets, only to the nature of their wounding effect (see also Byron, 2009, p. 135). In effect this excludes criminal liability for persons who use such bullets without knowing so, or without awareness of the nature of their effect. Hence, if someone else has charged the weapon with such bullets without the person firing the weapon knowing or if the person firing the weapon is assured that the bullets are not of unlawful nature and he or she acts in good faith, or the person firing the weapon is in other ways unaware of the nature of the bullets used he or she should not be criminal liable.¹⁶

One scholar has argued that the third element should be interpreted as requiring a “specific intent (*mens rea*) to employ small arms munitions against combatants to ‘uselessly aggravate suffering’ for there to be a criminal offense”.¹⁷ This argument have some support in the 2010 amendment establishing an identical provision for non-international armed conflicts (see Commentary to Article 8(2)(e)(xv)). Hays Parks has further argued that “[u]selessly aggravate’ means the injury must be excessive when balanced against military and other requirements for the projectile”. This in-

¹⁶ Charles Garraway, “Superior orders and the International Criminal Court: Justice delivered or justice denied”, in *International Review of the Red Cross*, 1999, vol. 81, no. 836, pp. 793–794 (‘Garraway, IRRC, 1999’); Cryer, 2003, p. 244.

¹⁷ W. Hays Parks, “SOST: A Way Forward in Contemporary Understanding of the 1899 Hague Declaration on Expanding Bullets”, in *Small Arms Defense Journal*, 2013, vol. 5.

terpretation results in sort of a “military necessity-exception” (Hays Parks, 2013). Other scholars have argued that the third element should rather be seen as an emphasis of the objectives behind The Hague Declaration IV. This view is based on that the wording “uselessly aggravate” derives from the St Petersburg Declaration and argues that given that The Hague Declaration IV and customary international law contain a prohibition without exceptions, element 3 cannot be read as establishing a “military necessity exception” to criminal liability. Cottier and Křivánek have held that “in view of the objective of the 1899 Hague Declaration, element 3 clearly cannot mean that a person knowing that the expanding or flattening effect of a bullet offers a military advantage, automatically becomes immune to criminal responsibility”.¹⁸ Cryer has held: “The probable meaning is that the perpetrator will need to know that there is something about the particular bullets that makes them more dangerous. It must be remembered that the value judgement that the suffering is uselessly aggravated does not need to be made by the accused” (Cryer, 2003, p. 245).

It is thus not clear how the specific *mens rea* element of this provision will be interpreted by the Court. Though it may be difficult to establish the exact meaning of element 3, it should be read in conjunction with the Statute as a whole and the underlying prohibition in customary international law (accordingly, it may be contrasted with, for example, Elements of Crimes, Article 8(2)(b)(xiii) whose formulation and element 5 do provide such exception, in a manner which is absent from Articles 8(2)(b)(xix) and 8(2)(e)(xv).

In relation to this, the third element may allow a possible defence of mistake of fact (see the Commentary to Article 32 of the Statute; see also Byron, 2009, p. 135 on defences of mistake of law and mistake of fact relating to elements 2 and 3). The provision may also raise issues relating to superior orders (see the Commentary to Article 33 of the Statute; see also Garraway, IRRC, 1999).

¹⁸ Cottier and Křivánek, 2016, p. 467; Charles Garraway, “Article 8(2)(b)(xix)-Employing prohibited bullets”, in Roy S. Lee (ed.), *The International Criminal Court: the making of the Rome Statute : issues, negotiations, results*, Kluwer Law International, The Hague, 1999.

b. The Conduct Took Place in the Context of and Was Associated with an International Armed Conflict (Element 4):

The fourth element is common to all war crimes.¹⁹ As it requires that the conduct took place in the context of and was associated with an international armed conflict it serves to ensure that the employment of the prohibited bullets had a sufficient *nexus* to the (international) armed conflict and to exclude lawful use of such bullets in law enforcement unrelated to the armed conflict (see Commentary to Article 8(2)(e)(xv) as regards non-international armed conflicts).²⁰

Based on that international criminal law has clearly demonstrated that also law enforcement officials can be held responsible for war crimes and that situations claimed to be law enforcement or counter-terrorism can result in war crimes,²¹ the distinction should be based on the objective of the conduct, the nature of the operation and whether the conduct took place in the context of and was associated with an international armed conflict.

Generally, the Court has emphasized and applied the case law of the ICTY on the *nexus* requirement.²² Accordingly, the Court has held that the *nexus* element is met when “the alleged crimes were closely related to the hostilities”, meaning that the armed conflict “must play a substantial role in the perpetrator’s decision, in his ability to commit the crime or in the manner in which the conduct was ultimately committed”. The Court further held that “[i]t is not necessary, however, for the armed conflict to have been

¹⁹ See the Elements of Crimes for Article 8(2)(a)-(b) and ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 244 (“*Katanga and Ngudjolo*, 30 September 2008”) (<https://www.legal-tools.org/doc/67a9ec/>).

²⁰ See also Robin Geiß, “Poison, Gas and Expanding Bullets: The Extension of the List of Prohibited Weapons at the Review Conference of the International Criminal Court in Kampala”, in *Yearbook of International Humanitarian Law*, 2010, vol. 13; Samuel Longuet, “Permitted for law enforcement purposes but prohibited in the conduct of hostilities: The case of riot control agents and expanding bullets”, in *International Review of the Red Cross*, 2016, vol. 98, no. 901.

²¹ See, for example, ICTY, *Prosecutor v. Tarculovski*, Trial Chamber II, Judgement, 10 July 2008, IT-04-82-T, paras. 571–572 (<https://www.legal-tools.org/doc/939486/>).

²² See, for example, references to ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, paras. 68 and 70 (<https://www.legal-tools.org/doc/866e17/>), and *Prosecutor v. Kunarac et al.*, Appeals Chamber, Judgment, 12 June 2002, IT-96-23 and IT-96-23/1-A, para. 59 (<https://www.legal-tools.org/doc/029a09/>) in *Katanga and Ngudjolo*, 30 September 2008, paras. 380–382.

regarded as the ultimate reason for the criminal conduct, nor must the conduct have taken place in the midst of the battle” (*Katanga and Ngudjolo*, 30 September 2008, para. 380).

c. The Perpetrator Was Aware of the Factual Circumstances that Established the Existence of an Armed Conflict (Element 5)

The requirement that the perpetrator was aware of these factual circumstances establishing an armed conflict in element 5 is common to the elements of crimes to all war crimes of (international) armed conflict (see the Elements of Crimes for Article 8(2)(a)-(b) and *Katanga and Ngudjolo*, 30 September 2008, para. 244). It is thus not required that the perpetrator has made the legal analysis that the situation constitutes an international armed conflict but it suffices that he or she is aware of the factual circumstances.

Cross-reference:

Article 8(2)(e)(xv).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, pp. 379–476 (<https://www.legal-tools.org/en/doc/01addc/>).
2. Christine Byron, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court*, Manchester University Press, 2009.
3. Michael Cottier and David Křivánek, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 454–57, 465–67 (<https://www.legal-tools.org/doc/040751/>).
4. Robert Cryer, “Hague law comes home: Prosecuting weapons offences at the International Criminal Court”, in *Criminal Justice in a New Society*, *Acta Juridica*, 2003, vol. 238, pp. 238–255.
5. Knut Dörmann, *Elements of war crimes under the Rome statute of the International Criminal Court: sources and commentary*, Cambridge University Press, 2003.
6. Charles Garraway, “Article 8(2)(b)(xix)-Employing prohibited bullets”, in Roy S. Lee (ed.), *The International Criminal Court: the making of the*

- Rome Statute : issues, negotiations, results*, Kluwer Law International, The Hague, 1999.
7. Charles Garraway, “Superior orders and the International Criminal Court: Justice delivered or justice denied”, in *International Review of the Red Cross*, 1999, vol. 81, No. 836.
 8. Robin Geiß, “Poison, Gas and Expanding Bullets: The Extension of the List of Prohibited Weapons at the Review Conference of the International Criminal Court in Kampala”, in *Yearbook of International Humanitarian Law*, 2010, vol. 13, pp. 337–352.
 9. Samuel Longuet, “Permitted for law enforcement purposes but prohibited in the conduct of hostilities: The case of riot control agents and expanding bullets”, in *International Review of the Red Cross*, 2016, vol. 98, no. 901, pp. 249–274.
 10. W. Hays Parks, “Conventional Weapons and Weapons Review”, in *Yearbook of International Humanitarian Law*, 2005, vol. 8, pp. 55–142.
 11. W. Hays Parks, “SOST: A Way Forward in Contemporary Understanding of the 1899 Hague Declaration on Expanding Bullets”, in *Small Arms Defense Journal*, 7 October 2013, vol. 5.
 12. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross, 2009, vol. 1 (chapter 25) and vol. 2 (chapter 25) (<https://www.legal-tools.org/doc/78a250/>).
 13. Stefan Oeter, “Methods and Means of Combat”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd. ed., Oxford University Press, 2013, pp. 115–230.
 14. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 277–284 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Anna Andersson.

Article 8(2)(b)(xx)

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

This a catch-all prohibition which requires an amendment in the form of annex in order to be binding. Thus, the provision is at the present time not applicable. The present provision was part of the compromise mentioned in the commentary to Article 8(2)(b)(xvii). A great number of delegations at the Rome Conference wanted to include additional weapons such as biological weapons, chemical weapons, land mines and laser-blinding weapons. The provision may be amended in a future review conference.

Cross-reference:

Article 8(2)(b)(xvii).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 408–9 (<https://www.legal-tools.org/doc/01addc/>).
2. Roberta Arnold and Stefan Wehrenberg, “Article 8, War Crimes, Grave Breaches”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 454–457, 467–69 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, p. 374, mn. 1114–1115 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(b)(xxi)

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

General Remarks:

Under international humanitarian law, the prohibition of committing outrages upon personal dignity, in particular humiliating and degrading treatment, is recognised as a rule of customary international law applicable in both international and non-international armed conflicts.¹ It is prohibited under international humanitarian law under Common Article 3(1)(c) to the Geneva Conventions of 1949,² applicable in armed conflicts not of an international character. Common Article 3 is developed and supplemented by Protocol (II) Additional to the Geneva Conventions,³ Article 4(2)(e) of which includes a prohibition of outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault against persons who do not take a direct part or who have ceased to take a direct part in hostilities. In armed conflicts of an international character, outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault is prohibited under Article 75(2)(b) of Protocol (I) Additional to the Geneva Conventions.⁴ Outrages upon personal dignity is included in the notion of inhuman treatment which constitutes a grave breach of the Geneva Conventions of 1949 under Article 50 GC I, Article 50 GC II, Article 130 GC III, and Article 147 GC IV. Under Article 85(4)(c) of AP I, practices of ‘apartheid’ and other inhuman and degrading practices in-

¹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009, Rule 90 (<https://www.legal-tools.org/doc/78a250/>).

² Geneva Conventions I-IV, 12 August 1949 (‘GC I-IV’) (GC I: <https://www.legal-tools.org/doc/baf8e7/>; GC II: <https://www.legal-tools.org/doc/0d0216/>; GC III: <https://www.legal-tools.org/doc/365095/>; GC IV: <https://www.legal-tools.org/doc/d5e260/>).

³ Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (‘AP II’) (<https://www.legal-tools.org/doc/fd14c4/>).

⁴ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (‘AP I’) (<https://www.legal-tools.org/doc/d9328a/>).

volving outrages upon personal dignity, based on racial discrimination, are regarded as a grave breach of the Protocol.

i. Material Elements:

The Elements of Crimes sets out the *actus reus* for this war crime as: (1) the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons; and (2) the severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.

The elements of Article 8(2)(b)(xxi) largely mirror those identified by the *ad hoc* Tribunals. However, the *ad hoc* Tribunals generally recognised the requirement of “serious humiliation, degradation or other serious attack on human dignity” as an outrage upon personal dignity.⁵ No further definition of “outrages upon personal dignity” was included in the Statute. Rather, specifically listed examples are provided and included in the elements as the core of this war crime. This war crime can be committed by an act or omission.⁶ The humiliation, degradation or violation of personal dignity must reach an objectively sufficient gravity to constitute an outrage upon personal dignity (*Katanga and Ngudjolo*, 30 September 2008, para. 369). There is no requirement for the perpetrator to have personally completed a value judgment (General Introduction to the Elements of Crimes, para. 4). However, Pre-Trial Chamber I referenced the jurisprudence of ICTY that provided so long as the serious humiliation or degradation is real and serious there is not requirement that such suffering be lasting or that it is necessary for the act to directly harm the physical or mental well-being of the victim/s.⁷ What differentiates this war crime from the war crime of inhuman treatment under Article 8(2)(a)(ii) is the level of severity of the actions or omissions.

Pre-Trial Chamber I referenced findings of the Human Rights Committee, ICTY and ICTR regarding acts or omissions that constituted humil-

⁵ ICTY, *Prosecutor v. Kunarac, Kovać and Vuković*, Trial Chamber, Judgment, 22 February 2001, IT-96-23, para. 514 (*‘Kunarac et al., 22 February 2001’*) (<https://www.legal-tools.org/doc/fd881d/>).

⁶ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 431 (*‘Katanga and Ngudjolo, 30 September 2008’*) (<https://www.legal-tools.org/doc/67a9ec/>).

⁷ *Katanga and Ngudjolo*, 30 September 2008, para. 369, relying on *Kunarac et al., 22 February 2001*, para. 501 and ICTY, *Prosecutor v. Aleksovski*, Trial Chamber, Judgement, 25 June 1999, IT-95-14/1-T, para. 56 (<https://www.legal-tools.org/doc/52d982/>).

iating treatment or outrages upon personal dignity, namely: hanging naked from handcuffs or being forced to maintain a certain position for long periods of time; compelling victims to dance naked on a table, using detainees as human shields or trench diggers; forcing detainees to relieve bodily functions in their clothing; imposing conditions of constant fear of being subjected to physical, mental, or sexual violence on detainees; forced incest, burying corpses in latrine pits; and leaving infants without care after killing their guardians (*Katanga and Ngudjolo*, 30 September 2008, paras. 370–371).

The victim/s must be: (i) aligned or whose allegiance is to a party to the conflict who is adverse or hostile to the perpetrator; and (ii) in the hands of the party to the conflict to which the perpetrator belongs (*Katanga and Ngudjolo*, 30 September 2008, para. 368). A footnote to the elements indicates that relevant aspects of the cultural background of the victim should be taken into account. In addition, the victim need not personally be aware of the existence of humiliation or degradation or other violation, and “persons” can include dead persons.

ii. Mental Element:

Reference to Article 30 should be made for the *mens rea* of this war crime. In *Katanga and Ngudjolo*, Pre-Trial Chamber I held that this includes, first and foremost, *dolus directus* of the first degree and *dolus directus* of the second degree (*Katanga and Ngudjolo*, 30 September 2008, para. 372). *Dolus directus* in the first degree refers those situations in which the suspect (i) knows that his or her actions or omissions will bring about the objective elements of the crime, and (ii) undertakes such actions or omissions with the concrete intent to bring about the objective elements of the crime⁸ and was endorsed by the majority of Pre-Trial Chamber I earlier in *Katanga and Ngudjolo* (*Katanga and Ngudjolo*, 30 September 2008, para. 251 fn. 329). *Dolus directus* in the second degree refers to those situations in which the suspect, without having concrete intent to bring about the objective elements of the crime, is aware that such elements will be the necessary outcome of his or her actions or omissions. This definition was set forth by Pre-Trial Chamber I in *Lubanga* (*Lubanga*, 29 January 2007, para. 351).

⁸ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 351 (*‘Lubanga*, 29 January 2007’) (<https://www.legal-tools.org/doc/b7ac4f/>).

The Prosecutor must also establish that the conduct took place in the context and was associated with an international armed conflict, and that the perpetrator was aware of the factual circumstances that established the existence of an armed conflict. It is not necessary for the perpetrator to have made a legal evaluation as to the character of the armed conflict.

iii. Charges before the ICC:

No charges have been brought by the ICC for the commission of this crime to date.

Cross-references:

Articles 7(1)(c), 8(2)(a)(ii), 8(2)(c)(ii) and 30.

Doctrine:

1. Roberta Arnold and Stefan Wehrenberg, “Article 8, War Crimes, Grave Breaches in Detail”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 469–476 (<https://www.legal-tools.org/doc/040751/>).
2. Michael Boothe, “War Crimes” in Antonio Cassese, John R.W.D. Jones and Paola Gaeta (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 408 (<https://www.legal-tools.org/doc/01addc/>).
3. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2003, pp. 314–324 (<https://www.legal-tools.org/doc/01addc/>).
4. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009, Rule 90 (<https://www.legal-tools.org/doc/78a250/>).

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Article 8(2)(b)(xxii)-1

(xxii) Committing rape,

Rape is considered the most severe form of sexual violence. Sexual violence is a broad term that covers all forms of acts of a sexual nature under coercive circumstances, including rape. The key element that separates rape from other acts is penetration. The Elements of Crimes provide a more specific definition of the criminal conduct. Rape falls under the chapeaus of genocide, crimes against humanity or war crimes under specific circumstances, confirmed both through the ICC Statute and through the case law of the ICTR and the ICTY. Rape as a war crime differs from the definition of rape as a crime against humanity only in terms of the context in which the crime is committed. The rape must have been perpetrated in the context of and in association with an international armed conflict.

For the mental element of rape Article 30 applies. The perpetrator has to be aware of the factual circumstances that established the existence of an armed conflict. He or she must also have intended to penetrate the victim's body and be aware that the penetration was by force or threat of force.

The definition of rape is the same regarding rape as genocide, crimes against humanity and war crimes, albeit the contextual elements of the chapeaus differ. The *actus reus* of the violation is found in the Elements of Crimes. The definition focuses on penetration with (i) a sexual organ of any body part, or (ii) with the use of an object or any other part of the body of the anal or genital opening of the victim, committed by force or threat or force or coercion. "Any part of the body" under point 1 refers to vaginal, anal and oral penetration with the penis and may also be interpreted as ears, nose and eyes of the victim. Point 2 refers to objects or the use of fingers, hands or tongue of the perpetrator. Coercion may arise through fear of violence, duress, detention, psychological oppression or abuse of power. These situations are provided as examples, apparent through the use of the term 'such as'. Consent is automatically vitiated in such situations. The definition is intentionally gender-neutral, indicating that both men and women can be perpetrators or victims. The definition of rape found in the Elements of Crimes is heavily influenced by the legal reasoning in cases regarding rape of the ICTY and the ICTR. Such cases can thus further elucidate the interpretation of the elements of the crime, meanwhile also highlighting

different approaches to the main elements of rape, including ‘force’ and ‘non-consent’. See, for example, the *Furundžija* case, in which the Trial Chamber of the ICTY held that force or threat of force constitutes the main element of rape.¹ To the contrary, the latter case of *Kunarac* emphasized the element of non-consent as the most essential in establishing rape, in that it corresponds to the protection of sexual autonomy.² As to the term ‘coercion’ the ICTR Trial Chamber in *Akayesu* held that a coercive environment does not require physical force. It also adopted a broad approach to the *actus reus*, including also the use of objects, an approach that has been embraced also by the ICTY and the ICC.³

Rule 63 is of importance which holds that the Court’s Chambers cannot require corroboration to prove any crime within its jurisdiction, particularly crimes of sexual violence. Rule 70 further delineates the possibility of introducing evidence of consent as a defense. This is highly limited, emphasizing that consent cannot be inferred in coercive circumstances. Rule 71 forbids evidence of prior sexual conduct.

In *Katanga and Ngudjolo*, the ICC Pre-Trial Chamber found sufficient evidence to affirm charges of rape as a war crime.⁴ This included the invasion of the body of civilian women by the penetration of the perpetrator’s sexual organ or other body parts, through force, threat or fear of violence or death (*Katanga and Ngudjolo*, 30 September 2008, paras. 351–352).

Cross-references:

Articles 7(1)(g) and 8(2)(e)(vi).

Doctrine:

1. Antonio Cassese and Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University

¹ ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Judgment, 10 December 1998, IT-95-17/1-T (<https://www.legal-tools.org/doc/e6081b/>).

² ICTY, *Prosecutor v. Kunarac, Kovač and Vuković*, Trial Chamber, Judgment, 22 February 2001, IT-96-23 (<https://www.legal-tools.org/doc/fd881d/>).

³ ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, para. 598 (<https://www.legal-tools.org/doc/b8d7bd/>).

⁴ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 347 (*Katanga and Ngudjolo*, 30 September 2008’) (<https://www.legal-tools.org/doc/67a9ec/>).

- Press, 2002, pp. 374–375 and 415–416 (<https://www.legal-tools.org/doc/01addc/>).
2. Christopher K. Hall, Joseph Powderly and Niamh Hayes, “Article 7, Crimes Against Humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 206–212 (<https://www.legal-tools.org/doc/040751/>).
 3. Michael Cottier and Sabine Mzee, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), 2016, pp. 476–490.
 4. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 248–250; 313, mn. 723–727; 912–913 (<http://www.legal-tools.org/doc/e35f82/>).
 5. Robert Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure*, 3rd. ed., Cambridge University Press, 2014, p. 292 (<https://www.legal-tools.org/doc/f691a2/>).
 6. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, Cambridge, 2005, pp. 199–201 (<https://www.legal-tools.org/doc/43fca9/>).

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Article 8(2)(b)(xxii)-2

sexual slavery,

Sexual slavery is a particular form of enslavement which includes limitations on one's autonomy, freedom of movement and power to decide matters relating to one's sexual activity. Although it is listed as a separate offence in the ICC Statute, it is regarded as a particular form of enslavement. However, whereas enslavement is solely considered a crime against humanity, sexual slavery may constitute either a war crime or a crime against humanity. It is partly based on the definition of enslavement identified as customary international law by the ICTY in the *Kunarac* case.¹ Sexual slavery is thus considered a form of enslavement with a sexual component. Its definition is found in the Elements of Crimes and includes the exercise of any or all of the powers attached to the right of ownership over one or more persons, "such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty". The person should have been made to engage in acts of a sexual nature. The crime also includes forced marriages, domestic servitude or other forced labour that ultimately involves forced sexual activity. In contrast to the crime of rape, which is a completed offence, sexual slavery constitutes a continuing offence. Sexual slavery as a war crime differs from the definition of sexual slavery as a crime against humanity only in terms of the context in which the crime is committed.

In *Katanga and Ngudjolo*, the ICC Pre-Trial Chamber held that "sexual slavery also encompasses situations where women and girls are forced into 'marriage', domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors. Forms of sexual slavery can, for example, be practices such as the detention of women in 'rape camps' or 'comfort stations', forced temporary 'marriages' to soldiers and other practices involving the treatment of women as chattel, and as such, violations of the peremptory norm prohibiting slavery".² The Chamber found sufficient evidence to affirm charges of sexual slavery as a

¹ ICTY, *Prosecutor v. Kunarac, Kovač and Vuković*, Trial Chamber, Judgment, 22 February 2001, IT-96-23, para. 543 (<https://www.legal-tools.org/doc/fd881d/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 431 ('*Katanga and Ngudjolo*, 30 September 2008') (<https://www.legal-tools.org/doc/67a9ec/>).

war crime in the form of women being abducted for the purpose of using them as wives, being forced or threatened to engage in sexual intercourse with combatants, to serve as sexual slaves and to work in military camps servicing soldiers (*Katanga and Ngudjolo*, 30 September 2008, para. 347).

The SCSL Appeals Chamber in the *Brima* case has found the abduction and confinement of women to constitute forced marriage and consequently a crime against humanity. The Chamber concluded that forced marriage was distinct from sexual slavery. Accordingly, “While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife”, which could lead to disciplinary consequences for breach of this exclusive arrangement”.³ In 2012 the SCSL in a decision on the Charles Taylor case declared its preference for the term ‘forced conjugal slavery’. The Trial Chamber did not find the term ‘marriage’ to be helpful in describing the events that had occurred, in that it did not constitute marriage in the universally understood sense.⁴

Cross-references:

Articles 7(1)(g) and 8(2)(e)(vi).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 415 (<https://www.legal-tools.org/doc/01addc/>).
2. Christopher K. Hall, Joseph Powderly and Niamh Hayes, “Article 7, Crimes Against Humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd.

³ See SCSL, *Prosecutor v. Brima*, Appeals Chamber, Judgment, 22 February 2008, SCSL-2004-16-A, para. 195 (<https://www.legal-tools.org/doc/4420ef/>).

⁴ SCSL, *Prosecutor v. Taylor*, Judgment, 18 May 2012, SCSL-03-01-T, para. 427 (<https://www.legal-tools.org/doc/8075e7/>).

- ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 212–214 (<https://www.legal-tools.org/doc/040751/>).
3. Michael Cottier and Sabine Mzee, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), 2016, pp. 476–496.
 4. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 250–251, 313, mn. 728, 914–916 (<http://www.legal-tools.org/doc/e35f82/>).
 5. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, Cambridge, 2005, pp. 199–201 (<https://www.legal-tools.org/doc/43fca9/>).

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Article 8(2)(b)(xxii)-3

enforced prostitution,

The Elements of Crimes requires the (i) causing or a person to engage in acts of a sexual nature (ii) by force or threat of force or under coercive circumstances and (iii) the perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts. Primarily the latter point distinguishes it from sexual slavery. It can also be distinguished in that sexual slavery requires the exercise or any or all of the powers attaching to the rights of ownership. Enforced prostitution could, however, rise to the level of sexual slavery, should the elements of both crimes exist. In comparison with rape and sexual slavery, enforced prostitution can either be a continuing offence or constitute a separate act. Enforced prostitution is prohibited in the Geneva Convention IV of 1949 as an example of an attack on a woman's honour and in Additional Protocol I as an outrage upon personal dignity.¹ Forced prostitution as a war crime differs from the definition of forced prostitution as a crime against humanity only in terms of the context in which the crime is committed.

Cross-references:

Articles 7(1)(g) and 8(2)(e)(vi).

Doctrine:

1. Michael Bothe, "War Crimes", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 415 (<https://www.legal-tools.org/doc/01addc/>).
2. Christopher K. Hall, Joseph Powderly and Niamh Hayes, "Article 7, Crimes Against Humanity", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 214–215 (<https://www.legal-tools.org/doc/040751/>).

¹ Geneva Convention (IV) relative to the protection of civilian persons in time of war, 12 August 1949 (<https://www.legal-tools.org/doc/d5e260/>); Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/d9328a/>).

3. Michael Cottier and Sabine Mzee, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), 2016, p. 496.
4. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 251, 313, mn. 729–730 and 914–916 (<http://www.legal-tools.org/doc/e35f82/>).
5. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, Cambridge, 2005, pp. 199–201 (<https://www.legal-tools.org/doc/43fca9/>).

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Article 8(2)(b)(xxii)-4

forced pregnancy, as defined in Article 7, paragraph 2 (f),

Forced pregnancy means the unlawful confinement of a woman forcibly made pregnant. Unlawful confinement should be interpreted as any form of deprivation of physical liberty contrary to international law. The deprivation of liberty does not have to be severe and no specific time frame is required. The use of force is not required, but some form of coercion is. To complete the crime, it is sufficient if the perpetrator holds a woman imprisoned who has been impregnated by someone else. The forcible impregnation may involve rape or other forms of sexual violence of comparable gravity. In addition to the mental requirements in Article 30, the perpetrator must act with the purpose of affecting the ethnic composition of any population or carrying out other grave violations of international law. National laws prohibiting abortion do not amount to forced pregnancy. Forced pregnancy as a war crime differs from the definition of forced pregnancy as a crime against humanity only in terms of the context in which the crime is committed.

Cross-references:

Articles 7(1)(g) and 8(2)(e)(vi).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 415 (<https://www.legal-tools.org/doc/01addc/>).
2. Christopher K. Hall, Joseph Powderly and Niamh Hayes, “Article 7, Crimes Against Humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 215–216 (<https://www.legal-tools.org/doc/040751/>).
3. Michael Cottier and Sabine Mzee, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), 2016, pp. 497–500.
4. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 251–252, 313, mn. 731–732 and 914–916 (<http://www.legal-tools.org/doc/e35f82/>).

5. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, Cambridge, 2005, pp. 199–201 (<https://www.legal-tools.org/doc/43fca9/>).

Author: Maria Sjöholm.

Article 8(2)(b)(xxii)-5

enforced sterilization,

Enforced sterilization is a form of “[i]mposing measures intended to prevent births within the group” within the meaning of Article 6(e). It is carried out without the consent of a person. Genuine consent is not given when the victim has been deceived. Enforced sterilization includes depriving a person of their biological reproductive capacity, which is not justified by the medical treatment of the person. It does not include non-permanent birth-control methods. It is not restricted to medical operations but can also include the intentional use of chemicals for this effect. It arguably includes vicious rapes where the reproductive system has been destroyed. The Elements of Crimes provide a more specific definition of the criminal conduct. For the mental element Article 30 applies. Enforced sterilization may also fall under the chapeau of genocide if such intent is present. Enforced sterilization as a war crime differs from the definition of enforced sterilization as a crime against humanity only in terms of the context in which the crime is committed.

Cross-references:

Articles 7(1)(g) and 8(2)(e)(vi).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 415 (<https://www.legal-tools.org/doc/01addc/>).
2. Christopher K. Hall, Joseph Powderly and Niamh Hayes, “Article 7, Crimes Against Humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 216 (<https://www.legal-tools.org/doc/040751/>).
3. Michael Cottier and Sabine Mzee, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), 2016, p. 500.
4. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 252, 313, mn. 733 and 914–916 (<http://www.legal-tools.org/doc/e35f82/>).

5. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, Cambridge, 2005, pp. 199–201 (<https://www.legal-tools.org/doc/43fca9/>).

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Article 8(2)(b)(xxii)-6

or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

The provision has a catch-all character and requires that the conduct is comparable in gravity to the other acts listed in Article 8(2)(b)(xxii). It concerns acts of a sexual nature against a person through the use of force or threat of force or coercion. The importance of distinguishing the different forms of sexual violence primarily lies in the level of harm to which the victim is subjected and the degree of severity, and therefore becomes a matter of sentencing. Sexual violence as a war crime differs from crimes against humanity in terms of the context in which the crime is committed, in this case in the context of an international armed conflict.

It is generally held to include forced nudity, forced masturbation or forced touching of the body. The ICTR in *Akayesu* held that “sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact...”.¹ The Trial Chamber in the case confirmed that forced public nudity was an example of sexual violence within its jurisdiction (see para. 10 A). Similarly, the Trial Chamber of the ICTY in its *Kvočka* decision declared: “sexual violence is broader than rape and includes such crimes as sexual slavery or molestation, and also covers sexual acts that do not involve physical contact, such as forced public nudity”.² To the contrary, in the decision on the Prosecutor’s application for a warrant of arrest in the *Bemba* case, the Pre-Trial Chamber of the ICC did not include a charge of sexual violence as a crime against humanity in the arrest warrant, which had been based on allegations that the troops in question had forced women to undress in public in order to humiliate them, stating that “the facts submitted by the Prosecutor do not constitute other forms of sexual violence of comparable gravity to the other forms of sexual violence set forth in Article 7(1)(g)”.³

¹ ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, para. 688 (<https://www.legal-tools.org/doc/b8d7bd/>).

² ICTY, *Prosecutor v. Kvočka*, Trial Chamber, Judgement, 2 November 2001, IT-98-30/1-T, para. 180 (<https://www.legal-tools.org/doc/34428a/>).

³ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG, para. 40 (<https://www.legal-tools.org/doc/fb80c6/>).

In the *Lubanga* case of the ICC, evidence of sexual violence was presented during the trial, including various forms of sexual abuse of girl soldiers who were forcefully conscripted. However, no charges of sexual violence were brought. The Prosecution rather encouraged the Trial Chamber to consider evidence of sexual violence as an integral element of the recruitment and use of child soldiers. In the confirmation of charges in the *Muthaura and Kenyatta* case, Pre-Trial Chamber II chose not to charge forced male circumcision and penile amputation as sexual violence, but rather as inhumane acts. The Pre-Trial Chamber held that “the evidence placed before it does not establish the sexual nature of the acts of forcible circumcision and penile amputation. Instead, it appears from the evidence that the acts were motivated by ethnic prejudice”.⁴ It argued that “not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence” (*Muthaura and Kenyatta*, 23 January 2012, para. 265).

In the *Katanga and Ngudjolo* case, the defendants were charged with outrages upon personal dignity, as defined in Article 8(2)(b)(xxi), rather than sexual violence for making a woman walk through town, dressed solely in a blouse, without underwear.⁵

Cross-references:

Articles 7(1)(g) and 8(2)(e)(vi).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 415–416 (<https://www.legal-tools.org/doc/01addc/>).
2. Christopher K. Hall, Joseph Powderly and Niamh Hayes, “Article 7, Crimes Against Humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd.

⁴ ICC, *Prosecutor v. Muthaura, Kenyatta and Hussein*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red (public redacted version), para. 266 (*Muthaura and Kenyatta*, 23 January 2012’) (<https://www.legal-tools.org/doc/4972c0/>).

⁵ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 375 (<https://www.legal-tools.org/doc/67a9ec/>).

- ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 216–219 (<https://www.legal-tools.org/doc/040751/>).
3. Michael Cottier and Sabine Mzee, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), 2016, pp. 500–503.
 4. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 252–253, 313, mn. 734, 914–916 (<http://www.legal-tools.org/doc/e35f82/>).
 5. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, Cambridge, 2005, pp. 199–201 (<https://www.legal-tools.org/doc/43fca9/>).

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Article 8(2)(b)(xxiii)

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

In addition to civilians, it is prohibited to use the presence of prisoners of war and military medical personnel as a shield. If a party violates this provision, the attacking party must still uphold the rules of humanitarian law, including the rule of proportionality and consider additional incidental casualties which may arise due to an attack. In addition to mental requirement of Article 30 the perpetrator must act to protect, aid or prevent a military objective or operation.

Doctrine:

1. Roberta Arnold and Stefan Wehrenberg, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 503–06 (<https://www.legal-tools.org/doc/040751/>).
2. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 365–367, mn. 1090–1094 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(b)(xxiv)

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

The term “attack” corresponds to the offence of attacks on a civilian population (Article 8(2)(b)(i)). The recognized emblems are the emblem of the Red Cross, the red crescent, the red lion and the sun and the red crystal.¹

Cross-references:

Articles 8(2)(b)(i) and 8(2)(e)(ii).

Doctrine:

1. Roberta Arnold and Stefan Wehrenberg, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 506–07 (<https://www.legal-tools.org/doc/040751/>).
2. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 348–349, mn. 1035–1038 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

¹ Protocol (III) additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, 8 December 2005 (<https://www.legal-tools.org/doc/ddefae/>).

Article 8(2)(b)(xxv)

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

In addition to deprivation of food, the term “starvation” may include non-food objects indispensable to the survival of civilians, for example medicines, blankets or clothing. Acts prohibited under this provision may also be covered by Articles 6(c); 7(1)(b), (j) and (k); 7(2)(b); 8(2)(a)(iii); 8(2)(b)(ii), (v) and (xiii). Starvation can take many forms, including removal or destruction of essential supplies, the prevention of the production of food, impeding relief supplies, and not fulfilling a duty under international law to provide supplies. In addition to mental requirement of Article 30 the perpetrator must intend to starve civilians as a method of warfare.

Cross-references:

Articles 6(c); 7(1)(b), (j) and (k); 7(2)(b); 8(2)(a)(iii); 8(2)(b)(ii), (v) and (xiii).

Doctrine:

1. Michael Cottier and Emilia Richard, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 508–19 (<https://www.legal-tools.org/doc/040751/>).
2. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 362–365, mn. 1081–1087 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(b)(xxvi)

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities

General Remarks:

Article 8(2)(b)(xxvi) concerns the conscription, recruitment or use of children younger than fifteen years of age, in the context of an international conflict. The crime also appears in Article 8(2)(b)(vii) to cover the same crime in the context of an internal conflict. The act of conscripting or enlisting a child under the age of fifteen years into a national or non-governmental force is therefore a crime, regardless of whether it is committed in the context of an international or internal armed conflict.

Preparatory Works:

As the practice of child soldier recruitment, conscription and use had not been previously expressly recognised as criminalised, its inclusion was naturally a controversial point of debate during ICC Statute negotiations. The United States in particular was against the inclusion of the crime, arguing that it was not a crime under customary international law and represented an area of legislative action “outside the purview of the Conference”.¹ However, agreement on inclusion was eventually reached due to its position as a well-established treaty law provision.² In 2002 the crime was included as a serious violation of international humanitarian law in Article 4(c) of the Statute of the Special Court for Sierra Leone.³ In a split decision in May 2004, the SCSL held that the provision was already customary international law prior to the adoption of the ICC Statute in 1998; that is to

¹ Committee of the Whole: Summary Record of the 4th Meeting, UN Doc. A/CONF.183/C.1/SR.4, 20 November 1998, para. 54 (<https://www.legal-tools.org/doc/78fea6/>).

² Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977, Article 77(2) (‘AP I’) (<https://www.legal-tools.org/doc/d9328a/>); Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, Article 4(3)(c) (<https://www.legal-tools.org/doc/fd14c4/>); and Convention on the Rights of the Child, 20 November 1989, A/RES/44/25, Article 38(3) (<https://www.legal-tools.org/doc/f48f9e/>).

³ Statute of the Special Court for Sierra Leone, UN Doc. S/2002/246, 14 August 2000, Article 4(c) (<https://www.legal-tools.org/doc/aa0e20/>).

say that the Statute codified an existing customary norm rather than forming a new one.⁴

Analysis:

i. Definition:

According to Article 8(2)(b)(xxvi) the crime has three components: recruitment, conscription or use. This is in contrast to both AP I and Article 38 of the Convention on the Rights of the Child, which make reference to the singular act of ‘recruiting’. The Elements of Crimes provide further:

1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict

The Pre-Trial Chamber in the *Lubanga* case determined that the term ‘conscripting’ refers to a forcible act, ‘enlisting’ encompasses a ‘voluntary’ decision to join a military force.⁵

ii. Consent of the Child as a Mitigating Factor:

While alleged voluntariness may be negated by force or intimidation, the consent of the child creates the legal characterisation of the conduct as enlistment rather than conscription. Consent is therefore not irrelevant, but nonetheless places the admission of a child to the armed forces firmly within the realm of Article 8 regardless of the means of admission. The specific mode of admission, whether “the result of governmental policy, individual

⁴ SCSL, *Prosecutor v. Hinga Norman*, Appeals Chamber, Fourth Defence Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004. SCSL-04-14-AR72 (<https://www.legal-tools.org/doc/27e4fc/>).

⁵ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06 (*‘Lubanga, 29 January 2007’*) (<https://www.legal-tools.org/doc/b7ac4f/>); *Prosecutor v. Lubanga*, Trial Chamber I, Judgment, 14 March 2012, ICC-01/04-01/06, para. 573 (*‘Lubanga, 14 March 2012’*) (<https://www.legal-tools.org/doc/677866/>).

initiative or acquiescence in demands to enlist”⁶ is, for the most part irrelevant. Happold suggests that this distinction between the means of committing the material element of this crime may become pertinent during sentencing (Happold, 2006, p. 12). In its judgment in the *Lubanga* case, the ICC Trial Chamber intimated that it would follow this path when determining the sentence, but found no aggravating factors when delivering the sentencing order on 10 July 2012, instead finding that the factors that are relevant for determining the gravity of the crime cannot additionally be taken into account as aggravating circumstances.⁷

iii. Continuing Crime:

There are a number of different ways in which these two concepts are inter-related or occur concurrently in the context of the crime. Conscriptio and enlistment can be viewed as continuing crimes that begin from the moment a child joins an armed group and end upon demobilisation or attainment of 15 years of age, with all intermittent time additionally constituting ‘use’. This is therefore a continuing crime: a state of affairs where a crime has been committed and then maintained. The crime is committed from the moment that a child is entered into an armed force or group, through enlistment or conscription, and continues for as long as that child remains a ‘child soldier’, ending either through demobilisation or the attainment of 15 years of age. This places liability on the person who recruited the child, whether by enlisting or conscripting, regardless of whether they were involved in the ‘use’ of the child in an armed conflict. The act of recruitment triggers responsibility for all subsequent use, even if by other commanders. An alternative interpretation is that the crime is not a composite one, as it is capable of being committed by either the initial conscription or enlistment step, or through the subsequent ‘use’ of the given child, and not necessarily through demonstrating a combination of the two. This expands the liability for the crime to incorporate not just the person who actually undertakes the recruitment process of a given child, but also includes others who later use the child for military purposes.

⁶ Matthew Happold, “The Age of Criminal Responsibility in International Criminal Law”, in Karin Arts and Vaesselin Popovski (eds.), *International Criminal Accountability and the Rights of Children*, T.M.C. Asser, The Hague, 2006, p. 8.

⁷ *Lubanga*, 14 March 2012, para. 617; ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Sentencing Order, 10 July 2012, ICC-01/04-01/06-2901, paras. 78 and 96 (<https://www.legal-tools.org/doc/c79996/>).

iii. Requirements:

In addition to the contextual elements required for all war crimes of an international nature set out in elements 4 and 5 of the above-listed Elements of Crimes, the following needs to be proven:

a. Material Elements:

The first two elements listed above set out the material elements of child soldier conscription, enlistment or use.

1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.

The war crimes established by the ICC Statute are limited to the conscription or enlistment and use of children under the age of fifteen years. However, the acts of ‘conscripting’ and ‘enlistment’ are not defined in the Statute, nor in the Elements of Crimes, leaving elaboration to judicial interpretation. The Pre-Trial Chamber (*Lubanga*, 29 January 2007, paras. 246–247) determined that the term ‘conscripting’ refers to a forcible act, whereas ‘enlisting’ encompasses a ‘voluntary’ decision to join a military force. The act of ‘enlisting’ includes ‘any conduct accepting the child as part of the militia’ (*Lubanga*, 14 March 2012, para. 573). While alleged voluntariness may be negated by force or intimidation, the consent of the child creates the legal characterisation of the conduct as enlistment rather than conscription. Consent is therefore not irrelevant, but nonetheless places the admission of a child to the armed forces firmly within the realm of Article 8 regardless of the means of admission.

Finally, participation by combatant and non-combatant children are covered equally by the ICC Statute due to its use of the term ‘participate actively’. However, their participation must be within the context of an armed conflict. The Elements of Crimes require that the participation be conduct ‘associated with an armed conflict’, while the travaux préparatoires noted above specifies that participation in the armed confrontations is not necessary, but a link to combat is required.⁸

⁸ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, UN Doc. A/CONF.183/2/Add.1, 14 April 1998 (<https://www.legal-tools.org/doc/816405/>).

b. Mental Elements:

3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.

While Article 30(3) provides that a perpetrator must have had positive knowledge of the child's age, the Elements of Crimes merely require that he 'knew or should have known' that the child was under fifteen. In *Lubanga* it was determined that the Elements of Crimes provides for situations where the perpetrator fails to possess knowledge of the given child's age due to a failure to exercise due diligence in the circumstances, (*Lubanga*, 29 January 2007, para. 348). Therefore, the Pre-Trial Chamber considered this element of negligence to be an exception to the 'intent and knowledge' standard provided in Article 30(1).

Cross-reference:

Article 8(2)(e)(vii).

Doctrine:

1. Julie McBride, *The War Crime of Child Soldier Recruitment*, Springer, New York, 2013 (<https://www.legal-tools.org/doc/2a122f/>).
2. Matthew Happold, "Child Recruitment as a Crime under the Rome Statute of the International Criminal Court", in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Memory of Igor Blischenko*, Brill, Leiden, 2009 (<https://www.legal-tools.org/doc/289fd7/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2009 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Julie McBride.

Article 8(2)(c)

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

General Remarks:

Two provisions in the ICC Statute relate to war crimes committed in non-international armed conflict, subparagraphs (c) and (e). A literal interpretation of these subparagraphs shows that there are two thresholds of applicability, that is, two types of non-international armed conflicts. However, it seems that the Court does not distinguish between the two types of non-international armed conflicts.¹ This may be so because the subparagraph (d) (which explains subparagraph (c)) threshold appears lower, not requiring the conflict to be protracted. For example, in *Katanga*, the ICC only refers to Article 8(2)(f) to characterise the nature of the conflict² and yet probes offences under Article 8(2)(c) (*Katanga*, 7 March 2014, para. 1231). The same occurs in *Bemba*, though some reference is made to Article 8(2)(c).³ In *Ongwen*, the ICC found the defendant guilty of crimes listed under Arti-

¹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, paras. 216 and 224 (*'Bemba*, 15 June 2009') (<https://www.legal-tools.org/doc/07965c/>); *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 103 (*'Mbarushimana*, 16 December 2011') (<https://www.legal-tools.org/doc/63028f/>); *Situation in the Islamic Republic of Afghanistan*, Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33, para. 65 (*'Situation in Afghanistan*, 12 April 2019') (<https://www.legal-tools.org/doc/2fb1f4/>).

² ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgment pursuant to Article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 1183–1187 (*'Katanga*, 7 March 2014') (<https://www.legal-tools.org/doc/f74b4f/>).

³ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343, paras. 127–147 (*'Bemba*, 21 March 2016') (<https://www.legal-tools.org/doc/edb0cf/>).

cles 8(2)(c) and (e) and yet only discussed one definition of a non-international armed conflict.⁴

Subparagraph (c) must be read in conjunction with Article 8(2)(d) as the latter removes specific situations from its scope of application. As a result, the following situations are not covered by subparagraph (c):

- international armed conflicts.

This explains why the assessment of the characterisation of the conflict under Article 8(2)(c) takes place in a wider discussion, notably in contradistinction to international armed conflicts (see Article 8(2)(a) ICC Statute). The problem may arise in particular in armed conflicts where there is fighting between governmental forces on one side and organized armed groups on the other where at the same time a third State is involved in the conflict intervening in support of the organized armed groups. The way the Court distinguishes between a non-international and an international armed conflict is by using the “overall control” test as opposed to the “effective control” test that was established by the International Court of Justice in the *Nicaragua* case.⁵ The ‘overall control’ test was devised and developed by the ICTY⁶ and readily adopted by the ICC.⁷

- internal disturbances and tensions.

This is confirmed by Article 8(3) which clearly states to “Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means”. The aim of

⁴ ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Judgment, 4 February 2021, ICC-02/04-01/15-1762-Red (public redacted version), para. 2683 (*Ongwen*, 4 February 2021’) (<https://www.legal-tools.org/doc/kv27ul/>).

⁵ ICJ, *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment, 27 June 1986, para. 115 (<https://www.legal-tools.org/doc/046698/>).

⁶ ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1, para. 137 (*Tadić*, 2 October 1995’) (<https://www.legal-tools.org/doc/866e17/>).

⁷ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 211 (*Lubanga*, 29 January 2007’) (<https://www.legal-tools.org/doc/b7ac4f/>); *Prosecutor v. Lubanga*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 541 (<https://www.legal-tools.org/doc/677866/>); *Katanga*, 7 March 2014, para. 1178; *Bemba*, 21 March 2016, para. 130.

this Article is to ensure that acts committed in times of internal disturbances and tensions are not to be prosecuted as war crimes.

Analysis:

Article 8(2)(c) reads: “In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause”.⁸

i. Scope of Application: Existence of an Armed Conflict not of an International Character:

For this sub-provision to apply, the ICC must determine that the acts were committed in the context of an armed conflict not of an international character, which means that the Court will examine first (1) whether the conflict is international or has been internationalised and then (2) whether a number of criteria to consider the events as a non-international armed conflict are fulfilled (see *Bemba*, 15 June 2009, paras. 220–237).

In *Bemba*, the Court after reviewing the limits set by the ICC Statute to Article 8(2)(c) and (e) by Article 8(2)(d) and (f) respectively (*Bemba*, 15 June 2009, paras. 224–226), Common Article 3 of the Geneva Conventions (para. 227), AP II (para. 228), the ICTY case-law (para. 229 referring to *Tadić*, 2 October 1995, para. 70) and ICTR case-law⁹ states that a non-international armed conflict is characterised by the following elements (*Bemba*, 15 June 2009, para. 231):

1. the armed hostilities reach “a certain level of intensity, exceeding that of internal disturbances and tensions, such as riots, isolated acts of

⁸ Geneva Conventions I-IV, 12 August 1949 (‘GC I-IV’) (GC I: <https://www.legal-tools.org/doc/baf8e7/>; GC II: <https://www.legal-tools.org/doc/0d0216/>; GC III: <https://www.legal-tools.org/doc/365095/>; GC IV: <https://www.legal-tools.org/doc/d5e260/>). Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (‘AP I’) (<https://www.legal-tools.org/doc/d9328a/>). Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (‘AP II’) (<https://www.legal-tools.org/doc/fd14c4/>).

⁹ *Bemba*, 15 June 2009, para. 230 referring to ICTR, *Prosecutor v. Akayesu*, Trial Chamber I, Judgement, 2 September 1998, ICTR-96-4-T, para. 620 (<https://www.legal-tools.org/doc/b8d7bd/>).

violence or other acts of a similar nature” (see also *Mbarushimana*, 16 December 2011, para. 103);

2. the armed hostilities take “place within the confines of a State territory” (see also *Mbarushimana*, 16 December 2011, para. 103). The Court has clearly indicated that an armed conflict that falls within Common Article 3 of the Geneva Conventions must be “within the borders of the state where the hostilities are actually occurring” (Situation in the Islamic Republic of Afghanistan, 12 April 2019, para. 53);
3. the armed hostilities break out either “between government authorities and organised dissident armed groups” or “between such groups” (see also *Mbarushimana*, 16 December 2011, para. 103). Whilst subparagraph (d) does not refer to two opposing sides to the conflict the ICC in Bemba explained that this element also applies as a matter of customary law (*Bemba*, 21 March 2016, paras. 132–133).

The notion of ‘organised armed group’ is understood as covering armed groups that:

- have the ability to plan and carry out military operations for a prolonged period of time (*Lubanga*, 29 January 2007, para. 234, *Bemba*, 15 June 2009, para. 233). The existence of a centre that co-ordinates the operations of the different actors attests to the group’s ability to plan and carry out military operations (*Bemba*, 15 June 2009, para. 259); and
- must be under responsible command. This notably entails the capacity to impose discipline and the ability to plan and carry out military operations (*Lubanga*, 29 January 2007, para. 232; *Bemba*, 15 June 2009, para. 234). The group must have a hierarchical structure and a high level of internal organisation (*Mbarushimana*, 16 December 2011, para. 104) which means that a group that is structured like a conventional army easily fulfils this requirement (*Bemba*, 15 June 2009, paras. 258 and 261). Constitutive instruments as well as the existence and knowledge by the members of the group of disciplinary and military codes demonstrate that the group has an internal disciplinary system (*Mbarushimana*, 16 December 2011, para. 104; *Bemba*, 15 June 2009, para. 261).

It is unclear whether the requirement of “protracted armed conflict” that is expressly mentioned in subparagraph (f) as a limitation to subpara-

graph (e) also applies as a limitation to subparagraph (c). A literal approach of the ICC Statute would conclude that there is no need for an Article 8(2)(c) conflict to be protracted. In *Mbarushimana* and the decision on the *Situation in Afghanistan* the ICC simply mentioned the requirement of “protracted” without giving any justification for its application (*Mbarushimana*, 16 December 2011, para. 103 and *Situation in Afghanistan*, 12 April 2019, para. 65). However, in *Bemba* the Trial Chamber explains that this divergence in wording is only problematic if the conflict is not protracted (*Bemba*, 21 March 2016, para. 138). The Court then notes that as the duration of the conflict is a factor in the framework of the assessment of the intensity of the conflict there is no need to carry out two assessments (para. 139). Indeed, whether the conflict is protracted can be assessed at the same time and so, in the application of the law, the ICC specifically indicates that the threshold of ‘protracted’ is also reached (para. 663). That being said there is no requirement under the ICC Statute for the armed group “to exert control over a part of the territory” (*Bemba*, 15 June 2009, para. 236).

Since 2012 the Court has consistently defined a non-international armed conflict by reference to Article 8(2)(e) and (f) and it is unclear what has happened to the *Bemba* and *Mbarushimana* jurisprudence. The commentaries of subparagraphs (e) and (f) examine in detail the current state of the law regarding the definition of a non-international armed conflict.

ii. Serious Violations of Article 3 Common to the Four Geneva Conventions of 12 August 1949:

As specified in Article 8(2)(c) and acknowledged by the case-law (*Katanga*, 7 March 2014, para. 785) the crimes listed thereunder are the acts specified under (a), (b), (c) and (d) of Common Article 3 (1) of the Geneva Conventions, though not in the same order. Such crimes are also prohibited under customary international law all the more as Common Article 3 is viewed as a “mandatory minimum code applicable to internal conflict”.¹⁰

iii. Acts Committed against Persons Taking No Active Part in the Hostilities:

The offences listed in Article 8(2)(c) must be committed against persons taking no active part in the hostilities and these include “members of armed

¹⁰ ICTY, *Prosecutor v. Delalić et al.*, Appeals Chamber, Judgement, 20 February 2001, IT-96-21-A, para. 140 (<https://www.legal-tools.org/doc/051554/>).

forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause” (*Ongwen*, 4 February 2021, para. 2704). As the word “including” is used it means that this list is only illustrative. Indeed the Elements of Crimes refers to “persons [who are] either hors de combat, or [...] civilians, medical personnel, or religious personnel taking no active part in the hostilities”. (Elements of Crimes, Article 8, page 21; see also *Katanga*, 7 March 2014, para. 786).

The ICC examines the status of individuals on a case-by-case basis, as a constituent element of the offences (*Bemba*, 15 June 2009, para. 237). To define the concept of a civilian the Trial Chamber in *Bemba* refers to the Geneva Convention III and the Additional Protocols I and II (*Bemba*, 21 March 2016, para. 93). Generally, civilians are persons who are not members of State and non-State armed forces (*Katanga*, 7 March 2014, paras. 788 and 801).

In *Katanga*, the ICC, after noting that whilst Article 8(2)(c) refers to “direct participation” the Elements of Crimes use the terminology of “active participation”, explains that as Article 8(2)(c) reflects offences under Common Article 3 the concept that applies under Article 8(2)(c) is that of “direct participation”, an interpretation further supported by the case-law of the ICTY and ICTR that does not distinguish between ‘direct’ and ‘active’ participation (*Katanga*, 7 March 2014, para. 789). In other words, persons protected under Article 8(2)(c) only lose their protection if they take a direct, rather, than an active part in the hostilities and for the duration of their participation (para. 790). In the absence of a treaty or customary definition of direct participation in hostilities, the ICC uses the Commentary to Article 13(3) AP II that states that these are “acts of war that by their nature or purpose struck at the personnel and ‘matériel’ of enemy armed forces” (*Katanga*, 7 March 2014, para. 790; *Ongwen*, 4 February 2021, para. 2697). Yet, to determine whether these civilians were indeed not taking part in the hostilities, the ICC, relying on ICTY case-law¹¹ has spelled the following factors “the location of the [individuals], whether the victims were carrying weapons, and the clothing, age, and gender of the victims”.¹²

¹¹ See, for example, ICTY, *Prosecutor v Halilović*, Trial Chamber, Judgment, 16 November 2005, IT-01-48-T, paras. 33–34 (<https://www.legal-tools.org/doc/abda04/>).

¹² *Bemba*, 21 March 2016, para. 94; see also ICC, *Prosecutor v Ntaganda*, Trial Chamber VI, Judgment, 8 July 2019, ICC-01/04-02/06-2359, para. 884 (<https://www.legal-tools.org/doc/80578a/>).

The persons specifically included in the list in Article 8(2)(c) are known as persons *hors de combat*, that is, members of the armed forces who have surrendered and/or are sick, wounded or detained. Whilst it is clear that those who have surrendered or are detained are no threat to the opposing party anymore and thus hors de combat it must be noted that under international humanitarian law combatants who are sick or wounded are only considered hors de combat if they refrain from hostile conduct.¹³ So far the ICC has not had the opportunity to examine any such cases.

The Elements of Crimes and the *Katanga* case (*Katanga*, 7 March 2014, para. 784) further refer to medical and religious personnel taking no active part in the hostilities, the latter being defined as “non-confessional non-combatant military personnel carrying out a similar function” (Elements of Crimes, Article 8, footnote 56).

iv. Awareness:

The Elements of Crimes requires 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’”, that is, there must be a nexus between the act and the conflict (Elements of Crimes, Article 8; *Bemba*, 15 June 2009, para. 263; *Katanga*, 7 March 2014, paras. 791, 794, 1176 and 1231). The Trial Chambers in *Katanga* and *Bemba* explain that “the armed conflict must play a major part in the perpetrator’s decision, in his or her ability to commit the crime or the manner in which the crime was ultimately committed” (*Katanga*, 7 March 2014, para. 1176; *Bemba*, 21 March 2016, para. 142). In this regard it does not matter that the act was committed away from the hostilities or that the act was motivated by further reasons (*Katanga*, 7 March 2014, para. 1176; *Bemba*, 21 March 2016, para. 142). To ascertain concretely such a nexus, factors such as “the status of the perpetrator and victim; whether the act may be said to serve the ultimate goal of a military campaign; and whether the crime is committed as part of, or in the context of, the perpetrator’s official duties” are used by the ICC (*Bemba*, 21 March 2016, para. 143). Further the perpetrator must be aware that the acts were perpetrated in the context of a non-international armed conflict (Elements of Crimes, Article 8).

¹³ Sandoz Yves *et al.* (eds.), *Commentary on the Additional Protocols to the Geneva Conventions*, Martinus Nijhoff, Geneva, 1987, para. 1409.

What is more the perpetrator must be aware of “the factual circumstances that established the [status of the persons against whom the acts were committed]” (Elements of Crimes, Article 8, p. 21). In other words, the perpetrator could easily draw from the circumstances that the individuals had, for example, civilian status (see, for instance, *Mbarushimana*, 16 December 2011, paras. 191 and 219).

Cross-reference:

Article 8(2)(e).

Doctrine:

1. Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, pp. 32–79 (<https://www.legal-tools.org/doc/415188/>).
2. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 417–418 (<https://www.legal-tools.org/doc/01addc/>).
3. Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *International Criminal Law*, Oxford University Press, 2013, pp. 62–83 (<https://www.legal-tools.org/doc/7ca295/>).
4. Robert Cryer, Darryl Robinson and Sergey Vasiliev (eds.), *An Introduction to International Criminal Law and Procedure*, 4th. ed., Cambridge University Press, 2019, pp. 259–296.
5. Anthony Cullen, “War Crimes”, in William A. Schabas and Nadia Bernaz, *Routledge Handbook of International Criminal Law*, Routledge, London, 2011, pp. 139–154 (<https://www.legal-tools.org/doc/780dbc/>).
6. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2002, pp. 382–393.
7. Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court*, Cambridge University Press, 2014, pp. 279–285 (<https://www.legal-tools.org/doc/b7505c/>).
8. William A. Schabas, *An Introduction to the International Criminal Court*, 6th. ed., Cambridge University Press, 2020, pp. 136–139 (<https://www.legal-tools.org/doc/e9fb2f/>).

9. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 213–300 (<https://www.legal-tools.org/doc/b7432e/>).
10. Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, 2014, pp. 192–195, 273–280 (<https://www.legal-tools.org/doc/d9a80d/>).
11. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 528–48 (<https://www.legal-tools.org/doc/040751/>).

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Article 8(2)(c)(i): Violence to Life and Person

(i) Violence to life and person,

General Remarks:

The examples listed of murder, mutilation, cruel treatment and torture all constitute “violence to life and person”. No further definition of “violence to life and person” is provided in the Statute.¹ The specifically listed examples are then further defined as criminal conduct under Article 8(2)(c)(i). The prominent position of this prohibition in Common Article 3 underlines its fundamental importance in ensuring humane treatment to persons not or no longer participating in hostilities.² As the provision indicates both “violence to life” and violence to “person”, it is not necessary that death result from the violence caused, as is noted below in the relation to the various crimes specified (Commentary to Common Article 3, 2016, para. 592).

Cross-references:

Articles 7(1)(a), 8(2)(a)(i).

Doctrine:

1. Mikael Bothe, “War Crimes”, in Antonio Cassese, John R.W.D. Jones and Paola Gaeta (eds.), *The Rome Statute of the International Criminal Law: A Commentary*, Oxford University Press, 2002, pp. 395–397, 419 (<https://www.legal-tools.org/doc/01addc/>).
2. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 549 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2009, pp. 232–233 nn. 674–677, pp. 302–303 nn. 875–878 (<https://www.legal-tools.org/doc/e35f82/>).

¹ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Article 4(2)(a) (<https://www.legal-tools.org/doc/d9328a/>).

² Knut Dörmann *et al.*, *Commentary to the First Geneva Convention*, Common Article 3, International Committee of the Red Cross, 2016, para. 584 (“Commentary to Common Article 3, 2016”) (<https://www.legal-tools.org/doc/714eac/>).

4. Lindsey Cameron *et al.*, “Article 3: Conflicts not of an international character”, in Knut Dörmann *et al.*, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Cambridge University Press, 2016, pp. 126–325 (<https://www.legal-tools.org/doc/714eac/>).

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Article 8(2)(c)(i): Murder

in particular murder of all kinds,

General Remarks:

Murder is clearly established as an underlying offence for war crimes in customary international law, and is prohibited in numerous treaties, statutes of international criminal tribunals and courts, domestic legislation on war crimes, and military codes and manuals. It is one of the most common charges in war crimes jurisprudence.

Analysis:

i. Material Elements:

The Elements of Crimes sets out the *actus reus* for this crime as: (1) the perpetrator killed one or more persons; and (2) such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.

The war crime of murder under Article 8(2)(c)(i) differs materially from the crime against humanity of murder under Article 7(1)(a). In addition to the difference of protected status of the victim under Article 8(2)(c)(i), the crime must also take place in the context of an armed conflict. Article 7(1)(a) requires the existence of a widespread or systematic attack against a civilian population, and the demonstration of a nexus between the perpetrator's conduct and the attack, in respect of both the objective and the subjective elements. In *Katanga*, the Trial Chamber was of the opinion that accordingly multiple convictions may be entered for the crimes of murder constituting crimes against humanity under Article 7(1)(a) and war crimes under Article 8(2)(c)(i).¹

The first element of the war crime of murder under Article 8(2)(c)(i) is identical to the first element of Article 8(2)(a)(i), the war crime wilful killing in an international armed conflict and therefore reference should be made to the definitions under Article 8(2)(a)(i).

As with Article 8(2)(a)(i), the term 'killed' is interchangeable with the term 'caused death'. The war crime can be committed by an act or

¹ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgment pursuant to Article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1696 ('*Katanga*, 7 March 2014') (<https://www.legal-tools.org/doc/f74b4f/>).

omission.² Article 8(2)(c)(i) covers murder “of all kinds”. The term “murder” itself is not defined, but has been noted by the International Law Commission as a crime that is “clearly understood and well defined in the national law of every State” not requiring further explanation.³ To constitute murder, there must be no lawful justification for causing the death of the person or persons. In *Bemba*, Trial Chamber III incorporated its findings relating to murder as a crime against humanity *mutatis mutandis* to the war crime of murder under Article 8(2)(c)(i).⁴ As such, like murder as a crime against humanity, murder under Article 8(2)(c)(i) may be proven by circumstantial evidence so long as the victim’s death is the only reasonable inference that be drawn from such evidence (*Bemba*, 21 March 2016, paras. 88 and 91). It is not necessary for the Prosecutor to prove the specific identify of the victim or perpetrator, nor is it required that the victim’s body has been recovered. However, the Chamber noted the distinguishing feature between these two crimes regarding the status of the victim under Article 8(2)(c)(i) (paras. 88 and 91).

The Elements of Crimes for Article 8(2)(c)(i) reflects the difference in the legal framework applicable in non-international armed conflicts compared with the law regulating international armed conflicts in Article 8(2)(a). As such, the Elements specifically lists those protected under the law applicable in non-international armed conflicts. Persons *hors de combat* includes anyone who is in the power of an adverse party, anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness, or anyone who clearly expresses an intention to surrender.⁵ Medical and religious personnel includes civilian and military personnel. “Religious personnel” includes those non-confessional non-combatant military personnel

² ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 274 (*‘Bemba*, 15 June 2009’) (<https://www.legal-tools.org/doc/07965c/>); and *Katanga*, 7 March 2014, para. 786.

³ Draft Code of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission, UN Doc. A/CN.4/SER.A/1996/Add.1, Volume II, Part 2, 26 July 1996, p. 48 (<https://www.legal-tools.org/doc/bb5adc/>).

⁴ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343, para. 91 (*‘Bemba*, 21 March 2016’) (<https://www.legal-tools.org/doc/edb0cf/>).

⁵ See further Knut Dörmann *et al.*, *Commentary to the First Geneva Convention*, Common Article 3, International Committee of the Red Cross, 2016, paras. 518–539 (<https://www.legal-tools.org/doc/714eac/>).

carrying out similar functions (Elements of Crimes, fn. 156). The crime of murder is not applicable to lawful killing during the conduct of hostilities.

To date, the ICC has issued two judgments relating to the war crime of murder under Article 8(2)(c)(i), both of which relate to the murder of civilians (see *Katanga*, 7 March 2014, para. 787 and *Bemba*, 21 March 2016, para. 93). There is a difference, however, in relation to the mode of responsibility between the two judgments. *Katanga* was found guilty of this war crime as an accessory under Article 25(3)(d), whereas *Bemba* was found guilty of this war crime of murder as a military commander under Article 28(a). *Bemba* was later acquitted by the Appeals Chamber of all charges.⁶ In *Katanga*, Trial Chamber II defined civilians as “persons who are not members of either State or non-state armed forces” with reference to Articles 1 and 13 of Protocol (II) Additional to the Geneva Conventions of 12 August 1949 when read in conjunction with Common Article 3 to the Geneva Conventions (*Katanga*, 7 March 2014, para. 788).⁷ In the *Bemba* judgment, Trial Chamber III made reference to Articles 43 and 50(1) of AP I, and Article 4(A)(1), (2) and (3) of GC III in relation to the definition of civilians, noting particularly the definition in favour of civilian status in situations of doubt.⁸ The *Katanga* trial judgment addressed the difference in language used in the French version of the chapeau of Article 8(2)(c), which refers to “direct participation in hostilities”, and the Elements of Crimes, which refer to “taking no active part in the hostilities”. The Chamber held that for the purposes of this article alone, the criterion of direct hostilities must be used (*Katanga*, 7 March 2014, para. 789). The Chamber made reference to the findings of the *ad hoc* Tribunals and the drafting of the ICC Statute in coming to this conclusion. As such, “persons protected

⁶ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, 8 June 2018, ICC-01/05-01/08-3636-Red (<https://www.legal-tools.org/doc/40d35b/>).

⁷ Geneva Conventions I-IV, 12 August 1949 (‘GC I-IV’) (GC I: <https://www.legal-tools.org/doc/baf8e7/>; GC II: <https://www.legal-tools.org/doc/0d0216/>; GC III: <https://www.legal-tools.org/doc/365095/>; GC IV: <https://www.legal-tools.org/doc/d5e260/>). Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (‘AP I’) (<https://www.legal-tools.org/doc/d9328a/>). Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (‘AP II’) (<https://www.legal-tools.org/doc/fd14c4/>).

⁸ See further Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009, Rule 5 (<https://www.legal-tools.org/doc/78a250/>).

by virtue of Article 8(2)(c) lose that protection only through dire – and not active – participation in hostilities and for the duration of that participation” (*Katanga*, 7 March 2014, para. 790). The Chamber made reference to the Commentary on Article 13(3) of AP II that defines direct participation in hostilities as “acts of war that by their nature or purpose strike at the personal and ‘*matériel*’ of enemy armed forces” (*Katanga*, 7 March 2014, para. 790). In *Bemba*, Trial Chamber III noted that the burden is on the Prosecutor to establish that the victim/s as a civilian taking no active part in hostilities. In determining whether victims were taking an active part in hostilities, consideration will be given to the relevant facts and specific situation of the victims at the relevant time, including the location of the murders, whether the victims were carrying weapons, and the clothing, age, and gender of the victims (*Bemba*, 21 March 2016, para. 94).

In *Banda*, Pre-Trial Chamber I considered the war crime of attempted murder of peacekeepers.⁹ The Chamber first determined whether the personnel were peacekeepers for the purposes of Article 8(2)(e)(iii), these legal findings then having consequences for the charge of murder and attempted murder under Article 8(2)(c)(i) (*Banda*, 7 March 2011, para. 58). The Chamber held there are substantial grounds to believe that AMIS was involved in a peacekeeping mission in accordance with the UN Charter as it was established under the auspices of the African Union, a regional agency within the meaning of Article 52 of the UN Charter with a mandate to maintain peace and security and (a) was deployed with the consent of the parties to the conflict active at the time of the agreements; (b) was impartial in its dealings with all parties to the conflict and (c) its personnel were not allowed to use force except in self-defence (para. 63). The Chamber reiterated that personnel involved in peacekeeping missions enjoy protection from attack under the ICC Statute unless and for such time as they take direct part in hostilities or in combat-related activities (para. 102). That protection does not cease if such persons only used armed force in the exercise of their right to self-defence (para. 102). The determination of whether a person is directly participating in hostilities must be carried out on a case-by-case basis (para. 102).

The final three elements of this war crime are nearly identical to those under Article 8(2)(a), save for the requirement that the conduct must

⁹ ICC, *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber I, Corrigendum of the “Decision on Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121-Corr-Red, paras. 90–95 (*Banda*, 7 March 2011’) (<https://www.legal-tools.org/doc/5ac9eb/>).

take place in the context of and be associated with an armed conflict not of an international character and, as such, reference should be made to that provision.

ii. Mental Element:

As no specific intent requirement is specified in the Elements of Crimes, reference should be made to Article 30 (*Bemba*, 15 June 2009, para. 275; *Bemba*, 21 March 2016, para. 95; and *Katanga*, 7 March 2014, para. 792). In the *Bemba* judgment, Trial Chamber III defined the mental element of this war crime as requiring proof beyond reasonable doubt that the perpetrator (i) meant to kill or to cause the death of one or more persons or (ii) was aware that the death(s) would occur in the ordinary course of events (*Bemba*, 21 March 2016, para. 96). In *Katanga*, Trial Chamber II considered that the perpetrator must have intentionally killed one or more persons. This intention will be proven where the perpetrator acted deliberately or failed to act (1) in order to cause the death of one or more persons or (2) whereas he or she was aware that death would occur in the ordinary course of events (*Katanga*, 7 March 2014, para. 793).

The Prosecutor must establish that the perpetrator was aware of the factual circumstances that established the status of the victim (see also *Bemba*, 21 March 2016, para. 97 and *Banda*, 7 March 2011, para. 105) and the factual circumstances that established the existence of an armed conflict (see further Introduction to Article 8 in the Elements of Crimes; *Katanga*, 7 March 2014, paras. 784 and 794; *Bemba*, 15 June 2009, paras. 213–239; *Bemba*, 21 March 2016, paras. 126–147; and *Banda*, 7 March 2011, paras. 48–52). In the Introduction to Article 8 in the Elements of Crimes, it is provided that 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, or a requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict. In *Banda*, Pre-Trial Chamber I held it was not necessary to make a distinction in the assessment of subjective elements in relation to murders, whether attempted or completed, as the attempt to commit a crime is a crime in which the objective elements are incomplete while the subjective elements are complete (*Banda*, 7 March 2011, para. 106).

iii. Charges before the ICC:

In relation to the situation in Uganda, Dominic Ongwen has been charged with the war crime of murder and attempted murder under Article 8(2)(c)(i).¹⁰ In the situation in Darfur, Sudan, the warrant of arrest dated 1 March 2012 for Abdel Raheem Muhammad Hussein includes the count of murder as war crime under Article 8(2)(c)(i). Charges for this war crime were brought against Callixte Mbarushimana, but the Pre-Trial Chamber I declined to confirm any of the charges due to insufficient evidence to establish individual criminal responsibility under Article 25(3)(d).¹¹ Charges for the war crime of murder under Article 8(2)(c)(i) were confirmed by Pre-Trial Chamber II against Patrice-Edouard Ngaïssona and Alfred Yekatom in the situation in the Central African Republic II on 11 December 2019.¹² In the situation in the Democratic Republic of Congo, charges for this war crime are included in the warrant for arrest against Sylvestre Mudacumura, who remains at large. Three warrants of arrest relating to the situation in Darfur, Sudan include charges for this war crime, namely against Ali Muhammad Ali Abd-Al-Rahman, Ahmad Muhammad Harun and Abdel Raheem Muhammad Hussein. The warrant of arrest for Mahmoud Mustafa Busyf Al-Werfalli relating to the situation in Libya also includes charges for this war crime and the suspect also remains at large.

Cross-references:

Article 7(1)(a), 8(2)(a)(i), 30.

Doctrine:

1. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 549–51 (<https://www.legal-tools.org/doc/040751/>).

¹⁰ ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 March 2016, ICC-02/04-01/15-422-Red (<https://www.legal-tools.org/doc/74fc6e/>).

¹¹ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, paras. 291–340 (<https://www.legal-tools.org/doc/63028f/>).

¹² ICC, *Prosecutor v. Yekatom and Ngaïssona*, Trial Chamber II, Corrected version of ‘Decision on the confirmation of charges’, 11 December 2019 (corr. 14 May 2020), ICC-01/14-01/18-403-Red-Corr (<https://www.legal-tools.org/doc/s5qfg5/>).

2. Michael Boothe, “War Crimes” in Antonio Cassese, John R.W.D. Jones and Paola Gaeta (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 419 (<https://www.legal-tools.org/doc/01addc/>).
3. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2003, pp. 394–403.
4. Lindsey Cameron *et al.*, “Article 3: Conflicts not of an international character”, in Knut Dörmann *et al.*, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Cambridge University Press, 2016, pp. 126–325 (<https://www.legal-tools.org/doc/714eac/>).

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Article 8(2)(c)(i): Mutilation

mutilation,

General Remarks:

The International Committee of the Red Cross has identified the prohibition of mutilation, together with the prohibition of medical or scientific experimentation, as a rule of customary international law, and was already recognised in the Lieber Code.¹ The war crime of mutilation in non-international armed conflicts was also included under the Statute of the International Criminal Tribunal for Rwanda and Statute of the Special Court for Sierra Leone.

Analysis:

i. Material Elements:

The *actus reus* for this war crime is provided in the Elements of Crimes as: (1) the perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage; (2) the conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interests; and (3) such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

There is overlap with the war crimes of physical mutilation under Article 8(2)(b)(x) applicable in international armed conflicts, and the war crime of mutilation under Article 8(2)(e)(xi) applicable in non-international armed conflicts. The first and second elements of Article 8(2)(c)(i) are identical to the first and third Elements of Crimes for the Article 8(2)(b)(x) and Article 8(2)(e)(xi), and as such reference can therefore be made to the definition of “mutilation” under Article 8(2)(b)(x) and Article 8(2)(e)(xi). Although Article 8(2)(b)(x) and Article 8(2)(e)(xi) refer to “physical mutilations”, the reference to “mutilations” in Article 8(2)(c)(i) has been con-

¹ Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863 (<https://www.legal-tools.org/doc/842054/>).

sidered synonymous as it refers to an act of “violence to life”.² In addition to the difference in character of the conflict, Article 8(2)(b)(x) applies where the victim is in the power of an adverse party in the international armed conflict. Similarly, but in the context of non-international armed conflicts, Article 8(2)(e)(xi) relates to victims who were in the power of “another party” to the non-international armed conflict. In contrast Article 8(2)(c)(i) applies to persons who were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities. Unlike Article 8(2)(b)(x) and Article 8(2)(e)(xi), it is not required that the conduct must cause death or seriously endanger the physical or mental health of the persons. In the *Mbarushimana* case, the Pre-Trial Chamber noted that the war crime of mutilation presupposes an act committed against a person and not a dead body.³

The second element indicates that mutilations justified on medical ground (such as amputations of gangrenous limbs) are not covered by this war crime. Mutilation of dead bodies would not be covered by this provision, but may constitute a war crime of outrages upon personal dignity under Article 8(2)(c)(ii), which applies to dead bodies.

Reference can be made to the findings of the ICC pertaining to protected persons for the war crime of murder under Article 8(2)(c)(i).

ii. Mental Element:

As no specific intent requirement is specified in the Elements of Crimes, reference should be made to Article 30. The Prosecutor must also establish that the conduct took place in the context and was associated with an armed conflict not of an international character, and that the perpetrator was aware of the factual circumstances that established the status of the victim and the factual circumstances that established the existence of an armed conflict. It is not necessary for the perpetrator to have made a legal evaluation as to the character of the armed conflict (see Introduction to Article 8 in the Elements of Crimes).

² See also Knut Dörmann *et al.*, *Commentary to the First Geneva Convention*, Common Article 3, International Committee of the Red Cross, 2016, para. 602 (<https://www.legal-tools.org/doc/714eac/>).

³ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, paras. 154 and 158 (*Mbarushimana*, 16 December 2011) (<https://www.legal-tools.org/doc/63028f/>).

iii. Charges before the ICC:

As noted above, charges were brought against Callixte Mbarushimana for the war crime of mutilation under Article 8(2)(c)(i), but the Pre-Trial Chamber I declined to confirm any of the charges due to insufficient evidence to establish individual criminal responsibility under Article 25(3)(d) (*Mbarushimana*, 16 December 2011, paras. 291–340). In the situation in the Democratic Republic of Congo, charges for this war crime are included in the warrant for arrest against Sylvestre Mudacumura, who remains at large.

Cross-references:

Articles 8(2)(b)(x), 8(2)(e)(xi), 30.

Doctrine:

1. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 551 (<https://www.legal-tools.org/doc/040751/>).
2. Michael Boothe, “War Crimes” in Antonio Cassese, John R.W.D. Jones and Paola Gaeta (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 419 (<https://www.legal-tools.org/doc/01addc/>).
3. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2003, pp. 394–403.
4. Knut Dörmann *et al.*, *Commentary to the First Geneva Convention*, Common Article 3, International Committee of the Red Cross, 2016 (<https://www.legal-tools.org/doc/714eac/>).

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Article 8(2)(c)(i): Cruel Treatment

cruel treatment

General Remarks:

“Cruel treatment” is not contained in other provisions in Part 2 of the ICC Statute, unlike the other terms used in Article 8(2)(c)(i). Article 55 does, however, provide that a person who is subject to an investigation under the Statute shall not be subjected to any form of cruel, inhuman or degrading treatment or punishment. In addition to Common Article 3, “cruelty” is also prohibited under Article 87 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, and Article 118 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War of 12 August 1949.¹ Cruel treatment is also prohibited under Article 4(2)(a) of Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977.² Prohibitions of “cruel treatment” are contained in the provisions of the UN International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights.³

Analysis:

i. Material Elements:

The *actus reus* for this war crime is that (1) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; and (2) such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.

The first element is identical to the first element for the war crime of inhuman treatment under Article 8(2)(a)(ii). The content of the term “in-

¹ Geneva Conventions III, IV, 12 August 1949 (‘GC III, IV’) (GC III: <https://www.legal-tools.org/doc/365095/>; GC IV: <https://www.legal-tools.org/doc/d5e260/>).

² Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/fd14c4/>).

³ International Covenant on Civil and Political Rights, 16 December 1966 (<https://www.legal-tools.org/doc/2838f3/>); American Convention On Human Rights, 22 November 1969 (<https://www.legal-tools.org/doc/1152cf/>); African Charter on Human And Peoples’ Rights, 1 October 1986 (<https://www.legal-tools.org/doc/f0db44/>).

human treatment” in Article 8(2)(a)(ii) was considered the same as the term “cruel treatment” under Article 8(2)(c)(i) by the Preparatory Commission in drafting the Elements of Crimes.⁴ Reference should therefore be made to Article 8(2)(a)(ii) in determining what constitutes cruel treatment. Similar to the crimes defined under Article 8(2)(a)(ii), acts which do not fulfil the purposive requirements of torture would fulfil the requirements for cruel treatment under Article 8(2)(c)(i).

Reference can be made to the findings of the ICC pertaining to protected persons for the war crime of murder under Article 8(2)(c)(i).

ii. Mental Element:

As no specific intent requirement is provided in the Elements of Crimes, reference should be made to Article 30. The Prosecutor must also establish that the conduct took place in the context and was associated with an armed conflict not of an international character, and that the perpetrator was aware of the factual circumstances that established the status of the victim and the factual circumstances that established the existence of an armed conflict. It is not necessary for the perpetrator to have made a legal evaluation as to the character of the armed conflict (see Introduction to Article 8 in the Elements of Crimes).

iii. Charges before the ICC:

In *Katanga and Ngudjolo*, Pre-Trial Chamber I was of the view “that there is sufficient evidence to establish substantial grounds to believe that the war crime of inhuman treatment, as defined in Article 8(2)(a)(ii) of the Statute was committed”.⁵ As noted above, charges were brought against Callixte Mbarushimana for the war crime of mutilation under Article 8(2)(c)(i), but the Pre-Trial Chamber I declined to confirm any of the charges due to insufficient evidence to establish individual criminal respon-

⁴ Andreas Zimmerman and Robin Geis, “Article 8, War Crimes, Grave Breaches in Detail”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., Beck, Hart, Nomos, Munich, Oxford, Baden-Baden, 2016, p. 551 (<https://www.legal-tools.org/doc/040751/>).

⁵ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 364 (<https://www.legal-tools.org/doc/67a9ec/>).

sibility under Article 25(3)(d).⁶ Charges for this war crime were confirmed by Pre-Trial Chamber II against Patrice-Edouard Ngaïssona and Alfred Yekatom in the situation in the Central African Republic II on 11 December 2019.⁷ In the situation in the Democratic Republic of Congo, charges for this war crime are included in the warrant for arrest against Sylvestre Mudacumura, who remains at large.

Cross-references:

Articles 7(1)(k), 8(2)(a)(ii), 8(2)(c)(i) (murder), 30.

Doctrine:

1. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 551–52 (<https://www.legal-tools.org/doc/040751/>).
2. Michael Boothe, “War Crimes” in Antonio Cassese, John R.W.D. Jones and Paola Gaeta (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 392–393 and 419 (<https://www.legal-tools.org/doc/01addc/>).
3. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2003, pp. 394–403.
4. Knut Dörmann *et al.*, *Commentary to the First Geneva Convention*, Common Article 3, International Committee of the Red Cross, 2016 (<https://www.legal-tools.org/doc/714eac/>).

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⁶ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, paras. 291–340 (*‘Mbarushimana*, 16 December 2011’) (<https://www.legal-tools.org/doc/63028f/>).

⁷ See ICC, *Prosecutor v. Yekatom and Ngaïssona*, Trial Chamber II, Corrected version of ‘Decision on the confirmation of charges’, 11 December 2019 (corr. 14 May 2020), ICC-01/14-01/18-403-Red-Corr (<https://www.legal-tools.org/doc/s5qfg5/>).

Article 8(2)(c)(i): Torture

torture;

General Remarks:

The prohibition of torture in international humanitarian law is a well-established rule of custom. Torture is listed as a grave breach in all four of the Geneva Conventions of 1949.¹ The prohibition of torture is also listed in the provision on fundamental guarantees in Protocols I and II Additional to the Geneva Conventions of 12 August 1949.² Torture is also prohibited under international human rights law and the prohibition was considered a rule of *jus cogens* by the ICTY in the *Furundžija* case.³

Analysis:

i. Material Elements:

The *actus reus* for this war crime is set out in the Elements of Crimes as: (1) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; (2) the perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind; and (3) such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

The first two elements are identical to the elements for torture under Article 8(2)(a)(ii) and reference can therefore be made to Article 8(2)(a)(ii) in relation to the requirements under Article 8(2)(c)(ii). The General Introduction to the Elements of Crimes provides that it is not necessary for the perpetrator to have personally completed a value judgment of the severity of the pain or suffering. As with the Elements of Crimes for Article

¹ Geneva Conventions I-IV, 12 August 1949 ('GC I-IV') (GC I: <https://www.legal-tools.org/doc/baf8e7/>; GC II: <https://www.legal-tools.org/doc/0d0216/>; GC III: <https://www.legal-tools.org/doc/365095/>; GC IV: <https://www.legal-tools.org/doc/d5e260/>).

² Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/d9328a/>). Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/fd14c4/>).

³ ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Judgment, 10 December 1998, IT-95-17/1-T10, paras. 155–157 (<https://www.legal-tools.org/doc/e6081b/>).

8(2)(a)(ii), Article 8(2)(c)(ii) includes the requirement that the infliction of severe physical or mental pain or suffering is for a purpose. This differs from the crime of torture as a crime against humanity under Article 7(1)(f), where no such purpose requirement is included. As noted in relation to Article 8(2)(a)(ii), there is no requirement for the perpetrator to have acted in any official capacity. This is particularly noteworthy for Article 8(2)(c)(ii) in the context of non-international armed conflicts.

Reference can be made to the findings of the ICC pertaining to protected persons for the war crime of murder under Article 8(2)(c)(i).

ii. Mental Element:

The *Bemba* Pre-Trial Chamber set out the mental element of this crime as the perpetrator (1) must have committed the crime of torture with intent and knowledge pursuant to Article 30 of the Statute; (2) must have inflicted the pain or suffering for such purposes as obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind; (3) must have been aware of the factual circumstances that established the status of the persons concerned.⁴

The perpetrator's intent to inflict the pain or suffering for the purposes set out in the Elements of Crimes constitutes a specific intent which has to be proven by the Prosecutor (*Bemba*, 15 June 2009, para. 294). The Prosecutor must also establish the conduct took place in the context and was associated with an armed conflict not of an international character, and that the perpetrator was aware of the factual circumstances that established the status of the victim and the factual circumstances that established the existence of an armed conflict. It is not necessary for the perpetrator to have made a legal evaluation as to the character of the armed conflict (see Introduction to Article 8 in the Elements of Crimes).

iii. Charges before the ICC:

The Prosecutor brought charges against Bemba for the war crime of torture under Article 8(2)(c)(i), but these were not confirmed by the Chamber due to the Prosecutor's failure to provide evidence of the specific intent required for this crime (*Bemba*, 15 June 2009, paras. 291–292 and 297–300).

⁴ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 293 ('*Bemba*, 15 June 2009') (<https://www.legal-tools.org/doc/07965c/>).

Charges were also brought against Callixte Mbarushimana for the war crime of cruel treatment under Article 8(2)(c)(i), but the Pre-Trial Chamber I declined to confirm any charges due to insufficient evidence to establish individual criminal responsibility under Article 25(3)(d).⁵ Pre-Trial Chamber II confirmed the charges of the war crime of cruel treatment under Article 8(2)(c)(i) against Dominic Ongwen.⁶ Charges for this war crime were confirmed by Pre-Trial Chamber II against Patrice-Edouard Ngaïssona and Alfred Yekatom in the situation in the Central African Republic II on 11 December 2019.⁷ In the situation in Mali, Pre-Trial Chamber I confirmed charges for the war crime of torture under Article 8(2)(c)(i) against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud on 30 September 2019.⁸ In addition, charges for this war crime are included in the warrants of arrest for Al-Tuhamy Mohamed Khaled (in the situation in Libya) and Sylvestre Mudacumura (in the situation in the Democratic Republic of Congo), both of whom remain at large.

Cross-references:

Articles 7(1)(f), 8(2)(a)(ii), 8(2)(c)(i) (murder), 8(2)(c)(i) (cruel treatment), 30.

Doctrine:

1. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 552–53 (<https://www.legal-tools.org/doc/040751/>).
2. Michael Boothe, “War Crimes” in Antonio Cassese, John R.W.D. Jones and Paola Gaeta, *The Rome Statute of the International Criminal Court:*

⁵ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red (public redacted version), paras. 291–340 (<https://www.legal-tools.org/doc/63028f/>).

⁶ ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision on Confirmation of Charges, 23 March 2016, ICC-02/04-01/15-422-Red (<https://www.legal-tools.org/doc/74fc6e/>).

⁷ See ICC, *Prosecutor v. Yekatom and Ngaïssona*, Pre-Trial Chamber II, Corrected version of ‘Decision on the confirmation of charges’, 11 December 2019 (corr. 14 May 2020), ICC-01/14-01/18-403-Red-Corr (<https://www.legal-tools.org/doc/s5qfg5/>).

⁸ ICC, *Prosecutor v. Al Hassan*, Pre-Trial Chamber I, Rectificatif à la Décision relative à la confirmation des charges, 13 November 2019, ICC-01/12-01/18-461-Corr-Red (<https://www.legal-tools.org/doc/9lm15x/>).

A Commentary, Oxford University Press, 2002, pp. 392–393 and 419 (<https://www.legal-tools.org/doc/01addc/>).

3. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2003, pp. 394–403.
4. Lindsey Cameron *et al.*, “Article 3: Conflicts not of an international character”, in Knut Dörmann *et al.*, *Commentary to the First Geneva Convention*, Common Article 3, International Committee of the Red Cross, 2016, pp. 126–325 (<https://www.legal-tools.org/doc/714eac/>).

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Article 8(2)(c)(ii)

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

General Remarks:

Under international humanitarian law, the prohibition of committing outrages upon personal dignity, in particular humiliating and degrading treatment, is recognised as a rule of customary international law applicable in both international and non-international armed conflicts.¹ It is prohibited under international humanitarian law under Common Article 3(1)(c) to the Geneva Conventions of 1949, applicable in armed conflicts not of an international character.² Common Article 3 is developed and supplemented by Protocol (II) to the Geneva Conventions of 12 August 1949, and Additional Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977, Article 4(2)(e) of which includes a prohibition of outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault against persons who do not take a direct part or who have ceased to take a direct part in hostilities.³ In armed conflicts of an international character, outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault is prohibited under Article 75(2)(b) of Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977.⁴ Outrages upon personal dignity is included in the notion of inhuman treatment which constitutes a grave breach of the Geneva Conventions of 1949 under Article 50 GC I, Article 50 GC

¹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009, Rule 90 (<https://www.legal-tools.org/doc/78a250/>).

² Geneva Conventions I-IV, 12 August 1949 ('GC I-IV') (GC I: <https://www.legal-tools.org/doc/baf8e7/>; GC II: <https://www.legal-tools.org/doc/0d0216/>; GC III: <https://www.legal-tools.org/doc/365095/>; GC IV: <https://www.legal-tools.org/doc/d5e260/>).

³ Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 ('AP II') (<https://www.legal-tools.org/doc/fd14c4/>).

⁴ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 ('AP I') (<https://www.legal-tools.org/doc/d9328a/>).

II, Article 130 GC III and Article 147 GC IV. Under Article 85(4)(c) of AP I, practices of ‘apartheid’ and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination, are regarded as a grave breach of the Protocol.

Analysis:

i. Material Elements:

The *actus reus* for this war crime is set out in the Elements of Crimes as: (1) the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons; (2) the severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity; and (3) such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

The first two Elements of Crimes for this war crime are identical to those under Article 8(2)(b)(xxi) and reference therefore should be made to the definitions under Article 8(2)(b)(xxi).

Footnote 57 to the Elements notes that “persons” can include dead persons. In addition, the victim need not personally be aware of the existence of the humiliation or degradation or other violation. As such, it would apply to acts committed against unconscious persons or persons with limited mental capacity. Relevant aspects of the cultural background of the victim should be taken into account in determining whether or not the perpetrator humiliated, degraded or otherwise violated their dignity. The *Bemba* Pre-Trial Chamber made reference to the General Introduction to the Elements of Crimes, para. 4 in relation to this crime according to which the perpetrator need not make a value judgment as to the severity of humiliation, degradation or other violation of dignity.⁵ The humiliating and degrading treatment is prohibited even if the victim overcomes the consequences relatively quickly. In *Katanga and Ngudjolo*, Pre-Trial Chamber I quoted

⁵ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 295 (*Bemba*, 15 June 2009’) (<https://www.legal-tools.org/doc/07965c/>).

ICTY jurisprudence when it stated that “there is no requirement that such suffering be lasting”.⁶

Reference can be made to the findings of the ICC pertaining to protected persons for the war crime of murder under Article 8(2)(c)(i).

ii. Mental Element:

The *Bemba* Pre-Trial Chamber defined the mental element of this war crime as the perpetrator (1) must have committed the crime of outrage upon personal dignity with intent and knowledge pursuant to Article 30; and (2) must have been aware of the factual circumstances that established the status of the persons concerned (*Bemba*, 15 June 2009, para. 304). The Prosecutor must also establish that the conduct took place in the context and was associated with an armed conflict not of an international character, and that the perpetrator was aware of the factual circumstances that established the status of the victim and the factual circumstances that established the existence of an armed conflict. It is not necessary for the perpetrator to have made a legal evaluation as to the character of the armed conflict (see Introduction to Article 8 in the Elements of Crimes).

iii. Charges before the ICC:

The Prosecutor brought charges against Bemba under both Article 8(2)(c)(ii) (outrages upon personal dignity) and Article 8(2)(e)(vi) (rape) in relation to the same conduct. Pre-Trial Chamber II declined to confirm the count under Article 8(2)(c)(ii), as the Prosecutor had not sufficiently set out the factual basis for the count and the essence of the violations of law underlying law were already fully encompassed in the count of rape (*Bemba*, 15 June 2009, paras. 307–310). Pre-Trial Chamber II confirmed the charges of the war crime of committing outrages upon personal dignity under Article 8(2)(c)(ii) against Dominic Ongwen.⁷ Charges for this war crime have been included in a further five warrants for arrest issued by the ICC to date. Of these four of the suspects remain at large, namely Abdel Raheem Muhammad Hussein and Ali Kushayb (situation in Darfur, Sudan), Al-Tuhamy Mohamed Khaled (situation in Libya) and Sylveste Mudacumura (situation

⁶ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 369 (<https://www.legal-tools.org/doc/67a9ec/>).

⁷ ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision on confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red (<https://www.legal-tools.org/doc/74fc6e/>).

in the Democratic Republic of Congo). Pre-Trial Chamber I confirmed charges under Article 8(2)(c)(ii) against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud on 30 September 2019.⁸

Cross-references:

Articles 7(1)(c), 8(2)(a)(ii), 8(2)(b)(xxi), 8(2)(c)(i) (murder).

Doctrine:

1. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 553 (<https://www.legal-tools.org/doc/040751/>).
2. Michael Boothe, “War Crimes” in Antonio Cassese, John R.W.D. Jones and Paola Gaeta (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 414–415 and 419 (<https://www.legal-tools.org/doc/01addc/>).
3. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2003, pp. 404–405.
4. Commentary to Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva 12 August 1949, International Committee of the Red Cross, Cambridge, 2016.
5. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009, Rule 90 (<https://www.legal-tools.org/doc/78a250/>).

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⁸ ICC, *Prosecutor v. Al Hassan*, Pre-Trial Chamber I, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 13 November 2019, ICC-01/12-01/18-461-Corr-Red (<https://www.legal-tools.org/doc/9lml5x/>).

Article 8(2)(c)(iii)

(iii) Taking of hostages;

General Remarks:

Under international humanitarian law, the prohibition of the taking of hostages is considered to be a rule of customary international law.¹ It is prohibited under Common Article 3(1)(b), applicable in armed conflicts not of an international character. It is also prohibited under Article 34 of the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, applicable in international armed conflicts and is established as a grave breach of the Convention under Article 147.² These provisions are supplemented and developed by Article 75(2)(c) of the Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 and Article 4(2)(c) of the Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977.³

Analysis:

i. Material Elements:

The *actus reus* for this war crime is set out in the Elements of Crimes as: (1) the perpetrator seized, detained or otherwise held hostage one or more persons; (2) the perpetrator threatened to kill, injure or continue to detain such person or persons; (3) the perpetrator intended 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; and (4) such person or persons

¹ Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, vol. 1, International Committee of the Red Cross, 2009, Rule 96 (<https://www.legal-tools.org/doc/78a250/>).

² Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (<https://www.legal-tools.org/doc/d5e260/>).

³ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/d9328a/>); Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/fd14c4/>).

were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

The first three elements of crime are identical to those under Article 8(2)(a)(viii). Reference should therefore be made to the definitions under Article 8(2)(a)(viii) in relation to the terms under Article 8(2)(c)(iii).

Reference can be made to the findings of the ICC pertaining to protected persons for the war crime of murder under Article 8(2)(c)(i).

ii. Mental Element:

Reference should be made to Article 30 requirements of intent and knowledge. In addition, the 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 a condition for the safety or release of the hostages is a specific intent requirement that must be established by the Prosecutor. The Prosecutor must also establish that the conduct took place in the context and was associated with an armed conflict not of an international character, and that the perpetrator was aware of the factual circumstances that established the status of the victim and the factual circumstances that established the existence of an armed conflict. It is not necessary for the perpetrator to have made a legal evaluation as to the character of the armed conflict (see Introduction to Article 8 in the Elements of Crimes).

iii. Charges before the ICC:

No charges have been brought by the ICC for the commission of this crime to date.

Cross-references:

Article 8(2)(a)(viii), 30.

Doctrine:

1. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 553–554 (<https://www.legal-tools.org/doc/040751/>).
2. Michael Boothe, “War Crimes” in Antonio Cassese, John R.W.D. Jones and Paola Gaeta (eds.), *The Rome Statute of the International Criminal*

Court: A Commentary, Oxford University Press, 2002, pp. 395 and 419 (<https://www.legal-tools.org/doc/01addc/>).

3. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2003, pp. 406–407.
4. Lindsey Cameron *et al.*, “Article 3: Conflicts not of an international character”, in Knut Dörmann *et al.*, *Commentary to the First Geneva Convention*, Common Article 3, International Committee of the Red Cross, 2016 (<https://www.legal-tools.org/doc/714eac/>).
5. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009, Rule 96 (<https://www.legal-tools.org/doc/78a250/>).

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Article 8(2)(c)(iv)

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

General Remarks:

The prohibition of sentences and executions without a trial respecting judicial guarantees was included in Common Article 3(1)(d) in response to a concern of the preponderance of summary trials. Further detail was added to the requirements in Article 6 of Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977,¹ and there have since been significant developments in international human rights law. The standards included in Common Article 3(1)(d) are now accepted as customary international law.

Analysis:

i. Material Elements:

The Elements of Crimes sets out the *actus reus* for this war crime as: (1) the perpetrator passed sentence or executed one or more persons; (2) such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities. In addition, it is required that there was no previous judgement pronounced by a court, or the court that rendered judgement was not “regularly constituted”, that is, it did not afford the essential guarantees of independence and impartiality, or the court that rendered judgement did not afford all other judicial guarantees generally recognised as indispensable under international law.

This provision does not prevent the arrest, prosecution, sentence and punishment of a person according to the law, but recognises that certain guarantees are required prior to a sentence or execution being passed against a person protected under Article 8(2)(c)(iv). Reference to the pass-

¹ Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/fd14c4/>).

ing of sentence and execution as punishment indicate that these fair trial guarantees relate to criminal proceedings.²

This war crime is similar to Article 8(2)(a)(vi) applicable in international armed conflicts, but not identical. In certain respects, the elements of crime for Article 8(2)(c)(iv) are more specific in that they more explicitly reference the guarantees of independence and impartiality in being fundamental requirements for a “regularly constituted” court, combined with a general catch-all provision required “all other” judicial guarantees recognised as indispensable under international law. Article 8(2)(a)(vi) refers more generally to the denial of judicial guarantees as defined, in particular, in the Geneva Convention III and Geneva Convention IV of 1949. Article 8(2)(b)(xiv) also relates to fair trial requirements under the law of armed conflict, but specifically relates to the war crime of issuing declarations abolishing, suspending or holding inadmissible in a court of law the rights and actions of the nations of the hostile party. This provision would also relate to decisions taken under administrative or other areas of civil law, as well as criminal law.

There is nothing within the Elements of Crimes that requires that the court must be a State court, and the fair trial requirements reflected in this provision are also applicable to courts convened by non-State actors (Dörmann *et al.*, 2016, paras. 689–695). This is reflective of the developments in international humanitarian law, where the requirement that a court be “regularly constituted” was replaced in Article 6(2) of AP II, which develops and supplements Common Article 3 to the Geneva Conventions 1949.³ Article 6(2) provides instead that no sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. This formula was taken from Article 84 of GC III, focusing more on the capacity of the Court to conduct a fair trial, rather than on how it was established. This reflects the realities of non-international armed conflicts, where at least one party to the conflict must be a non-State party.

² Knut Dörmann *et al.*, *Commentary to the First Geneva Convention, Common Article 3*, International Committee of the Red Cross, 2016, p. 676 (<https://www.legal-tools.org/doc/714eac/>).

³ Geneva Conventions I-IV, 12 August 1949 (‘GC I-IV’) (GC I: <https://www.legal-tools.org/doc/baf8e7/>; GC II: <https://www.legal-tools.org/doc/0d0216/>; GC III: <https://www.legal-tools.org/doc/365095/>; GC IV: <https://www.legal-tools.org/doc/d5e260/>).

Reference should be made to the definitions of ‘independence’, ‘impartiality’ and other judicial guarantees recognised under international human rights law (Knut Dörmann *et al.*, 2016, paras. 678–688). The Commentary to the First Geneva Convention provides a non-exhaustive minimum list of judicial guarantees that are generally recognised as indispensable today as including (para. 685):

- the obligation to inform the accused without delay of the nature and cause of the offence alleged;
- the requirement that an accused have the necessary rights and means of defence;
- the right not to be convicted of an offence except on the basis of individual penal responsibility;
- the principle of *nullum crimen, nulla poena sine lege* (no crime or punishment without a law) and the prohibition of a heavier penalty than that provided for at the time of the offence;
- the right to be presumed innocent;
- the right to be tried in one’s own presence;
- the right not to be compelled to testify against oneself or to confess guilt;
- the right to be advised of one’s judicial and other remedies and of the time limits within which they may be exercised.

This list recognises the guarantees recognised in Article 6(2) and 6(3) of AP II. The denial of one of these guarantees might be serious enough to amount to a crime under Article 8(2)(c)(vi). Furthermore, footnote 59 to the Elements of Crimes for Article 8(2)(c)(iv) provides that the Court should consider whether, in the light of all relevant circumstances, the cumulative effect of factors with respect to guarantees deprived the person or persons of a fair trial.

For the death penalty to be imposed, it must be provided by domestic law and not prohibited by treaty law or other customary international legal obligations. Reference should be made to Article 6(4) of AP II which provides that the death penalty shall not be pronounced on persons who were

under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.⁴

Reference can be made to the findings of the ICC pertaining to protected persons for the war crime of murder under Article 8(2)(c)(i).

ii. Mental Element:

Reference should be made to Article 30 requirements of intent and knowledge. As with other war crimes under Article 8(2)(c), the Prosecutor must also establish that the conduct took place in the context and was associated with an armed conflict not of an international character, and that the perpetrator was aware of the factual circumstances that established the status of the victim and the factual circumstances that established the existence of an armed conflict. It is not necessary for the perpetrator to have made a legal evaluation as to the character of the armed conflict (see Introduction to Article 8 in the Elements of Crimes). In addition, the Prosecutor must prove beyond reasonable doubt that the perpetrator was aware of the absence of a previous judgement or of the denial of relevant guarantees and the fact that they are essential or indispensable to a fair trial. This again is a difference with the elements of crime compared with Article 8(2)(a)(vi) which does not include any such awareness.

iii. Charges before the ICC:

In the situation in Mali, Pre-Trial Chamber I confirmed charges under Article 8(2)(c)(iv) against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud on 30 September 2019.⁵

Cross-references:

Article 8(2)(a)(vi), 8(2)(b)(xiv), 30.

Doctrine:

1. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos,

⁴ See further Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, UN Doc. A/RES/54/263, 25 May 2000 (<https://www.legal-tools.org/doc/669fb1/>).

⁵ ICC, *Prosecutor v. Al Hassan*, Pre-Trial Chamber I, Rectificatif à la Décision relative à la confirmation des charges, 13 November 2019, ICC-01/12-01/18461-Corr-Red (<https://www.legal-tools.org/doc/9lm15x/>).

- Munich/Oxford/Baden-Baden, 2016, pp. 554–555 (<https://www.legal-tools.org/doc/040751/>).
2. Michael Boothe, “War Crimes” in Antonio Cassese, John R.W.D. Jones and Paola Gaeta (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 395, 419 (<https://www.legal-tools.org/doc/01addc/>).
 3. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2003, pp. 408–438.
 4. Lindsey Cameron *et al.*, “Article 3: Conflicts not of an international character”, in Knut Dörmann *et al.*, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Cambridge University Press, 2016, pp. 126–325 (<https://www.legal-tools.org/doc/714eac/>).
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Article 8(2)(d)

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

General Remarks:

Article 8(2)(d) limits the application of subparagraph (c) to certain situations.¹ As subparagraph (c) which relates to crimes committed in situations of a non-international armed conflict lacks any definition subparagraph (d) appears welcome. Further it must be noted that subparagraph (d) is repeated verbatim as the first sentence of subparagraph (f).

Analysis:

Article 8(2)(d) states that “Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”.

Scope of Application:

For a situation to fall within the purview of subparagraph (c) it must be above the lower threshold specified in subparagraph (d). The lower threshold differentiates a non-international armed conflict from “situations of internal disturbances and tensions”. In other words, it excludes specific situations from the realm of application of subparagraph (c). The provision provides some examples: riots, isolated and sporadic acts of violence or other acts of a similar nature, a sentence reiterated in *Ongwen* as the ICC explained that a non-international armed conflict is one that “exceeds situations of internal disturbances and tensions”.²

Case-law in relation to subparagraph (d) exclusively is rather sparse. In *Bemba* whilst the Court explains that a certain level of intensity must be

¹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 225 (*Bemba*, 15 June 2009’) (<https://www.legal-tools.org/doc/07965c/>).

² ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Judgment, 4 February 2021, ICC-02/04-01/15-1762-Red (public redacted version), para. 2684 (*Ongwen*, 4 February 2021’) (<https://www.legal-tools.org/doc/kv27ul/>).

reached for subparagraph (c) to apply (*Bemba*, 15 June 2009, para. 225) it considers this a limitation on its jurisdiction (para. 225) rather than a description of an armed conflict of a non-international character. In contrast, in *Mbarushimana* the Court, whilst also considering that subparagraph (d) requires the conflict to be of a certain level of intensity, examines the subparagraph in a broader discussion on the nature of the armed conflict.³ In fact it seems that the criterion of intensity is an element in the determination of a conflict of non-international armed conflict as well as a jurisdictional requirement.

Further although subparagraph (c) covers acts listed in Common Article 3 to the Geneva Conventions, subparagraph (d) directly stems from Article 1(2) of Additional Protocol II which is deemed to have a higher threshold of applicability than Common Article 3.⁴ In other words, there does not seem to be a distinction between non-international armed conflicts falling under the purview of subparagraph (c) limited by subparagraph (d) on the one hand and of subparagraph (e) limited by subparagraph (f) on the other. As a result, bearing in mind that the first sentences of subparagraphs (d) and (f) are identical ICC case-law relating to subparagraph (f) can be used. In *Lubanga*⁵ the Court refers to the ICTY jurisprudence, holding that the intensity of the conflict is used to distinguish an armed conflict from situations that are not subject to international humanitarian law.⁶ In the same paragraph of the judgment⁷ the Court also accepts that indicators of intensity are “the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in

³ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 103 (*‘Mbarushimana*, 16 December 2011’) (<https://www.legal-tools.org/doc/63028f/>).

⁴ Geneva Conventions I-IV, 12 August 1949 (‘GC I-IV’) (GC I: <https://www.legal-tools.org/doc/baf8e7/>; GC II: <https://www.legal-tools.org/doc/0d0216/>; GC III: <https://www.legal-tools.org/doc/365095/>; GC IV: <https://www.legal-tools.org/doc/d5e260/>); Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (‘AP II’) (<https://www.legal-tools.org/doc/fd14c4/>).

⁵ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment, 14 March 2012, ICC-01/04-01/06, para. 538 (<https://www.legal-tools.org/doc/677866/>).

⁶ ICTY, *Prosecutor v. Đorđević*, Trial Chamber, Public Judgment with Confidential Annex – Volume I of II, 23 February 2011, IT-05-87/1-T, para. 1522 (<https://www.legal-tools.org/doc/653651/>).

⁷ Referring to ICTY, *Prosecutor v. Mrkšić et al.*, Trial Chamber, Judgment, 27 September 2007, IT-95-13/1-T, para. 407 (<https://www.legal-tools.org/doc/32111c/>).

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”. These indicators are spelled out and applied in *Katanga* and in *Bemba*.⁸

In addition, the Court has read into Article 8(2)(d) the requirement that for a non-international armed conflict to be established there must be two opposing sides to the conflict (*Bemba*, 21 March 2016, para. 132). In *Bemba* it examined whether the stricter requirement of the conflict being “protracted” (that applies in the context of subparagraph (e) limited by subparagraph (f)) applies to subparagraph (c) limited by subparagraph (d) as part of the intensity of the hostilities but specifically stressed that this criterion had been met (*Bemba*, 21 March 2016, para. 663; *Bemba*, 15 June 2009, para. 235). It was also applied in other cases (*Mbarushimana*, 16 December 2011, para. 103 and *Katanga*, 7 March 2014, para. 1217). Moreover, this threshold of applicability cannot be used to cease the applicability of Article 8(2)(d) if there is a lull in the hostilities as violence does not need to be continuous and uninterrupted (*Bemba*, 21 March 2016, paras. 140 and 650). “The essential criterion is that it go beyond ‘isolated or sporadic acts of violence’” (para. 140).

Cross-reference:

Article 8(2)(f).

Doctrine:

1. Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, pp. 32–79 (<https://www.legal-tools.org/doc/415188/>).

⁸ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgement, 7 March 2014, ICC-01/04-01/07-3436-T, paras. 1187 and 1216–1218 (*Katanga*, 7 March 2014’) (<https://www.legal-tools.org/doc/f74b4f/>); *Prosecutor v. Bemba*, Trial Chamber III, Judgment, 21 March 2016, ICC-01/05-01/08, para. 143, para. 137 for the law and para. 662 for the application (*Bemba*, 21 March 2016’) (<https://www.legal-tools.org/doc/edb0cf/>). To this list, the ICC added in *Ongwen*, “whether any ceasefire orders had been issued or agreed to”, “the type of weapons used”, “whether those fighting considered themselves bound by international humanitarian law” and “the effects of the violence on the civilian population, including the extent to which civilians left the relevant area, the extent of destruction, and the number of persons killed” (*Ongwen*, 4 February 2021, para. 2684).

2. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 417–18 (<https://www.legal-tools.org/doc/01addc/>).
3. Antonio Cassese, *International Criminal Law*, 3rd. ed., Oxford University Press, 2013, pp. 62–83 (<https://www.legal-tools.org/doc/7ca295/>).
4. Robert Cryer, Darryl Robinson and Sergey Vasiliev (eds.), *An Introduction to International Criminal Law and Procedure*, 4th. ed., Cambridge University Press, 2019, pp. 259–296.
5. Anthony Cullen, “War Crimes”, in William A. Schabas and Nadia Bernaz, *Routledge Handbook of International Criminal Law*, Routledge, London, 2011, pp. 139–154, 264–284 (<https://www.legal-tools.org/doc/780dbc/>).
6. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2002, pp. 382–393.
7. Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2014, pp. 279–85.
8. William A. Schabas, *An Introduction to the International Criminal Court*, 6th. ed., Cambridge University Press, 2020, pp. 136–139 (<https://www.legal-tools.org/doc/e9fb2f/>).
9. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 213–300 (<https://www.legal-tools.org/doc/b7432e/>).
10. Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, 2014, pp. 192–195, 273–280 (<https://www.legal-tools.org/doc/d9a80d/>).
11. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 528–548, 555–556 (<https://www.legal-tools.org/doc/040751/>).

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Article 8(2)(e)

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

General Remarks:

Two provisions in the ICC Statute relate to war crimes committed in non-international armed conflict, subparagraphs (c) and (e). A literal interpretation of these subparagraphs shows that there are two thresholds of applicability, that is, two types of non-international armed conflicts. Whilst at first sight it seems that the Court does not distinguish between the two types of non-international armed conflicts¹ specified in subparagraphs (c) and (e) the Trial Chamber in *Bemba* has underlined the requirement of ‘protracted’ armed conflict in *Bemba*.²

Subparagraph (e) must be read in conjunction with subparagraphs (f) and Article 8(3). As a result the following situations are not covered by subparagraph (e):

- international armed conflicts.

This explains why the assessment of the characterisation of the conflict under Article 8(2)(e) takes place in a wider discussion, notably in contradistinction to international armed conflicts (see Article 8(2)(a) ICC Statute). The problem may arise in particular in armed conflicts where there is fighting between governmental forces on one side and organized armed groups on the other where at the same time a third State is involved in the conflict intervening in support of the organized armed groups. The way the Court distinguishes between a non-international and an international armed conflict is by using the ‘overall control’ test as opposed to the ‘effective control’ test that was established by the International Court of Justice in the

¹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, paras. 216 and 224 (*‘Bemba*, 15 June 2009’) (<https://www.legal-tools.org/doc/07965c/>); *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 103 (*‘Mbarushimana*, 16 December 2011’) (<https://www.legal-tools.org/doc/63028f/>).

² ICC, *Prosecutor v. Bemba*, Trial Chamber III, Judgment, 21 March 2016, ICC-01/05-01/08, para. 663 (*‘Bemba*, 21 March 2016’) (<https://www.legal-tools.org/doc/edb0cf/>).

Nicaragua Case.³ The ‘overall control’ test was devised and developed by the ICTY⁴ and readily adopted by the ICC.⁵

- internal disturbances and tensions.

This is confirmed by Article 8(3) which clearly states “Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means”. The aim of this article is to ensure that acts committed in times of internal disturbances and tensions are not to be prosecuted as war crimes.

Analysis:

Article 8(2)(e) states that “Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts”.

i. Scope of Application: Existence of an Armed Conflict not of an International Character:

For this sub-provision to apply the ICC must determine that the acts were committed in the context of an armed conflict not of an international character.

The Court’s case-law is unfortunately rather confusing. Initially, the Court seemed to have considered that there were two types of non-international armed conflicts, subparagraph (c) and subparagraph (e). Indeed in some instances the Court’s approach to subparagraph (e) is that explained in the Commentary to Article 8(2)(c). With the difference that the

³ ICJ, *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment, 27 June 1986, para. 115 (<https://www.legal-tools.org/doc/046698/>).

⁴ ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1, para. 137 (*‘Tadić, 2 October 1995’*) (<https://www.legal-tools.org/doc/866e17/>).

⁵ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 211 (<https://www.legal-tools.org/doc/b7ac4f/>); *Prosecutor v. Lubanga*, Trial Chamber I, Judgment, 14 March 2012, ICC-01/04-01/06, para. 541 (*‘Lubanga, 14 March 2012’*) (<https://www.legal-tools.org/doc/677866/>); *Prosecutor v. Katanga*, Trial Chamber II, Judgment, 7 March 2014, ICC-01/04-01/07-3436, para. 1178 (*‘Katanga, 7 March 2014’*) (<https://www.legal-tools.org/doc/f74b4f/>); *Bemba*, 21 March 2016, para. 130.

Court explained that for subparagraph (e) to apply the conflict must be protracted (*Bemba*, 15 June 2009, para. 235; *Mbarushimana*, 16 December 2011, para. 103).

Then from *Lubanga* onwards,⁶ the Court extensively refers to the ICTY case-law (thereby using an interpretation “within the established framework of international law” specified in subparagraph (e)) and follows Article 8(2)(f) as explained in the Commentary to subparagraph (f). In its latest jurisprudence the Court seems to revert to its earlier case-law by clarifying that (e) is in fact a combination of the relevant criteria for (c) and (f). However, because of the way ‘protracted’ is defined (see Commentary on (f)) this criterion is almost always fulfilled when the requirements for (c) are met.

The relevant criteria are:

First, the hostilities must be between governmental authorities and organized armed groups or between such groups within a State (*Lubanga*, 14 March 2012, para. 533). In *Katanga* the Court specifies that this provides for two types of non-international armed conflicts: those opposing the authorities of the government of the State where the hostilities occur against organised armed groups and those opposing organised armed groups, the former also encompassing situations where a State intervenes on a foreign territory in a conflict opposing the governmental authorities to armed opposition group(s), yet with the consent of the governmental authorities (*Katanga*, 7 March 2014, paras. 1184 and 1228; *Bemba*, 21 March 2016, paras. 653 and 658).

Second, the ‘organized armed groups’ “must have a sufficient degree of organisation, in order to enable them to carry out protracted armed violence” (*Lubanga*, 14 March 2012, para. 536; *Katanga*, 7 March 2014, para. 1185). There is however no express requirement for the group to be “under a responsible command” as expounded in *Bemba* (*Bemba*, 15 June 2009, para. 234) and in Article 1(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts⁷ (*Lubanga*, 14 March 2012, para. 536;

⁶ *Lubanga*, 14 March 2012; *Katanga*, 7 March 2014; *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Decision on the Confirmation of Charges, 9 June 2014, ICC-01/04-02/06-309 (<https://www.legal-tools.org/doc/5686c6/>).

⁷ Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (‘AP II’) (<https://www.legal-tools.org/doc/fd14c4/>).

Katanga, 7 March 2014, para. 1186) though this element is viewed as one factor to be taken into account when determining whether the group is organised (*Bemba*, 21 March 2016, paras. 135–136). In this respect whether the group must present a certain level of organisation such that it is able to implement humanitarian law relating to non-international armed conflicts (*Katanga*, 7 March 2014, para. 1185) or be able to impose discipline are only one aspect of the test relating to the group’s organisation (*Bemba*, 21 March 2016, para. 136). There is no requirement under the ICC Statute for the armed group “to exert control over a part of the territory” (*Bemba*, 15 June 2009, para. 236; *Lubanga*, 14 March 2012, para. 536; *Katanga*, 7 March 2014, para. 1186). As noted by the Court itself (*Bemba*, 15 June 2009, para. 236; *Lubanga*, 14 March 2012, para. 536) this clearly departs from Article 1(1) AP II. The ICC has drawn a non-exhaustive list of factors that assist in determining whether the group was organised. The list includes: “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” and each criterion is to be applied with some flexibility and each situation must be assessed on a case-by-case basis.⁸

Third, the conflict must reach a certain level of intensity (*Lubanga*, 14 March 2012, para. 538; *Katanga*, 7 March 2014, para. 1187; *Bemba*, 21 March 2016, para. 137). Again, referring back to the ICTY jurisprudence in line with the “within the established framework of international law” requirement set out in subparagraph (e) the Court explains that this minimum threshold spelled out in subparagraph (f) removes sporadic and isolated situations which are not subject to international humanitarian law⁹ from the jurisdiction of the ICC and that a number of factors must be taken into ac-

⁸ *Lubanga*, 14 March 2012, para. 537; *Katanga*, 7 March 2014, para. 1186; *Bemba*, 21 March 2016, paras. 134 and 136; *Situation in the Islamic Republic of Afghanistan*, Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation, 12 April 2019, ICC-02/17-33, para. 65 (<https://www.legal-tools.org/doc/2fb1f4/>). See also ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Judgment, 4 February 2021, ICC-02/04-01/15-1762-Red (public redacted version), para. 2685 (*Ongwen*, 4 February 2021’) (<https://www.legal-tools.org/doc/kv27ul/>).

⁹ ICTY, *Prosecutor v. Đorđević*, Trial Chamber, Public Judgment with Confidential Annex – Volume I of II, 23 February 2011, IT-05-87/1-T, para. 1522 (<https://www.legal-tools.org/doc/653651/>).

count when assessing the intensity of the conflict.¹⁰ These are “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”. (*Lubanga*, 14 March 2012, para. 538; *Katanga*, 7 March 2014, para. 1187; *Bemba*, 21 March 2016, para. 137). To this list, the ICC added in *Ongwen*, “whether any ceasefire orders had been issued or agreed to”, “the type of weapons used”, “whether those fighting considered themselves bound by international humanitarian law” and “the effects of the violence on the civilian population, including the extent to which civilians left the relevant area, the extent of destruction, and the number of persons killed” (*Ongwen*, 4 February 2021, para. 2684). Control of the territory is not a requirement but can be either an indication of the intensity of the conflict¹¹ or an important gauge in the absence of active hostilities (*Ongwen*, 4 February 2021, para. 2684). It is in this framework of relevant factors determining the intensity of the conflict that the ‘protracted’ element of the conflict is analysed (*Bemba*, 21 March 2016, para. 139).

ii. Crimes:

The crimes that are mentioned in Article 8(2)(e) are serious violations prohibited by either or both customary and treaty law. The word “other” relates to serious violations of Common Article 3, thereby indicating that the roots of the provision stem from other sources (see also *Bemba*, 15 June 2009, para. 224), including Additional Protocol II. However, whilst the list is mainly drawn from AP II not all violations contained in the treaty have been included in subparagraph (e) and whilst the list is exhaustive for ICC jurisdiction purposes it does not provide an exhaustive list of war crimes in non-international armed conflict. This is recognised by Article 10 ICC Statute that explains that “[n]othing 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”. In fact, Resolution RC/Res.5 has

¹⁰ ICTY, *Prosecutor v. Mrkšić et al.*, Trial Chamber, Judgment, 27 September 2007, IT-95-13/1-T, para. 407 (<https://www.legal-tools.org/doc/32111c/>).

¹¹ ICC, *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Judgment, 27 September 2016, ICC-01/12-01/15-171, para. 49 (<https://www.legal-tools.org/doc/042397/>).

expanded the list to include Articles 8(2)(e) (xiii), (xiv) and (xv), thereby proving that the list is exhaustive for ICC jurisdiction purposes only and that further crimes can and could be added onto the list.¹²

iii. Awareness:

The ICC Statute requires 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’”, that is, there must be a nexus between the act and the conflict (see for example Elements of Crimes in relation to Article 8(2)(e)(i); *Bemba*, 15 June 2009, para. 263; *Katanga*, 7 March 2014, paras. 1176 and 1231). The Trial Chambers in *Katanga* and *Bemba* explain that “the armed conflict must play a major part in the perpetrator’s decision, in his or her ability to commit the crime or the manner in which the crime was ultimately committed” (*Katanga*, 7 March 2014, para. 1176; *Bemba*, 21 March 2016, para. 142). In this regard it does not matter that the act was committed away from the hostilities or that the act was motivated by further reasons (*Katanga*, 7 March 2014, para. 1176; *Bemba*, 21 March 2016, para. 142). To ascertain concretely such a nexus, factors such as “the status of the perpetrator and victim; whether the act may be said to serve the ultimate goal of a military campaign; and whether the crime is committed as part of, or in the context of, the perpetrator’s official duties” are used by the Court (*Bemba*, 21 March 2016, paras. 143 and 664–665; *Ongwen*, 4 February 2021, para. 2689). Further the perpetrator must be aware that the acts were perpetrated in the context of a non-international armed conflict (see for example Elements of Crimes in relation to Article 8(2)(e)(i)). That being said, the ICC does not require the perpetrator to “have made a legal evaluation whether an international or non-international armed conflict existed, or have realised that the situation qualified as either of the two”,¹³ only to be aware of the factual circumstances that established the existence of the armed conflict.

Cross-reference:

Article 8(2)(c).

¹² ICC ASP, Amendments to Article 8 of the Rome Statute, 6 December 2019, ICC-ASP/18/Res.5 (<https://www.legal-tools.org/doc/m5rfks/>).

¹³ ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Judgment, 8 July 2019, ICC-01/04-02/06-2359, para. 733 (<https://www.legal-tools.org/doc/80578a/>).

Doctrine:

1. Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, pp. 32–79 (<https://www.legal-tools.org/doc/415188/>).
2. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 417–418 (<https://www.legal-tools.org/doc/01addc/>).
3. Antonio Cassese, *International Criminal Law*, 3rd. ed., Oxford University Press, 2013, pp. 62–83 (<https://www.legal-tools.org/doc/7ca295/>).
4. Robert Cryer, Darryl Robinson and Sergey Vasiliev (eds.), *An Introduction to International Criminal Law and Procedure*, 4th. ed., Cambridge University Press, 2019, pp. 259–296.
5. Anthony Cullen, “War Crimes”, in William A. Schabas and Nadia Bernaz, *Routledge Handbook of International Criminal Law*, Routledge, London, 2011, pp. 139–154 (<https://www.legal-tools.org/doc/780dbc/>).
6. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2002, pp. 382–393.
7. Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court*, Cambridge University Press, 2014, pp. 279–285 (<https://www.legal-tools.org/doc/b7505c/>).
8. William A. Schabas, *An Introduction to the International Criminal Court*, 6th. ed., Cambridge University Press, 2020, pp. 136–139 (<https://www.legal-tools.org/doc/e9fb2f/>).
9. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 213–300 (<https://www.legal-tools.org/doc/b7432e/>).
10. Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, 2014, pp. 192–195, 481–483 (<https://www.legal-tools.org/doc/d9a80d/>).
11. Andreas Zimmermann and Robin Geiß, “Article 8, Preliminary Remarks on para. 2(c)-(f) and para. 3”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Com-*

mentary, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 528–532 (<https://www.legal-tools.org/doc/040751/>).

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Article 8(2)(e)(i)

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

General Remarks:

The war crime of attacking the civilian population and civilians not taking direct part in hostilities “belongs to the category of offences committed during the actual conduct of hostilities by resorting to prohibited methods of warfare”.¹

Article 8(2)(e)(i) is a reflection of the principle of distinction in attack in a non-international armed conflict. Whilst the principle is enshrined in Article 13(2) of Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts² it is also of customary nature.³ The International Court of Justice has stressed that deliberate attacks on civilians are absolutely prohibited by international humanitarian law.⁴ Further, as the ICTY highlighted “the principles underlying the prohibition of attacks on civilians, namely the principles of distinction and protection [...] incontrovertibly form the basic foundation of international humanitarian law and constitute ‘intransgressible principles of international customary’” (*Galić*, 30 November 2006, para. 87).

Article 8(2)(e)(i) mirrors Article 8(2)(b)(i) that applies in an international armed conflict. Both Articles give the Court jurisdiction over attacks against civilians and the civilian population. That being said there is no

¹ ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Decision on the Confirmation of Charges, 9 June 2014, ICC-01/04-02/06-309, para. 45 (*‘Ntaganda*, 9 June 2014’) (<https://www.legal-tools.org/doc/5686c6/>).

² Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts, 8 June 1977, Article 85(3)(a) (*‘AP II’*) (<https://www.legal-tools.org/doc/fd14c4/>).

³ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009, Rule 1 (<https://www.legal-tools.org/doc/78a250/>); ICTY, *Prosecutor v. Galić*, Appeals Chamber, Judgement, 30 November 2006, IT-98-29-A, para. 87 (*‘Galić*, 30 November 2006’) (<https://www.legal-tools.org/doc/c81a32/>).

⁴ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports, para. 78 (<https://www.legal-tools.org/doc/d97bc1/>).

equivalent in Article 8(2)(e) to Article 8(2)(b)(ii) that prohibits attacks against civilian objects. Given that Article 8(2)(e)(i) specifically refers to the “civilian population” and “individual civilians”, that is, individuals, it cannot be interpreted so as to cover also civilian objects.

Analysis:

Article 8(2)(e)(i) states that the ICC has jurisdiction over acts of “[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”.

i. Material Elements:

In *Katanga* the Court has expounded that the material elements of the crime are:

- The perpetrator has launched an attack; and
- The aim of the attack was the civilian population or civilians not taking direct part in hostilities.⁵

a. Definition of an Attack:

The first element of the Elements of Crimes requires that “the perpetrator directed an attack” (Elements of Crimes, p. 24). Yet, neither the Statute nor the Elements of Crimes define the term “attack”. Referring to the “established framework of international law” mentioned in the chapeau of Article 8(2)(e) the Court has used Article 49 of AP I and applied it by analogy to Article 13(2) AP II to define an attack as “acts of violence against the adversary, whether in offence or in defence”.⁶ To establish the link between the attack and the conduct of the hostilities, the Court has stipulated that these civilians must be those “who have not fallen yet into the hands of the attacking party”.⁷ Acts committed against civilians who have fallen into the

⁵ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgment, 7 March 2014, ICC-01/04-01/07-3436, para. 796 (*‘Katanga, 7 March 2014’*) (<https://www.legal-tools.org/doc/f74b4f/>).

⁶ ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red (public redacted version), para. 65 (*‘Abu Garda, 8 February 2010’*) (<https://www.legal-tools.org/doc/cb3614/>); *Katanga, 7 March 2014*, para. 798; *Prosecutor v. Ntaganda*, Trial Chamber VI, Judgment, 8 July 2019, ICC-01/04-02/06-2359, para. 916 (*‘Ntaganda, 8 July 2019’*) (<https://www.legal-tools.org/doc/80578a/>); *Prosecutor v. Ongwen*, Trial Chamber IX, Judgment, 4 February 2021, ICC-02/04-01/15-1762-Red (public redacted version), para. 2758 (*‘Ongwen, 4 February 2021’*) (<https://www.legal-tools.org/doc/kv27ul/>).

⁷ ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber I, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Ka-

hands of the enemy (that is, civilians have been captured (*Ntaganda*, 8 July 2019, para. 919)) or are committed far from the combat area cannot be classified as attacks as they are not methods of warfare. They can however be prosecuted under other appropriate legal provisions (*Ntaganda*, 9 June 2014, para. 47).

The Court has spelled out that in order to characterise a certain conduct as an attack it is important to look at the intended and foreseeable consequences (*Ntaganda*, 9 June 2014, para. 46). In other words, there must be a causal link between the perpetrator's conduct and the consequence of the attack (*Abu Garda*, 8 February 2010, para. 66). Examples of acts falling within the purview of an attack under Article 8(2)(e)(i) are “shelling, sniping, murder, rape, pillage, attacks on protected objects and destruction of property” provided they are linked to the conduct of hostilities (*Ntaganda*, 9 June 2014, para. 46).

As the ICC Statute does not provide for a specific offence of acts whose primary purpose is to spread terror among the civilian population, it is likely that such acts fall within the broad scope of Article 8(2)(e)(i). As Article 8(2)(e)(i) is a reflection of the principle of distinction enshrined in Article 13(2) AP II and Article 8(2)(e) must be read “within the established framework of international law” it is likely that it will also cover the second sentence of the Article 13(2) AP II: “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”. This approach was espoused by the ICTY inasmuch as it explained that the prohibition of terror amounts to “a specific prohibition within the general (customary) prohibition of attack on civilians”.⁸

The attack does not need to lead to civilian casualties; it is sufficient to prove that the author directed the attack towards the civilian population or individual civilians. This is in line with Article 13(2) AP II which specifies that “the civilian population as such, as well as individual civilians, shall not be the object of attack”, thereby not requiring for harm to occur. As the Court explained “the crime provided for under Article [...] 8(2)(e)(i) of the Statute does not require any harmful impact on the civilian population or on the individual civilians targeted by the attack, and is committed

tanga, 7 July 2007, ICC-01/04-01/07, para. 37 (<https://www.legal-tools.org/doc/5556a6/>); *Ntaganda*, 8 July 2019, paras. 904 and 920.

⁸ ICTY, *Prosecutor v. Galić*, Trial Chamber I, Judgment and Opinion, 5 December 2003, IT-98-29-T, para. 98 (‘*Galić*, 5 December 2003’) (<https://www.legal-tools.org/doc/eb6006/>), upheld in *Galić*, 30 November 2006, para. 87.

by the mere launching of the attack”.⁹ It is the intention that counts as the Elements of Crimes require that “the perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack”. This stands in contrast to the ICTY jurisprudence that required the attack to result in death, serious bodily injury or equivalent harm.¹⁰

b. Object of the Attack Is a Civilian Population and Civilians not Taking Direct Part in the Hostilities:

The second element of the Elements of Crimes specifies that “the object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities” (Elements of Crimes, p. 24). This is an absolute prohibition that cannot be counterbalanced by military necessity (*Katanga*, 7 March 2014, para. 800). This position is reinforced by the fact that the ICC has, in contrast to the ICTY *Kupreskic* case,¹¹ indicated in clear terms that such attacks are prohibited in all circumstances,¹² relying notably on the ICTY *Martic* decision.¹³

As there is no definition of a combatant in a non-international armed conflict there is no definition of a civilian under the treaties. Whilst the ICTY defined a civilian as “anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict” (*Galić*, 5 December 2003, para. 47) the ICC considers as a civilian anyone who is not a member of the State or non-State armed forces (*Katanga*, 7 March 2014, para. 788; *Ongwen*, 4 February 2021, para. 2759) and a civilian population as “all civilians as opposed to members of armed forces and

⁹ ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber I, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 6 July 2007, ICC-01/04-01/07-55, para. 37 (<https://www.legal-tools.org/doc/37fdf3/>); see also *Katanga*, 7 March 2014, para. 799; *Ntaganda*, 8 July 2019, para. 904; and *Ongwen*, 4 February 2021, para. 2758.

¹⁰ ICTY, *Prosecutor v. Kordić and Čerkez*, Appeals Chamber, Judgment, 17 December 2004, IT-95-14/2-A, paras. 55–68 (<https://www.legal-tools.org/doc/738211/>).

¹¹ ICTY, *Prosecutor v. Kupreškić et al.*, Trial Chamber, Judgment, 14 January 2000, IT-95-16-R, paras. 527–535 (<https://www.legal-tools.org/doc/5c6a53/>).

¹² ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red (public redacted version), para. 143 (*Mbarushimana*, 16 December 2011) (<https://www.legal-tools.org/doc/63028f/>).

¹³ ICTY, *Prosecutor v. Martić*, Trial Chamber, Decision, 8 March 1996, IT-95-11-R61, paras. 15–17 (<https://www.legal-tools.org/doc/6df6a3/>).

any other legitimate combatants”.¹⁴ In case of doubt an individual must be considered a civilian¹⁵ though the Court has explained that this is presumption under international humanitarian law and that it is to the Prosecution to establish the status of the victim (*Ntaganda*, 8 July 2019, para. 883). The presence amongst the civilian population of individuals who do not fit within the definition of a civilian, however, does not deprive the entire population of its civilian character (*Mbarushimana*, 16 December 2011, para. 148; *Ntaganda*, 8 July 2019, para. 921; *Ongwen*, 4 February 2021, para. 2759) though the Court will take into account factors such as the number and the behaviour of the fighters present amongst the population (*Katanga*, 7 March 2014, para. 801).

Article 8(2)(e)(i) refers to “individual civilians not taking direct part in direct hostilities”, thereby introducing the concept of direct participation in hostilities in a non-international armed conflict (which also appears in the chapeau of Article 8(2)(c)). The Court has acknowledged that there is no definition of this concept under the Statute, customary law, treaty law or the principles and rules of international law (*Abu Garda*, 8 February 2010, para. 80; *Ntaganda*, 8 July 2019, para. 883). Such participation leads to a temporary loss of protection of civilian status, unless the act is in self-defence (*Mbarushimana*, 16 December 2011, para. 148). It is indeed recognised that a civilian is allowed to defend him or herself.¹⁶

The Court has stressed that in line with the Commentary of Article 13(3) AP II which explains that “[h]ostilities have been defined as ‘acts of war’ that by their nature or purpose struck at the personnel and ‘matériel’ of enemy armed forces” there must be a sufficient causal relationship between the act and its immediate consequences (*Abu Garda*, 8 February 2010, para. 80; *Katanga*, 7 March 2014, para. 790). The assessment of whether an individual takes a direct part in hostilities must be carried out on a case-by-case basis (*Abu Garda*, 8 February 2010, para. 83). The Trial Chamber in *Bemba* has outlined the following factors: “the location of the [individuals],

¹⁴ *Mbarushimana*, 16 December 2011, para. 148; ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 78 (*‘Bemba*, 15 June 2009’) (<https://www.legal-tools.org/doc/07965c/>).

¹⁵ *Mbarushimana*, 16 December 2011, para. 148; ICC, *Prosecutor v. Bemba*, Trial Chamber III, Judgment, 21 March 2016, ICC-01/05-01/08, para. 94 (*‘Bemba*, 21 March 2016’) (<https://www.legal-tools.org/doc/edb0cf/>).

¹⁶ ICTR, *Prosecutor v. Bagosora et al.*, Trial Chamber I, Judgement and Sentence, 18 December 2008, ICTR-98-41-T, paras. 2238–2239 (<https://www.legal-tools.org/doc/6d9b0a/>).

whether the victims were carrying weapons, and the clothing, age, and gender of the victims” (*Bemba*, 21 March 2016, para. 94; see also *Ntaganda*, 8 July 2019, para. 884). For example, the Court has spelled out that “[using] weapons or other means to commit violence against human or material enemy forces” or singing and making noise with a view to diverting the enemy’s attention so that fighters can attack (*Ntaganda*, 8 July 2019, para. 925) will qualify as direct participation in hostilities whilst supplying food and shelter, sympathising with one belligerent party will not (*Mbarushimana*, 16 December 2011, para. 148). Yet, gender, age and clothing are not the most relevant factors to determine whether civilians are taking a direct part in the hostilities (*Ntaganda*, 8 July 2019, paras. 885). What appears to matter is that the individuals were “armed at the time when they were killed” (*Ntaganda*, 8 July 2019, para. 886).

The Court has further explained that the act must be committed against civilians before they fall into the hands of the enemy (*Ntaganda*, 8 July 2019, para. 904). Likewise, attacks on civilians committed far from the combat zone do not fall within the remit of Article 8(2)(e)(ii) as there is no sufficient link between the acts of violence and the conduct of the hostilities.¹⁷ As the Court stated, this provision covers methods of warfare and thus acts of violence perpetrated away from the frontline or in a location that is now under the control of the party cannot be deemed war crimes under Article 8(2)(i) (*Ntaganda*, 9 June 2014, para. 47).

The ICC has explained that in cases where the attack is directed towards a legitimate military objective and simultaneously the civilian population or civilians not taking direct part in the hostilities, the author can still be prosecuted under Article 8(2)(e)(i) (*Katanga*, 7 March 2014, para. 802; *Mbarushimana*, 16 December 2011, para. 142). Whilst the Court had stressed that the principal or primary target of the attack had to be the civilian population (*Katanga*, 7 March 2014, para. 802 and *Ongwen*, 4 February 2021, para. 2760), in *Ntaganda* it introduced some nuances since it referred to an organised group that “equally intended to attack civilians” (*Ntaganda*, 8 July 2019, para. 923). In this regard, it is important to take into consideration the context of the attack, in particular whether the author of the act made some efforts to comply with the principle of distinction and took pre-

¹⁷ ICC, *Prosecutor v Ntaganda*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309, para. 47 (*‘Ntaganda*, 9 June 2014’) (<https://www.legal-tools.org/doc/5686c6/>).

cautionary measures prior to launching the attack (*Ongwen*, 4 February 2021, para. 2760).

The Court further explained in *Ntaganda* that Article 8(2)(e)(i) also includes indiscriminate attacks, that is, attacks targeting an area, provided the author is aware of the presence of civilians and attacks carried out without taking the necessary precautions to spare civilian lives. In *Mbarushimana*, the Court had clearly distinguished attacks aimed at the civilian population from attacks against military objectives with the awareness that they will or may result in the incidental loss of life or injury to civilians (*Mbarushimana*, 16 December 2011, paras. 142 and 218) and thus distinguished between a violation of the principle of distinction and a violation of the principle of proportionality. The inclusion of the prohibition of non-discriminatory attacks into Article 8(2)(e)(i) raises some issues. Whilst in an international armed conflict the violation of the principle of proportionality can be prosecuted under Article 8(2)(b)(vi) this is not the case in a non-international armed conflict, despite the fact that the principle is recognised to be of customary nature in both international and non-international armed conflicts (see discussion in *Mbarushimana*, 16 December 2011, fn. 290). The Court's view was that in some instances the incidental effect on the civilian population or civilians not taking direct part in hostilities might be so disproportionate that it could amount to a direct attack against such a population or individuals, thereby revealing the author's intention to make the civilian population the object of his or her attack (*Katanga*, 7 March 2014, para. 802). The Court justifies this broadening of the scope of application of Article 8(2)(e)(i) by linking indiscriminate attacks, demonstrated by the use of certain weapons (*Katanga*, 7 March 2014, para. 802; *Ntaganda*, 8 July 2019, para. 921), to the intention of attacking directly the civilian population even if fighters are equally the object of the attack (*Ntaganda*, 8 July 2019, paras. 921–923 and 926).

ii. Subjective Elements:

In *Katanga* (*Katanga*, 7 March 2014, para. 808) the Court explained that for the subjective element to be fulfilled four requirements must be present.

a. “[I]ntentionally” Directing an Attack:

The crime must be committed with intention and knowledge, as indicated in Article 30 ICC Statute. The Court has however noted that Article 8(2)(e)(i) specifies that the crime has to be committed “intentionally”. Whilst in some cases (those relating to Article 8(2)(b)(i)) the Court has ex-

plained that this intention to attack the civilian population is in addition to the standard *mens rea* requirement provided in Article 30 ICC Statute, and hence there must be a *dolus directus* of first degree, that is, a concrete intent,¹⁸ in other cases it has argued that the word “intentionally” is nothing but a repetition of Article 30(2)(a) (*Katanga*, 7 March 2014, para. 806). The Court has argued that the third element in the Elements of Crimes (Elements of Crimes, page 24) does not constitute a specific *dolus* but is justified by the use of the word “intentionally” at the beginning of the sentence and by the need to distinguish this crime from other acts violating the principles of proportionality and/or precautions (*Katanga*, 7 March 2014, fn. 1851). The Court has also explained that the word ‘direct’ “means selecting the intended target and deciding on the attack” (*Ntaganda*, 8 July 2019, para. 744; see also *Ongwen*, 4 February 2021, para. 2758).

b. Intention that the Object of the Attack Is the Civilian Population or Civilians:

The Court has stated that this requirement, which is the second element in the Elements of Crimes (Elements of Crimes, page 24), must be analysed as a behaviour.¹⁹ Elements assisting in ascertaining the intention are the means and methods used during the attack, the number and status of victims, the discriminatory character of the attack and the nature of the act (*Katanga*, 7 March 2014, para. 807). For example, in *Mbarushimana* intention could be inferred from the fact that the armed group wanted to exact revenge on both civilians and soldiers (dubbed operation “eye for eye”, *Mbarushimana*, 16 December 2011, para. 144), the orders were to kill all individuals (for example, “everything that moves should be killed”, “everything which has breath shouldn’t be there at all”, para. 144) and the troops were congratulated for achieving the objective, for instance killing civilians (para. 150).

c. Awareness of the Civilian Status of the Population or Individuals:

The Court further requires that the perpetrator attacking the civilian population or individual civilians not taking direct part in the hostilities must be

¹⁸ *Abu Garda*, 8 February 2010, para. 93; ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, para. 271 (<https://www.legal-tools.org/doc/67a9ec/>).

¹⁹ ICC, *Prosecutor v Ngudjolo*, Pre-Trial Chamber I, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 6 July 2007, ICC-01/04-01/07-4-tFRA, para. 41 (<https://www.legal-tools.org/doc/5556a6/>).

aware of the civilian status of the victims (*Mbarushimana*, 16 December 2011, paras. 151 and 219; *Katanga*, 7 March 2014, para. 808). In *Ntaganda*, the Court explained that it must be proven that “a reasonable person could not have believed that the individual or group he or she attacked was a fighter or directly participating in hostilities” (*Ntaganda*, 8 July 2019, para. 921).

d. Awareness of the Circumstances that Established the Existence of the Armed Conflict:

According to element 5 of the Elements of Crimes for the war crime of attacking civilians, the perpetrator must be aware of factual circumstances that established the existence of an armed conflict (Elements of Crimes, p. 24).

Cross-references:

Article 8(2)(b)(ii), 8(2)(b)(ix), 8(2)(b)(i) and 8(2)(c).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 397 (<https://www.legal-tools.org/doc/01addc/>).
2. Knut Dörmann, Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 355–362, 557–558 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, pp. 475–487, mn. 1278–1304.
4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 213–300 (<https://www.legal-tools.org/doc/b7432e/>).
5. Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, 2014, pp. 338–341 (<https://www.legal-tools.org/doc/d9a80d/>).

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Article 8(2)(e)(ii)

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

The term “attack” corresponds to the offence of attacks on a civilian population (Article 8(2)(e)(i)). The recognized emblems are the emblem of the Red Cross, the red crescent, the red lion and the sun and the red crystal.¹ The provision is identical to Article 8(2)(b)(xxiv) and differs only in terms of the context in which the crime is committed.

Cross-references:

Articles 8(2)(e)(i) and 8(2)(b)(xxiv).

Doctrine:

1. Roberta Arnold, Stefan Wehrenberg, Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 506–507, 558 (<https://www.legal-tools.org/doc/040751/>).
2. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2009, pp. 348–349, mn. 1035–1038 (<https://www.legal-tools.org/doc/e35f82/>).

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¹ Protocol (III) additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, 8 December 2005 (<https://www.legal-tools.org/doc/ddefae/>).

Article 8(2)(e)(iii)

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

General Remarks:

Attacking personnel or objects involved in humanitarian assistance or peacekeeping missions, entitled to the protection of civilians or civilian objects, is not a new crime under international humanitarian law. It is rather evidence of the need to specify a group of civilians that because of its missions deserves a specific protection.¹ During the negotiations of the ICC Statute, the Convention on the Safety of United Nations and Associated Personnel provided the basis in the Draft Statute for one out of three treaty crimes. When decided that no treaty crime would be included in the Statute the delegations began to concentrate on treating and including attacks against UN personnel as a war crime. The crime of attacking peacekeepers was the only one of the three treaty crimes that ‘survived’ this change, which is evidence of its strong symbolic character. A crime with the same definition as in the ICC Statute was included in the Statute of the Special Court for Sierra Leone.

Analysis:

a. Objective Elements:

i. The Perpetrator Directed an Attack:

The Elements of Crimes do not include a definition of the term “attack”. The ICC Pre-Trial Chamber has, by reference *inter alia* to the “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict” in Article 21 (1)(b) of the ICC Statute found guidance in Article 49 of Additional Protocol I, applicable in international armed conflicts (‘IACs’) where the term “attack” is defined as “acts of violence against the adversary, whether in offence or in defence”. The term has been given the same definition in Ar-

¹ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para. 16 (<https://www.legal-tools.org/doc/4af5d2/>).

ticle 13(2) of Additional Protocol II applicable in non-international armed conflicts ('NIACs').² There is no requirement of any harmful impact on the personnel or material. There is a need to establish a causal link between the conduct of the perpetrator and the consequence "so that the concrete consequence, the attack in this case, can be seen as having been caused by the perpetrator".³

ii. The Object of the Attack Was Personnel, Installations, Material, Units or Vehicles Involved in a Humanitarian Assistance or Peacekeeping Mission in Accordance with the Charter of the United Nations:

There is no generally accepted definition on the notion "humanitarian assistance", but it includes measures taken with the purpose of preventing or alleviating human suffering of victims of an armed conflict. In practice the object of attacks has so far been personnel and objects involved in a peacekeeping mission. The term "peacekeeping" is not mentioned in the UN Charter but has developed in practice. The reference to "in accordance with the Charter of the United Nations" does not mean that the mission needs to be established by the UN but includes also missions established by regional organisations. (*Abu Garda*, 8 February 2010, para. 124). While the term lacks a simple definition three basic principles are accepted as constituting a peacekeeping mission; consent of the parties; impartiality; and use of force only in self-defence, (para. 71) although there is now a change in UN doctrine regarding definition of such missions.⁴ Consent of the host state is a legal requirement but in practice the consent of the main parties to the conflict is also sought to ensure the effectiveness of the operation. Regarding impartiality, the Report of the Panel of the United Nations Peace Operations states *inter alia* that "impartiality for such operations must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles. Such impartiality is

² Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 ('AP I') (<https://www.legal-tools.org/doc/d9328a/>); Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 ('AP II') (<https://www.legal-tools.org/doc/fd14c4/>).

³ ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red (public redacted version), paras. 64–66 ('*Abu Garda*, 8 February 2010') (<https://www.legal-tools.org/doc/cb3614/>).

⁴ SCSL, *Prosecutor v. Sesay, Kallon and Gbao*, Judgement, 2 March 2009, SCSL-04-15-T, paras. 224–225 ('*RUF*, 2 March 2009') (<https://www.legal-tools.org/doc/7f05b7/>).

not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement”.⁵ The Majority in the ICC Pre-Trial Chamber noted that peacekeeping missions were only entitled to use force in self-defence compared to peace enforcement missions decided under Chapter VII of the UN Charter which may use force beyond the concept of self-defence in order to achieve their mandates (*Abu Garda*, 8 February 2010, para. 74). In UN doctrine the right of self-defence includes a “right to resist attempts by forceful means to prevent the peacekeeping operation from discharging its duties under the mandate of the Security Council” although it is doubtful if it has developed to become settled law (international or national) (*RUF*, 2 March 2009, para. 228).

The development in practice where operations are often authorized by the Security Council under Chapter VII to use all necessary measures for certain purposes is reflected in the UN doctrine by references to robust peacekeeping. Recent UN doctrine considers that the tendency to refer to peacekeeping operations as Chapter VI operations and peace enforcement operations as Chapter VII operations is somewhat misleading. It is now the usual practice, both in peacekeeping and in peace enforcement, “for a Chapter VII mandate to be given” and a distinction is instead made between “operations in which the robust use of force is integral to the mission from the outset [...] and operations in which there is a reasonable expectation that force may not be needed at all”.⁶ The Capstone Doctrine, as it is known, draws a distinction between peace enforcement and robust peacekeeping. Peacekeeping operations with a robust mandate have been authorized to “use all necessary means to deter forceful attempts to disrupt the political process, and/or assist the national authorities in maintaining law and order. The concept of robust peacekeeping is defined as involving “the use of force at the tactical level with the authorization of the Security Council and consent of the host nation and/or the main parties to the conflict”. A peace enforcement operation on the other hand “does not require the consent of the main parties and may involve the use of military force at

⁵ Report of the Panel of the United Nations Peace Operations, UN Doc. A/55/305-S/2000/809, 21 August 2000 (‘Brahimi Report’) (<https://www.legal-tools.org/doc/20lxve/>) and *Abu Garda*, 8 February 2010, para. 73.

⁶ A More Secure World: Our Shared Responsibility, UN Doc. A/59/565 (2004), para. 211 (<https://www.legal-tools.org/doc/b7add1/>).

the strategic level, which is generally prohibited for Member States under Article 2(4) of the Charter, unless authorized by the Security Council”.⁷

The difference between these types of operation is thus not whether they have been established under Chapter VII of the UN Charter, but whether they are dependent on the existence of consent and the use of force at a strategic level. The concept of robust peacekeeping therefore challenges the traditional borders between the concepts of peacekeeping and peace enforcement (traditionally regarded as Chapter VI operations and Chapter VII operations). This may ultimately have an effect on the interpretation of the term peacekeeping mission in the ICC statute. It is telling that the Trial Chamber in the *RUF* case found that the mandate of the UNAMSIL, even after it has been expanded through Resolution 1289 which clearly was decided under Chapter VII and included the expression “take necessary action”,⁸ was regarded a peacekeeping mission for the purpose of the crime of attacking personnel in such missions (*RUF*, 2 March 2009, para. 1888).

iii. Such Personnel, Installations, Material, Units or Vehicles Were Entitled to the Protection Given to Civilians or Civilian Objects under the International Law of Armed Conflict:

Personnel in humanitarian assistance and peacekeeping missions are presumed to be entitled to the protection of civilians. This is particularly so regarding humanitarian assistance personnel. The authority to use force by peacekeepers, in self-defence or based on a resolution adopted under Chapter VII of the UN Charter (depending on the definition of a peacekeeping mission) naturally raise questions if the use of force by peacekeepers could affect their protection as civilians under international humanitarian law. Personnel in humanitarian assistance and peacekeeping missions are entitled to the protection of civilians as long as they are not taking a direct part in hostilities. Their protection would not be affected by exercising their individual right of self-defence – nor the use of force “in self-defence in the discharge of their mandate, provided that it is limited to such use”. (*RUF*, 2 March 2009, para. 233) It should in this respect be noted that the use of force in defence of the mandate is inherently difficult to define. Determining whether peacekeeping personnel or objects of such a mission were enti-

⁷ *United Nations Peacekeeping Operations: Principles and Guidelines*, United Nations Secretariat, New York, 2008, p. 34.

⁸ Resolution 1289 (2000), UN Doc. S/RES/1289, 7 February 2000 (<https://www.legal-tools.org/doc/ca385f/>).

tled to the protection of civilians or civilian objects, the Trial Chamber in the *RUF* case found that it needed to consider the totality of circumstances existing at the time of the alleged offence including “inter alia, the relevant Security Council resolutions for the operation, the specific operational mandates, the role and practices actually adopted by the peacekeeping mission during the particular conflict, their rules of engagement and operational orders, the nature of the arms and equipment used by the peacekeeping force, the interaction between the peacekeeping force and the parties involved in the conflict, any use of force between the peacekeeping force and the parties in the conflict, the nature and frequency of such force and the conduct of the alleged victim(s) and their fellow personnel”.(para. 234) It can be questioned if indeed all these aspects are valid for the determination whether personnel or objects are entitled to the protection of civilians since this a question decided under international humanitarian law.

The Majority in the ICC Pre-Trial exemplified “direct participation in hostilities” to include “bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for immediate use of a belligerent, and transporting weapons in proximity to combat operations” (*Abu Garda*, 8 February 2010, para. 81). The determination of whether a person is directly participating in hostilities requires a case-by-case analysis (para. 83).

Based on the definition of civilian objects in Article 52(2) of AP I and the ICRC customary law study,⁹ the Majority in the ICC Pre-Trial Chamber found that “installations, material, units or vehicles involved in a peacekeeping mission the context of an armed conflict not of an international character shall not be considered military objectives, and thus shall be entitled to the protection given to civilian objects, unless and for such time as their nature, location, purpose or use make an effective contribution to the military action of a party to a conflict and insofar as their total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage” (*Abu Garda*, 8 February 2010, para. 89).

⁹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009 (<https://www.legal-tools.org/doc/78a250/>).

Given the military structure and organisation of peacekeeping missions it may in fact be questioned if such personnel should be regarded as civilians taking direct part in hostilities if they become involved in armed conflict. Military personnel organised and commanded by a state or an intergovernmental organisation within a traditional military structure may rather be regarded as members of a military force under command of party to an armed conflict than civilians directly participating in an armed conflict. The former has also the legal effect of a change in status of the personnel in a more permanent manner than the latter where civilians directly participating in hostilities only temporarily.

b. Subjective Elements:

i. The Perpetrator Intended Such Personnel, Installations, Material, Units or Vehicles So Involved to Be the Object of the Attack:

The Majority in the ICC Pre-Trial Chamber found that this subjective element was of similar character to that of the Elements of the Crimes for Articles 8 (2)(b)(i) and 8 (2)(e)(i) dealing with attacks on civilians in both international and non-international armed conflicts. The offence first and foremost encompasses *dolus directus* of the first degree. The finding of the Majority was also applicable in NIACs. (*Abu Garda*, 8 February 2010, para. 93)

ii. The Perpetrator Was Aware of the Factual Circumstances that Established the Protection:

The necessary knowledge required by the perpetrator pertains to the facts establishing that the installations, materials, units or vehicles and personnel were involved in a peacekeeping mission but there is no need of legal knowledge regarding their protection.

iii. The Perpetrator Was Aware of Factual Circumstances that Established the Existence of an Armed Conflict:

There is no requirement on behalf of the perpetrator to conclude “on the basis of a legal assessment of the said circumstances, that there was an armed conflict” (*Abu Garda*, 8 February 2010, para. 96; *RUF*, 8 March 2009, para. 235)

Cross-reference:

Article 8(2)(b)(iii).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 412 (<https://www.legal-tools.org/doc/01addc/>).
2. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 558–560 (<https://www.legal-tools.org/doc/040751/>).
3. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, ICRC/Cambridge University Press, Cambridge, 2003, pp. 453–456 (<https://www.legal-tools.org/doc/b07fe3/>).
4. Ola Engdahl, “Prosecution of Attacks against Peacekeepers in International Courts and Tribunals”, in *Military Law and Law of War Review*, vol. 51, 2012, p. 249.
5. Daniel Frank, “Article 8(2)(b)(iii) – Attacking Personnel or Objects Involved in a Humanitarian Assistance or Peacekeeping Mission”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers Ardsley, 2001, p. 146 (<https://www.legal-tools.org/doc/e34f81/>).
6. Herman von Hebel and Darryl Robinson, “Crimes Within the Jurisdiction of the Court”, in Roy S. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, p. 110 (<https://www.legal-tools.org/doc/d71078/>).

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Article 8(2)(e)(iv)

Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

General Remarks:

With this Article the drafters of the ICC Statute included a provision criminalizing violations of the rules protecting cultural property, which have been established by international humanitarian law as well as several UNESCO treaties over the years. The purpose of this provision is to specifically criminalize the destruction of cultural property as opposed to civilian property and therefore, it constitutes a *lex specialis* to Article 8(2)(e)(xii).

Analysis:

i. Definition:

Pursuant to the ICC Elements of Crimes, the following criteria need to be met in order to fulfil the Article at hand:

1. The perpetrator directed an attack.
2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.
3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

ii. Requirements:

a. Material Elements:

The object of the offence has to be specially protected. The institutions enlisted in the ICC Statute can be classified into four main categories: cultural objects, places for the collection of those in need (for example, hospi-

tals), institutions dedicated to religion and others dedicated to education. The ICTY defined ‘cultural objects’ by referring the definition of cultural property in treaty law.¹ According to the case law of the ICTY, religious and educational institutions are protected as long as they meet the special requirement of “cultural heritage of people”, meaning “objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people”.² Additionally, these institutions must “clearly be identified as dedicated to religion or education”.³

Furthermore, the object of the offence cannot be a military objective. Military objectives are defined by Article 52(3) of Additional Protocol I as objects “which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.⁴

Concerning the nature of the offence the Rome Statute penalizes the directing of attacks against such institutions. The term ‘attack’ is defined in Article 49(1) AP I and means “acts of violence against the adversary, whether in offence or in defence”. Hence, the scope of the Article is extremely broad and almost all acts of hostility fall under this provision. Furthermore, no actual damage to the protected institutions is required. In order for the Article at hand to be fulfilled it is sufficient that the attack was directed against the respective protected institution.

b. Mental Elements:

Additionally to the mental elements concerning the general requirements of war crimes, the perpetrator has to fulfil the mental elements of the underly-

¹ For instance, Final act of the intergovernmental conference on the protection of cultural property in the event of armed conflict (Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict), 14 May 1954, 249 UNTS 215 (<https://www.legal-tools.org/doc/6d6697/>); ICTY, *Prosecutor v. Strugar*, Trial Chamber, Judgement, 31 January 2005, IT-01-42, para. 230 (<https://www.legal-tools.org/doc/927ba5/>).

² ICTY, *Prosecutor v. Martić*, Trial Chamber, Judgment, 12 June 2007, IT-95-11, para. 97 (<https://www.legal-tools.org/doc/06634c/>).

³ ICTY, *Prosecutor v. Blaškić*, Trial Chamber, Judgment, 3 March 2000, IT-95-14, para. 185 (‘*Blaškić*, 3 March 2000’) (<https://www.legal-tools.org/doc/e1ae55/>).

⁴ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/d9328a/>).

ing offence at hand. Namely, the attack against the protected institutions has to be committed “intentionally”. A controversial issue while drafting the ICC Statute was whether the term “intentionally” was related solely to the directing of an attack or also to the object of the attack. The *travaux préparatoires* adopted the latter approach. Therefore, the ICC Elements of the Crime require that the perpetrator must have known about the protected status of the institution. Additionally the perpetrator must have knowledge of the institution’s failure to qualify as a military objective, and nevertheless carry out the attack. However, he does not have to make a legal assessment of the protected status of the institutions. He merely needs to know the factual circumstances, which give the object a special status (*Blaškić*, 3 March 2000, para. 185).

Cross-reference:

Article 8(2)(b)(ix).

Doctrine:

1. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 560 (<https://www.legal-tools.org/doc/040751/>).
2. Gideon Boas *et al.*, *International Criminal Law Practitioner Library*, vol. 2, *Elements of Crime under International Criminal Law*, Cambridge University Press, 2008 (<https://www.legal-tools.org/doc/4d3bb5/>).
3. Caroline Ehlert, *Prosecuting the Destruction of Cultural Property in International Criminal Law*, Martinus Nijhoff Publishers, Leiden, 2014 (<https://www.legal-tools.org/doc/b945d6/>).
4. Micaela Frulli, “The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest of Consistency”, in *European Journal of International Law*, 2011, vol. 22, pp. 203–217 (<https://www.legal-tools.org/doc/5e5e95/>).
5. Mireille Hector, “Enhancing individual criminal responsibility for offences involving cultural property – the road to the Rome Statute and the 1999 Second Protocol”, in Nout Van Woudenberg/Liesbeth Lijnzaad (eds.), *Protecting Cultural Armed Conflict – An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of*

- Cultural Property in the Event of Armed Conflict*, Koninklijke Brill, Leiden, 2010, pp. 21–42 (<https://www.legal-tools.org/doc/721068/>).
6. Theodor Meron, “The Protection of Cultural Property in the Event of Armed Conflict within the Case-law of the International Criminal Tribunal for the Former Yugoslavia”, in *Museum International*, 2005, vol. 57, pp. 41–59 (<https://www.legal-tools.org/doc/0b8bb2/>).
 7. Roger O’Keefe, “Protection of Cultural Property under International Criminal Law”, in *Melbourne Journal of International Law*, 2010, vol. 11, pp. 1–54 (<https://www.legal-tools.org/doc/f2bd0b/>).
 8. Rüdiger Wolfrum, “Protection of Cultural Property in Armed Conflict”, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008 (<https://www.legal-tools.org/doc/e727e0/>).

Author: Caroline Ehlert.

Article 8(2)(e)(v)

(v) Pillaging a town or place, even when taken by assault;

The term “pillage” means appropriation of property for private, personal use and embraces acts of plundering, looting and sacking. There is no substantive difference between appropriation and confiscation. Article 8(2)(b)(xvi) is an identical provision to the present provision, but applies in international armed conflicts. In comparison with Articles 8(2)(a)(iv), 8(2)(b)(xiii) and 8(2)(e)(xii), pillage differs from appropriation and confiscation in regard to the perpetrator’s intent to obtain the property for private or personal use.

In *Katanga and Ngudjolo*, the Pre-Trial chamber stated that the “war crime of pillaging under Article 8(2)(b)(xvi) of the Statute requires that the property subject to the offence belongs to an ‘enemy’ or ‘hostile’ party to the conflict”.¹

Cross-references:

Articles 8(2)(a)(iv), 8(2)(b)(xiii), 8(2)(b)(xvi) and 8(2)(e)(xii)

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 413, 422 (<https://www.legal-tools.org/doc/01addc/>).
2. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 560–561 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2009, pp. 334–338, mn. 986–999 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 329 (<https://www.legal-tools.org/doc/67a9ec/>).

Article 8(2)(e)(vi)-1

(vi) Committing rape,

Rape is considered the most severe form of sexual violence. Sexual violence is a broad term that covers all forms of acts of a sexual nature under coercive circumstances, including rape. The key element that separates rape from other acts is penetration. The Elements of Crimes provide a more specific definition of the criminal conduct. Rape falls under the chapeaus of genocide, crimes against humanity or war crimes under specific circumstances, confirmed both through the ICC Statute and through the case law of the ICTR and the ICTY. Rape as a war crime differs from the definition of rape as a crime against humanity only in terms of the context in which the crime is committed. The rape must have been perpetrated in the context of and in association with a non-international armed conflict. In *Kunarac*, a sufficient nexus to the armed conflict was considered to exist in a situation where combatants took advantage of their positions of military authority to rape individuals, whose displacement was an express goal of the military campaign of which they were part.¹

For the mental element of rape Article 30 applies. The perpetrator has to be aware of the factual circumstances that established the existence of an armed conflict. He or she must also have intended to penetrate the victim's body and be aware that the penetration was by force or threat of force. The definition of rape is the same regarding rape as genocide, crimes against humanity and war crimes, albeit the contextual elements of the chapeaus differ. The *actus reus* of the violation is found in the Elements of Crimes. The definition focuses on penetration with (i) a sexual organ of any body part, or (ii) with the use of an object or any other part of the body of the anal or genital opening of the victim, committed by force or threat of force or coercion. "Any part of the body" under point 1 refers to vaginal, anal and oral penetration with the penis and may also be interpreted as ears, nose and eyes of the victim. Point 2 refers to objects or the use of fingers, hands or tongue of the perpetrator. Coercion may arise through fear of violence, duress, detention, psychological oppression or abuse of power. These situations are provided as examples, apparent through the use of the term

¹ ICTY, *Prosecutor v. Kunarac, Kovač and Vuković*, Appeals Chamber, Judgment, 12 June 2002, IT-96-23 and IT-96-23/1-A, paras. 58–59 (<https://www.legal-tools.org/doc/029a09/>).

“such as”. Consent is automatically vitiated in such situations. The definition is intentionally gender-neutral, indicating that both men and women can be perpetrators or victims. The definition of rape found in the Elements of Crimes is heavily influenced by the legal reasoning in cases regarding rape of the ICTY and the ICTR. Such cases can thus further elucidate the interpretation of the elements of the crime, meanwhile also highlighting different approaches to the main elements of rape, including ‘force’ and ‘non-consent’. See for example *Furundžija*, in which the Trial Chamber of the ICTY held that force or threat of force constitutes the main element of rape.² To the contrary, the latter case of *Kunarac et al.* emphasized the element of non-consent as the most essential in establishing rape, in that it corresponds to the protection of sexual autonomy.³ As to the term “coercion” the ICTR Trial Chamber in *Akayesu* held that a coercive environment does not require physical force. It also adopted a broad approach to the *actus reus*, including also the use of objects, an approach that has been embraced also by the ICTY and the ICC.⁴

Rule 63 RPE is of importance which holds that the Court’s Chambers cannot require corroboration to prove any crime within its jurisdiction, particularly crimes of sexual violence. Rule 70 further delineates the possibility of introducing evidence of consent as a defense. This is highly limited, emphasizing that consent cannot be inferred in coercive circumstances. Rule 71 forbids evidence of prior sexual conduct.

The ICC has in several arrest warrants found reasonable grounds to believe that rape as a war crime within the meaning of Article 8(2)(e)(vi) has been committed.⁵

² ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Judgment, 10 December 1998, IT-95-17/1-T (<https://www.legal-tools.org/doc/e6081b/>).

³ ICTY, *Prosecutor v. Kunarac, Kovač and Vuković*, Trial Chamber, Judgment, 22 February 2001, IT-96-23 (<https://www.legal-tools.org/doc/fd881d/>).

⁴ ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, para. 598 (<https://www.legal-tools.org/doc/b8d7bd/>).

⁵ See the Second Arrest Warrant against Ntaganda, where the Chamber found reasonable grounds to believe that rape and sexual slavery were committed in different locations in Ituri, ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Decision on Prosecutor’s Application under Article 58, 13 July 2012, ICC-01/04-02/06-36-Red (public redacted version) (<https://www.legal-tools.org/doc/18c310/>). See also *Prosecutor v. Ahmad Harun and Ali Kushayb*, Pre-Trial Chamber I, Warrant of arrest for Ahmad Harun and Ali Kushayb, 27 April 2007, ICC-02/05-01/07 (reasonable grounds to believe that Harun, through the direction of the Sudanese Armed Forces and the Janjaweed committed rapes of women and girls) (<https://www.legal-tools.org/doc/acafe8/>) ; *Prosecutor v. Kony, Otti and Odhiambo*, Warrant

Cross-references:

Articles 7(1)(g) and 8(2)(b)(xxii).

Doctrine:

1. Antonio Cassese, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 374–375 (<https://www.legal-tools.org/doc/01addc/>).
2. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), 2002, pp. 415–416, 422.
3. Christopher K. Hall, Joseph Powderly and Niamh Hayes, “Article 7, Crimes against humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 209–212 (<https://www.legal-tools.org/doc/040751/>).
4. Michael Cottier and Sabine Mzee, “Article 8, War Crimes”, in Triffterer and Ambos (eds.), 2016, pp. 476–490.
5. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Triffterer and Ambos (eds.), 2016, pp. 561–562.
6. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2009, pp. 248–250, 313, mn. 723–727; 912–913 (<https://www.legal-tools.org/doc/e35f82/>).
7. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, New York, 2005, pp. 202–220 (<https://www.legal-tools.org/doc/43fca9/>).

Author: Maria Sjöholm.

of arrest for Joseph Kony, Pre-Trial Chamber II, 27 September 2005, ICC-02/04-01/05 (<https://www.legal-tools.org/doc/b1010a/>); Warrant of Arrest for Vincent Otti, 8 July 2005, ICC-02/04-01/05-54, para. 17 (<https://www.legal-tools.org/doc/f7c78c/>); and *Prosecutor v. Sylvestre Mudacumura*, Pre-Trial Chamber II, Decision on the Prosecutor’s Application under Article 58, 13 July 2012, ICC-01/04-01/12, para. 47 (<https://www.legal-tools.org/doc/ecfae0/>).

Article 8(2)(e)(vi)-2

sexual slavery,

Sexual slavery is a particular form of enslavement which includes limitations on one's autonomy, freedom of movement and power to decide matters relating to one's sexual activity. Although it is listed as a separate offence in the ICC Statute, it is regarded as a particular form of enslavement. However, whereas enslavement is solely considered a crime against humanity, sexual slavery may constitute either a war crime or a crime against humanity. It is partly based on the definition of enslavement identified as customary international law by the ICTY in the *Kunarac* case.¹ Sexual slavery is thus considered a form of enslavement with a sexual component. Its definition is found in the Elements of Crimes and includes the exercise of any or all of the powers attached to the right of ownership over one or more persons, "such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty". The person should have been made to engage in acts of a sexual nature. The crime also includes forced marriages, domestic servitude or other forced labour that ultimately involves forced sexual activity. In contrast to the crime of rape, which is a completed offence, sexual slavery constitutes a continuing offence. The provision is identical to Article 8(2)(b)(xxii) and differs only in terms of the context in which the crime is committed.

In *Katanga and Ngudjolo*, the Pre-Trial Chamber held that "sexual slavery also encompasses situations where women and girls are forced into 'marriage', domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors. Forms of sexual slavery can, for example, be practices such as the detention of women in 'rape camps' or 'comfort stations', forced temporary 'marriages' to soldiers and other practices involving the treatment of women as chattel, and as such, violations of the peremptory norm prohibiting slavery".²

The SCSL Appeals Chamber in the *Brima* case has found the abduction and confinement of women to constitute forced marriage. The Cham-

¹ ICTY, *Prosecutor v. Kunarac, Kovač and Vuković*, Trial Chamber, Judgment, 22 February 2001, IT-96-23, para. 543 (<https://www.legal-tools.org/doc/fd881d/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 431 ('*Katanga and Ngudjolo*, 30 September 2008') (<https://www.legal-tools.org/doc/67a9ec/>).

ber concluded that forced marriage was distinct from sexual slavery. Accordingly, “While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife”, which could lead to disciplinary consequences for breach of this exclusive arrangement”.³ In 2012 the Court in a decision on the Charles Taylor case declared its preference for the term ‘forced conjugal slavery’. The Trial Chamber did not find the term ‘marriage’ to be helpful in describing the events that had occurred, in that it did not constitute marriage in the universally understood sense.⁴

Cross-references:

Articles 7(1)(g) and 8(2)(b)(xxii).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 415, 422 (<https://www.legal-tools.org/doc/01addc/>).
2. Christopher K. Hall, Joseph Powderly and Niamh Hayes, “Article 7, Crimes against humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 212–214 (<https://www.legal-tools.org/doc/040751/>).
3. Michael Cottier and Sabine Mzee, “Article 8, War Crimes”, in Triffterer and Ambos (eds.), 2016, pp. 490–496.
4. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Triffterer and Ambos (eds.), 2016, pp. 561–562.

³ See SCSL, *Prosecutor v. Brima*, Appeals Chamber, Judgment, 22 February 2008, SCSL-2004-16-A, para. 195 (<https://www.legal-tools.org/doc/4420ef/>).

⁴ SCSL, Trial Chamber, *Prosecutor v. Taylor*, Judgment, 18 May 2012, SCSL-03-01-T, para. 427 (<https://www.legal-tools.org/doc/8075e7/>).

5. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2009, pp. 250–251, 313, mn. 728, 914–916 (<https://www.legal-tools.org/doc/e35f82/>).
6. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, New York, 2005, pp. 202–220 (<https://www.legal-tools.org/doc/43fca9/>).

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Article 8(2)(e)(vi)-3

enforced prostitution,

The Elements of Crimes requires:

1. causing or a person to engage in acts of a sexual nature;
2. by force or threat of force or under coercive circumstances; and
3. the perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts.

Primarily the latter point distinguishes it from sexual slavery. It can also be distinguished in that sexual slavery requires the exercise or any or all of the powers attaching to the rights of ownership. Enforced prostitution could, however, rise to the level of sexual slavery, should the elements of both crimes exist. In comparison with rape and sexual slavery, enforced prostitution can either be a continuing offence or constitute a separate act. Enforced prostitution is prohibited in the Geneva Convention (IV) of 1949 as an example of an attack on a woman's honour and in Additional Protocol I as an outrage upon personal dignity.¹ The provision is identical to Article 8(2)(b)(xxii) and differs only in terms of the context in which the crime is committed.

Cross-references:

Articles 7(1)(g) and 8(2)(b)(xxii).

Doctrine:

1. Michael Bothe, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 415, 422 (<https://www.legal-tools.org/doc/01addc/>).
2. Christopher K. Hall, Joseph Powderly and Niamh Hayes, "Article 7, Crimes against humanity", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd.

¹ Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, (<https://legal-tools.org/doc/d5e260/>); Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/d9328a/>).

- ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 214–215 (<https://www.legal-tools.org/doc/040751/>).
3. Michael Cottier and Sabine Mzee, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), 2016, pp. 496–497.
 4. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), 2016, pp. 561–562.
 5. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2009, pp. 251, 313, nn. 729–730, 914–916 (<https://www.legal-tools.org/doc/e35f82/>).
 6. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, New York, 2005, pp. 202–220 (<https://www.legal-tools.org/doc/43fca9/>).

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Article 8(2)(e)(vi)-4

forced pregnancy, as defined in Article 7, paragraph 2 (f),

Forced pregnancy means the unlawful confinement of a woman forcibly made pregnant. Unlawful confinement should be interpreted as any form of deprivation of physical liberty contrary to international law. The deprivation of liberty does not have to be severe and no specific time frame is required. The use of force is not required, but some form of coercion. To complete the crime, it is sufficient if the perpetrator holds a woman imprisoned who has been impregnated by someone else. The forcible impregnation may involve rape or other forms of sexual violence of comparable gravity. In addition to the mental requirements in Article 30, the perpetrator must act with the purpose of affecting the ethnic composition of any population or carrying out other grave violations of international law. National laws prohibiting abortion do not amount to forced pregnancy. The provision is identical to Article 8(2)(b)(xxii) and differs only in terms of the context in which the crime is committed.

Cross-references:

Articles 7(1)(g) and 8(2)(b)(xxii).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 415, 422 (<https://www.legal-tools.org/doc/01addc/>).
2. Christopher K. Hall, Joseph Powderly and Niamh Hayes, “Article 7, Crimes against humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 215–216 (<https://www.legal-tools.org/doc/040751/>).
3. Michael Cottier and Sabine Mzee, “Article 8, War Crimes”, in Triffterer and Ambos (eds.), 2016, pp. 497–500.
4. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Triffterer and Ambos (eds.), 2016, pp. 561–562.

5. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2009, pp. 251–252, 313, mn. 731–732, 914–916 (<https://www.legal-tools.org/doc/e35f82/>).
6. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, New York, 2005, pp. 202–220 (<https://www.legal-tools.org/doc/43fca9/>).

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Article 8(2)(e)(vi)-5

enforced sterilization,

Enforced sterilization is a form of “[i]mposing measures intended to prevent births within the group” within the meaning of Article 6(e). It is carried out without the consent of a person. Genuine consent is not given when the victim has been deceived. Enforced sterilization includes depriving a person of their biological reproductive capacity, which is not justified by the medical treatment of the person. It does not include non-permanent birth-control methods. It is not restricted to medical operations but can also include the intentional use of chemicals for this effect. It arguably includes vicious rapes where the reproductive system has been destroyed. The Elements of Crimes provide a more specific definition of the criminal conduct. For the mental element Article 30 applies. Enforced sterilization may also fall under the chapeau of genocide if such intent is present. The provision is identical to Article 8(2)(b)(xxii) and differs only in terms of the context in which the crime is committed.

Cross-references:

Articles 7(1)(g) and 8(2)(b)(xxii).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 415, 422 (<https://www.legal-tools.org/doc/01addc/>).
2. Christopher K. Hall, Joseph Powderly and Niamh Hayes, “Article 7, Crimes against humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 216 (<https://www.legal-tools.org/doc/040751/>).
3. Michael Cottier and Sabine Mzee, “Article 8, War Crimes”, in Triffterer and Ambos (eds.), 2016, p. 500.
4. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Triffterer and Ambos (eds.), 2016, pp. 561–562.

5. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2009, pp. 252, 313, mn. 733, 914–916 (<https://www.legal-tools.org/doc/e35f82/>).
6. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, New York, 2005, pp. 202–220 (<https://www.legal-tools.org/doc/43fca9/>).

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Article 8(2)(e)(vi)-6

and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;

The provision has a catch-all character and requires that the conduct is comparable in gravity to the other acts listed in Article 8(2)(e)(vi). It concerns acts of a sexual nature against a person through the use of force or threat of force or coercion. The importance of distinguishing the different forms of sexual violence primarily lies in the level of harm to which the victim is subjected and the degree of severity, and therefore becomes a matter of sentencing. Common Article 3 is considered part of customary international law.

It is generally held to include forced nudity, forced masturbation or forced touching of the body. The ICTR in *Akayesu* held that “sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact”.¹ The Trial Chamber in the case confirmed that forced public nudity was an example of sexual violence within its jurisdiction (*Akayesu*, 2 September 1998, para. 10 A). Similarly, the Trial Chamber of the ICTY in its *Kvočka* decision declared: “sexual violence is broader than rape and includes such crimes as sexual slavery or molestation, and also covers sexual acts that do not involve physical contact, such as forced public nudity.”² To the contrary, in the decision on the Prosecutor’s application for a warrant of arrest in the *Bemba* case, the Pre-Trial Chamber of the ICC did not include a charge of sexual violence as a crime against humanity in the arrest warrant, which had been based on allegations that the troops in question had forced women to undress in public in order to humiliate them, stating that “the facts submitted by the Prosecutor do not constitute other forms of sexual violence of comparable gravity to the other forms of sexual violence set forth in Article 7(1)(g)”³

¹ ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, para. 688 (*‘Akayesu, 2 September 1998’*) (<https://www.legal-tools.org/doc/b8d7bd/>).

² ICTY, *Prosecutor v. Kvočka*, Trial Chamber, Judgment, 2 November 2001, IT-98-30/1-T, para. 180 (<https://www.legal-tools.org/doc/34428a/>).

³ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber I, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08, para. 40 (<https://www.legal-tools.org/doc/fb80c6/>).

In the *Lubanga* case of the ICC, evidence of sexual violence was presented during the trial, including various forms of sexual abuse of girl soldiers who were forcefully conscripted. However, no charges of sexual violence were brought. The Prosecution rather encouraged the Trial Chamber to consider evidence of sexual violence as an integral element of the recruitment and use of child soldiers.⁴ In the confirmation of charges in the *Muthaura* and *Kenyatta* case, Pre-Trial Chamber II chose not to charge forced male circumcision and penile amputation as sexual violence, but rather as inhumane acts. The Chamber held that “the evidence placed before it does not establish the sexual nature of the acts of forcible circumcision and penile amputation. Instead, it appears from the evidence that the acts were motivated by ethnic prejudice”.⁵ It argued that “not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence” (*Muthaura and Kenyatta*, 23 January 2012, para. 265).

Cross-references:

Articles 7(1)(g) and 8(2)(b)(xxii).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 411–416, 422 (<https://www.legal-tools.org/doc/01addc/>).
2. Christopher K. Hall, Joseph Powderly and Niamh Hayes, “Article 7, Crimes against humanity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck//Hart//Nomos, Munich/Oxford//Baden-Baden, 2016, pp. 216–219 (<https://www.legal-tools.org/doc/040751/>).
3. Michael Cottier and Sabine Mzee, “Article 8, War Crimes”, in Triffterer and Ambos (eds.), 2016, pp. 500–503.

⁴ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Prosecution’s Closing Brief, 1 June 2011, ICC-01/04-01/06-2748-Red, paras. 139, 142 and 205 (<https://www.legal-tools.org/doc/92ecf9/>).

⁵ ICC, *Prosecutor v. Muthaura and Kenyatta*, Pre-Trial Chamber I, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 266 (*Muthaura and Kenyatta*, 23 January 2012’) (<https://www.legal-tools.org/doc/4972c0/>).

4. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Triffterer and Ambos (eds.), 2016, pp. 561–562.
5. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2009, pp. 252–253, 313, mn. 734; 914–916 (<https://www.legal-tools.org/doc/e35f82/>).
6. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, New York, 2005, pp. 202–220 (<https://www.legal-tools.org/doc/43fca9/>).

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Article 8(2)(e)(vii)

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

General Remarks:

Article 8(2)(e)(vii) concerns the conscription, recruitment or use of children younger than fifteen years of age, in the context of an internal conflict. The crime also appears in Article 8(2)(b)(xxvi) to cover the same crime in the context of an international conflict.

Preparatory Works:

As the practice of child soldier recruitment, conscription or use had not been previously expressly recognised as criminalised, its inclusion was naturally a controversial point of debate during Statute negotiations. The United States in particular was against the inclusion of the crime, arguing that it was not a crime under customary international law and represented an area of legislative action “outside the purview of the Conference”.¹ However, agreement on inclusion was eventually reached due to its position as a well-established treaty law provision.² In 2002 the crime was included as a serious violation of international humanitarian law in Article 4(c) of the Statute of the Special Court for Sierra Leone.³ In a split decision in May 2004, the Special Court held that the provision was already customary international law prior to the adoption of the ICC Statute in 1998;

¹ Committee of the Whole: Summary Record of the 4th Meeting, UN Doc. A/CONF.183/C.1/SR.4, 20 November 1998, para. 54 (<https://www.legal-tools.org/doc/78fea6/>).

² Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977, Article 77(2) (‘AP I’) (<https://www.legal-tools.org/doc/d9328a/>); Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, Article 4(3)(c) (<https://www.legal-tools.org/doc/fd14c4/>); and Convention on the Rights of the Child, 20 November 1989, A/RES/44/25, Article 38(3) (<https://www.legal-tools.org/doc/f48f9e/>).

³ Statute of the Special Court for Sierra Leone, UN Doc. S/2002/246, 14 August 2000, Article 4(c) (<https://www.legal-tools.org/doc/aa0e20/>).

that is to say that the Statute codified an existing customary norm rather than forming a new one.⁴

Analysis:

i. Definition:

According to Article 8(2)(e)(vii) the crime has three components: recruitment, conscription or use. This is in contrast to both Additional Protocol I and Article 38 of the Convention on the Rights of the Child, which make reference to the singular act of ‘recruiting’. The Elements of Crimes provide further:

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities;
2. Such person or persons were under the age of 15 years;
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years;
4. The conduct took place in the context of and was associated with an armed conflict not of an international character;
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The Pre-Trial Chamber in the *Lubanga* case determined that the term ‘conscripting’ refers to a forcible act, ‘enlisting’ encompasses a ‘voluntary’ decision to join a military force, and the act of ‘enlisting’ includes ‘any conduct accepting the child as part of the militia’.⁵

ii. Consent of the Child as a Mitigating Factor:

While alleged voluntariness may be negated by force or intimidation, the consent of the child creates the legal characterisation of the conduct as enlistment rather than conscription. Consent is therefore not irrelevant, but nonetheless places the admission of a child to the armed forces firmly within the realm of Article 8 regardless of the means of admission. The specific

⁴ SCSL, *Prosecutor v. Hinga Norman*, Appeals Chamber, Fourth Defence Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004. SCSL-04-14-AR72 (<https://www.legal-tools.org/doc/27e4fc/>).

⁵ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06 (‘*Lubanga*, 29 January 2007’) (<https://www.legal-tools.org/doc/b7ac4f/>); *Prosecutor v. Lubanga*, Trial Chamber I, Judgment, 14 March 2012, ICC-01/04-01/06, para. 573 (‘*Lubanga*, 14 March 2012’) (<https://www.legal-tools.org/doc/677866/>).

mode of admission, whether “the result of governmental policy, individual initiative or acquiescence in demands to enlist”⁶ is, for the most part irrelevant. Happold suggests that this distinction between the means of committing the material element of this crime may become pertinent during sentencing (Happold, 2006, p. 12). In its judgment in the *Lubanga* case the ICC Trial Chamber intimated that it would follow this path when determining the sentence, but found no aggravating factors when delivering the sentencing order on 10 July 2012, instead finding that the factors that are relevant for determining the gravity of the crime cannot additionally be taken into account as aggravating circumstances.⁷

iii. Continuing Crime:

There are a number of different ways in which these two concepts are inter-related or occur concurrently in the context of the crime. Conscriptio and enlistment can be viewed as continuing crimes that begin from the moment a child joins an armed group and end upon demobilisation or attainment of 15 years of age, with all intermittent time additionally constituting ‘use’. This is therefore a continuing crime: a state of affairs where a crime has been committed and then maintained. The crime is committed from the moment that a child is entered into the armed forces, through enlistment or conscription, and continues for as long as that child remains a ‘child soldier’, ending either through demobilisation or the attainment of 15 years of age. This places liability on the person who recruited the child, whether by enlisting or conscripting, regardless of whether they were involved in the use of the child in an armed conflict. The act of recruitment triggers responsibility for all subsequent use, even if by other commanders. An alternative interpretation is that the crime is not a composite one, as it is capable of being committed by either the initial conscription or enlistment step, or through the subsequent ‘use’ of the given child, and not necessarily through demonstrating a combination of the two. This expands the liability for the crime to incorporate not just the person who actually undertakes the recruitment process of a given child, but also includes others who later use the child for military purposes.

⁶ Matthew Happold, “The Age of Criminal Responsibility in International Criminal Law”, in Karin Arts and Vesselin Popovski (eds.), *International Criminal Accountability and the Rights of Children*, T.M.C. Asser, The Hague, 2006, p. 8.

⁷ *Lubanga*, 14 March 2012, para. 617; ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Sentencing Order, 10 July 2012, ICC-01/04-01/06-2901, paras. 78 and 96 (<https://www.legal-tools.org/doc/c79996/>).

iii. Requirements:

In addition to the contextual elements required for all war crimes not of an international character set out in elements 4 and 5 of the above-listed Elements of Crimes, the following needs to be proven:

a. Material Elements:

The first two elements listed above set out the material elements of child soldier conscription, enlistment or use.

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.

The war crimes established by the ICC Statute are limited to the conscription or enlistment and use of children under the age of fifteen years. However, the acts of ‘conscripting’ and ‘enlistment’ are not defined in the Statute, nor in the Elements of Crimes, leaving elaboration to judicial interpretation. The Pre-Trial Chamber, determined that the term ‘conscripting’ refers to a forcible act, whereas ‘enlisting’ encompasses a ‘voluntary’ decision to join a military force (*Lubanga*, 29 January 2007, paras. 246–247). The act of ‘enlisting’ includes “any conduct accepting the child as part of the militia” (*Lubanga*, 14 March 2012, para. 114). While alleged voluntariness may be negated by force or intimidation, the consent of the child creates the legal characterisation of the conduct as enlistment rather than conscription. Consent is therefore not irrelevant, but nonetheless places the admission of a child to the armed forces firmly within the realm of Article 8 regardless of the means of admission.

Finally, participation by combatant and non-combatant children are covered equally by the ICC Statute due to its use of the term ‘participate actively’. However, their participation must be within the context of an armed conflict. The Elements of Crimes require that the participation be conduct ‘associated with an armed conflict’, while the *travaux préparatoires* noted above specifies that participation in the armed confrontations is not necessary, but a link to combat is required.⁸

⁸ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, UN Doc. A/CONF.183/2/Add.1, 14 April 1998 (<https://www.legal-tools.org/doc/816405/>).

b. Mental Elements:

The perpetrator knew or should have known that such person or persons were under the age of 15 years. While Article 30(3) provides that a perpetrator must have had positive knowledge of the child's age, the Elements of Crimes merely require that he 'knew or should have known' that the child was under fifteen. In *Lubanga* it was determined that the Elements of Crimes provides for situations where the perpetrator fails to possess knowledge of the given child's age due to a failure to exercise due diligence in the circumstances (*Lubanga*, 29 January 2007, para. 348). Therefore, the Pre-Trial Chamber considered this element of negligence to be an exception to the 'intent and knowledge' standard provided in Article 30(1).

Cross-reference:

Article 8(2)(b)(xxvi).

Doctrine:

1. Julie McBride, *The War Crime of Child Soldier Recruitment*, Springer, New York, 2013 (<https://www.legal-tools.org/doc/2a122f/>).
2. Matthew Happold, "Child Recruitment as a Crime under the Rome Statute of the International Criminal Court", in M. Cherif Bassiouni, Hans-Peter Gasser, José Doria (eds.), *The Legal Regime of the International Criminal Court: Essays in Memory of Igor Blischenko*, Brill, Leiden, 2009 (<https://www.legal-tools.org/doc/289fd7/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2009 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Julie McBride.

Article 8(2)(e)(viii)

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

Article 8(2)(e)(viii), parallel to Article 8(2)(b)(viii), prohibits the displacement of the civilian population in the context of a non-international armed conflict, unless the security of the civilians involved or imperative military reasons so demand. This conduct is prohibited under the same terms in Article 17 of the 1949 Geneva Conventions (Additional Protocol II) and reflects customary international humanitarian law.¹

The ICC Elements of Crimes clarify that to prove the war crime of displacing a civilian population it is necessary that 1. the perpetrator ordered a displacement of a civilian population; 2. such an order was not justified by the security of the civilians involved or by military necessity; 3. the perpetrator was in a position to effect such displacement by giving such order; 4. the conduct took place in the context and was associated with a non-international armed conflict; and 5. the perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Since the *chapeau* of Article 8(2)(e), as well as the Introduction to Article 8 in the Elements of Crimes mandate to interpret the criminalised conduct “within the established framework of international law of armed conflict”, the term “displacement” shall be interpreted in light of international humanitarian law as to include the evacuation of the civilian population both within and outside the national territory. Article 17(2) AP II proscribes the displacement of civilians outside their national territory.

Differently from the wording used in the ICC Statute, the Elements of Crimes refer to the displacement of “a civilian population” as opposed to “the civilian population”. This discrepancy shall be construed as to crimi-

¹ Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts, 8 June 1977, Article 71 (‘AP II’) (<https://www.legal-tools.org/doc/fd14c4/>); Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009, Rule 129 (<https://www.legal-tools.org/doc/78a250/>).

nalize conducts of displacement of civilians not necessarily involving the whole civilian population.²

However, the number of civilians involved in the displacement shall exceed individual occurrences. This results from the systemic reading of the Elements of Crimes where, for example, Article 8(2)(a)(vii) refers to “one or more persons” as opposed to “a civilian population” (Dörmann, 2003, p. 472). Arguably, since the letter of Article 8(2)(e)(vii) does not resort to the same expression, only the civilian population and not individual civilians shall be affected by the displacement in order for the conduct to fall under the scope of the provision. This proposition finds support in the *travaux préparatoires* to the ICC Statute where the expression “civilian population” was deliberately chosen against the “one or more civilians” as the drafters considered the displacement of one civilian to be insufficient to constitute the war crime of displacement of civilians (Dörmann, 2003, p. 472).

A salient issue, which has been elucidated by the ICC case law, relates to the existence of an actual *order* to displace a civilian population as a constitutive element of the war crime under Article 8(2)(e)(viii). In the *Ntaganda* case, Trial Chamber VI has clarified that the existence of an order is the distinctive constitutive element of the war crime of ordering the displacement of the civilian population, in contrast to forcible transfer of population as a crime against humanity (*Ntaganda* 8 July 2019, para. 1080). This departs from the interpretation of the Pre-Trial Chamber in the same case, which considered that the conduct by which the perpetrator(s) force(s) civilians to leave a certain area is not limited to an order, as referred to in element 1 of the relevant Elements of Crimes. The Chamber considered that, should this not be the case, the actual circumstances of civilian displacement in the course of an armed conflict would be unduly restricted. This is specifically reflected in the general introduction to the Elements of Crimes, which states that “[t]he elements [...] apply *mutatis mu-*

² On the point, cf. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary*, Cambridge University Press, 2003, p. 473 (<https://www.legal-tools.org/doc/b07fe3/>). This reading has been confirmed by ICC, Trial Chamber VI, *Prosecutor v. Ntaganda*, Judgment, 8 July 2019, ICC-01/04-02/06-2359, para. 1083 (*Ntaganda*, 8 July 2019’) (<https://www.legal-tools.org/doc/80578a/>).

tandis to all those whose criminal responsibility may fall under Articles 25 and 28 of the Statute”.³

It is interesting to note that Trial Chamber VI in *Ntaganda* was satisfied that “ordering the UPC/FPLC troops to indiscriminately attack the Lendu present in Mongbwalu, with the purpose of either eliminating them or driving them out” consisted in an order to displace the civilian population for the purposes of Article 8(2)(e)(viii) ICC Statute (see *Ntaganda*, 8 July 2019, para. 1088). Nothing in the Elements of Crimes indicates the nature of the position which the alleged perpetrator has to cover in order to effect the displacement of civilians under Article 8(2)(e)(viii). Yet, the wording “to effect the displacement” seems to privilege a de facto appraisal of such a position. Therefore, both de jure and de facto positions can be reasonably contemplated under the terms of the provision. This finds support in the pronouncement of the Pre-Trial Chamber in the *Ntaganda* case stating “the means used [...] and the modus operandi show that the UPC/FPLC soldiers were in a position to displace civilians, as further demonstrated by the large number of civilians who were in fact displaced” (*Ntaganda*, 9 June 2014, para. 68; on the point, see also *Ntaganda*, 8 July 2019, paras. 1095–1097).

Article 8(2)(e)(viii) admits the displacement of a civilian population for reasons connected to the conflict only in two exceptional circumstances: (i) when the security of the civilians involved so demands (for example, when the civilians are located in areas likely to be subjected to bombings, or as “in cases of epidemics or natural disasters” as clarified in *Ntaganda*, 8 July 2019, para. 1098); (ii) when imperative military reasons so demand, where the term “imperative” imposes a restrictive interpretation of this exception (Dörmann, 2003, pp. 474–475).

Cross-references:

Articles 7(1)(d), 8(2)(a)(vii) and 8(2)(b)(viii).

Doctrine:

1. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary*, Cambridge University Press, 2003 (<https://www.legal-tools.org/doc/b07fe3/>).

³ ICC, Pre-Trial Chamber II, *Prosecutor v. Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309, para. 64 (<https://www.legal-tools.org/doc/5686c6/>).

2. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009 (<https://www.legal-tools.org/doc/78a250/>).

Author: Letizia Lo Giacco.

Article 8(2)(e)(ix)

(ix) Killing or wounding treacherously a combatant adversary;

Treachery, also synonymous with perfidy, involves a breach of good faith of the combatant adversaries. In practice, it is typically cases in which the accused in deception claims a right to protection for him or herself, and uses this for his or her advantage in the combat. It includes:

- pretending to be a civilian;
- fake use of a flag of truce, the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions;
- fake use of the protective emblem of cultural property;
- fake use of other internationally recognized protective emblems, signs or signals;
- pretending to surrender;
- pretending to be incapacitated by wounds or sickness;
- pretending to belong to the enemy by the use of their signs.

The provision is similar, but not identical to Article 8(2)(b)(xi). The prohibition of Article 8(2)(e)(ix) only extends to “combatant adversaries”, while Article 8(2)(b)(xi) also prohibits the killing and wounding of civilians. The use of the notion “combatant adversary” should be distinguished from “enemy combatants”, indicating that there is notion “combatant” is not applicable in internal armed conflicts. Perfidious acts are only punishable if the perpetrator intentionally killed or wounded an adversary.

Cross-references:

Article 8(2)(b)(vii) and 8(2)(b)(xi).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 405 and 421 (<https://www.legal-tools.org/doc/01addc/>).
2. Michael Cottier and Julia Grignon, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International*

Criminal Court: A Commentary, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 425–432 (<https://www.legal-tools.org/doc/040751/>).

3. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Triffterer and Ambos (eds.), 2016, pp. 566–567.
4. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2009, pp. 354–357, mn. 1054–1060 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(e)(x)

(x) Declaring that no quarter will be given;

The offence covers ‘take no prisoners’ warfare. The material element will typically be fulfilled by a declaration that any surrender by the enemy shall be refused even if it is reasonable to accept. In addition to declarations, the provision should be including order and threats that no quarter shall be given. Combatant adversaries are not required to provide the enemy with the opportunity to surrender.

Cross-references:

Article 8(2)(b)(vi) and 8(2)(b)(xii).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 421 (<https://www.legal-tools.org/doc/01addc/>).
2. Michael Cottier and Julia Grignon, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 432–436 (<https://www.legal-tools.org/doc/040751/>).
3. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Triffterer and Ambos (eds.), 2016, p. 567 (<https://www.legal-tools.org/doc/040751/>).
4. Gerhard Werle, *Principles of International Criminal Law*, T.M.C Asser Press, The Hague, 2009, pp. 360–62, mn. 1074–1079 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(e)(xi)-1

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation

The term “physical mutilation” cover acts such as amputations, injury to limbs, removal of organs, and forms of sexual mutilations. The victim’s consent is not an excusable defence.

Cross-references:

Articles 8(2)(b)(x) and 8(2)(e)(xi).

Doctrine: For the bibliography, see the comment “Article 8(2)(e)(xi)-3”.

Author: Mark Klamberg.

Article 8(2)(e)(xi)-2

or to medical or scientific experiments

The prohibition of medical or scientific experiments covers the use of therapeutic methods which are not justified on medical grounds and not carried out in the interest of the affected person. The consent of the victim is not relevant.

Cross-references:

Article 8(2)(a)(ii) and 8(2)(e)(xi).

Doctrine: For the bibliography, see the comment “Article 8(2)(e)(xi)-3”.

Author: Mark Klamberg.

Article 8(2)(e)(xi)-3

of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

The acts in Article 8(2)(e)(xi) can only be justified if undertaken in the interest of the person concerned, for example amputations may be lawful if performed to save the live or overall health of the patient. Any physical mutilation or unwarranted medical or scientific experiments undertaken of either governmental authorities or on non-state groups are covered by Article 8(2)(e)(xi).

Cross-reference:

Articles 8(2)(b)(x).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 422 (<https://www.legal-tools.org/doc/01addc/>)
2. Andreas Zimmermann and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 423–425, 567–568 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2009, pp. 307–310, mn. 895–902 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(e)(xii)

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

This provision is parallel, *mutatis mutandis*, to Article 8(2)(b)(xiii) ICC Statute and reflects customary international humanitarian law.¹

The ICC Elements of Crimes set out the constitutive elements of the war crime of destroying or seizing the enemy's property:

1. The perpetrator destroyed or seized certain property;
2. Such a property was of an adversary;
3. Such property was protected from the destruction or seizure under the international law of armed conflict;
4. The perpetrator was aware of the factual circumstances that established the status of the property; the destruction of the property was not required by military necessity;
5. The conduct took place in the context and was associated with an armed conflict not of an international character;
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8(2)(e)(xii) has been invoked as ground of charges against, *inter alios*, Callixte Mbarushimana,² Bosco Ntaganda³ and Dominic Ongwen.⁴ Likewise, the crime of destruction of enemy's property has been imputed to Germain Katanga and Mathieu Ngudjolo Chui under Article 8(2)(b)(xiii). Such a legal basis was subsequently modified into Article

¹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009, Rule 50 (<https://www.legal-tools.org/doc/78a250/>)

² ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red (public redacted version) ('*Mbarushimana*, 16 December 2011') (<https://www.legal-tools.org/doc/63028f/>).

³ ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Decision on the Confirmation of Charges, 9 June 2014, ICC-01/04-02/06-309, paras. 72 ff. ('*Ntaganda*, 9 June 2014') (<https://www.legal-tools.org/doc/5686c6/>).

⁴ ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 March 2016, ICC-02/04-01/15-422-Red, paras. 51–52 relating to count 35, and para. 64 relating to count 48 (<https://www.legal-tools.org/doc/74fc6e/>).

8(2)(e)(xii) after the re-qualification of the conflict from international to non-international.

In the judgment in the *Katanga* case,⁵ Trial Chamber II clarified the scope of Article 8(2)(e)(xii) by stating that “there is nothing to suggest that the constituent elements of the crime defined under article 8(2)(e)(xii) differ from those of the crime of destruction of enemy property committed in an international armed conflict, under article 8(2)(b)(xiii)” (*Katanga*, 7 March 2014, para. 889). Such an interpretation is supported by authoritative doctrine.⁶ Based on this, the analysis of Article 8(2)(e)(xii) may occur by analogy with Article 8(2)(b)(xiii) ICC Statute.

The provision criminalizes the destruction or seizure of enemy’s property protected by the law of armed conflicts. There exists a plurality of ways in which the destruction of property may be carried out. The Trial Chamber has exemplified some of them, namely, “acts such as setting ablaze, demolishing, or otherwise damaging property” (*Katanga*, 7 March 2014, para. 891), concluding that property heavily damaged can be assimilated to partly destroyed property and can thus fall under the terms of Article 8(2)(e)(xii) (para. 891). In the case of *Ntaganda*, the Pre-Trial Chamber confirmed the charge of destruction of property against the defendant for having destroyed houses, buildings and other permanent structures, set on fire houses or removed their metal roofs, destroyed fields, destroyed and burned villages (*Ntaganda*, 9 June 2014, paras. 72–73). Trial Chamber VI in *Ntaganda*, by reference to *Katanga*, considered that “the acts of destruction can take many different forms and include torching and demolishing.”⁷ On the same vein, destruction of property may occur by “setting fire to, pulling down, or otherwise damaging the adversaries’ property” (*Mbarushimana*, 16 December 2011, para. 171).

As to the “seizure” of property, neither the ICC Statute nor the Elements of Crimes help clarify the meaning of the term. According to the ICRC Commentary, seizure is to be distinguished from requisition because

⁵ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Jugement rendu en application de l’Article 74 du Statut, 7 March 2014, ICC-01/04-01/07-3436, paras. 889 ff. (*Katanga*, 7 March 2014’) (<https://www.legal-tools.org/doc/f74b4f/>).

⁶ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary*, Cambridge University Press, 2003, pp. 485–486 (<https://www.legal-tools.org/doc/b07fe3/>).

⁷ ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Judgment, 8 July 2019, ICC-01/04-02/06-2359, para. 1153 (*Ntaganda*, 8 July 2019’) (<https://www.legal-tools.org/doc/80578a/>).

the former relates to public property and is a temporary sequestration followed by restitution and indemnity; the latter affects private property and consists in a passage of ownership.⁸ However, this point remains debated in literature and unclarified by the ICC case law (for a recollection of relevant positions, cf. Dörmann, 2003, pp. 256–257).

The notion of property is quite broad. It includes property of natural and legal persons, moveable and immoveable, public and private, provided that they are of the adverse party (*Katanga*, 7 March 2014, para. 892; *Ntaganda*, 8 July 2019, para. 1153). The Trial Chamber has shed light of the meaning of adverse, notably, “aligned with or with allegiance to a party to the conflict adverse or hostile to the perpetrator” (*Katanga*, 7 March 2014, para. 892). Such an adverse character can be established by virtue of the ethnic origin of the persons whose property has been destroyed (or partly destroyed) or seized or based on their place of residence (para. 892). This interpretation of ‘belonging to an adversary’, or ‘considered as such by the perpetrators’, has been confirmed in *Ntaganda* as well as in *Ongwen*, extensively citing the *Katanga* Trial Judgment and *Ntaganda* Trial Judgment.⁹

Article 8(2)(e)(xii) applies to individual acts of destruction or seizure of enemy’s property which are protected by the law of armed conflict and does not require to prove a threshold-element of extensiveness as opposed to Article 8(2)(a)(iv) (“Extensive destruction and appropriation of property [...] carried out unlawfully and wantonly”).

The destruction of enemy property does not constitute a crime under the terms of the ICC Statute if such a destruction was “imperatively demanded by the necessities of the conflict”. Such an expression “sets a certain threshold and denotes that only when the perpetrator had no other option, which would render the object intact, can the destruction be considered to have been justified by military necessity” (see *Ntaganda*, 8 July 2019, para. 1164). Trial Chamber II in *Katanga* considered the expression substantively equivalent to “military necessity” and interpreted in line with

⁸ Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949 Commentary – IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, p. 296 (<https://www.legal-tools.org/doc/7d971f/>).

⁹ ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Judgment, 4 February 2021, ICC-02/04-01/15-1762-Red (public redacted version), paras. 2773–2779 (*Ongwen*, 4 February 2021) (<https://www.legal-tools.org/doc/kv27ul/>).

the ICTY case law.¹⁰ Military necessity is therefore meant as “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”.¹¹

Cross-references:

Articles 8(2)(a)(iv), (8)(2)(b)(xiii), 8(2)(b)(xvi) and 8(2)(e)(v).

Doctrine:

1. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary*, Cambridge University Press, 2003 (<https://www.legal-tools.org/doc/b07fe3/>).
2. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross (‘ICRC’), 2009, (<https://www.legal-tools.org/doc/78a250/>).
3. Jean Pictet (ed.), *Commentary to I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1958 (<https://www.legal-tools.org/doc/1ecc15/>).

Author: Letizia Lo Giacco.

¹⁰ *Katanga*, 7 March 2014, para. 894; see also *Ntaganda*, 8 July 2019, paras. 1164–1165, citing *Katanga* and ICTY, Appeals Chamber, *Prosecutor v. Kordić and Čerkez*, Judgment, 17 December 2004, IT-95-14/2-A (<https://www.legal-tools.org/doc/738211/>) as leading authorities.

¹¹ Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Article 14 (<https://www.legal-tools.org/doc/842054/>), cited in *Katanga*, 7 March 2014, para. 894.

Article 8(2)(e)(xiii)

(xiii) Employing poison or poisoned weapons;

This offence could for example include the poisoning of water supplies. The production and storage of poison is not prohibited. There is no agreement whether the prohibition on the use of poison covers poison gas. Article 8(2)(b)(xvii) is an identical provision to the present provision, but applies in international armed conflicts.

The provision does not prohibit chemical and biological weapons of mass destruction. This may be explained the lack of agreement on the prohibition on of nuclear weapons and a following compromise during the Rome conference, with the result that weapons of mass destruction are not subject to an explicit and binding provision in the ICC Statute.

Cross-references:

Article 8(2)(b)(xvii), 8(2)(b)(xviii) and 8(2)(b)(xx).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 406 (<https://www.legal-tools.org/doc/01addc/>).
2. Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 569–571 (<https://www.legal-tools.org/doc/040751/>).
3. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2009, pp. 369–72, mn. 1100–1106 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

Article 8(2)(e)(xiv)

(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

The wording of the present provision is basically identical the Geneva Protocol of 17 June 1925 for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare.¹ Article 8(2)(b)(xviii) is also an identical provision to the present provision, but applies in international armed conflicts.

It is generally understood that the wording “asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” in the Geneva Protocol of 1925 includes chemical weapons which nullifies the compromise mentioned in the previous commentary (Article 8(2)(e)(xiv)). Even though biological weapons are covered by the Geneva Protocol of 1925, it is doubtful that the present provision covers these weapons. This is supported by the fact that the relevant passage on biological weapons in the Geneva Protocol of 17 June 1925 was not included in Article 8(2)(b)(xvii).

Cross-references:

Article 8(2)(b)(xvii) and 8(2)(b)(xviii).

Doctrine:

1. Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 569–572 (<https://www.legal-tools.org/doc/040751/>).
2. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2009, pp. 372–73, mn. 1107–1110 (<https://www.legal-tools.org/doc/e35f82/>).

Author: Mark Klamberg.

¹ Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare, 17 June 1925 (‘Geneva Protocol of 1925’) (<https://www.legal-tools.org/doc/a68438/>).

Article 8(2)(e)(xv)

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

General Comments:

The issue of weapons was complex and contested during the drafting of the ICC Statute and no provisions on weapons for non-international armed conflict was included in the original Statute adopted in 1998. At the Kampala Review Conference in 2010 an amendment was adopted which included the war crime of employing prohibited bullets in non-international armed conflicts. The provision, stated in Article 8(2)(e)(xv), is identical to that for international armed conflicts (Article 8(2)(b)(xix)). The use of bullets which expand or flatten easily in the human body is prohibited under customary international law.

Preparatory Works:

During the preparatory work and negotiations at the Rome Conference, several different options on weapons provisions were proposed for both international and non-international armed conflicts. However, only provisions for international armed conflicts were eventually adopted.¹ At the Kampala Review Conference in 2010 an amendment was adopted with, for example, a provision on expanding bullets for non-international armed conflicts.² The amendment established Article 8(2)(e)(xv), this provision is identical to that for international armed conflicts in Article 8(2)(b)(xix). Also the elements of crimes are identical, with the only difference being the character of the armed conflict. It is required that States who were already a State Party to the ICC Statute before the adoption of the amendment ratifies the amendment for it to become binding for them. The amendment enters into force one year after a State Party has deposited their instrument of ratification or acceptance. (Article 121(5) of the Statute). The amendment on weapons provisions for non-international armed conflicts

¹ See Commentary to Article 8(2)(b)(xix); see also Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2, 14 April 1998, p. 17 and 19 for some of the discussed options (<https://www.legal-tools.org/doc/732f58/>).

² ICC ASP, Amendments to Article 8 of the Rome Statute, Resolution RC/Res.5, 10 June 2010 ('ICC-ASP, Res.5, 2010').

entered into force on 26 September 2012. As of 17 May 2017, 34 States had ratified the amendment.³

The amendment was based on a Belgian proposal forwarded to the Review Conference by the Assembly of State Parties in 2009.⁴ This proposal was based on an earlier Belgian proposal of amendment which included provisions on employing several other prohibited weapons but which had failed to receive sufficient support.⁵ Also the Elements of Crimes to the new provisions were proposed by Belgium (Annex VIII Elements of crimes corresponding to the proposed amendment contained in Annex III to Res.6, 2010). The objective behind the Belgian proposed amendment was to harmonize and standardize the Statute's parts on war crimes in international and non-international armed conflicts according to customary international law and avoid impunity for employment of prohibited weapons in non-international armed conflicts.⁶

Analysis:

The provision is based on customary international law as well as the Hague Declaration IV Concerning Expanding Bullets, and its wording is almost identical to the latter.⁷ The Hague Declaration IV states: “The Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions”.

The Hague Declaration builds on and gives reference to the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight of 11 December 1868, which expresses: “That the

³ ICC ASP, Res.5, 2010, status of ratification (available on the UN Treaty Collection's web site).

⁴ ICC ASP, Belgium: Proposal of amendment, 10 June 2010, ICC-ASP/8/20, Annex III to Resolution ICC-ASP/8/Res.6 ('Annex III to Res.6, 2010') (<https://www.legal-tools.org/doc/bf0e8c/>).

⁵ Belgium: Proposal of Amendments, 29 October 2009, C.N.733.2009.TREATIES-8 (Depositary Notification); see also ICC ASP, Report of the Working Group on Amendments, 16 November 2015, ICC-ASP/14/34, paras. 9–11 ('Report of the Working Group on Amendments, 2015').

⁶ ICC ASP, Report of the Bureau on the Review Conference, ICC-ASP/8/43/Add.1, Annex I, 10 November 2009; see also Annex III, Report of the Working Group on Amendments, 2015.

⁷ Declaration on the Use of Bullets Which Expand or Flatten Easily in the Human Body, 29 July 1899 ('The Hague Declaration IV') (<https://www.legal-tools.org/doc/3bea0d/>).

progress of civilization should have the effect of alleviating as much as possible the calamities of war; That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity”.⁸ Given the reference in The Hague Declaration IV to the St. Petersburg Declaration, both instruments may provide some guidance in determining which specific bullets are covered by this war crime. In accordance with the St. Petersburg Declaration, objectives The Hague Declaration was drafted with the intention of preventing the use of a specific projectile, the so called ‘dum-dum bullet’, developed by the United Kingdom for use in India.⁹

While The Hague Declaration IV concerned relations between States, the prohibition of such bullets is generally considered as a rule of customary international law which is applicable both in international and non-international armed conflicts.¹⁰ The prohibition is further expressed in numerous military manuals and has been included in other instruments relating to the law of armed conflict (See “Practice” in Rule 77, ICRC CIHL Study). However, some scholars have voiced a sceptical view as to the customary nature of the ban, especially as regards non-international armed conflicts.¹¹

To transpose criminal provisions applicable in (or drafted for) international armed conflict to non-international armed conflicts may provide challenges in certain situations. This challenge was apparent when the

⁸ Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles, 11 December 1868 (‘St. Petersburg Declaration’) (<https://www.legal-tools.org/doc/c951bc/>).

⁹ Stefan Oeter, “Methods and Means of Combat”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd. ed., Oxford University Press, 2013, para. 407.

¹⁰ See, for example, William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 278 (<https://www.legal-tools.org/doc/b7432e/>); Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, International Committee of the Red Cross, 2009, Rule 77 (‘ICRC CIHL Study’) (<https://www.legal-tools.org/doc/78a250/>); and Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, 2014, p. 402 (<https://www.legal-tools.org/doc/d9a80d/>).

¹¹ See W. Hays Parks, “Conventional Weapons and Weapons Review”, in *Yearbook of International Humanitarian Law*, 2005, vol. 8, p. 89.

amendment on expanding weapons was discussed and adopted since expanding bullets are lawful in peacetime and used by several States' law enforcement agencies to avoid harming bystanders in, for instance, riot control situations or avoid dangerous ricochets in confined spaces such as airplanes and ships. While determining whether the use of expanding bullets constitute a war crime may be complex in international armed conflicts¹² it may be even more complex in non-international armed conflicts.¹³

While the elements of crime was adopted with identical wording as those for the corresponding crime in international armed conflicts (except for the nature of the armed conflict), the amendment stated that employing bullets which expand or flatten easily in the human body is a serious violation of the law applicable in non-international armed conflicts, and expressed the understanding that “the crime is committed only if the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law” (ICC ASP, Res.5, 2010). And further that the elements of crime could assist in interpretation and application “in that *inter alia* they specify that the conduct took place in the context of and was associated with an armed conflict, which consequently confirm the exclusion from the Court’s jurisdiction of law enforcement situations” (ICC ASP, Res.5, 2010).

Upon acceptance of the amendment, the Czech Republic issued a declaration that it interprets the amendment in regard to expanding bullets as: “(ii) The prohibition to employ bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, does not apply to the use of such bullets during activities of police nature in the context of law enforcement and maintenance of public order, which do not constitute direct participation an armed conflict, such as rescuing hostages and neutralizing civil aircraft hijackers”.¹⁴

¹² For example, in regard to terrorists or peace operations, see Michael Cottier/David Krivánek, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 466 (<https://www.legal-tools.org/doc/040751/>).

¹³ Robert Cryer, “Hague law comes home: Prosecuting weapons offences at the International Criminal Court”, in *Acta Juridica*, 2003, vol. 238, pp. 246–247.

¹⁴ ICC ASP, Res.5, 2010, Declaration of the Czech Republic (available on the UN Treaty Collection’s web site).

iii. Material Elements:

The material elements of crimes to Article 8(2)(e)(xv) of the Statute require that the perpetrator used certain prohibited bullets which were prohibited because they expand or flatten easily in the human body.

a. The Perpetrator Employed certain Prohibited Bullets (Element 1):

The wording “employed” demonstrates that the bullets must have been used. While the provision and the elements of crime are termed in plural (“bullets”), it is unclear if this should be read as a requirement that more than one bullet are in fact employed for criminal liability. Cryer has noted that plural is not used in the weapon provisions of Article 8(2)(b)(xvii) or (xviii) but saw no reason for a requirement that several bullets have been used (Cryer, 2003, p. 245 fn. 36). Most likely the plural form is simply a result of using the same formulation as in The Hague Declaration IV.

b. The Bullets Were Such that Their Use Violates the International Law of Armed Conflict Because They Expand or Flatten Easily in the Human Body (Element 2):

The wording of the provision, the origin of the prohibition (as described above) and the material elements of the crime demonstrate that the offence is based on the (designated or modified) *effect* of the bullets or projectiles. The second element entails that the Court examines whether the used bullets are indeed prohibited under international law of armed conflict, and for the reason that they expand or flatten easily inside the human body.

The war crime thus covers only bullets which have the effect of expanding or flatten easily inside the human body. The word “easily” serves as a threshold and to distinguish lawful bullets which malfunction upon penetrating a human body. The war crime includes the ‘dum-dum’ bullet as well as other bullets which expand or flatten easily in the human body, for instance (most) soft-nosed or hollow-point bullets. The wording “such as” demonstrates that the provision is not exhaustively limited to “bullets with a hard envelope which does not entirely cover the core” or bullets which “is pierced with incisions”; these are rather examples of prohibited bullets. It has been argued that the prohibition of the use of such bullets includes shotguns, projectiles of a nature to burst or deform while penetrating the human body, projectiles of a nature to tumble early in the human body, projectiles of a nature to cause shock waves leading to extensive tissue damage or even lethal shock (Oeter, 2013, para. 407). Which bullets are cov-

ered by the war crime is still unclear, though it should be assessed based on the wounding effects that they have inside the human body, and whether they are construed (for example, sufficiently jacketed) to prevent that they expand or flatten easily inside the human body. The provision covers both bullets which are produced with the designated effect of expanding or flattening within the human body in its normal and expected use, and standard bullets which have later been modified or converted to have such effects (for example, if an ordinary soldier removes the cover of a full-metal jacketed bullet at the battlefield).¹⁵ The word “easily” serves to distinguish lawful bullets. This means that lawful bullets which malfunction and thereby deform inside a body are not covered by the provision, unless they have been modified to have the effect of expanding or flattening inside the human body.

The insertion in element 2 of “*violates the international law of armed conflict*” has also been seen as a manner of excluding lawful use of expanding bullets for law enforcement operations unrelated to the armed conflict.¹⁶

iv. Mental Elements:

The crime includes the two common mental elements required for war crimes and one which is specific to this offence. Element 2 requires no knowledge by the perpetrator as regards to their illegality, simply that the bullets are prohibited under international law because they expand or flatten easily in the human body; an objective assessment. It seems as the “default” *mens rea* (on intent and knowledge) in Article 30 of the ICC Statute is replaced with awareness of the nature of the bullets, by element 3 (that is, not their illegality).

a. The Perpetrator Was Aware that the Nature of the Bullets Was Such that Their Employment Would Uselessly Aggravate Suffering or the Wounding Effect (Element 3):

The third element was meant to formulate a *mens rea* which is balanced with what an individual soldier can be expected to know about specific bullets and their damaging effects. There is thus no strict liability for using

¹⁵ Cottier/Křivánek, 2016, p. 466 and Christine Byron, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court*, Manchester University Press, 2009, p. 134.

¹⁶ Knut Dörmann, *Elements of war crimes under the Rome statute of the International Criminal Court: sources and commentary*, Cambridge University Press, 2003, p. 292. See also the *nexus* requirement below.

prohibited bullets. The necessary knowledge required by the perpetrator relates to the nature of the bullets; that it was such that their employment would uselessly aggravate suffering or the wounding effect. No knowledge is required pertaining to the illegality of the bullets, only to the nature of their wounding effect (see also Byron, 2009, p. 135). In effect this excludes criminal liability for persons who use such bullets without knowing so, or without awareness of the nature of their effect. Hence, if someone else has charged the weapon with such bullets without the person firing the weapon knowing or if the person firing the weapon is assured that the bullets are not of unlawful nature and he or she acts in good faith, or the person firing the weapon is in other ways unaware of the nature of the bullets used he or she should not be criminal liable.¹⁷

One scholar has argued that the third element should be interpreted as requiring a “specific intent (*mens rea*) to employ small arms munitions against combatants to ‘uselessly aggravate suffering’ for there to be a criminal offense”.¹⁸ Hays Parks has further argued that “[u]selessly aggravate” means the injury must be excessive when balanced against military and other requirements for the projectile”. This interpretation results in sort of a ‘military necessity-exception’ (Hays Parks, 2013). Other scholars have argued that the third element should rather be seen as an emphasis of the objectives behind The Hague Declaration. This view is based on that the wording “uselessly aggravate” derives from the St Petersburg Declaration and argues that given that The Hague Declaration IV and customary international law contain a prohibition without exceptions, element 3 cannot be read as establishing a ‘military necessity exception’ to criminal liability. Cottier and Křivánek has held that “in view of the objective of the 1899 Hague Declaration, element 3 clearly cannot mean that a person knowing that the expanding or flattening effect of a bullet offers a military advantage, automatically becomes immune to criminal responsibility” (Cottier and Křivánek, 2016, p. 467; see also Garraway, 1999). Cryer has held: “The probable meaning is that the perpetrator will need to know that there is something about the particular bullets that makes them more dangerous. It must be remembered that the value judgement that the suffering is use-

¹⁷ Charles Garraway, “Article 8(2)(b)(xix)-Employing prohibited bullets”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, pp. 793–794; and Cryer, 2003, p. 244.

¹⁸ W. Hays Parks, “SOST: A Way Forward in Contemporary Understanding of the 1899 Hague Declaration on Expanding Bullets”, in *Small Arms Defense Journal*, 2013, vol. 5.

lessly aggravated does not need to be made by the accused” (Cryer, 2003, p. 245).

It is thus not clear how the specific *mens rea* element of this provision will be interpreted by the Court. Though it may be difficult to establish the exact meaning of element 3, it should be read in conjunction with the Statute as a whole and the underlying prohibition in customary international law (accordingly it may be contrasted with, for example, the elements to Article 8(2)(b)(xiii) whose formulation and element 5 do provide such exception, in a manner which is absent from Articles 8(2)(b)(xix) and 8(2)(e)(xv)).

In relation to this, the third element may allow a possible defence of mistake of fact (see Commentary to Article 32 of the Statute, see also Byron, 2009, p. 135 on defences of mistake of law and mistake of fact relating to elements 2 and 3). The provision may also raise issues relating to superior orders.¹⁹

b. The Conduct Took Place in the Context of and Was Associated with a Non-International Armed Conflict (Element 4):

The fourth element is common to all war crimes.²⁰ As it requires that the conduct took place in the context of and was associated with an armed conflict not of an international character it serves to ensure that the employment of the prohibited bullets had a sufficient *nexus* to the (non-international) armed conflict and to exclude lawful use of such bullets in law enforcement unrelated to the armed conflict.²¹

The amendment and the declaration made by the Czech Republic (which met no objections) as quoted above demonstrate that States were

¹⁹ See Commentary to Article 33 of the Statute; Charles Garraway, “Superior orders and the International Criminal Court: Justice delivered or justice denied”, in *International Review of the Red Cross*, 1999, vol. 81, no. 836 (‘Garraway, IRRC, 1999’).

²⁰ See the Elements of Crimes for Article 8(2)(a)-(b) and ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 244 (‘*Katanga and Ngudjolo*, 30 September 2008’) (<https://www.legal-tools.org/doc/67a9ec/>).

²¹ See also Robin Geiß, “Poison, Gas and Expanding Bullets: The Extension of the List of Prohibited Weapons at the Review Conference of the International Criminal Court in Kampala”, *Yearbook of International Humanitarian Law*, 2010, vol. 13; Samuel Longuet, “Permitted for law enforcement purposes but prohibited in the conduct of hostilities: The case of riot control agents and expanding bullets”, *International Review of the Red Cross*, 2016, vol. 98, no. 901.

particularly concerned with and wished to emphasize the distinction between lawful use of expanding bullets in law enforcement situations and the serious violation of the law of non-international armed conflicts of using bullets which expand or flatten easily in the human body. Based on that international criminal law has clearly demonstrated that also law enforcement officials can be held responsible for war crimes and that situations claimed to be law enforcement or counter-terrorism can result in war crimes,²² the distinction should be based on the objective of the conduct, the nature of the operation and whether the conduct took place in the context of and was associated with an armed conflict not of an international character.

Generally, the Court has emphasized and applied the case law of the ICTY on the *nexus* requirement.²³ Accordingly, the Court has held that the *nexus* element is met when “the alleged crimes were closely related to the hostilities”, meaning that the armed conflict “must play a substantial role in the perpetrator’s decision, in his ability to commit the crime or in the manner in which the conduct was ultimately committed”. The Court further held that “[i]t is not necessary, however, for the armed conflict to have been regarded as the ultimate reason for the criminal conduct, nor must the conduct have taken place in the midst of the battle” (*Katanga and Ngudjolo*, 30 September 2008, para. 380).

c. The Perpetrator Was Aware of the Factual Circumstances that Established the Existence of an Armed Conflict (Element 5):

The requirement that the perpetrator was aware of these factual circumstances establishing an armed conflict in element 5 is common to the elements of crimes to all war crimes of (non-international) armed conflict (see the Elements of Crimes for Article 8(2)(c)-(e), and compare *Katanga and Ngudjolo*, 30 September 2008, para. 244). It is thus not required that the perpetrator has made the legal analysis that the situation constitutes an

²² See, for example, ICTY, *Tarculovski*, Trial Chamber II, Judgement, 10 July 2008, IT-04-82-T, paras. 571–572 (<https://www.legal-tools.org/doc/939486/>).

²³ See, for example, references to ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, paras. 68 and 70 (<https://www.legal-tools.org/doc/866e17/>), and *Prosecutor v. Kunarac et al.*, Appeals Chamber, Judgment, 12 June 2002, IT-96-23 and IT-96-23/1-A, para. 59 (<https://www.legal-tools.org/doc/029a09/>) in *Katanga and Ngudjolo*, 30 September 2008, paras. 380–382.

armed conflict not of an international character but it suffices that he or she is aware of the factual circumstances.

Cross-reference:

Article 8(2)(b)(xix).

Doctrine:

1. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, pp. 379–476 (<https://www.legal-tools.org/en/doc/01addc/>).
2. Christine Byron, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court*, Manchester University Press, 2009.
3. Michael Cottier and David Křivánek, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 465–467 (<https://www.legal-tools.org/doc/040751/>).
4. Robin Geiß, “Article 8, War Crimes”, in Triffterer and Ambos (eds.), 2016, pp. 569–574.
5. Robert Cryer, “Hague law comes home: Prosecuting weapons offences at the International Criminal Court”, *Criminal Justice in a New Society*, in *Acta Juridica*, 2003, vol. 238, pp. 238–255.
6. Knut Dörmann, *Elements of war crimes under the Rome statute of the International Criminal Court: sources and commentary*, Cambridge University Press, Cambridge, 2003.
7. Charles Garraway, “Article 8(2)(b)(xix)-Employing prohibited bullets”, in Roy S. Lee (ed.), *The International Criminal Court: the making of the Rome Statute : issues, negotiations, results*, Kluwer Law International, The Hague, 1999.
8. Charles Garraway, “Superior orders and the International Criminal Court: Justice delivered or justice denied”, in *International Review of the Red Cross*, 1999, vol. 81, no. 836.
9. Robin Geiß, “Poison, Gas and Expanding Bullets: The Extension of the List of Prohibited Weapons at the Review Conference of the Interna-

- tional Criminal Court in Kampala”, in *Yearbook of International Humanitarian Law*, 2010, vol. 13, pp. 337–352.
10. Samuel Longuet, “Permitted for law enforcement purposes but prohibited in the conduct of hostilities: The case of riot control agents and expanding bullets”, in *International Review of the Red Cross*, 2016, vol. 98, no. 901, pp. 249–274.
 11. W. Hays Parks, “Conventional Weapons and Weapons Review”, in *Yearbook of International Humanitarian Law*, 2005, vol. 8, pp. 55–142.
 12. W. Hays Parks, “SOST: A Way Forward in Contemporary Understanding of the 1899 Hague Declaration on Expanding Bullets”, in *Small Arms Defense Journal*, 2013, vol. 5.
 13. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross, 2009, vol. 1 (chapter 25) and vol. 2 (chapter 25) (<https://www.legal-tools.org/en/doc/78a250/>).
 14. Stefan Oeter, “Methods and Means of Combat”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd. ed., Oxford University Press, 2013, pp. 115–230.
 15. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 277–284 (<https://www.legal-tools.org/doc/b7432e/>).

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Article 8(2)(f)

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

General Remarks:

Subparagraph (f) is an express limitation to the scope of application of subparagraph (e) that enumerates crimes committed in a non-international armed conflict.¹ It is undoubtedly the most discussed Article in academic literature as it conveys the impression that there are two types of non-international armed conflicts under the ICC Statute: Article 8(2)(c) conflicts as limited by subparagraph (d) and Article 8(2)(e) conflicts as limited by subparagraph (f). It appears to adopt the *Tadić* jurisprudence, though with a difference in the wording.²

Analysis:

Article 8(2)(f) states that “Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”.

i. Scope of Application:

Article 8(2)(f) limits the application of subparagraph (e) by first providing a minimum threshold of applicability and secondly spelling out the re-

¹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 225 (*‘Bemba, 15 June 2009’*) (<https://www.legal-tools.org/doc/07965c/>).

² ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72, para. 70 (*‘Tadić, 2 October 1995’*) (<https://www.legal-tools.org/doc/866e17/>).

quirements for a conflict to be characterised as an armed conflict of a non-international nature. The first sentence is identical to that expressed in subparagraph (d) and has been interpreted in the same way.³

The second sentence was initially considered by the Court as adducing an additional requirement (*Bemba*, 15 June 2009, para. 235), raising the threshold of a non-international armed conflict. Yet, later case-law suggests that this was not the case and there was only one type of non-international armed conflict (see Commentaries on subparagraph (c) and (e)). Yet, recent case-law reverts to the idea that there are two thresholds, clarifying that because of the way ‘protracted’ is defined this criterion is almost always fulfilled when the requirements for (c) are met (*Bemba*, 21 March 2016, paras. 138–139).

Subparagraph (f) second sentence requires:

1. the armed conflict to take place between governmental authorities and organised armed groups or between such groups (see Commentary on subparagraph (e)); and
2. the armed conflict to be protracted (see also *Lubanga*, 14 March 2012, para. 536; *Bemba*, 21 March 2016, paras. 138–140).

Whilst in subparagraph (f) it is the armed conflict that needs to be protracted, in the ICTY case-law it is the violence that must be protracted (*Tadić*, 2 October 1995, para. 70). The temporal connotation of ‘protracted’ has often been overlooked (as acknowledged by the ICTY)⁴ yet, it is implied in two separate, though related contexts:

- Linked to the requirement that the conflict be of a certain intensity.

The Trial Chamber in *Bemba* explains that whilst the concept of “protracted armed conflict” has not been expressly addressed in the case-law it features as part of the assessment of the intensity of the conflict (*Bemba*, 21 March 2016, para. 139). Indeed, when discussing the intensity requirement, the Court examines the length of the conflict as one (that is,

³ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgment, 7 March 2014, ICC-01/04-01/07-3436, paras. 1187 and 1216 (‘*Katanga*, 7 March 2014’) (<https://www.legal-tools.org/doc/f74b4f/>); *Prosecutor v. Lubanga*, Trial Chamber I, Judgment, 14 March 2012, ICC-01/04-01/06, para. 538 (‘*Lubanga*, 14 March 2012’) (<https://www.legal-tools.org/doc/677866/>); *Prosecutor v. Bemba*, Trial Chamber III, Judgment, 21 March 2016, ICC-01/05-01/08, para. 138 (‘*Bemba*, 21 March 2016’) (<https://www.legal-tools.org/doc/edb0cf/>).

⁴ ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Trial Chamber, Judgement, 10 July 2008, IT-04-82-T, para. 186 (<https://www.legal-tools.org/doc/939486/>).

“the spread [of attacks] [...] over a period of time” (*Lubanga*, 14 March 2012, para. 538) of many other elements. It has found that hostilities covering a period of four and a half months (*Bemba*, 21 March 2016, paras. 663), five months (*Bemba*, 15 June 2009, paras. 235 and 255), seven months,⁵ 12 months,⁶ 16 months⁷ and 17 months (*Katanga*, 7 March 2014, para. 1217) are protracted but this may not solely be due to the length of the conflict. Other factors play a role in deciding whether the conflict has reached the required intensity (see Commentary on subparagraph (e)).

- Linked to the requirement that the armed group be organised.

Directly referring to the adjective “protracted” in subparagraph (f) the ICC explains that the organised armed group must “have the ability to plan and carry out military operations for a prolonged period of time” (*Lubanga*, 29 January 2007, para. 234; *Mbarushimana*, 16 December 2011, para. 103; see also *Katanga*, 7 March 2014, para. 1185; *Lubanga*, 14 March 2012, para. 536). This interpretation is based on Article 1(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts that requires the dissident armed forces to be able “to carry out sustained and concerted military operations”,⁸ albeit decoupled from the requirement of territorial control, and the *Tadić* definition of an armed conflict (*Tadić*, 2 October 1995, para. 70). It must be added that the words “prolonged” and “protracted” have both been translated into French as “prolongé” but do not seem to have been given a specific temporal connotation.

The Court has specifically mentioned that there is no requirement under the ICC Statute for the armed group “to exert control over a part of the territory” (*Bemba*, 15 June 2009, para. 236; *Lubanga*, 14 March 2012,

⁵ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, paras. 236–237 (*‘Lubanga*, 29 January 2007’) (<https://www.legal-tools.org/doc/b7ac4f/>).

⁶ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 107 (*‘Mbarushimana*, 16 December 2011’) (<https://www.legal-tools.org/doc/63028f/>).

⁷ ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309, para. 33 (*‘Ntaganda*, 9 June 2014,’) (<https://www.legal-tools.org/doc/5686c6/>).

⁸ Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (*‘AP II’*) (<https://www.legal-tools.org/doc/fd14c4/>).

para. 536; *Katanga*, 7 March 2014, para. 1186). As noted by the Court itself (*Bemba*, 15 June 2009, para. 236; *Lubanga*, 14 March 2012, para. 536) this clearly departs from Article 1(1) AP II. That being said, territorial control is sometimes mentioned (for instance, *Ntaganda*, 9 June 2014, para. 34) but as an element of the degree of the intensity of the conflict.⁹ Likewise, the Court has specified that there is no express need for the organised armed group to be under responsible command (*Lubanga*, 14 March 2012, para. 536) as it is only one of the elements to determine whether the group is organised (*Bemba*, 21 March 2016, para. 136).

Cross-reference:

Article 8(2)(d).

Doctrine:

1. Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, pp. 32–79 (<https://www.legal-tools.org/doc/415188/>).
2. Michael Bothe, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 417–18 (<https://www.legal-tools.org/doc/01addc/>).
3. Antonio Cassese, *International Criminal Law*, 3rd. ed., Oxford University Press, 2013, pp. 62–83 (<https://www.legal-tools.org/doc/7ca295/>).
4. Robert Cryer, Darryl Robinson and Sergey Vasiliev (eds.), *An Introduction to International Criminal Law and Procedure*, 4th. ed., Cambridge University Press, 2019, pp. 259–296.
5. Anthony Cullen, “War Crimes”, in William A. Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law*, Routledge, London, 2011, pp. 139–54 (<https://www.legal-tools.org/doc/780dbc/>).
6. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2002, pp. 82–393 (<https://www.legal-tools.org/doc/b07fe3/>).

⁹ ICC, *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Judgment, 27 September 2016, ICC-01/12-01/15, para. 49 (<https://www.legal-tools.org/doc/042397/>).

7. Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court*, Cambridge University Press, 2014, pp. 279–285 (<https://www.legal-tools.org/doc/b7505c/>).
8. William A. Schabas, *An Introduction to the International Criminal Court*, 6th. ed., Cambridge University Press, 2020, pp. 136–139 (<https://www.legal-tools.org/doc/e9fb2f/>).
9. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 213–300 (<https://www.legal-tools.org/doc/b7432e/>).
10. Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, 2014, pp. 192–195 (<https://www.legal-tools.org/doc/d9a80d/>).
11. Andreas Zimmerman and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 528–532, 574–577 (<https://www.legal-tools.org/doc/040751/>).

Author: Noëlle Quénivet.

Article 8(3)

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Paragraph 3 is a saving clause taken from Article 3(1) of the second Additional Protocol.¹ The provision may justify legitimate actions taken on behalf of the Government of a State in which an internal armed conflict is taking place and its armed forces, but not actions taken by non-state groups. The reference to “legitimate means” should be interpreted in a way that the saving clause does not destroy the objects and purposes of subparagraphs 2(c) and (e).

Doctrine:

1. Michael Bothe, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 423–24 (<https://www.legal-tools.org/doc/01addc/>).
2. Andreas Zimmerman and Robin Geiß, “Article 8, War Crimes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 577–9 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

¹ Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/fd14c4/>).

Article 8 bis

Article 8 bis³ Crime of Aggression [...]

³ Inserted by resolution RC/Res.6 of 11 June 2010.

General Remarks:

The crime of aggression criminalizes the planning, preparation, initiation and execution of aggressive use of force from one state against another. The crime of aggression is a leadership crime, requiring the perpetrator to have been in a powerful position in the state that committed the act of aggression. Unlike other crimes in the ICC Statute, it is without application to leaders of non-state groups. The Court will exercise jurisdiction of the crime of aggression in accordance with Articles 15 *bis* and 15 *ter*. The definition of aggression in this Article is based largely on the UN General Assembly Definition of Aggression of 14 December 1974.¹

Preparatory Works:

The crime of aggression has been listed as a crime under Article 5 of the ICC Statute since 1998, however the Court's jurisdiction over the crime was made dependent on the Assembly of State Parties agreeing on a definition in accordance with the now deleted Article 5(2). In 2002 the ASP decided to establish a Special Working Group on the Crime of Aggression ('SWGCA'), which was to submit proposed provisions to a future Review Conference.² The SWGCA draft amendments were the starting point for the discussions at the Kampala Review Conference in 2010, where Articles 8 *bis*, 15 *bis*, 15 and 25(3) *bis* were adopted.

The main areas of controversy for the SWGCA, and later for the Review Conference, were the definition of 'an act of aggression'; the individual conduct within the act; and the exercise of jurisdiction. The first two sets of issues are covered by this Article, whereas the question of jurisdiction is dealt with under Articles 15 *bis* and 15 *ter*.

¹ Definition of Aggression, UN Doc. A/RES/3314(XXIX), 14 December 1974 ('3314 Definition') (<https://www.legal-tools.org/doc/752c30/>).

² ICC ASP, Continuity of Work in Respect of the Crime of Aggression, Resolution ICC-ASP/1/Res.1, 9 September 2002 (<https://www.legal-tools.org/doc/7ecd13/>).

The challenge for the SWGCA when defining ‘act of aggression’ for the purpose of the ICC Statute was to find a definition inclusive enough to be effective, but narrow enough to exclude potentially justifiable uses of force. It was also considered as important that it should remain close to the definition under customary international law.

Acts of aggression have long been held to be grave violations of the prohibition of the use of force as regulated in Article 2(4) of the UN Charter. While it has been agreed that not all acts prohibited by Article 2(4) constitute aggression, it has proven difficult to draw the line between aggression and ‘mere uses of force’. This has not been made easier by the uncertainty surrounding the scope and definition of prohibition of the use of force and its exceptions. However, despite significant disagreements, there are some uses of force that lie outside of this sphere of uncertainty and it has been possible to reach at least some agreement on how to define ‘act of aggression’.

In 1974, the General Assembly unanimously agreed on the definition of aggression annexed to the 3314 Definition, which sought to define aggression for the purposes of determinations by the Security Council under Chapter VII of the UN Charter. While most agreed that the 3314 Definition was the most effective starting point for finding a definition of aggression for the purpose of the ICC Statute, it was held to be problematic since it was written for the determination of state acts rather than for individual criminal responsibility. The use of the 3314 Definition as a starting point was further questioned due to its ambiguity and questionable status as customary international law. Despite suggestions to find a generic definition in customary international law on the crime of aggression, or to leave for the UN Security Council to determine whether an act of aggression had been committed, the solution was to keep the core Articles of the 3314 Definition in Article 8 *bis*(2) and to contextualize the definition for the purpose of the ICC Statute.³

The second set of issues for the SWGCA to consider was the individual elements of the crime. As an act of aggression generally is committed by a collective, it is essential to have tools to ascertain that every person is treated fairly in relation to his or her individual conduct. To agree on the

³ Stefan Barriga, “Negotiating the Amendments on the Crime of Aggression”, in Stefan Barriga and Claus Kress (eds.), *The Travaux Préparatoires of the Crime of Aggression*, Cambridge University Press, 2012, pp. 18–20 (<https://www.legal-tools.org/doc/19103c/>).

individual elements proved to be less difficult than agreeing on a definition of ‘act of aggression’, partly because the customary crime of aggression here could provide more guidance. The requirements for a perpetrator to have been involved in ‘the planning, preparation, initiation or execution’ of the act was based on Article 6(a) of the Charter of the International Military Tribunal in Nuremberg with ‘execution’ being held to be a modern synonym of ‘waging’.⁴ Still, there was some discussion on the level of influence that the leader needed to have over the acts of the State to be in a position to commit a crime of aggression. The crime of aggression has historically been a leadership crime, and with few exceptions it was also widely held in the negotiations that its application should be limited to leaders of states, rather than of non-state entities such as armed rebel groups.⁵ While the majority promoted the now adopted ‘control or direct’ test, some favoured the broader ‘power to shape or influence’ test which was held to be more consistent with the customary definition of the crime of aggression.⁶

Doctrine: For the bibliography, see the final comment on Article 8 *bis*.

Author: Marie Aronsson-Storrier.

⁴ Charter of the International Military Tribunal (annexed to the London Agreement), 8 August 1945, Article 6(a) (<https://www.legal-tools.org/doc/64ffdd/>).

⁵ Claus Kress and Leonie von Holtendorff, “The Kampala Compromise on the Crime of Aggression”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, p. 1090 (<https://www.legal-tools.org/doc/95212b/>).

⁶ Kevin Jon Heller, “Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression”, in *European Journal of International Law*, 2007, vol. 18, p. 479 (<https://www.legal-tools.org/doc/732579/>).

Article 8 *bis*(1): Crime of Aggression

For the purpose of this Statute, “crime of aggression”

Article 8 *bis*(1) is to be read together with Article 8 *bis*(2), which defines ‘act of aggression’ for the purpose of the ICC Statute.

The first paragraph aims to define the role that a person played in the act of aggression and the level of power he or she had within the State. The wording in Article 8 *bis*(1) reflects that a perpetrator does not have to take part of the whole process from beginning to end, but rather he or she needs to have planned, prepared, initiated or executed the act. The conduct verbs are taken directly from the Charter of the International Military Tribunal,¹ as well as from the ICL Draft Code on Crimes against the Peace and Security of Mankind,² with the exemption of ‘execution’, which has replaced ‘waging’ in order to take into account the modernization of the language. In assessing the individual conduct, Article 8 *bis*(1) should be read together with Article 25(3), 25(3) *bis* and Article 28, although the latter has been held to be very unlikely to apply in practice.³

There is some uncertainty regarding the scope of the different modes of participation, and it has been considered difficult to receive much guidance from the Post-World War II Tribunals in Nuremberg and Tokyo, which took a very broad approach to the interpretation of these verbs. It will be for the Court to make a more detailed determination of the nature and scope of the conduct verbs, while taking into account Article 22(2) in cases of ambiguity.

Doctrine: For the bibliography, see the final comment on Article 8 *bis*.

Author: Marie Aronsson-Storrier.

¹ Charter of the International Military Tribunal (annexed to the London Agreement), 8 August 1945, Article 6(a) (<https://www.legal-tools.org/doc/64ffdd/>).

² Draft Code of Crimes against the Peace and Security of Mankind with commentaries, in *Yearbook of the International Law Commission*, Vol. 2, Part 2, 1996, (<https://www.legal-tools.org/doc/5e4532/>).

³ Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 184 (<https://www.legal-tools.org/doc/280086/>).

Article 8 bis(1): Planning

planning,

The *planning* of an act of aggression can for example consist of participation in meetings where plans to attack another State are formulated. While it does not require the person to be alone in planning the act, it seems not to be sufficient that a person in a powerful position has verbally supported a plan that was already under way, unless in a way their conduct would be caught by Article 25(3).¹

Doctrine: For the bibliography, see the final comment on Article 8 bis.

Author: Marie Aronsson-Storrier.

¹ Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 187 (<https://www.legal-tools.org/doc/280086/>).

Article 8 *bis*(1): Preparation

preparation,

The *preparation* of an act of aggression includes a wide range of activities leading to a State having the capacity and possibility to commit the act. This includes military, economic, and diplomatic conduct and can for example consist of traditional assembling of troops on a border to the State to be attacked, as well as acts such as acquisition of weapons, and the liquidation of state assets in order to fund such purchases when this is done for the purpose of committing the act of aggression. It further includes diplomatic attempts to conceal the State's intentions to gain military advantage before an attack.¹

Doctrine: For the bibliography, see the final comment on Article 8 *bis*.

Author: Marie Aronsson-Storrier.

¹ Muhammad Aziz Shukri, "Individual Criminal Responsibility for the Crime of Aggression", in Roberto Bellelli (ed.), *International Criminal Justice – Law and Practice from the Rome Statute to Its Review*, Ashgate Publishing, Farnham, 2010, p. 528 (<https://www.legal-tools.org/doc/ad4448/>); International Military Tribunal, *United States of America, France, the United Kingdom and the Union of Soviet Socialist Republics v. Hermann Wilhelm Göring et al.*, Judgment, 1 October 1946, pp. 108–109 (<https://www.legal-tools.org/doc/45f18e/>).

Article 8 bis(1): Initiation

initiation

The *initiation* of an act of aggression refers to the decision taken immediately before the act to actually move ahead and commit it. This covers decisions on a strategic level, but not necessarily on an operational or tactical level. It may for example criminalize the conduct of a defence minister, military leader, or a president giving final orders to commit the act.¹

Doctrine: For the bibliography, see the final comment on Article 8 bis.

Author: Marie Aronsson-Storrier.

¹ Muhammad Aziz Shukri, “Individual Criminal Responsibility for the Crime of Aggression”, in Roberto Bellelli (ed.), *International Criminal Justice – Law and Practice from the Rome Statute to Its Review*, Ashgate Publishing, Farnham, 2010, p. 528 (<https://www.legal-tools.org/doc/ad4448/>); Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 188 (<https://www.legal-tools.org/doc/280086/>).

Article 8 *bis*(1): Execution

or execution,

The *execution* of an act of aggression includes decisions taken after commencement of the act, such as annexing occupied territory or to occupy territory after an initial aggressive act. This can notably include conduct by persons who were not at all involved in the initial stages of the act.¹

Doctrine: For the bibliography, see the final comment on Article 8 *bis*.

Author: Marie Aronsson-Storrier.

¹ Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 188 (<https://www.legal-tools.org/doc/280086/>).

Article 8 bis(1): Leadership Crime

by a person in a position effectively to exercise control over or to direct the political or military action of a State,

The leadership requirement in Article 8 bis(1) states that a “perpetrator was a person 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”. That leaders can be convicted under the ICC Statute is not exclusive for the crime of aggression, but it is the only crime where the perpetrator has to be in a leadership position.

“In a position to effectively exercise” requires the perpetrator to be in a *de facto* position, and includes not only people in formal positions, but rather anyone with a certain level of influence over the act of the State. It also excludes formal holders of office who are lacking real power. Suggested examples of non-governmental figures with *de facto* influence are prominent figures in business and religion. It should be noted, however, that the requirement that they should be in a position to ‘exercise control over or to direct the political and military action of the State’ has been held to be a very high threshold for non-formal office holders, making it unlikely that Article 8 bis will apply to such actors.¹

There are some uncertainties as to the application of the ‘control or direct’ test. Whereas, the ICJ has applied an ‘effective control’ test in the *Nicaragua v. United States* case with regard to a State’s level of control over an armed group,² and used it again in the *Genocide* case,³ the ICTY

¹ Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 181 (<https://www.legal-tools.org/doc/280086/>); Kevin Jon Heller, “Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression”, in *European Journal of International Law*, 2007, vol. 18, p. 470 (<https://www.legal-tools.org/doc/732579/>); Mauro Politi, “The ICC and the Crime of Aggression: A Dream that Came Through and the Reality Ahead”, in *Journal of International Criminal Justice*, 2012, vol. 10, p. 285 (<https://www.legal-tools.org/doc/cb3f6f/>).

² ICJ, *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment, 27 June 1986, para. 115 (<https://www.legal-tools.org/doc/046698/>).

³ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007 (<https://www.legal-tools.org/doc/5fed00/>).

instead preferred an ‘overall control’ test in *Tadic*.⁴ It remains to be seen to what extent the ICC will take guidance from these judgements when applying the ‘control or to direct’ test in Article 8 *bis*.

A further requirement under this paragraph is that a perpetrator needs to have had the certain position in the State which committed the act of aggression, and in cases where an entities status as a State will need to be decided upon, it will be for the Court to do so. The exclusion of non-State actors from the crime of aggression is an important difference from the other crimes in the ICC Statute and, despite being a largely undisputed solution, it has been criticized for not accounting for the reality of contemporary uses of force.⁵

Doctrine: For the bibliography, see the final comment on Article 8 *bis*.

Author: Marie Aronsson-Storrier.

⁴ ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Judgement, 15 July 1999, IT-94-1-A (<https://www.legal-tools.org/doc/8efc3a/>).

⁵ Noah Weisbord, “Conceptualizing Aggression”, in *Duke Journal of Comparative and International Law*, 2009, vol. 20, p. 7 (<https://www.legal-tools.org/doc/a8e632/>).

Article 8 bis(1): Character, Gravity and Scale

of an act of aggression which, by its character, gravity and scale,

According to Understanding 7, the three components of character, gravity and scale ‘must be sufficient to justify a “manifest” determination’, and the presence of one component will not suffice on its own.¹ While some argue that it is sufficient that two of the three components are present, as long as they together are strong enough to satisfy the standard,² others argue that the wording of this paragraph makes clear that all three components need to be present, albeit not to the same degree.³

Doctrine: For the bibliography, see the final comment on Article 8 bis.

Author: Marie Aronsson-Storrier.

¹ ICC ASP, The Crime of Aggression, Resolution RC/Res.6, 11 June 2010, Annex III, Understanding 7 (<https://www.legal-tools.org/doc/0d027b/>).

² Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, pp. 128–130 (<https://www.legal-tools.org/doc/280086/>).

³ Claus Kress and Leonie von Holtendorff, “The Kampala Compromise on the Crime of Aggression”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, p. 1207 (<https://www.legal-tools.org/doc/95212b/>); Tom Ruys, “Criminalizing Aggression: How the Future of the Law on the Use of Force Rests in the Hands of the ICC”, in *European Journal of International Law*, 2018 vol. 29, no. 3, p. 893.

Article 8 bis(1): Manifest Violation and Mens Rea

constitutes a manifest violation of the Charter of the United Nations.

In order for a crime of aggression to have been committed, an act of aggression as defined in Paragraph 2 must have constituted a “manifest violation” of the UN Charter by its character, gravity and scale. According to the drafted elements, this is an objective qualification, and the subjective experience of the victim State as a manifest violation is not sufficient. As the Elements of Crimes also state that “any of the acts referred to in Article 8 bis, paragraph 2, qualify as an act of aggression”, there has been some debate as to whether or not the ‘manifest violation’ requirement changes the threshold compared to the 1974 Definition of Aggression,¹ and compared to customary international law. Some argue that since the 3314 Definition already has a high threshold, and as only grave violations of the prohibition of the use of force constitutes aggression under *jus ad bellum*, it is not inconsistent with the law applicable on State conduct to require a violation to be ‘manifest’. Others similarly suggest that the ‘manifest violation’ requirement is a safeguard to make sure to exclude ‘grey areas’ of the law on the use of force, especially with regard to Humanitarian Intervention.² The influence of discussions on Humanitarian Intervention can also be seen in Understanding 6, which states that a determination of an act of aggression shall take into consideration 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”.³ While a suggestion to have an explicit exclusion for Humanitarian Interventions failed to gain support of the majority, this understanding aims to exclude acts with positive humanitarian consequences. It should be noted that the legal value of

¹ Definition of Aggression, UN Doc. A/RES/3314(XXIX), 14 December 1974 (‘3314 Definition’) (<https://www.legal-tools.org/doc/752c30/>).

² Mary Ellen O’Connell and Mirakmal Niyazmatov, “What is Aggression? Comparing the Jus ad Bellum and the ICC Statute”, in *Journal of International Criminal Justice*, 2012, vol. 10, pp. 203–204 (<https://www.legal-tools.org/doc/fl1be77/>); Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst (eds.), *An Introduction to International Criminal Law and Procedure*, 3rd. ed., Cambridge University Press, 2014, p. 321 (<https://www.legal-tools.org/doc/f691a2/>).

³ ICC ASP, The Crime of Aggression, Resolution RC/Res.6, 11 June 2010, Annex III, Understanding 6 (‘Resolution RC/Res.6, 2010’) (<https://www.legal-tools.org/doc/0d027b/>).

the understandings in Annex III is contested, and although there is agreement that they are not considered to be part of the text of the ICC Statute itself, there is disagreement on to what extent they bind the Court.⁴ According to some scholars the understandings are purely suggestions for interpretation, whereas others hold them as part of the context in which the crime of aggression is to be interpreted. It remains to be seen how they will be treated by the Court.

Another ‘grey area’ of *jus ad bellum* is the right to anticipatory self-defense. Despite some still arguing Article 51 of the UN Charter requires the actual occurrence of an armed attack, and that the adoption of the Article overrode the previous customary right to anticipatory self-defense, there is growing acceptance of the right to use force in anticipatory self-defense as long as it is conducted as a last resort where no peaceful means are available.⁵ The significant uncertainties around the temporality requirement of self-defence mean that it is possible that anticipatory self-defense adhering to the principle of necessity and conducted in a proportionate manner will not be considered a ‘manifest violation’ of the Charter rules.

Mens Rea

The *mens rea* requirement is found in Article 30 with some clarifying notes on the interpretation with regards to the Crime of Aggression in Annex II. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether or not the use of armed force was inconsistent with the UN Charter (Resolution RC/Res.6, 2010, Annex II, para. 2). There is also no need to prove that the perpetrator has made a legal evaluation as to the ‘manifest’ nature of the violation of the UN Charter (Resolution RC/Res.6,

⁴ Robert Heinsch, “The Crime of Aggression After Kampala: Success or Burden for the Future?”, in *Goettingen Journal of International Law*, 2010, vol. 2, no. 2, pp. 729–730 (<https://www.legal-tools.org/doc/955203/>); Kevin Jon Heller, “The Uncertain Legal Status of the Aggression Understandings”, in *Journal of International Criminal Justice*, 2012, vol. 10, pp. 230–231 (<https://www.legal-tools.org/doc/fb4f4e/>); Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, pp. 113–119 (<https://www.legal-tools.org/doc/280086/>); Beth Van Schaack, “Crime of Aggression and Humanitarian Intervention on Behalf of Women”, in *International Criminal Law Review*, 2011, vol. 11, pp. 487 (<https://www.legal-tools.org/doc/232a59/>).

⁵ Elisabeth Wilmshurst, “Principles of International Law on the Use of Force by States in Self-Defence”, Chatham House, ILP WP 05/01, 2005, pp. 4–5; James A. Green, “The *ratione temporis* elements of self-defence”, in *Journal on the Use of Force and International Law*, 2015, vol. 2, p. 106 (<https://www.legal-tools.org/doc/ea12ba/>).

2010, Annex II, para. 4). What is required is that the perpetrator was aware of the factual circumstances that established that the use of armed force was not only inconsistent with, but also a manifest violation of, the UN Charter (Resolution RC/Res.6, 2010, Annex II, Elements 5 and 6). A mistake of fact leading to a lack of *mens rea* is a ground for excluding criminal responsibility in accordance with Article 32.

Doctrine: For the bibliography, see the final comment on Article 8 *bis*.

Author: Marie Aronsson-Storrier.

Article 8 bis(2)

2. For the purpose of paragraph 1, “act of aggression” means 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. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

Article 8 bis(2) defines ‘act of aggression’ for the purpose of the ICC Statute. In deciding what constitutes an act of aggression, the paragraph relies heavily on Article 1 and 3 of the Definition of Aggression of 1974¹ and should be read together with Article 8 bis(1), which requires the act to be a ‘manifest violation’ of the rules of the UN Charter. Although there has been some discussion on how to interpret the insertion of “in accordance with [...] Resolution 3314“, this is not held to mean that the parts of the 3314 Definition that are not repeated in Article 8 bis(2) are directly applicable to the Court.²

The examples of acts of aggression listed in Article 3 of the 3314 Definition and in the present paragraph have previously been criticised for not being consistent with the definition of aggression under customary international law. While there seem to be little debate on whether occupation following a military intervention, bombardment of another State’s territory, and the sending of armed groups to use substantial force on another State’s territory, all constitute aggression under customary international law, other acts such as the allowance of territory to be used for act of aggression against third state are held to be more uncertain.³ This is not problematic with regard to States Parties, though it can create a potential defense for

¹ Definition of Aggression, UN Doc. A/RES/3314(XXIX), 14 December 1974 (‘3314 Definition’) (<https://www.legal-tools.org/doc/752c30/>).

² Claus Kress and Leonie von Holtendorff, “The Kampala Compromise on the Crime of Aggression”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, p. 1191 (<https://www.legal-tools.org/doc/95212b/>).

³ ICJ, *Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement, 19 December 2005 (‘*Armed Activities on the territory of the Congo*, 19 December 2005’) (<https://www.legal-tools.org/doc/8f7fa3/>); Separate Opinion of Judge Koijmans (<https://www.legal-tools.org/doc/5b8384/>) and Judge Elaraby (<https://www.legal-tools.org/doc/a6ca7f/>).

individuals from non-States Parties, where a situation has been referred to the Court by the Security Council in accordance with Article 15 *ter*.⁴ While the adoption of Article 8 *bis* strengthens the status of the listed examples as acts of aggression under customary international law, especially if it is ratified by a high number of States, this is not necessarily sufficient to change the customary definition.

Even though determinations of an act of aggression are not binding upon the Court, in accordance with Article 15 *bis*(9) and Article 15 *ter*(4), determinations by the Security Council and the International Court of Justice can still serve as significant guidance for the ICC when assessing whether an act of aggression has been committed. Still, it is important to remain careful when interpreting judgments and decisions of acts of aggression by the Security Council and the ICJ, as they are made in the context of *ius ad bellum*, rather than under international criminal law. It is often not necessary for the Security Council to determine whether there has been an act of aggression, as it is sufficient that it has been a “threat or breach to the peace” in accordance with Article 39 of the UN Charter for the full spectrum of Chapter VII measures to be available to the Council. That the Security Council or the ICJ has labelled an act as unlawful ‘use of force’ or ‘threat or breach of the peace’ rather than ‘act of aggression’ should therefore not be taken as a negative determination of whether an act of aggression has been committed.

The definition of acts as ‘armed attacks’ for the purpose of Article 51 of the UN Charter might provide some guidance. The ICJ has referred to the 3314 Definition in determining whether there has been an armed attack giving right to self-defense both in *Nicaragua* and in *Armed Activities*.⁵ It should be noted, however, that while the ICJ has referred to the 3314 Definition when assessing the existence of an armed attack, the relationship between ‘act of aggression’ and ‘armed attack’ is contested. Some consider the difference between ‘act of aggression’ and ‘armed attack’ to be purely

⁴ Marko Milanovic, “Aggression and Legality Custom in Kampala”, in *Journal of International Criminal Justice*, 2012, vol. 10, pp. 174–175 (<https://www.legal-tools.org/doc/f0907d/>).

⁵ ICJ, *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment, 27 June 1986 (<https://www.legal-tools.org/doc/046698/>); *Armed Activities on the territory of the Congo*, 19 December 2005.

contextual,⁶ whereas others hold that an ‘armed attack’ triggering a right to self-defense not necessarily would constitute an ‘act of aggression’.⁷

Though there was initially some discussion of whether or not the list in Article 8 bis(2) should be considered exhaustive, the list is by most read as open ended, a view supported by the wording of the Article. However, as regard all crimes, care shall still be taken in accordance with the principle of *nullum crime sine lege*, found in Article 22 of the Statute.⁸

One area of particular interest with regard to the reading of the list in this paragraph is that of cyber-attacks. Since such attacks do not fit directly with any of the examples given in the list below, it has been suggested that a cyber-attack could be covered under Article 8 bis where it constitutes a manifest violation of the rules of the UN Charter.⁹ It is to be seen which approach the Court will take to cyber-attacks in the future.

Doctrine: For the bibliography, see the final comment on Article 8 bis.

Author: Marie Aronsson-Storrier.

⁶ Mary Ellen O’Connell and Mirakmal Niyazmatov, “What is Aggression? Comparing the Jus ad Bellum and the ICC Statute”, in *Journal of International Criminal Justice*, 2012, vol. 10, p. 198 (<https://www.legal-tools.org/doc/flbe77/>).

⁷ Tom Ruys, *‘Armed Attack’ and Article 51 of the UN Charter; Evolutions in Customary Law and Practice*, Cambridge University Press, 2010, p. 139 (<https://www.legal-tools.org/doc/94bdae/>).

⁸ Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 103 (<https://www.legal-tools.org/doc/280086/>); Kress and von Holzendorff, 2010, p. 1191.

⁹ David Scheffer, “The Missing Pieces in Article 8 bis (Aggression) of the Rome Statute”, in *Harvard International Law Journal*, 2017, vol. 58, p. 85; Noah Weisbord, “Conceptualizing Aggression”, in *Duke Journal of Comparative and International Law*, 2009, vol. 20, pp. 19–20 (<https://www.legal-tools.org/doc/a8e632/>).

Article 8 bis(2)(a)

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

Invasion by armed forces, military occupation, or annexation of territory through the use of force are uncontroversial types of aggression. It has, however, been suggested that the requirement for an occupation to follow from an ‘armed attack’ is limiting and would exclude occupation following from threats and other coercive means.¹

The UN General Assembly explicitly referred to Article 3(a) of the Definition of Aggression of 1974² in a series of Resolutions from 1981 to 1992, when holding that Israel’s occupation of the Syrian Golan Heights constituted an act of aggression. It also referred to the 3314 Definition of Aggression regarding South Africa’s occupation of Namibia in 1982.³

The Security Council, which often avoids the term ‘aggression’, has used it on a number of occasions such as Resolution 546 regarding the military occupation and bombings by South Africa in Angola⁴ and Resolution 424 on Southern Rhodesia’s invasion of Zambia.⁵

Even though the Security Council did not describe Iraq’s invasion of Kuwait in 1990 as aggression, but merely as an illegal use of force triggering the need for collective action,⁶ the invasion is still widely held as an act

¹ Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 76 (<https://www.legal-tools.org/doc/280086/>).

² Definition of Aggression, UN Doc. A/RES/3314(XXIX), 14 December 1974 (‘3314 Definition’) (<https://www.legal-tools.org/doc/752c30/>).

³ Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights, UN Doc. A/RES/37/43, 3 December 1982 (<https://www.legal-tools.org/doc/fd351e/>).

⁴ Resolution 546 (1984), UN Doc. S/RES/546 (1984), 6 January 1984 (<https://www.legal-tools.org/doc/c31a0e/>).

⁵ Resolution 424 (1978), UN Doc. S/RES/424 (1978), 17 March 1978 (<https://www.legal-tools.org/doc/e5d326/>).

⁶ Resolution 660 (1990), UN Doc. S/RES/660 (1990), 2 August 1990 (<https://www.legal-tools.org/doc/ea4b03/>).

of aggression.⁷ The same is true for the invasion of Falkland Islands by Argentina in 1982, which was deemed a ‘breach of peace’ by the Security Council.⁸

Doctrine: For the bibliography, see the final comment on Article 8 bis.

Author: Marie Aronsson-Storrier.

⁷ Antonio Cassese, “On Some Problematical Aspects of the Crime of Aggression”, in *Leiden Journal of International Law*, 2007, vol. 20, no. 4, p. 845 (<https://www.legal-tools.org/doc/2c5743/>).

⁸ Resolution 502 (1982), UN Doc. S/RES/502 (1982), 3 April 1982 (<https://www.legal-tools.org/doc/ebef79/>).

Article 8 *bis*(2)(b)

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

The use of any weapons against the territory of another State which meets the criteria of manifest violation in Article 8 *bis*(1) constitutes an act of aggression. There are numerous examples of acts deemed as aggression that would fall under this section should the Court hold them to be sufficiently severe. Some examples are the Israeli bombing of the Osirak nuclear reactor in Iraq in 1981,¹ the attacks by Southern Rhodesia into Zambia,² and the air raid by Israel over Tunisia.³

Doctrine: For the bibliography, see the final comment on Article 8 *bis*.

Author: Marie Aronsson-Storrier.

¹ Armed Israeli aggression against the Iraqi nuclear installations and its grave consequences for the established international system concerning the peaceful uses of nuclear energy, the non-proliferation of nuclear weapons and international peace and security, Resolution 36/27 (1981), UN Doc. A/RES/36/27, 13 November 1981 (<https://www.legal-tools.org/doc/11549a/>).

² Resolution 424 (1978), UN Doc. S/RES/424 (1978), 17 March 1978 (<https://www.legal-tools.org/doc/e5d326/>).

³ Resolution 573 (1985), UN Doc. S/RES/573 (1985), 4 October 1985 (<https://www.legal-tools.org/doc/6c430e/>).

Article 8 bis(2)(c)

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

A blockade of ports and coasts are activities that halt the maritime transport to and from another State. A common example of this is the presence of warships controlling traffic in and out of a harbour or of coastal, territorial waters, as well as the mining of a harbour stopping boats and ships from entering or leaving. Two examples of blockade are those by the United States of Cuba during the Missile Crisis in 1962 and again of the Dominican Republic in 1965.¹

Doctrine: For the bibliography, see the final comment on Article 8 bis.

Author: Marie Aronsson-Storrier.

¹ Michael Glennon, “The Blank-Prose Crime of Aggression”, in *Yale Journal of International Law*, 2010, vol. 35, p. 93 (<https://www.legal-tools.org/doc/674699/>).

Article 8 *bis*(2)(d)

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

This sub-paragraph concerns the attack of the forces or fleets of a State, even where they are stationed in, or in transit through, a third State. There is no set requirement for the level of damage, or for the size of the force or fleet that is subject for attack, in order for this provision to apply. The ICJ has not ruled out the possibility for the destruction of a ‘single military vessel’ to constitute an ‘armed attack’ for the purpose of Article 51 of the UN Charter.¹ It has, however, been suggested that the use of the term ‘fleets’ in this provision aims to exclude attacks on a single, or a small group of, commercial vessels.²

Doctrine: For the bibliography, see the final comment on Article 8 *bis*.

Author: Marie Aronsson-Storrier.

¹ ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 6 November 2003, para. 72 (<https://www.legal-tools.org/doc/23c5c4/>).

² Yoram Dinstein, *War, Aggression and Self-Defence*, 5th. ed., Cambridge University Press, 2011, p. 217 (<https://www.legal-tools.org/doc/0cd4ee/>).

Article 8 bis(2)(e)

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

Article 8 bis(2)(e) is applicable in situations where a State initially has consented to the presence of the armed forces of another State, but where the second state either overstays its welcome, or in other ways uses its armed forces in breach of this agreement. A contravention of conditions can include both geographical scope and activities.¹

Doctrine: For the bibliography, see the final comment on Article 8 bis.

Author: Marie Aronsson-Storrier.

¹ ICJ, *Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement, 19 December 2005 (<https://www.legal-tools.org/doc/8f7fa3/>).

Article 8 *bis*(2)(f)

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

This provision establishes responsibility where a State has approved the use of its territory by another State for the purpose of attacking a third State. The provision has been criticised for confusing the use of force with assistance of the use of force by the means of State action.¹ It should be noted that acts under this provision also includes cases where a state allows another state to attack a third State's forces or fleets as regulated under Article 8 *bis*(2)(d).

Doctrine: For the bibliography, see the final comment on Article 8 *bis*.

Author: Marie Aronsson-Storrier.

¹ Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 76 (<https://www.legal-tools.org/doc/280086/>).

Article 8 bis(2)(g)

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

Article 8 bis(2)(g) regulates ‘indirect aggression’, where a State instead of using its armed troops uses armed bands, groups, irregulars or mercenaries to conduct the act of aggression. Similar provisions can be found in the Friendly Relations Declaration of 1970,¹ as well as in the ILC Draft Code on Offences against the Peace and Security of Mankind of 1954.² The inclusion of both groups and mercenaries shows that the aims of the group, whether political, ideological or economical, are unimportant for the application of this Statute; what matter is the extent to which the State in question has control over their actions.

While many violent activities by non-State actors do not meet the requirement of gravity and scale, this section asserts that when they do, a State controlling the non-State actor should not avoid responsibility because its own troops did not conduct the violent act.³ Further, while it is uncommon for non-State actors to commit acts that in themselves meet the threshold for an act of aggression, the ICJ has held that a series of incidents breaching the prohibition of the use of force can collectively amount to an armed attack. This might provide some guidance for the interpretation of this sub-paragraph.⁴

With regard to attribution, the ICJ, in *Nicaragua*, invented and applied the ‘effective control’ test in examining the required level of control

¹ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1985 (<https://www.legal-tools.org/doc/e6c77e/>).

² ILC, Draft Code of Offences against the peace and Security of Mankind, 28 July 1954 (<https://www.legal-tools.org/doc/dfbb5c/>).

³ Noah Weisbord, “Conceptualizing Aggression”, in *Duke Journal of Comparative and International Law*, 2009, vol. 20, p. 13 (<https://www.legal-tools.org/doc/a8e632/>).

⁴ Yoram Dinstein, *War, Aggression and Self-Defence*, 5th. ed., Cambridge University Press, 2011, p. 202 (<https://www.legal-tools.org/doc/0cd4ee/>); ICJ, *Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement, 19 December 2005, para. 146 (<https://www.legal-tools.org/doc/8f7fa3/>).

for actions being attributable for the State.⁵ The test was later rejected by the ICTY in *Tadić* which favoured a test of ‘overall control’ since it held the ‘effective control’ test to lack flexibility, but was reinforced by the ICJ in the *Genocide Case* in 2007, then acknowledging the importance of flexibility as to the circumstances of each case;⁶ The alternative basis ‘or substantial involvement therein’ seems to open up for less direct involvement in the activities of an armed group and include activities such as financing, providing of arms or other means, and training. Such activities failed to meet the threshold for an ‘armed attack’ in Nicaragua, which was criticized in the dissenting opinion of Judge Schwebel for failing to account for “the realities of the use of force in international relations”.⁷ It remains to be seen how the ICC will interpret ‘substantial involvement’ in relation to the requirements in Article 8 *bis*(1).

Cross-references:

Article 5(1)(d), 15 *bis*, 15 *ter* and 25(3) *bis*.

Doctrine:

1. Stefan Barriga, “Negotiating the Amendments on the Crime of Aggression”, in Stefan Barriga and Claus Kress (eds.), *The Travaux Préparatoires of the Crime of Aggression*, Cambridge University Press, 2012, pp. 3–57 (<https://www.legal-tools.org/doc/19103c/>).
2. Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilms-hurst (eds.), *An Introduction to International Criminal Law and Procedure*, 3rd. ed., Cambridge University Press, 2014, p. 321 (<https://www.legal-tools.org/doc/f691a2/>).
3. Yorah Dinstein, *War, Aggression and Self-Defence*, 5th. ed., Cambridge University Press, 2011, p. 217 (<https://www.legal-tools.org/doc/0cd4ee/>).

⁵ ICJ, *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment, 27 June 1986 (‘*Nicaragua v. United States*, 27 June 1986’) (<https://www.legal-tools.org/doc/046698/>).

⁶ ICTY, *Prosecutor v. Tadić*, Judgment, 15 July 1999, IT-94-1-A (<https://www.legal-tools.org/doc/8efc3a/>); ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007 (<https://www.legal-tools.org/doc/5fcd00/>).

⁷ *Nicaragua v. United States*, Dissenting Opinion of Judge Schwebel, 27 June 1986, para. 155 (<https://www.legal-tools.org/doc/5e03f7/>).

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4. Michael Glennon, “The Blank-Prose Crime of Aggression”, in *Yale Journal of International Law*, 2010, vol. 35, pp. 71–114 (<https://www.legal-tools.org/doc/674699/>).
 5. James A. Green, “The *ratione temporis* elements of self-defence”, in *Journal on the Use of Force and International Law*, 2015, vol. 2, pp. 97–118 (<https://www.legal-tools.org/doc/ea12ba/>).
 6. Robert Heinsch, “The Crime of Aggression After Kampala: Success or Burden for the Future?”, in *Goettingen Journal of International Law*, 2010, vol. 2, no. 2, pp. 713–743 (<https://www.legal-tools.org/doc/955203/>).
 7. Kevin Jon Heller, “The Uncertain Legal Status of the Aggression Understandings”, in *Journal of International Criminal Justice*, 2012, vol. 10, pp. 229–248 (<https://www.legal-tools.org/doc/fb4f4e/>).
 8. Kevin Jon Heller, “Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression”, in *European Journal of International Law*, 2007, vol. 18, pp. 477–497 (<https://www.legal-tools.org/doc/732579/>).
 9. Claus Kress and Leonie von Holtendorff, “The Kampala Compromise on the Crime of Aggression”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, pp. 1179–1217 (<https://www.legal-tools.org/doc/95212b/>).
 10. Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, pp. 76, 103, 113–119, 128–130, 181, 184, 187–188 (<https://www.legal-tools.org/doc/280086/>).
 11. Marko Milanovic, “Aggression and Legality Custom in Kampala”, in *Journal of International Criminal Justice*, 2012, vol. 10, pp. 165–187 (<https://www.legal-tools.org/doc/f0907d/>).
 12. Mary Ellen O’Connell/Mirakmal Niyazmatov, “What is Aggression? Comparing the *Jus ad Bellum* and the ICC Statute”, in *Journal of International Criminal Justice*, 2012, vol. 10, pp. 189–207 (<https://www.legal-tools.org/doc/flbe77/>).
 13. Mauro Politi, “The ICC and the Crime of Aggression: A Dream that Came Through and the Reality Ahead”, in *Journal of International Criminal Justice*, 2012, vol. 10, pp. 267–288 (<https://www.legal-tools.org/doc/cb3f6f/>).

14. Tom Ruys, ‘*Armed attack*’ and Article 51 of the UN Charter, *Evolutions in Customary Law and Practice*, Cambridge University Press, 2010, p. 139 (<https://www.legal-tools.org/doc/94bdae/>).
15. Muhammad Aziz Shukri, “Individual Criminal Responsibility for the Crime of Aggression”, in Roberto Bellelli (ed.), *International Criminal Justice – Law and Practice from the Rome Statute to Its Review*, Ashgate Publishing, Farnham, 2010, pp. 477–494 (<https://www.legal-tools.org/doc/ad4448/>).
16. Beth Van Schaack, “Crime of Aggression and Humanitarian Intervention on Behalf of Women”, in *International Criminal Law Review*, 2011, vol. 11, pp. 477–494 (<https://www.legal-tools.org/doc/232a59/>).
17. David Scheffer, “The Missing Pieces in Article 8 bis (Aggression) of the Rome Statute”, in *Harvard International Law Journal*, 2017, vol. 58, pp. 83–86 (<https://www.legal-tools.org/doc/232a59/>).
18. Noah Weisbord, “Conceptualizing Aggression”, in *Duke Journal of Comparative & International Law*, 2009, vol. 20, pp. 1–48 (<https://www.legal-tools.org/doc/a8e632/>).
19. Elisabeth Wilmhurst, *Principles of International Law on the Use of Force by States in Self-Defence*, International Law Program No. 05/01, Chatham House, Royal Institute of International Affairs, 2005, pp. 4–5.

Author: Marie Aronsson-Storrier.

Article 9(1)

Article 9⁴

Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of Articles 6, 7, 8 and 8 bis. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

[...]

⁴ As amended by resolution RC/Res.6 of 11 June 2010 (inserting the reference to article 8 bis).

The main purpose of the Elements of Crimes is to define the crimes with clarity, precision and specificity in order to meet the principle of legality, required for by criminal law. In both civil and common law systems a crime consists of material elements (the objective requirements, the *actus reus*) and mental elements (the subjective requirements: intent and/or knowledge, or *mens rea*).

The Elements of Crimes include material elements of three different types, which relate to conduct, consequence and circumstance (see reference in Article 30).

Unless otherwise provided, Article 30 provides the mental requirement. Thus, the principal mental elements in the Elements of Crimes stem from Article 30.

The wording “shall assist the Court” makes clear the non-binding nature of the Elements of Crimes. The provision appears to contradict Article 21(1)(a) which states that: “The Court shall apply: In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence”. However, in light of the negotiating history, the Elements of Crimes should be understood to have only persuasive value rather than binding force.

The present provision should be contrasted to Article 112(7)(a) which states that: “Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting”. The wording of Article 9(1) makes it clear that a two-thirds majority of the total members of the Assembly of States Parties, not just the States present and voting, is required for the adoption of the Elements of Crimes.

Doctrine: For the bibliography, see the final comment on Article 9.

Author: Mark Klamberg.

Article 9(2)(a)

2. Amendments to the Elements of Crimes may be proposed by: (a) Any State Party;

The right for any State Party to propose an amendment to a treaty stems from the sovereign equality of States. It should be noted that the Elements of Crimes are subject to a different procedure than the one designed for amendments of the ICC Statute.

It is not specified in Regulation 5(1) whether proposals from State Parties should be submitted to the Advisory Committee on Legal Texts. It appears likely that a State Party would submit a proposal for an amendment to an organ of the Assembly of States Parties. One alternative would be to adopt the same procedure as used for amendments of the Rules of Procedure and Evidence (Rule 3), whereby State Parties submit their proposals to the President of the Bureau of the Assembly of States Parties.

Cross-reference:

Regulation 5(1) Amendments to the Rules.

Doctrine: For the bibliography, see the final comment on Article 9.

Author: Mark Klamberg.

Article 9(2)(b)

(b) The judges acting by an absolute majority;

Provided that there are eighteen judges, an absolute majority requires the support of ten judges. According to Regulation 5(1) any proposal for amendments to the Elements of Crimes pursuant to Article 9 shall be submitted by a judge to the Advisory Committee on Legal Texts.

Cross-reference:

Regulation 5(1) Amendments to the Rules.

Doctrine: For the bibliography, see the final comment on Article 9.

Author: Mark Klamberg.

Article 9(2)(c)-1

(c) The Prosecutor.

In contrast to proposals from the judges, the use of the word “may” instead of “shall” in Regulation 5(1) appear to indicate that proposals for amendments to the Elements of Crimes can be submitted by the Prosecutor both to the Advisory Committee on Legal Texts and the appropriate organ of the Assembly of States Parties.

Cross-reference:

Regulation 5(1) Amendments to the Rules.

Doctrine: For the bibliography, see the final comment on Article 9.

Author: Mark Klamberg.

Article 9(2)(c)-2

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

The procedure for amending the Elements of Crimes is identical for the procedure of the adoption of the Elements of Crimes stated in paragraph 1. Thus, it is clear that a two-thirds majority of the total members of the Assembly of States Parties, not just the States present and voting, is required for the amendment of the Elements of Crimes.

Doctrine: For the bibliography, see the final comment on Article 9.

Author: Mark Klamberg.

Article 9(3)

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

The present provision indicates the relation between the ICC Statute and the Elements of Crimes is *lex superior derogat legi inferiori*, rather than *lex posterior derogat legi priori*. In other words, in the event of a conflict between the ICC Statute and the Elements of Crimes, the ICC Statute shall prevail. Thus, the non-binding nature of the Elements of Crimes is affirmed.

Doctrine:

1. Erika Gadirov and Roger Clark, “Article 9”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 619–643 (<https://www.legal-tools.org/doc/040751/>).
2. Herman von Hebel and Maria Kelt, “General Principles of Criminal Law and Elements of Crimes” in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 7–14.
3. Alain Pellet, “Applicable Law” in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, pp. 1059–62, 1077–78 (<https://www.legal-tools.org/doc/01addc/>).

Author: Mark Klamberg.

Article 10

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.

General Remarks:

Article 10 has no heading that would enlighten the purpose of the provision or clarify its content. When draft Article Y – eventually adopted as Article 10 – was suggested, it was namely envisaged that the provision could be a sub-paragraph to Article 5 (enumerating the crimes within the jurisdiction of the Court) and as such it would not have needed a heading.¹ The formulation “for purposes other than this Statute”, however, gives forth that the provision was adopted to affect the status given to Part 2 of the Statute outside the ICC context. According to Sadat, the desire was to ensure that “the codification of [...] international criminal law in the ICC Statute would not negatively impact either the existing customary international framework or the development of new customary law”.² Draft Article Y hence made the ICC negotiations easier by emphasizing that the goal of the negotiations was to adopt crime definitions for the purpose of ICC proceedings only and not to influence international law more generally. Article 10 is thus an article that postulates the “existence of two [...] regimes or corpora of international criminal law”,³ that is, an ICC regime and a customary international law regime.

While there is general agreement that the pivotal function of draft Article Y was to preserve existing international law in situations where the ICC Statute fell short of it (most notably in relation to war crimes), there

¹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2, 14 April 1998, p. 20 (<https://www.legal-tools.org/doc/fb8414/>); see further Otto Triffterer and Alexander Heinze, “Article 10”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 645–646 (<https://www.legal-tools.org/doc/040751/>).

² Leila Nadya Sadat, “Custom, Codification and Some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute”, in *DePaul Law Review*, 2000, vol. 49, pp. 910–911 (<https://www.legal-tools.org/doc/4cacef/>).

³ Antonio Cassese, “The Statute of the International Criminal Court: Some Preliminary Reflections”, in *European Journal of International Law*, 1999, vol. 10, no. 1, p. 157 (<https://www.legal-tools.org/doc/8087d2/>).

are different opinions about the extent to which the goal also was to prevent other types of legal changes. In this regard, Sadat has held that “the framers apparently intended that only the restrictive portions of the definitions of the crimes would remain locked within the ICC structure, not more progressive elements” (Sadat, 2000, p. 918). Bennouna, on his part, has argued that the aim of Article 10 was not only to “protect the position of the countries favouring a broader definition of war crimes”, but also to hinder “unease among those adhering to a more restrictive definition of crimes against humanity”.⁴ Bennouna’s interpretation finds support in the fact that the provision does not only address existing rules of international law, but also applies to developing rules. Sadat’s, on the other hand, in that the Article only refers to limiting or prejudicing interpretation.⁵ While the drafters’ intention with the provision is open to debate, Sadat’s interpretation is more functional in that it entails that international criminal law is not unnecessarily fragmented. To preserve the unity of international criminal law is important in that the ICC may have jurisdiction over individuals based on Security Council referrals of situations (Article 13) in which cases it is problematic if the ICC law departs from customary international law.⁶ It should also be noted that when amendments to the ICC Statute were adopted in 2010, including a definition of the crime of aggression, an understanding was attached to the amendment in which it was reaffirmed that the crime of aggression also can be prosecuted in relation to situations referred by the Security Council. At the same time, however, Article 10 is mentioned in relation to domestic jurisdiction over the crime of aggression, and it is emphasized that the ICC definition of the crime has been accepted “for the purpose of [..., the] Statute only”.⁷ As such, the understanding sends a conflicting message about the customary law relevance of ICC law and

⁴ Mohamed Bennouna, “The Statute’s Rules on Crimes and Existing or Developing International Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, p. 1102 (<https://www.legal-tools.org/doc/01addc/>).

⁵ Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, Transnational Publishers, Ardsley, 2002, p. 269 (<https://www.legal-tools.org/doc/3b71e2/>).

⁶ See further Marko Milanović, “Is the Rome Statute Binding on Individuals? (And Why We Should Care)”, in *Journal of International Criminal Justice*, 2011, vol. 9, no. 1, pp. 25 ff. (<https://www.legal-tools.org/doc/384f0e/>); and Sadat, 2002, pp. 262 and 269–271.

⁷ ICC ASP, The Crime of Aggression, 11 June 2010, Resolution RC/Res.6, Annex III (<https://www.legal-tools.org/doc/0d027b/>).

does not really answer how Article 10 should be interpreted. In a 2018 Pre-Trial Chamber decision regarding jurisdiction in relation to crimes originating from Myanmar, the Pre-Trial Chamber observed that: “under particular circumstances, the Statute may have an effect on States not Party to the Statute, consistent with principles of international law”.⁸ This decision, on its part, gives forth that the Rome Statute may have ICC-external effects.

The fact that the Article’s primary addressees are actors outside the Court makes it necessary to ask to what extent such actors are bound to follow provisions in the ICC Statute. It is, for sure, possible to have treaty provisions explaining the drafters’ intentions and to try to influence interpretations (see also Articles 22(3), 25(4) and 80). This being said, the behaviour of States in connection to the negotiation and ratification of international treaties plays a central role when State practice and *opinio juris* are assessed in connection to customary international law. As such, the participation of numerous States in the ICC negotiations and their subsequent ratification of the Rome Statute is something that cannot be completely ignored when the content of customary international law is considered (see for example Bennouna, 2002, p. 1106). The same also applies to State behaviour in treaty amendment procedures. From this perspective, it is not surprising that the case law of many international and regional courts contains references to Part 2 of the ICC Statute.⁹ In the *Furundžija* case, a Trial Chamber of the ICTY explicitly commented upon the legal relevance of Article 10 and found that:

[The ICC Statute] was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the General Assembly’s Sixth Committee on 26 November 1998. In many areas the Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States. Notwithstanding Article 10 of the Statute, the purpose of which is to ensure that existing or developing law is not “limited” or “prejudiced” by the Statute’s provisions, resort may be had *cum grano salis* to these provisions to help elucidate customary international law. De-

⁸ ICC, Pre-Trial Chamber I, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, ICC-RoC46(3)-01/18, 6 September 2018, paras. 44–45 (<https://www.legal-tools.org/doc/73aeb4/>).

⁹ For such references, see William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 336 (<https://www.legal-tools.org/doc/b7432e/>).

pending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.¹⁰

The case law of the various international and regional courts has made Schabas submit that “Article 10 appears to be largely ignored by the very bodies to whom it is directed, namely specialized tribunals engaged in the interpretation of international law” (Schabas, 2016, pp. 336–337).

As Article 10 of the ICC Statute primarily is directed to actors outside the Court, it is rarely mentioned in the case law of the ICC. In the *Al Bashir* case, the majority of the Pre-Trial Chamber, however, found that the Article “becomes meaningful insofar as it provides that the definition of the crimes in the Statute and the Elements of Crimes shall not be interpreted ‘as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.’”¹¹ What the judges exactly meant by this reference to Article 10 is not evident. Schabas, however, interprets the pronouncement to mean that the judges held that Article 10 supported their claim that it was not necessary to take into consideration customary international law when interpreting the ICC provision on genocide.¹² Furthermore, Article 10 has been mentioned in a dissenting opinion by Judge Kaul, where he found that Article 10 “reinforces the assumption that the drafters of the Statute may have deliberately deviated from customary rules”.¹³ As noted above, Article 10 indeed envisages a fragmented international criminal law.

¹⁰ ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Judgement, 10 December 1998, IT-95-17/1-T, para. 227 (<https://www.legal-tools.org/doc/e6081b/>). See also Robert Cryer, “Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study”, in *Journal of Conflict and Security Law*, 2006, vol. 11, no. 2, p. 251 (<https://www.legal-tools.org/doc/1c8b0e/>).

¹¹ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 127 (<https://legal-tools.org/doc/e26cf4/>).

¹² William A. Schabas, *An Introduction to the International Criminal Court*, 6th. ed., Cambridge University Press, 2020, p. 85 (<https://www.legal-tools.org/doc/e9fb2f/>).

¹³ ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Judgment, Dissenting Opinion of Judge Kaul, 31 March 2010, ICC-01/09-19, para. 32 (<https://www.legal-tools.org/doc/338a6f/>).

Finally, it should be noted that Article 10 limits its applicability to “this Part” referring to Part 2 of the ICC Statute containing provisions on jurisdiction, admissibility and applicable law. The international crimes definitions are placed in Part 2, but, for example, the provisions on individual criminal responsibility and grounds for excluding criminal responsibility are situated elsewhere (in Part 3). This gives rise to the question of to what extent the implications of the Rome Statute on the existing or developing rules of international law are different in other parts of the Statute. In this regard, Triffterer and Heinze have argued that the legal principle enshrined in Article 10 is applicable to the whole Statute. They base their argument on the drafting process of the provision:

by its drafting process it may be assumed that a limiting or prejudicing interpretation of all Articles outside Part 2, adopted as a compromise or those describing a status quo, should equally not bar the interpretation of “existing or developing rules of international law for purposes other than this Statute”. This applies for instance, to Article 25 [on individual criminal responsibility] (Triffterer and Heinze, 2016, p. 650; see also pp. 655–656).

While a detailed analysis of the relationship between customary international law and the ICC Statute lies beyond the scope of this commentary, the following should be noted: Firstly, Part 3 of the ICC Statute contains a provision similar to Article 10, namely Article 22(3), which stipulates that the *nullum crimen sine lege* provision shall not affect the characterization of any conduct as criminal under international law independently of the Statute.¹⁴ Secondly, when it comes to the modes of responsibility and grounds for excluding criminal responsibility, it is generally accepted that customary international law and ICC law do not always concur. For example, in connection to commission responsibility, the ICC has not adopted the joint criminal enterprise doctrine of the *ad hoc* tribunals¹⁵ and the ICTY, on its part, has found that co-perpetratorship responsibility *à la* ICC Article

¹⁴ On the relationship between Article 10 and 22(3), see Bruce Broomhall, “Article 22, Nullum Crimen Sine Lege”, in Triffterer and Ambos (eds.), 2008, pp. 962–963 (<https://www.legal-tools.org/doc/040751/>), and Susan Lamb, “Nullum Crimen, Nulla Poena Sine Lege”, in Cassese, Gaeta and Jones (eds.), 2002, p. 754.

¹⁵ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803, paras. 329, 335 and 338 (<https://www.legal-tools.org/doc/b7ac4f/>).

25(3)(a) “does not have support in customary international law”.¹⁶ As, however, the *ad hoc* international criminal tribunals primarily addressed atrocities that had occurred before the adoption of the ICC Statute, these tribunals have not had any reason to in detail consider to what extent, if any, the State Practice in connection to the adoption and ratification of the Rome Statute, or its amendment procedures, have changed customary international law.

Cross-references:

Articles 21(3) and 22(3).

Doctrine:

1. Mohamed Bennouna, “The Statute’s Rules on Crimes and Existing or Developing International Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd ed., Oxford University Press, 2002, pp. 1101–1107 (<https://www.legal-tools.org/doc/01addc/>).
2. Bruce Broomhall, “Article 22”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 949–966 (<https://www.legal-tools.org/doc/040751/>).
3. Antonio Cassese, “The Statute of the International Criminal Court: Some Preliminary Reflections”, in *European Journal of International Law*, 1999, vol. 10, no. 1, pp. 144–171.
4. Robert Cryer, “Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study”, in *Journal of Conflict and Security Law*, 2006, vol. 11, no. 2, pp. 239–263 (<https://www.legal-tools.org/doc/1c8b0e/>).
5. Susan Lamb, “Nullum Crimen, Nulla Poena Sine Lege”, in Cassese, Gaeta and Jones (eds.), 2002, pp. 733–766.
6. Marko Milanović, “Is the Rome Statute Binding on Individuals? (And Why We Should Care)”, in *Journal of International Criminal Justice*, 2011, vol. 9, no. 1, pp. 25–52 (<https://www.legal-tools.org/doc/384f0e/>).
7. Leila Nadya Sadat, “Custom, Codification and Some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute”, in

¹⁶ ICTY, *Prosecutor v. Stakić*, Appeals Chamber, Judgment, 22 March 2006, IT-97-24-A, paras. 59 and 62 (<https://www.legal-tools.org/doc/09f75f/>).

- DePaul Law Review*, 2000, vol. 49, pp. 909–923 (<https://www.legal-tools.org/doc/4cacef/>).
8. Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, Transnational Publishers, Ardsley, 2002 (<https://www.legal-tools.org/doc/3b71e2/>).
 9. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 334–338 (<https://www.legal-tools.org/doc/b7432e/>).
 10. William A. Schabas, *An Introduction to the International Criminal Court*, 6th. ed., Cambridge University Press, 2020 (<https://www.legal-tools.org/doc/e9fb2f/>).
 11. Otto Triffterer and Alexander Heinze, “Article 10”, in Triffterer and Ambos (eds.), 2016, pp. 949–966.

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Article 11(1)

Jurisdiction *Ratione Temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

The Court has the power to exercise jurisdiction following the 1 July 2002, when the ICC Statute was ratified by 60 States and thus entered into force (Article 126). Thus, the ICC Statute is based on the non-retroactivity principle and the temporal jurisdiction of the Court is prospective (Article 24(1)).

The ICC Statute is silent in regard to violations which are committed prior to the entry into force of the Statute and continued afterwards. It is submitted that references in future cases to acts pre-dating the entry into force of the Statute may be useful in establishing the historical context but they may not form the basis of a charge.

The jurisdiction *ratione temporis* may be limited in two ways. The Security Council may according to Article 16 prevent the Court from exercising jurisdiction for a fixed period of time. A State may also upon ratification of the ICC Statute make a declaration in accordance with Article 124 and opt out for a period of seven years from the jurisdiction of the Court in relation to war crimes.

Cross-references:

Articles 16, 24(1), 124 and 126.

Doctrine: For the bibliography, see the final comment on Article 11.

Author: Mark Klamberg.

Article 11(2)

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

A precondition to the Court's exercise of jurisdiction is that the State has accepted the jurisdiction of the Court (Article 12). In addition, the Security Council may refer a situation to the Court (Article 13). The requirement on consent on behalf of the State has implications for the temporal jurisdiction of the Court. In regard to States that accepts the jurisdiction of the Court two exceptions may be noted in relation to the jurisdiction *ratione temporis* set by the entry into force of the ICC Statute.

The first exception concerns States Parties. When a State becomes a party, the Court's temporal jurisdiction is limited to the crimes committed after the entry into force of the ICC Statute for that State, unless that State in accordance with Article 12(3) accepts jurisdiction for acts committed prior to ratification but after the entry into force of the Statute. It is submitted that the declaration must be explicit, which was the case in the situation in Uganda and the situation in the Democratic Republic of Congo.¹

The second exception, concerning States Not Parties to the ICC Statute, is examined in the comment to Article 12.

Cross-references:

Articles 12 and 13.

Doctrine:

1. Rod Rastan and Mohamed Elewa Badar, "Article 11", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Mu-

¹ See letter of the Prosecutor of 17 June 2004 attached to ICC, *Situation in Uganda*, Presidency, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, 5 July 2004, ICC-02/04-1, p. 4 (<https://www.legal-tools.org/doc/b904bb/>) and *Situation in the Democratic Republic of Congo*, Presidency, Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I, 5 July 2004, ICC-01/04-1, p. 4 (<https://www.legal-tools.org/doc/218294/>).

nich/Oxford/Baden-Baden, 2016, pp. 657–671 (<https://www.legal-tools.org/doc/040751/>).

2. Stéphane Bourgon, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 543–52 (<https://www.legal-tools.org/doc/01addc/>).

Author: Mark Klamberg.

Article 12

Preconditions to the Exercise of Jurisdiction

General Remarks:

Article 12 sets the preconditions for the exercise of jurisdiction by the Court. As such, the provision has been called “one of the cornerstone provisions of the Statute”.¹ In addition to specifying the general preconditions for the exercise of jurisdiction, Article 12 is the central provision governing the territorial jurisdiction (*ratione loci* jurisdiction) of the ICC. Notably the ICC Statute contains no separate provision for the *ratione loci* jurisdiction of the Court² – comparable to Article 11 on temporal jurisdiction (*ratione temporis* jurisdiction).

Article 12 is divided into three separate parts. First, Article 12(1) sets out that by becoming a party to the ICC Statute a State accepts the jurisdiction of the ICC over those international crimes stipulated in Article 5. Second, in order for the ICC to be able to exercise this jurisdiction, Article 12(2) requires that either the territorial State where the crime was committed or the State of nationality of the accused to be among the State Parties. Article 12(3) ICC Statute further provides for non-State Parties to accept ad hoc the exercise of jurisdiction by the ICC in respect of acts occur on their territory or committed by their nationals.

Article 12 thus demonstrates an apparent respect for the sovereignty of States³ and the consent principle,⁴ and confirms their role as limiting factors for the ICC’s jurisdiction. Thus, Article 12 is the result of a “compromise between State sovereignty and the needs of international justice” (Bourgon, 2002, p. 560). Under the ICC Statute the ordinary prerogatives

¹ Morten Bergsmo, “The Jurisdictional Régime of the International Criminal Court (Part II, Articles 11–19)”, in *European Journal of Crime, Criminal Law and Criminal Justice*, 1998, vol. 6, p. 30 (<https://www.legal-tools.org/doc/1b44e7/>).

² Stéphane Bourgon, “12. Jurisdiction *ratione temporis*”, “12. Jurisdiction *ratione loci*”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 560 (<https://www.legal-tools.org/doc/01addc/>).

³ Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, Routledge, New York, 1997, p. 17 (<https://www.legal-tools.org/doc/bfe8e0/>).

⁴ Dapo Akande, “Prosecuting Aggression: The Consent Problem and the Role of the Security Council”, in *Oxford Legal Research Paper Series*, 2011, no. 10 (<https://www.legal-tools.org/doc/6ad27b/>).

of State sovereignty, as underlined in particular in Article 12(2)–(3), may be pierced only in one of two cases. First, by the referral of a situation to the prosecutor by the United Nations Security Council, pursuant to Article 13(b). Second, to the extent immunities ordinarily attaching to certain serving officials (*ratione personae*) or official acts (*ratione materiae*) do not apply either before the Court (Article 27) or in the case of international crimes generally.⁵

A temporary opt out from the automatic jurisdiction under Article 12(1) is possible for war crimes pursuant to Article 124 if a declaration to this effect is made by a State upon becoming a Party to the ICC Statute. Such an opt out can be made for a maximum seven years and may be withdrawn at any time. For example, France declared that “[p]ursuant to Article 124 of the Statute of the International Criminal Court, the French Republic declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory”.⁶ Similarly, a State which has accepted the amendments to the ICC Statute adding the crime of aggression may nonetheless lodge with the Registrar a declaration stating that “it does not accept such jurisdiction” over the offence being exercised where it arises from an act of aggression committed by that State Party (Article 15 *bis*(4)).

It follows from the fact that the Court has territorial jurisdiction that it may exercise jurisdiction in respect of the acts of nationals of non-State parties. It has long been observed that, unless immunity *ratione personae* or *ratione materiae* is held to apply, a State has jurisdiction over the conduct of foreign nationals on its territory (subjective territorial jurisdiction) and that such jurisdiction may be delegated to other States or to international courts irrespective of the consent of the individual’s state of nationality.⁷ A more difficult question for the Court is its jurisdiction over crimes commenced on the territory of a non-State party but which culminate in

⁵ ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr (<https://www.legal-tools.org/doc/0c5307/>).

⁶ France, Declaration under Article 124 of the Statute of the International Criminal Court, 9 June 2000, in UN Treaty Collection, XVIII 10. Penal Matters, Rome Statute of the International Criminal Court, p. 15 (<https://www.legal-tools.org/doc/7132fd/>).

⁷ Dapo Akande, “The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits” in *Journal of International Criminal Justice*, 2003, Vol. 1, pp. 621–634 (<https://www.legal-tools.org/doc/kqfppe/>).

territory of a State party (objective territorial jurisdiction). It may be correct to say that as this is an ordinary instance of territorial jurisdiction the Court was intended to enjoy such jurisdiction (Bourgon, 2002, p. 567) and, indeed, a Pre-Trial Chamber of the Court has so held.⁸ Nonetheless, the effect of so holding is to extend significantly the Court's reach beyond the territory of those State parties obliged to co-operate with the Court. Claiming such objective territorial jurisdiction is thus likely to result in significant practical complexities, not least in conducting investigations.⁹

Preparatory Works

The drafting history of Article 12 was not straightforward. There were several alternatives.

Germany represented one extreme which may be described as advocating that the Court should have “universal jurisdiction”.¹⁰ Germany held the view that States could delegate to the Court the full extent of the jurisdiction which they are entitled to exercise under customary international law. Since States may, and several States do, exercise universal jurisdiction over genocide, crimes against humanity and war crimes this jurisdiction could, therefore, be delegated to the Court. The German position was supported by States such as Sweden, the Czech Republic, Latvia, Costa Rica, Albania, Ghana, Namibia, Italy, Hungary, Azerbaijan, Belgium, Ireland, Netherlands, Luxembourg, Bosnia and Herzegovina and Ecuador.

At the other extreme, the United States that held that the State of nationality had to give its consent in all cases, except for Security Council referrals (Schabas and Pecorella, 2016, p. 678). India, Indonesia, Gabon, Russia, Jamaica, Nigeria, Vietnam, Algeria, Egypt, Israel, Sri Lanka, Pakistan, Afghanistan, Iran and China advanced similar positions preferring a narrower jurisdiction.

⁸ ICC, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Pre-Trial Chamber I, Decision on the “Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, ICC-RoC46(3)-01/18 (<https://www.legal-tools.org/doc/73aeb4/>).

⁹ Douglas Guilfoyle, “The ICC pre-trial chamber decision on jurisdiction over the situation in Myanmar”, in *Australian Journal of International Affairs*, 2019, vol. 73, p. 4 (<https://www.legal-tools.org/doc/drggpf/>).

¹⁰ William A. Schabas and Giulia Pecorella, “Article 12”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 675–677 (<https://www.legal-tools.org/doc/040751/>).

Other States, such as the United Kingdom and Korea, tried to find a compromise. Korea in particular proposed that by becoming a party to the ICC Statute a State would be considered to have automatically given its consent to the Court's jurisdiction and that a sufficient nexus would be the consent of the territorial state, the state of nationality of either the accused or victim, or the custodial state. A compromise proposed by the Bureau of the Assembly of States Parties based on the Korean proposal became Article 12.

As indicated above, the result demonstrates respect for the sovereignty of States and the consent principle. Nonetheless, while the result is not a Court of universal jurisdiction, if the objective territorial principle is upheld the Court's jurisdiction is potentially "far-reaching" (Bourgon, 2002, p. 568).

Doctrine: For the bibliography, see the final comment on Article 12.

Author: Dominik Zimmerman, revised by Douglas Guilfoyle.

Article 12(1)

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5.

The main content of Article 12 is the codification of the principle of automatic jurisdiction of the ICC *vis-à-vis* State Parties with respect to the most serious crimes of concern to the international community.¹ As such Article 12(1) merely refers to Article 5 which in turn contains the offences triggering the *ratione materiae* jurisdiction of the ICC. Through its codification of automatic jurisdiction, Article 12(1) furthermore puts emphasis on the understanding of the ICC as being “an independent permanent International Criminal Court” (see the Preamble of the ICC Statute). Pursuant to Article 120 no reservation is permitted with the exception of the ‘opt-out’ possibility for war crimes provided for in Article 124. However, Article 15 *bis*(4) means a State which has otherwise accepted the Court’s jurisdiction (under Article 121(5)) in respect of aggression may nonetheless lodge a declaration stating that “it does not accept such jurisdiction” being exercised where it arises from an act of aggression committed by that State party itself.

Author: Dominik Zimmerman, revised by Douglas Guilfoyle.

¹ The jurisdictional mechanism of ‘automatic jurisdiction’ is sometimes referred to as ‘inherent’ jurisdiction, see for example Markus Wagner, “The ICC and its Jurisdiction – Myths, Misperceptions and Realities”, in Armin von Bogdandy and Rüdiger Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, 2003, vol. 7, p. 477 (<https://www.legal-tools.org/doc/2d8bc1/>).

Article 12(2)

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:

Article 12(2) applies to the circumstances in Article 13(a) or (c) but not to Article 13(b). By omitting Article 13(b) the Court can, when authorized by the Security Council, exercise jurisdiction over crimes committed on the territory of non-Party States.

The second subsection of Article 12 provides guidance as to which State(s) has (have) to accept the ICC's jurisdiction in order for the Court to be able to exercise it in a particular situation. Article 12(2) contains two separate, but alternative, categories of State parties related to a conduct possibly constituting a crime under Article 5, that may constitute the necessary precondition for the ICC's jurisdiction: (a) the State on whose territory the relevant conduct has occurred (the territorial State); and (b) the State of which the accused person(s) is (are) national(s) (the nationality State). By adhering to these categories, the Statute does not provide for the exercise of jurisdiction on the basis that the State in whose custody a suspect is being held (the custodial State), or the State whose national was a victim of the relevant conduct (the State of the victim's nationality) is a State Party. In these or other cases, however, a referral of the relevant situation to the Prosecutor by the UNSC according to Article 13(b) may still found jurisdiction. Nonetheless such situations are likely to be relatively few, given the difficulty of reaching political consensus within the UNSC. Similarly, non-States Parties to the ICC Statute may confer territorial or nationality jurisdiction upon the court through an *ad hoc* acceptance of its jurisdiction pursuant to Article 12(3).

Following from the alternative wording "one or more" contained in Article 12(2) the Court may come to exercise its jurisdiction in cases where States not being Parties to the Statute are involved and which do not, pursuant to Article 12(3), *ad hoc* accept the exercise of jurisdiction. This may for example be the case where a crime is committed in the territory of a State party by a national of a non-State Party, or where a national of a State Party commits a serious crime in the territory of a non-State Party. Notwithstanding the impact this might have on the interests of a non-State Par-

ty, such exercise of jurisdiction cannot, however, be in violation of Article 34 of the Vienna Convention on the Law of Treaties.¹ This follows as the imposition of individual responsibility for international crimes upon the national of a non-State party will not generally involve the creation of rights or duties for the State of nationality itself (subject only to the question of applicable State immunities, if any, noted above).

Doctrine: For the bibliography, see the final comment on Article 12.

Author: Dominik Zimmerman, revised by Douglas Guilfoyle.

¹ Vienna Convention on the Law of Treaties, 23 May 1969 (<https://www.legal-tools.org/doc/6bfcd4/>).

Article 12(2)(a)

(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;

The first basis for the exercise of jurisdiction is the membership of the territorial State to the ICC Statute. This provision is mainly based on the assertion of territorial jurisdiction as one of the main implications of the principle of State sovereignty.¹ The consideration that “all individuals staying on the territory of a state are subjected to the law of that State”² forms a necessary precondition in this regard. Under international law States may exercise this jurisdiction within their own municipal organizational structure or delegate this right in international agreements. Closely connected to the delegation of the sovereign ability to prosecute crimes committed on a State’s territory is the granting of full exercise of the ICC’s function and powers on the territory of the State Party pursuant to Article 4(2). According to the principle of territorial jurisdiction the territorial State may exercise jurisdiction regardless of the nationality of the person accused of the crime (Kelsen, 1952, p. 310). With regard to the ICC this means that the Court may take jurisdiction over a conduct which occurred in the territory of a State Party, regardless of whether the person accused of the crime is a citizen of that same State or of a non-State Party. Furthermore, the exercise of jurisdiction is independent of the victim’s nationality and whether the alleged criminal remains in a custodial State which is a State Party or non-State party.

Whether or not the State of nationality or custodial State is a State Party to the ICC Statute is thus of no relevance to the ICC’s jurisdiction. Instead it has an influence on the obligation to co-operate with the ICC. Whereas State Parties, pursuant to Part 9 are obliged to fully co-operate with the Court in its investigation and prosecution of crimes, the same rules do not apply to non-State Parties unless they lodge an *ad hoc* declaration

¹ James Crawford, *Brownlie’s Principles of Public International Law*, 9th. ed., Cambridge University Press, 2019, pp. 442–443 (<https://www.legal-tools.org/doc/robl1v/>); Vaughan Lowe, “Jurisdiction”, in Malcolm D. Evans (ed.), *International Law*, 2nd. ed., Oxford University Press, 2006, pp. 342–345 (<https://www.legal-tools.org/doc/c8cfb7/>).

² Hans Kelsen, *Principles of International Law*, Rinehart, New York, 1952, p. 3100.

under Article 12(3), by which they may accept the exercise of ICC jurisdiction in a particular case (see below).

However, the United Nations Security Council may under the powers in Article 25 and Chapter VII of the UN Charter decide that all States, including non-State parties, shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor. The Security Council used this power when it referred the situation in Darfur to the Court in 2005 and when it referred the situation in Libya in 2011.³

States have jurisdiction over events occurring on their registered vessels or aircraft. Strictly, such vehicles are not territory but are instead treated “as an entity linked to the flag State”.⁴ This is reflected in Articles 91(1) and 92(1) of the United Nations Convention on the Law of the Sea, Article 17 of the Convention on International Civil Aviation and Article 3(1) Convention On Offences and Certain Other Acts Committed On Board Aircraft.⁵ Under these conventions, ships have the nationality of the State whose flag they are entitled to fly and an aircraft has the nationality of the State in which it is registered. In both cases, the flag State is competent to exercise criminal jurisdiction over events on board. No ICC investigation of crimes based on such jurisdiction has yet commenced, though the issue is live in the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia. The Prosecutor has repeatedly declined to open an investigation into that situation involving 10 deaths and 50 to 55 injuries caused in 2013 by Israeli Defence Force members aboard the vessel *Mavi Marmara* flagged to Comoros.⁶

³ Resolution 1593 (2005), S/RES/1593 (2005), 31 March 2005 (<https://www.legal-tools.org/doc/4b208f/>); Resolution 2011 (2011), S/RES/2011 (2011), 12 October 2011 (<https://www.legal-tools.org/doc/f52a6a/>).

⁴ International Tribunal for the Law of the Sea, *MV Saiga (No 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 1 July 1999, ITLOS Reports 10, para. 106 (<https://www.legal-tools.org/doc/fmtfz0/>).

⁵ United Nations Convention on the Law of the Sea, 10 December 1982 (<https://www.legal-tools.org/doc/c7b2bf/>); Convention on International Civil Aviation, 14 September 1963 (<https://www.legal-tools.org/doc/65db78/>); Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963 (<https://www.legal-tools.org/doc/97e04a/>).

⁶ ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Pre-Trial Chamber I, Notice of Prosecutor’s Final Decision under rule 108(3), as revised and refiled in accordance with the Pre-Trial Chamber’s request of 15 November 2018 and the Appeals Chamber’s judgment of 2 September 2019, 2 December 2019, ICC-01/13-99 (<https://www.legal-tools.org/doc/c6lysr/>).

There is no requirement that the territorial jurisdiction delegated to the Court is under the effective control of the State. Northern Cyprus is an example where this issue might arise.⁷

Doctrine: For the bibliography, see the final comment on Article 12.

Author: Dominik Zimmerman, revised by Douglas Guilfoyle.

⁷ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 352 (<https://www.legal-tools.org/doc/b7432e/>).

Article 12(2)(b)

(b) The State of which the person accused of the crime is a national.

The concept of nationality underlying Article 12(2)(b) rests on the legal bond of allegiance between a natural person and a sovereign State, though the concept is sometimes “extended by reliance on residence and other connections”.¹ This linkage forms the basis upon which a State may prosecute its nationals for crimes committed outside its territory.

The nationality principle is widely used by civil law States as a model to claim jurisdiction over crimes committed by their nationals abroad. At least as far as serious crimes are concerned, common law countries also adhere to the nationality principle (Crawford, 2019, pp. 443–444).

Extraterritorial jurisdiction pursuant to Article 12(2)(b) does not extend to cases where only the State of nationality of the victim is a State party (the so-called passive personality principle). Instead the provision covers only the active personality principle.

The Prosecutor has considered utilising such jurisdiction in relation to alleged acts in the territory of Iraq (a non-party State) by nationals of the United Kingdom (a State Party). On the basis of the admissibility assessment pertaining to gravity, the Prosecutor decided not to proceed with an investigation into the situation in Iraq.² The preliminary examination was, however, reopened in 2014,³ and finally closed in 2020.⁴

Doctrine: For the bibliography, see the final comment on Article 12.

Author: Dominik Zimmerman, revised by Douglas Guilfoyle.

¹ James Crawford, *Brownlie's Principles of Public International Law*, 9th. ed., Cambridge University Press, 2019, p. 443 (<https://www.legal-tools.org/doc/rob11v/>).

² ICC OTP, Annex to Update on Communications Received by the Office of the Prosecutor: Iraq Response, 9 February 2006 (<https://www.legal-tools.org/doc/315cbd/>).

³ ICC, “Prosecutor of the International Criminal Court, Fatou Bensouda, Re-opens the preliminary examination of the situation in Iraq”, OTP Press Release, 13 May 2014 (<https://www.legal-tools.org/doc/d9d9c5/>).

⁴ ICC, “Premiminary Examination: Iraq/UK” (available on its web site).

Article 12(3)

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 co-operate with the Court without any delay or exception in accordance with Part 9.

Article 12(3) concerns non-Party States. It is a residue of the 1994 Draft Statute of the International Law Commission where consent was required by States on a case-by-case basis.¹

In situations where neither the relevant territorial State nor the relevant nationality State is a party to the Statute, and where the UNSC does not refer the situation to the Prosecutor the ICC may still exercise jurisdiction if the non-State Party territorial State and/or the State of nationality State accepts the exercise of jurisdiction of the ICC on an *ad hoc* basis. The declaration accepting the jurisdiction of the Court “must be express, unequivocal, and precise as to the crime(s) or situation it applies to”.²

Provided a declaration has been lodged with the Registrar of the ICC pursuant to Article 12(3), the accepting State thereby commits itself to co-operate with the ICC as if it were a State Party. This commitment is limited, however, to the crime(s) in question and does thus not embrace any investigation and/or prosecution of crimes other than those covered by the declaration. This facultative obligation to co-operate is in line with Article 34 of the Vienna Convention on the Law of Treaties according to which “[a] treaty does not create either obligations or rights for a third State without its consent”.³

The wording “the crime in question” contained in Article 12(3) must furthermore be interpreted in accordance with Rule 44. Accordingly the

¹ “Draft Statute for an International Criminal Court”, in Yearbook of the International Law Commission, Vol. 2, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), 22 July 1994 (<https://www.legal-tools.org/doc/17ad09/>).

² Stéphane Bourgon, “12. Jurisdiction *ratione temporis*”, “12. Jurisdiction *ratione loci*”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 563 (<https://www.legal-tools.org/doc/01addc/>).

³ Vienna Convention on the Law of Treaties, 23 May 1969, Article 34 (<https://www.legal-tools.org/doc/6bfcd4/>).

‘Article 12(3)-declaration’ made by a non-State Party implies the “acceptance of jurisdiction with respect to the crimes referred to in Article 5 of relevance to the situation”, rather than individual crimes or specific incidents.⁴ As an example, the Republic of Côte d’Ivoire, while not being a party to the ICC Statute, accepted the exercise of jurisdiction by the Court regarding crimes committed on its territory since the events of 19 September 2002.⁵ A similar declaration, extending the temporal jurisdiction back to the time of the entry into force of the Statute, was made by the Ugandan government in December 2003⁶ as well as by the government of the Democratic Republic of the Congo.⁷ The Government of Palestine lodged a declaration under Article 12(3) on 1 January 2015 accepting ICC jurisdiction over alleged crimes committed “in the occupied Palestinian territory” since 13 June 2014.⁸ On 2 January 2015 Palestine acceded to the ICC Statute.⁹ In 2014 and 2015, Ukraine lodged two Article 12(3) declarations with the Court giving the Court jurisdiction over events occurring in Ukrainian territory since 21 November 2013.¹⁰

⁴ Carsten Stahn, Mohamed M. El Zeidy and Hector Olásolo, “The International Criminal Court’s Ad Hoc Jurisdiction Revisited”, in *American Journal of International Law*, 2005, vol. 99, pp. 427–428 (<https://www.legal-tools.org/doc/abc77d/>); Hans-Peter Kaul, “Preconditions to the Exercise of Jurisdiction”, in Cassese, Gaeta and Jones (eds.), 2002, p. 611 (<https://www.legal-tools.org/doc/c72561/>).

⁵ See ICC, “Registrar confirms that the Republic of Côte d’Ivoire has accepted the jurisdiction of the Court”, 15 February 2005, ICC-CPI-20050215-91; République de Côte d’Ivoire, Déclaration de reconnaissance de la Compétence de la Cour Pénale Internationale, 18 April 2003 (<https://www.legal-tools.org/doc/036bd2/>); and ICC, *Situation in the Republic of Côte d’Ivoire*, Pre-Trial Chamber III, 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, 3 October 2011, ICC-02/11-14, para. 10 (<https://www.legal-tools.org/doc/7a6c19/>).

⁶ See Letter of the Prosecutor of 17 June 2004 attached to ICC, Presidency, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, 5 July 2004, ICC-02/04-1 (<https://www.legal-tools.org/doc/b904bb/>).

⁷ See Letter of the Prosecutor of 17 June 2004 attached to ICC, Presidency, Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I, 5 July 2004, ICC-01/04-1 (<https://www.legal-tools.org/doc/218294/>).

⁸ ICC, “Palestine declares acceptance of ICC jurisdiction since 13 June 2014”, 5 January 2015, ICC-CPI-20150105-PR1080 (<https://www.legal-tools.org/doc/5737f5/>).

⁹ ICC, “The State of Palestine accedes to the Rome Statute”, 7 January 2015, ICC-ASP-20150107-PR1082 (<https://www.legal-tools.org/doc/539afd/>).

¹⁰ Ukraine, Article 12(3) Declaration, 9 April 2014 (<https://www.legal-tools.org/doc/eec0cf/>); Article 12(3) Declaration, 8 September 2015 (<https://www.legal-tools.org/doc/b53005/>).

Due to its facultative character, Article 12(3) is in line with the overall emphasis of Article 12 on State sovereignty and the consent principle.

Article 12(3) also potentially allows States to extend the *ratione temporis* jurisdiction of the Court. Pursuant to Article 11(1) the Court has jurisdiction only over crimes committed after the entry into force of the Statute. With regard to States that have become parties to the ICC Statute after its entry into force the jurisdiction only extends to crimes committed after the entry into force of the ICC Statute for that State, unless that State in accordance with Article 12(3) accepts jurisdiction for acts committed prior to ratification but after the entry into force of the ICC Statute generally on 1 July 2002. Palestine has achieved (or attempted to achieve) a similar effect by lodging a non-party *ad hoc* acceptance of jurisdiction prior to its accession. However, it is likely that the Court may also consider facts that occurred prior to the time specified in an Article 12(3) declaration – for the purpose of securing evidence or uncovering acts of a continuing nature – provided that these facts are linked to events that occurred after that time (Stahn, El Zeidy and Olásolo, 2005, pp. 429–31).

Cross-reference:

Rule 44.

Doctrine:

1. William A. Schabas and Giulia Pecorella, “Article 12”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 672–689 (<https://www.legal-tools.org/doc/040751/>).
2. Stéphane Bourgon and Hans-Peter Kaul, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 559–60, 562–65, 595–96, 607–11 (<https://www.legal-tools.org/doc/01addc/>).
3. Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, Routledge, New York, 1997, p. 17 (<https://www.legal-tools.org/doc/bfe8e0/>).
4. Morten Bergsmo, “The Jurisdictional Régime of the International Criminal Court” (Part II, Articles 11–19), in *European Journal of Crime*,

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- Criminal Law and Criminal Justice*, 1998, vol. 6, pp. 29–47 (<https://www.legal-tools.org/doc/1b44e7/>).
5. Carsten Stahn *et al.*, “The International Criminal Court’s Ad Hoc Jurisdiction Revisited”, in *American Journal of International Law*, 2005, vol. 99, pp. 421–31 (<https://www.legal-tools.org/doc/abc77d/>).
 6. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 344–366 (<https://www.legal-tools.org/doc/b7432e/>).
 7. Markus Wagner, “The ICC and its Jurisdiction – Myths, Misperceptions and Realities”, in Armin von Bogdandy and Rüdiger Wolfrum, *Max Planck Yearbook of United Nations Law*, vol. 7, 2003, pp. 409–512 (<https://www.legal-tools.org/doc/2d8bc1/>).
 8. James Crawford, *Brownlie’s Principles of Public International Law*, 9th. ed., Cambridge University Press, 2019, pp. 442, 443–4 (<https://www.legal-tools.org/doc/robl1v/>).
 9. Vaughan Lowe, in Malcom D. Evans, *International Law*, 2nd. ed., Oxford University Press, 2006, pp. 342–45 (<https://www.legal-tools.org/doc/c8cfb7/>).
 10. Douglas Guilfoyle, “The ICC pre-trial chamber decision on jurisdiction over the situation in Myanmar”, in *Australian Journal of International Affairs*, 2019, vol. 73, pp. 2–8 (<https://www.legal-tools.org/doc/drggpf/>).
 11. Dapo Akande, “The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits”, in *Journal of International Criminal Justice*, 2003, vol. 1, pp. 618–650 (<https://www.legal-tools.org/doc/kqfppe/>).
 12. Dapo Akande, “Prosecuting Aggression: The Consent Problem and the Role of the Security Council”, *University of Oxford Legal Research Paper Series*, February 2011 (<https://www.legal-tools.org/doc/6ad27b/>).

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Article 13

Exercise of Jurisdiction

General Remarks:

Article 13 comprises an exhaustive list of three procedural devices which can be used to activate (or ‘trigger’) the ICC’s jurisdiction – whose contours are premised on a reading of Articles 5 to 8 *bis* (*ratione materiae*), Article 11 (*ratione temporis*) and Articles 25 and 26 (*ratione personae*), and whose exercise is subject to the conditions specified by Article 12 (preconditions to the exercise of jurisdiction). Absent from the Statutes of other international criminal tribunals, such provision assumes foundational value in the ICC architecture because of the Court’s (mostly) prospective, permanent and potentially universal mandate.¹ In fact, considering the relatively wide boundaries of the ICC jurisdiction in abstract terms, Article 13’s three triggering mechanisms – each in a different way – are devoted to identify, concretely, the situations which will be brought to the ICC’s purview. In contrast, the investigative and prosecutorial reach of other international criminal tribunals has always been limited by their creators to a situation determined *ex ante*.

The structure of Article 13, read together with other provisions of the Statute, indicates that the ICC’s Office of the Prosecutor is competent to: receive information related to crimes within the jurisdiction of the Court; examine situations in which crimes under the Court’s jurisdiction may have been committed; independently decide whether to open (or, in the absence of a referral, seek the opening of) a formal investigation; and, if that is the case, prosecute one or more individuals (cf. Article 42(1) ICC Statute). Hence, States Parties’ and Security Council referrals under Article 13 have the purpose of bringing a certain situation to the Prosecutor’s attention – though the Prosecutor would still have the power to seek the opening of an investigation (ex Article 13(c)) even in the absence of such referrals. In light of the Article’s text, resort to the said triggering mechanisms does not require an ad hoc expression of consent by the State on whose territory the crimes are allegedly occurring, or whose nationals have allegedly commit-

¹ William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 2011, p. 157 (<https://www.legal-tools.org/doc/e9fb2ff/>).

ted them. Per Rule 45 of the Rules of Procedure and Evidence, a referral shall be in writing.

Whilst the ‘active’ players of Article 13 are States Parties, the UN Security Council and the Prosecutor, other unmentioned entities also play a role in triggering the ICC jurisdiction. Among others, victims, their relatives, intergovernmental and non-governmental organizations can file so-called ‘communications’ to the OTP. These may detail the circumstances in which crimes under the jurisdiction of the Court may have been committed, requesting the Prosecutor to start a preliminary examination and, possibly, an investigation.² Unlike States Parties, States that are not Parties to the ICC Statute are not entitled to formally refer situations to the Prosecutor, but may seek to act through the Security Council or just provide information in view of an investigation to be opened ex Article 13(c). When one considers the position of non-States Parties vis-à-vis the activation of the Court’s jurisdiction, it is useful to recall that a different provision, that is, Article 12(3), allows them to ‘enter’ the ICC system for a particular situation. However, one should not confuse the two different procedural mechanisms in question: unlike Article 13, Article 12(3) does not establish an additional triggering mechanism – but allows States that are not Parties to accept the Court’s jurisdiction *ad hoc*, without becoming Parties, for a specified set of facts (whilst States Parties accept the Court’s jurisdiction prospectively and unconditionally).³ Such acceptance is ‘just’ a precondition for the exercise of the Court’s jurisdiction, which would still need to be triggered via one of the three avenues listed in Article 13, including by giving a chance to the Prosecutor to make an application ex Article 15(3) (Policy Paper on Preliminary Examinations, 2013, para. 40, fn 25).

Importantly, neither of the three triggering mechanisms mentioned in Article 13 automatically leads to the opening of an investigation (Policy Paper on Preliminary Examinations, 2013, para. 76). In the case of a State or a Security Council referral (letters (a) and (b)), the Prosecutor will inform the Presidency of the Court – requesting the constitution of a Pre-Trial Chamber to which the situation will be assigned (Regulations of the

² Cf. Articles 15(2) and 42(1); cf. also ICC OTP, Policy Paper on Preliminary Examinations, November 2013, para. 78 (‘Policy Paper on Preliminary Examinations, 2013’) (<https://www.legal-tools.org/doc/acb906/>).

³ Carsten Stahn, Mohamed El Zeidy and Héctor Olásolo, “The International Criminal Court’s Ad Hoc Jurisdiction Revisited”, in *American Journal of International Law*, 2005, vol. 99, no. 2, p. 425 (<https://www.legal-tools.org/doc/abc77d/>).

Court, Regulations 45–46) – and analyse the relevant information (Regulations of the OTP, Regulation 25). The Prosecutor will formally open an investigation only if, at the outcome of this ‘preliminary examination’, she is satisfied that there is a reasonable basis to proceed with an investigation, because *inter alia*: there is a reasonable basis to believe that a crime within the Court’s jurisdiction has been or is being committed; the case(s) arising from the referred situation would be admissible in the sense of Article 17; and the investigation would not be against the interests of justice (cf. Article 53(1)). In case the Prosecutor decides to trigger the Court’s jurisdiction *proprio motu* (Article 13(c)), on the basis of a preliminary examination of a situation which was not referred by a States Party or by the Security Council, she will need to seek authorization from the Pre-Trial Chamber in order to proceed with a formal investigation (cf. Articles 15, 53 and 57 ICC Statute and Rule 48 ICC RPE).

Central to the understanding of Article 13 is the concept of ‘situations’, which are the object of referrals *sub* letters (a) and (b) and determines the context of the Prosecutor’s decision *sub* letter (c). Since the expression ‘situation’ is not explicitly defined in the ICC Statute, Pre-Trial Chamber I has clarified that ‘situations’ are “generally defined in terms of temporal, territorial and in some cases personal parameters”,⁴ and refer ba-

⁴ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 65 (<https://www.legal-tools.org/doc/2fe2fc/>); see also *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, 24 February 2006, ICC-01/04-01/06-8-Corr, para. 21 (<https://www.legal-tools.org/doc/c60aaa/>); *Prosecutor v. Katanga*, Pre-Trial Chamber I, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 5 November 2007, ICC-01/04-01/07-554, para. 9 (<https://www.legal-tools.org/doc/37fdf3/>); *Prosecutor v. Bemba*, Pre-Trial Chamber III, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG, para. 16 (<https://www.legal-tools.org/doc/fb80c6/>); *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘*Ali Kushayb*’), Appeals Chamber, Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’ (ICC-02/05-01/20-302)”, 1 November 2021, ICC-02/05-01/20-503 OA8, para. 25 (‘*Abd-Al-Rahman*, 1 November 2021’) (<https://www.legal-tools.org/doc/tffwvd/>). See also *Situation in the Philippines*, Pre-Trial Chamber I, Decision on the Prosecutor’s request for authorisation of an investigation pursuant to Article 15(3) of the Statute, ICC-01/21-12, 15 September 2021, para. 116 (<https://www.legal-tools.org/doc/ctwc9d/>).

sically to the set of circumstances subject to investigation and prosecution.⁵ Since a ‘situation’ delimits the scope of the Court’s intervention in practice, understanding its parameters is particularly important and has been a constant theme in the ICC jurisprudence in the past few years. In light of such jurisprudence, it seems that situations should be defined according to territorial, material and/or temporal parameters.

Territorial parameters are, comparatively, the easiest to identify. Most situations have so far been delimited by reference to a particular region or country. For instance, the situation in Georgia has been clearly defined as “covering [...] war crimes and crimes against humanity allegedly committed in and around South Ossetia”.⁶ In addition, the territorial parameters of a ‘situation’ – even if defined at its core with respect to the territory of one State Party – may also include crimes committed on the territory of other States Parties, insofar as they are “sufficiently linked”.⁷ In certain circumstances, territorial parameters used to identify situations may take into account the need to satisfy the required pre-conditions (ex Article 12) for the exercise of the Court’s jurisdiction. For instance, with respect to the Rohingya crisis, the OTP sought authorisation to investigate “crimes within the jurisdiction of the Court in which at least one element occurred on the territory of the People’s Republic of Bangladesh “,⁸ considering how

⁵ Policy Paper on Preliminary Examinations, November 2013, para. 41; cf. ICC OTP, Policy Paper on Case Selection and Prioritisation, 15 September 2016, para. 4 (‘Policy Paper on Case Selection and Prioritisation, 2016’) (<https://www.legal-tools.org/doc/182205/>); ICC, *Prosecutor v. Abd-Al-Rahman*, Pre-Trial Chamber II, Decision on the Defence ‘Exception d’incompétence’, 17 May 2021, ICC-02/05-01/20-391, paras. 25–26 (‘Abd-Al-Rahman, 17 May 2021’) (<https://www.legal-tools.org/doc/lg5nag/>).

⁶ ICC, *Situation in Georgia*, OTP, Corrected Version of “Request for authorisation of an investigation pursuant to article 15”, 17 November 2015, ICC-01/15-4-Corr2, para. 1 (‘*Situation in Georgia*, 17 November 2015’) (<https://www.legal-tools.org/doc/eca741/>).

⁷ ICC, *Situation in Afghanistan*, OTP, Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Red, paras. 1, 49, 52 and 376 (<https://www.legal-tools.org/doc/db23eb/>); cf. also *Situation in Bangladesh/Myanmar*, Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, ICC-01/19-27, para. 124 (‘*Situation in Bangladesh/Myanmar*, 14 November 2019’) (<https://www.legal-tools.org/doc/kbo3hy/>); *Abd-Al-Rahman*, 1 November 2021, para. 26.

⁸ ICC, *Situation in Bangladesh/Myanmar*, OTP, Request for authorisation of an investigation pursuant to article 15, 4 July 2019, ICC-01/19-7, para. 1 (<https://www.legal-tools.org/doc/8a47a5/>).

the latter is a State Party to the ICC Statute, unlike the State (Myanmar) where most of the violence against the Rohingya allegedly occurred.

Situations may additionally be defined according to *material parameters*, that is, with respect to one or a series of facts, events, incidents. Material parameters usually add up to geographical ones, as in the case of the aforementioned Bangladesh/Myanmar situation, which refers to crimes of which at least one element occurred on the territory of the Bangladesh “and which occurred within the context of two waves of violence in Rakhine State” on the territory of Myanmar (*Situation in Bangladesh/Myanmar*, 4 July 2019, para. 1). The Comoros referral was the first one not to define a situation geographically, but only ‘materially’ with respect to a specific incident, that is “the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza strip” (and the first one to invoke a vessel’s flag as precondition for the exercise of jurisdiction).⁹ The material parameters of a situation have been interpreted quite broadly by several Pre-Trial Chambers, which concurred in finding that the Prosecutor can carry out investigations (and, if the case, seek prosecutions) as long as these remain within the limits of the situation object of the referral (ex Article 13(a) or (b)) or of the Pre-Trial Chamber authorization (triggered by Article 13(c)). This means that the Prosecutor can investigate not only acts, incidents or persons that have already been identified at the time in which the investigation is opened, but also other ones “in so far as they are sufficiently linked to the situation of crisis referred to the Court”¹⁰ or if they remain within the scope of the situation as presented in the request for authorization.¹¹ Of

⁹ See ICC, Union of the Comoros, “Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation”, 14 May 2013 (<https://www.legal-tools.org/doc/93705a/>).

¹⁰ By a State Party: ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, 11 October 2010, ICC-01/04-01/10-1, para. 6 (<https://www.legal-tools.org/doc/04d4fa/>); cf. also *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the “Defence Challenge to the Jurisdiction of the Court”, 26 October 2011, ICC-01/04-01/10-451, paras. 16, 26–27 and 41 (<https://www.legal-tools.org/doc/864f9b/>); and *Prosecutor v. Mudacumura*, Pre-Trial Chamber II, Decision on the Prosecutor’s Application under Article 58, 13 July 2012, ICC-01/04-01/12-1-Red, para. 14 (<https://www.legal-tools.org/doc/ecfae0/>); or by the Security Council: *Prosecutor v. Al-Werfalli*, Pre-Trial Chamber I, Warrant of Arrest, 15 August 2017, ICC-01/11-01/17-2, para. 23 (<https://www.legal-tools.org/doc/881fb6/>).

¹¹ Cf. ICC, *Situation in Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr, paras. 74–75 and 205 (*Situation in Kenya*, 31 March 2010’) (<https://www.legal-tools.org/doc/f0caaf/>); *Situation in Georgia*, Pre-Trial

note, in its decision on the Prosecutor’s request with respect to Afghanistan, Pre-Trial Chamber II had momentarily changed course on this matter, by expressing that, at least with respect to investigations authorized by the Pre-Trial Chamber, the Prosecutor could only investigate acts with a “close link, rather than a simply ‘sufficient’ one” with one or more of the incidents identified in the request for authorization (and for which authorization to investigate has been granted), on the basis of factors like “[p]roximity in time and/or in location, identity of or connection between alleged perpetrators, identity of pattern or suitability to be considered as expression of the same policy or programme”.¹² Pre-Trial Chamber II’s stance on this issue was motivated by the fear of the authorization being transformed into a “blank cheque” to the Prosecutor and losing its filtering function – but it was short-lived. First, a different Pre-Trial Chamber (Pre-Trial Chamber III) soon returned to the ‘sufficiently linked’ criterion in the Myanmar authorization decision, noting how a more restrictive authorization would make investigations unduly cumbersome for the Prosecutor (*Situation in Bangladesh/Myanmar*, 14 November 2019, paras. 126–130). Secondly, and more authoritatively, the ICC Appeals Chamber reversed Pre-Trial Chamber II’s decision to deny the authorization in the Afghanistan situation, and brought the ICC case law back in line with its precedents. The Appeals Chamber, in particular, remarked that the Prosecutor’s “truth-seeking function” must not be jeopardized by an undue restriction of the scope of his or her investigations (*Situation in Afghanistan*, 5 March 2020, paras. 59–62).

Chamber I, Decision on the Prosecutor’s request for authorization of an investigation, 27 January 2016, ICC-01/15-12, paras. 63–64 (<https://www.legal-tools.org/doc/a3d07e/>); *Situation in Burundi*, Pre-Trial Chamber III, Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”, 9 November 2017, ICC-01/17-9-Red, paras. 192–193 (*Situation in Burundi*, 9 November 2017’) (<https://www.legal-tools.org/doc/8f2373/>); *Situation in Afghanistan*, OTP, Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Red, paras. 38 and 266 (<https://www.legal-tools.org/doc/db23eb/>); *Situation in Afghanistan*, Appeals Chamber, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138, para. 79 (*Situation in Afghanistan*, 5 March 2020’) (<https://www.legal-tools.org/doc/x7kl12/>). Cf. also Policy Paper on Case Selection and Prioritisation, 2016, para. 26.

¹² ICC, *Situation in Afghanistan*, Pre-Trial Chamber II, Decision Pursuant to Article 15, 12 April 2019, ICC-02/17-33, para. 41 (*Situation in Afghanistan*, 12 April 2019’) (<https://www.legal-tools.org/doc/2fb1f4/>); but see, dissenting on this issue, the Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua, paras. 8–15 (<https://www.legal-tools.org/doc/5e15ac/>).

It also noted that Pre-Trial Chamber II's reading would: result in an unworkable scenario in which the Prosecutor is required to file new requests for authorizations every time that new facts are identified; be contrary to the Statute in so far as it would subject the Prosecutor's investigations to continuous monitoring; and potentially compromise the effectiveness and efficiency of investigations by barring the Prosecutor from collecting evidence related to facts not expressly identified in the request for authorization (para. 63).

Finally, situations for which the Court's jurisdiction is triggered according to Article 13 may be defined according to *temporal parameters*, that is, with respect to a precise time-frame. For instance, the situation in Georgia covered "the period from 1 July 2008 to 10 October 2008" (*Situation in Georgia*, 7 November 2015, para. 1). Continuous crimes which started within the temporal limits of the situation would fall within the scope of the Prosecutor's investigations even if they partly unfolded outside of those temporal limits (*Situation in Burundi*, 9 November 2017, para. 192). In addition, the Court's case law so far has yielded conflicting interpretations of temporal parameters, especially with respect to situations which do not have a clear end-date. On this point, various Pre-Trial Chambers have taken different positions. The Pre-Trial Chambers in the *Kenya* and *Afghanistan* authorization decisions had suggested that the Prosecutor may only seek authorization to investigate crimes that have already been committed or are ongoing at the time of the request (*Situation in Kenya*, paras. 206–207; *Situation in Afghanistan*, 12 April 2019, paras. 42 and 68). Such stance seemed to be premised on the relevant Pre-Trial Chamber's fear to lose its supervisory power if authorizing open-ended investigations, and spurred criticism because it would artificially decrease the Prosecutor's ability to investigate complex and evolving situations of crisis.¹³ However, a different Pre-Trial Chamber, when authorizing investigations in Côte d'Ivoire, affirmed that investigations on any crime subsequent to the Prosecutor's request would still be covered by the authorization, as long as part of the same ongoing situation.¹⁴ The more recent Appeals Chamber deci-

¹³ Cf. Rod Rastan, "The Jurisdictional Scope of Situations before the International Criminal Court", in *Criminal Law Forum*, 2012, vol. 23, no. 1, pp. 21–22 (<https://www.legal-tools.org/doc/dcf6dc/>).

¹⁴ ICC, *Situation in Côte d'Ivoire*, Pre-Trial Chamber III, 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", 15 November 2011, ICC-02/11-14-Corr, paras. 178–179

sion on Afghanistan persuasively explained that limiting the scope of the authorization to incidents preceding the Prosecutor’s request would be unwarranted, based on the Statute’s text and on pragmatic considerations (see above, ‘General Remarks’; *Situation in Afghanistan*, 5 March 2020, paras. 59–63).

In light of the above, the extant case law points towards a functional reading of the scope of a ‘situation’ “by broad parameters” (as opposed to a “list of discrete incidents”),¹⁵ which the Prosecutor will be able to adapt to the circumstances, at times defying strict limitations based on geography, pre-identified sets of facts or time.

Once recourse has been made to one of the three triggering mechanisms listed in Article 13, they cannot be used in reverse to ‘un-trigger’ the Court’s intervention and prevent it from exercising its jurisdiction.¹⁶ Nevertheless, other procedures to that effect exist in the ICC Statute: for instance, the Security Council has the right to defer investigations or prosecutions pursuant to Article 16 (*Abd-Al-Rahman*, 17 May 2021, para. 34); a State may demand a deferral of the investigations ex Article 18; and the OTP may decide not to proceed with a formal investigation despite having received a referral,¹⁷ subject to the grounds and procedures enunciated by the Statute and, in particular, Article 53. These allow the Court to review, upon request or on its own initiative, issues such as admissibility, the interests of justice and jurisdiction activated by means of Article 13.

In this regard, it is also to be noted that Article 13 is neither concerned with or indicative of the admissibility of cases, which are instead regulated by subsequent provisions of the Statute (most notably Articles 17–20). Should an investigation be opened after a State referral or *proprio motu*, the Prosecutor has a duty to inform States Parties and States which would normally exercise jurisdiction over the relevant crimes, in order to give them a chance to challenge the Court’s jurisdiction or the admissibility

(<https://www.legal-tools.org/doc/e0c0eb/>); see also *Situation in Bangladesh/Myanmar*, 14 November 2019, paras. 131–133.

¹⁵ ICC, *Situation in Afghanistan*, OTP, Prosecution Appeal Brief, 30 September 2019, ICC-02/17-74, para. 93 (<https://www.legal-tools.org/doc/9aqzh3/>).

¹⁶ Cf. Andreas Th. Muller and Ignaz Stegmiller, “Self-Referrals on Trial: From Panacea to Patient”, in *Journal of International Criminal Justice*, 2010, vol. 8, pp. 1290–1292 (<https://www.legal-tools.org/doc/8b40cf/>).

¹⁷ See, for example, ICC, *Situation in Gabon*, OTP, Article 5 Report, 21 September 2018 (<https://www.legal-tools.org/doc/9aad5c/>).

of a situation or case (Article 18(1)). Importantly, the entire ‘complementarity’ framework applies to all situations and cases, regardless of the mechanism used to trigger the Court’s jurisdiction – thus, even in the case of Security Council referrals, as affirmed in the admissibility decisions related to cases originating from the Libya situation.¹⁸

Preparatory Works:

The final version of Article 13 is the result of intense negotiations over several points. Referrals from States Parties and the Security Council were conceived since the beginning as the key triggering mechanisms for the Court’s jurisdiction.¹⁹ However, a few issues concerning State Party referrals were seen as controversial.

First, it was debated whether State Party referrals could concern specific crimes, as opposed to situations. Moreover, since earlier drafts contemplated the possibility of accepting the Court’s jurisdiction only for certain categories of crimes (‘opt-in’ system), it was proposed to allow States to refer only crimes with regard to which they had accepted the Court’s jurisdiction (a sort of ‘reciprocity restriction’). Referrals concerning alleged acts of genocide could have been reserved to States parties to the Genocide Convention (Report of the ILC, 1994, Article 25(1)). Once negotiations proceeded, however, the view that referrals should cover ‘situations’ prevailed, to avoid politicization and promote efficiency.²⁰ Since the ‘opt-in’ system was also abandoned in favour of the Court’s automatic jurisdiction (subject to the ‘preconditions’ listed in Article 12), it was agreed to allow

¹⁸ See ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Appeals Chamber, 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”, 24 July 2014, ICC-01/11-01/11-565 (<https://www.legal-tools.org/doc/ef20c7/>); and *Prosecutor v. Gaddafi and Al-Senussi*, Appeals Chamber, 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”, 21 May 2014, ICC-01/11-01/11-547-Red (<https://www.legal-tools.org/doc/0499fd/>).

¹⁹ Draft Statute for an International Criminal Court with commentaries, in Report of the International Law Commission on the work of its forty-sixth session, *Yearbook of the International Law Commission*, vol. 2, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), 22 July 1994, Articles 21 and 25 (States) and 23 (Security Council) (‘Report of the ILC, 1994’) (<https://www.legal-tools.org/doc/390052/>).

²⁰ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/51/22, 14 September 1996, para. 146 (‘ICC Preparatory Committee Report, 1996’) (<https://www.legal-tools.org/doc/e75432/>).

all States Parties to refer situations involving any crime under the Court's jurisdiction. Nevertheless, it was debated whether the Court's jurisdiction should be activated only by States Parties with an interest in the situation – for example, the State on whose territory the situation occurred, or whose nationals were the perpetrators or victims, or which had custody of one or more perpetrators.²¹ Once it became clear that the Prosecutor would have been able to independently initiate investigations over any situation, restrictions on State Party referrals became less relevant. Thus, the view that all States Parties should be allowed to refer any situation to the Court prevailed, also in consideration of the symbolic interest of all States in the repression of international crimes.²²

The ILC Draft Statute of 1994 did not contain a provision on the Prosecutor's *proprio motu* investigations. However, subsequent negotiations evinced a willingness to endow the Prosecutor with such a power, especially in light of the proven reluctance of States to bring complaints before the existing human rights bodies, mostly due to diplomatic reasons (Ad Hoc Committee Report, 1995, paras. 113–115; ICC Preparatory Committee Report, 1996, para. 149). Moreover, the possibility of submitting communications directly to the Prosecutor in view of a *proprio motu* investigation was seen as a form of direct access to justice for victims and non-governmental organizations (Kirsch and Robinson, 2002, p. 662). Fears of politicization of an independent Prosecutor were addressed by creating a system of checks and balances to his or her action, most prominently the need for an authorization from the Pre-Trial Chamber when acting *proprio motu*.²³

Doctrine: For the bibliography, see the final comment on Article 13.

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²¹ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, 7 September 1995, para. 112 ('Ad Hoc Committee Report, 1995') (<https://www.legal-tools.org/doc/b50da8/>); ICC Preparatory Committee Report, 1996, para. 147.

²² Philippe Kirsch and Darryl Robinson, "Referral by State Parties", in Antonio Cassese, Paola Gaeta and John W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, p. 622 (<https://www.legal-tools.org/doc/01addc/>); and ICC Preparatory Committee Report, 1996, para. 147.

²³ Proposal submitted by Argentina and Germany, UN Doc. A/AC.249/1998/WG.4/DP.35, 25 March 1998 (<https://www.legal-tools.org/doc/896cf4/>).

Article 13(a)

The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with Article 14;

Analysis:

Referral by a State Party:

According to Article 13(a), States Parties can bring a situation to the Prosecutor’s attention by means of a referral, which follows the conditions enunciated in Article 14. Referrals activate the Court’s jurisdiction over all crimes that may have been committed within the referred situation. Therefore, a referral cannot be limited to crimes committed by a certain party to a conflict, or to crimes committed by specific individuals who – for instance – belong to a certain national, political or military group.¹ The Prosecutor made this view clear when reacting to the Ugandan referral, which had instead suggested the Court’s attention should be focused only on the crimes committed by the government’s political opponents.²

The fact that State Party referrals concern ‘situations’, as opposed to specific crimes, carries a practical advantage: identifying specific crimes in a context of generalized violence might require a proper investigation, a task which in the ICC system pertains to the ICC Prosecutor after the referral. This consideration, however, does not prevent States Parties from including, in their referrals, specific allegations concerning certain individuals, types of conduct or incidents.³

¹ See also ICC, *Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision requesting clarification on the Prosecutor’s Application under Article 58, ICC-01/04-575, 11 October 2010, paras. 6–8 (<https://www.legal-tools.org/doc/b63d59/>). Cf. ICC OTP, “Policy Paper on Case Selection and Prioritisation”, 15 September 2016, para. 18 (<https://www.legal-tools.org/doc/182205/>).

² ICC, *Situation in Uganda*, Presidency, Letter of Prosecutor dated 17 June 2004 annexed to Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, 5 July 2004, ICC-02/01 (<https://www.legal-tools.org/doc/b904bb/>); cf. also ICC OTP, “Policy Paper on Preliminary Examinations”, November 2013, para. 27 (‘Policy Paper on Preliminary Examinations, 2013’) (<https://www.legal-tools.org/doc/acb906/>).

³ Rod Rastan, “Situation and Case: Defining the Parameters”, in Carsten Stahn and Mohamed El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, 2011, p. 422 fn. 2 (<https://www.legal-tools.org/>)

Having been enabled to refer situations to the Court, States Parties were partly conceived by the Statute’s drafters as watchdogs against the commission of crimes under the Court’s jurisdiction. Contrary to the perception which may have been engendered by the frequent practice of ‘self-referrals’⁴ – that is, referrals by a State Party with respect to a situation taking place on their own territory⁵ – all States Parties can refer a situation to the Prosecutor, regardless of whether they have any jurisdictional link whatsoever with the crimes committed in that situation. This idea took life, for the first time, in the 2018 referral of the situation in Venezuela by Argentina, Canada, Colombia, Chile, Paraguay and Peru,⁶ and was revived in 2022 when a total of 43 States Parties referred the situation in Ukraine, following Russia’s invasion.⁷ However, except for these two instances, ‘diplomatic discomfort’ seems to have hindered a wider resort to such power, which might be perceived as unfriendly by States implicated in the referred situation.⁸ After all, from a diplomatic perspective, it may be easier for States to submit a simple ‘communication’ to the Prosecutor – providing the relevant information about a situation where crimes may have possibly been committed – and leave to the OTP the possibility of opening an investigation *proprio motu* based on that (and possibly additional) information.

doc/95c65d/); see, for example, ICC, State of Palestine, *Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute*, 15 May 2018, PAL-180515-Ref, paras. 12–13 and 16–17 (<https://www.legal-tools.org/doc/69852a/>).

- ⁴ Andreas Th. Muller and Ignaz Stegmüller, “Self-Referrals on Trial: From Panacea to Patient”, in *Journal of International Criminal Justice*, 2010, vol. 8, pp. 1271–1272 (<https://www.legal-tools.org/doc/8b40cf/>).
- ⁵ Darryl Robinson, “The Controversy over Territorial State Referrals and Reflections on ICL Discourse”, in *Journal of International Criminal Justice*, 2011, vol. 9, no. 2, especially at pp. 361–364 (<https://www.legal-tools.org/doc/251dca/>), explains however that the practice of self-referrals is not contrary to the Statute and was contemplated during its negotiations.
- ⁶ ICC, Referral of the situation in Venezuela under Article 14 of the Rome Statute submitted by the Republic of Argentina, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru, 26 September 2018 (<https://www.legal-tools.org/doc/92lp01/>).
- ⁷ ICC, *Situation in Ukraine*, Office of the Prosecutor, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, 2 March 2022 (<https://www.legal-tools.org/doc/8zpela/>); up to 1 April 2022, four more States Parties referred the situation, as documented in ICC, “Ukraine” (available on its web site).
- ⁸ William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 6th. ed., 2020, p. 157 (<https://www.legal-tools.org/doc/8ef137/>).

From a procedural point of view, however, a State Party referral offers a practical advantage for the Prosecutor when compared to *proprio motu* investigations. On one side, the decision to open an investigation following a State Party referral is not subject to authorization by the Pre-Trial Chamber, as is required under Article 15,⁹ but note that the Prosecutor, upon Palestine’s 2018 referral, decided to request Pre-Trial Chamber I to issue a ruling on the extent of the Court’s jurisdiction in that situation, prior to the formal opening of an investigation. This choice, however, was due to the questions about Palestinian statehood.¹⁰ On the other, the OTP is not exposed to the difficulty of justifying the reason for which it selected a particular situation for an investigation and not another, among those potentially covered by the ICC jurisdiction and for which there is evidence that the relevant crimes were committed (Schabas, 2020, p. 166). Perhaps for these reasons, the OTP has made a policy choice – when available information suggests that there would be a reasonable basis to proceed with an investigation, and before acting *proprio motu* ex Articles 13(c) and 15 – to inform those States who would have jurisdiction and ask them whether they would be interested in making a referral (Policy Paper on Preliminary Examinations, November 2013, para. 98).

As mentioned above, a State Party referral does not automatically lead to the formal opening of an investigation, a step which the Prosecutor will only take if satisfied that – based on the results of a preliminary examination of the situation at hand – there is a reasonable basis to proceed (cf. Article 53). However, after having activated the Court’s jurisdiction, the referring State maintains limited power over the procedure which subsequently unfolds. According to Article 53(3)(a), referring States can request the Pre-Trial Chamber to review the Prosecutor’s decision not to formally open an investigation or not to proceed with prosecutions after the investi-

⁹ Cf. ICC, *Situation in Venezuela*, Pre-Trial Chamber I, Public Redacted Version of ‘Decision on the “Request for judicial control submitted to the Pre-Trial Chamber I of the International Criminal Court by the Bolivarian Republic of Venezuela pursuant to Articles 15 and 21.3 of the Statute and Rule 46.2 of the Rules of the regulations of the Court”, 2 March 2022, ICC-02/18-9-Red, para. 11 (<https://www.legal-tools.org/doc/zsj107/>).

¹⁰ See ICC, *Situation in Palestine*, OTP, Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, 22 January 2020, ICC-01/18-12 (<https://www.legal-tools.org/doc/clur6w/>).

gation. This, in turn, may lead the Pre-Trial Chamber to request the Prosecutor to reconsider its decision.¹¹

Doctrine: For the bibliography, see the final comment on Article 13.

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¹¹ In this respect, see the procedural history of the *Situation in the Registered Vessels of Comoros, Greece and Cambodia* (available on the ICC's web site).

Article 13(b)

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

Referral by the UN Security Council:

According to Article 13(b), the UN Security Council can refer situations to the ICC Prosecutor acting under Chapter VII of the UN Charter. As such, Article 13(b) of the ICC Statute has been defined as a ‘bridging mechanism’, in the international legal order, between two separate and autonomous international organizations, namely the ICC and the Security Council, and their respective mandates.¹ The reference to Chapter VII of the UN Charter suggests that such referrals are dependent on a previous finding that a threat to the peace, a breach of the peace or an act of aggression has occurred,² and that they are thus related to the Council’s primary responsibility for the maintenance of international peace and security (Article 24 UN Charter). If one wanted to pinpoint Security Council referrals to a specific provision within Chapter VII, it has been suggested that they could be considered as a measure not involving the use of armed force employed by the Council to give effect to its decisions, in line with the wording of Article 41 of the Charter.³ Of note, the fact that the Security Council can refer a situation to the ICC does not mean that the Council has somehow lost its power to establish, acting under Chapter VII, *ad hoc* international criminal

¹ Rod Rastan, “Jurisdiction”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 157 and fn. 75 (<https://www.legal-tools.org/doc/729159/>); cf. Jennifer Trahan, “Revisiting the Role of the Security Council Concerning the International Criminal Court’s Crime of Aggression”, in *Journal of International Criminal Justice*, 2019, vol. 17, p. 475 (<https://www.legal-tools.org/doc/2s4g7g/>).

² Article 39 UN Charter; Dan Sarooshi, “Aspects of the relationship between the International Criminal Court and the United Nations”, in *Netherlands Yearbook of International Law*, 2001, vol. 32, pp. 33–34 (<https://www.legal-tools.org/doc/cs8h3c/>).

³ Cf. Gabriel Lentner, *The UN Security Council and the International Criminal Court: The Referral Mechanism in Theory and Practice*, Edward Elgar, Cheltenham, 2018, pp. 79 ff. (<https://www.legal-tools.org/doc/ocvlot/>); Alexander Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits*, Brill-Nijhoff, Leiden, 2018, pp. 52–53 (<https://www.legal-tools.org/doc/2qwk7j/>).

tribunals *qua* subsidiary organs pursuant to Article 7(2) of the UN Charter.⁴ Referrals to the ICC and the establishment of international criminal tribunals could simply be seen as two among the unspecified array of measures that the Council may adopt – based on the specificities of the situation – in pursuance of its responsibility to maintain and restore international peace and security. The choice between one or the other measure will inevitably depend on the circumstances of the relevant matter. That being said, whether a Security Council referral to the ICC would actually *be* conducive to peace and security, internationally and in the affected regions, is well beyond the scope of this short commentary.

A reading of Article 13(b) in conjunction with Article 12(2) – on pre-conditions to the exercise of ICC jurisdiction – reveals that Security Council referrals enable the Court to exercise jurisdiction to a different extent than the other two triggering mechanisms, that is, a State Party referral or a *proprio motu* investigation. Indeed, when the ICC’s jurisdiction over a given situation is activated by means of a Security Council referral, the Court may exercise such jurisdiction even if the crimes in question have neither been committed by nationals nor on the territory of States Parties or States which have accepted the Court’s jurisdiction pursuant to Article 12(3). Thus, a Security Council referral effectively lifts the requirement that the Court can only exercise its jurisdiction if either the territorial State or the State of nationality of accused have accepted such jurisdiction. However, it is generally accepted that, even when a referral is made by the Security Council pursuant to Article 13(b), the Court would not be allowed to exercise its jurisdiction outside of its statutory legal framework, that is, as defined with respect to subject-matter (Article 5), temporal (Article 11(1)) or personal jurisdiction (limited by Article 26).⁵ Hence, for instance, even if

⁴ Morten Bergsmo, “Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council”, in *Nordic Journal of International Law*, 2000, vol. 69, no. 1, p. 110 (<https://www.legal-tools.org/doc/d82a66/>); Sarooshi, 2001, p. 34; on the differences between the establishment of a new tribunal and a referral, see Lentner, 2018, pp. 56 ff.

⁵ ICC, *Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Senussi*, Pre-Trial Chamber I, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163, paras. 28–30 (<https://www.legal-tools.org/doc/ae7c48/>); *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 45 (<https://www.legal-tools.org/doc/e26cf4/>); see also ICC OTP, “Policy Paper on Case Selection and Prioritisa-

acting upon a Security Council referral, the Court could not backdate its jurisdiction beyond the ‘hard’ limit set in Article 11(1), according to which the Court “has jurisdiction *only* with respect to crimes committed after the entry into force of this Statute” (on 1 July 2002; the ordinary language of Article 11(2) suggests that “entry into force” refers to the entry into force of the Statute in general, and not for a particular State).⁶ More in general, the Security Council cannot compel or authorise the ICC, a different international organization with a different legal personality and membership, “to act beyond the scope of its powers as set out in the Statute” (Sarooshi, 2001, pp. 30–31 and 40–41, quote at p. 40).

Since Security Council referrals allow the Court to by-pass the pre-conditions to exercise jurisdiction in Article 12(2), one should question whether they are a means for the Security Council to retroactively confer to the Court jurisdiction it would not otherwise have had. It is commonly held that they are (cf. for example Sarooshi, 2001, p. 31), because the extent of the Court’s jurisdiction in the absence of a Security Council referral would depend on the States’ delegation of their own jurisdiction based on territoriality and active nationality grounds, made by becoming Parties or by means of a declaration ex Article 12(3).⁷ If so, should the Court decide to proceed in a situation referred by the Security Council, and to unconditionally apply the law of the Statute to individuals who committed crimes when

tion”, 15 September 2016, para. 28 (‘Policy Paper on Case Selection and Prioritisation, 2016’) (<https://www.legal-tools.org/doc/182205/>); Sarooshi, 2001, pp. 30–31 and 40–41; and Lentner, 2018, pp. 33–34.

⁶ Cf. Rastan, 2015, pp. 170–171; this interpretation is confirmed in Policy Paper on Case Selection and Prioritisation, 2016, para. 28; cf. also Galand, 2018, pp. 109–110; *contra*, Luigi Condorelli and Santiago Villalpando, “Can the Security Council Extend the ICC’s Jurisdiction?”, in Antonio Cassese, Paola Gaeta and John W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, p. 637 (<https://www.legal-tools.org/doc/01addc/>).

⁷ Talita de Souza Dias, “The Nature of the Rome Statute and the Place of International Law before the International Criminal Court”, in *Journal of International Criminal Justice*, 2019, vol. 17, no. 3, pp. 514–515 (<https://www.legal-tools.org/doc/2ds19g/>); cf. also Alexander Skander Galand, “The Nature of the Rome Statute of the International Criminal Court (and its Amended Jurisdictional Scheme)”, in *Journal of International Criminal Justice*, 2019, vol. 17, no. 5, p. 944 (<https://www.legal-tools.org/doc/ag8bs9/>); for an alternative view, positing that the ICC has been endowed with universal prescriptive jurisdiction since its inception, and thus Article 13(b) remains a ‘pure’ triggering mechanism for already existing jurisdiction, see Leila N. Sadat and Richard S. Carden, “The New International Criminal Court: An Uneasy Revolution”, in *Georgetown Law Journal*, 2000, vol. 88, no. 3, pp. 406–407, 409–410, and 412–413 (<https://www.legal-tools.org/doc/deecdd/>).

the pre-conditions set in Article 12(2) are absent (for instance because they were nationals of States non-Parties who performed their conduct on the territory of States non-Parties), this would constitute *de facto* to a retroactive application of criminal law. In fact, it is generally accepted that the ICC Statute does not necessarily reflect customary international law.⁸ If the ICC Statute as ‘newly applicable law’ is less favourable to the accused than the ‘previously applicable’ one (that is, national criminal law or customary international law), this could amount to a violation of the principle *nullum crimen sine lege*,⁹ an internationally recognized human right¹⁰ which must inform the Court’s application and interpretation of law pursuant to Article 21(3) ICC Statute (de Souza Dias, 2018, p. 67). In order to obviate to such problem, some scholars have persuasively advocated for the use of customary international law as applicable substantive law in these cases.¹¹

That being said, respect for the principle *nullum crimen sine lege* would not be a problem when the Court acts in presence of the preconditions listed in Article 12(2), even if the relevant jurisdiction is triggered by the Security Council. In such cases, indeed, the ICC could be deemed to operate on the basis of territorial jurisdiction or active nationality jurisdic-

⁸ On the discrepancy between the Statute and custom, see Galand, 2019, pp. 934–936; Lentner, 2018, p. 37; cf. ICC, *Situation in Bangladesh/Myanmar*, Pre-Trial Chamber I, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, ICC-RoC46(3)-01/18-37, para. 45 (<https://www.legal-tools.org/doc/73aeb4/>).

⁹ Kenneth S. Gallant, “Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts”, in *Villanova Law Review*, 2003, vol. 48, no. 3, pp. 839–840 (<https://www.legal-tools.org/doc/6luhzs/>); Talita de Souza Dias, “The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations: An Appraisal of the Existing Solutions to an Under-discussed Problem”, in *Journal of International Criminal Justice*, 2018, vol. 16, no. 1 (<https://www.legal-tools.org/doc/grltsx/>).

¹⁰ Cf. International Covenant on Civil and Political Rights, 16 December 1966, Article 15 (<https://www.legal-tools.org/doc/2838f3/>); European Convention on Human Rights, 4 November 1950, Article 7 (<https://www.legal-tools.org/doc/8267cb/>); African Charter on Human and Peoples’ Rights, 1 October 1986, Article 7(2) (<https://www.legal-tools.org/doc/f0db44/>), Article 7(2); American Convention on Human Rights, 22 November 1969, Article 9 (<https://www.legal-tools.org/doc/1152cf/>).

¹¹ For example, Marko Milanović, “Is the Rome Statute Binding on Individuals? (And Why We Should Care)”, in *Journal of International Criminal Justice*, 2011, vol. 9, no. 1, pp. 34 and 37–38 (<https://www.legal-tools.org/doc/384f0e/>) and de Souza Dias, 2018, p. 89; cf. also Galand, 2019, p. 952. See also the ICC Appeals Chamber’s stance in *Prosecutor v. Abd-Al-Rahman*, Appeals Chamber, Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’”, 1 November 2021, ICC-02/05-01/20-503, paras. 81–85 (<https://www.legal-tools.org/doc/tffvwd/>).

tion delegated by States which became Parties to the Statute or accepted its jurisdiction on an ad hoc basis (see for example Galand, 2019, pp. 943–944). Thus, individuals who come under the Court’s jurisdiction would be bound by the Statute’s substantive provisions from the moment in which the Statute entered into force for the relevant State (de Souza Dias, 2019, pp. 529–530).

In any case, the Security Council – as said above – cannot compel or authorize a separate and autonomous international organization (that is, the ICC) to exercise powers the latter does not have in accordance with its Statute, even if acting under Chapter VII (Sarooshi, 2001, pp. 30–31 and 40–41; see also Condorelli and Villalpando, 2002, pp. 575 and 578). In this regard, it remains unclear whether the ICC could exercise a form of control over the existence and extent of its jurisdiction following a Security Council referral. It could be argued that, when examining whether it has jurisdiction pursuant to Article 19, the Court could also consider whether the rules about triggering such jurisdiction have been respected. Whilst it is hard to imagine the ICC ever defying the Security Council’s qualification of a given situation as constituting a threat to the peace, a breach of the peace, or an act of aggression and thus entitling the Council to act under Chapter VII (even though Articles 15 *bis*(9) and 15 *ter*(4) affirm that, with respect to the crime of aggression, “a determination of an act of aggression by an organ outside the Court [that is, including the UN Security Council] shall be without prejudice to the Court’s own findings under this Statute”), the question has been raised with regard to referrals that appear to be incompatible with the ICC Statute (for instance excluding the Court’s jurisdiction over nationals of certain States).¹² It is controversial, in particular, whether the Court could selectively ignore specific parts of a Security Council resolution (containing a referral ex Article 13(b)), should these parts determine that the Court would act *ultra vires* with respect to the ICC Statute.¹³ The

¹² Resolution 1593 (2005), S/RES/1593 (2005), 31 March 2005, para. 6 (‘UNSC Res. 1593’) (<https://www.legal-tools.org/doc/4b208f/>); Resolution 1970 (2011), UN Doc. S/RES/1970 (2011), 17 March 2011, para. 6 (‘UNSC Res. 1970’) (<https://www.legal-tools.org/doc/00a45e/>); cf. William A. Schabas and Giulia Pecorella, “Article 13”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 700 (<https://www.legal-tools.org/doc/040751/>); Trahan, 2019, pp. 477 and 479.

¹³ Cf. Robert Cryer, “Sudan, Resolution 1593, and International Criminal Justice”, in *Leiden Journal of International Law*, 2006, vol. 19, no. 1, pp. 213–214 (<https://www.legal-tools.org/doc/5a06ec/>); Göran Sluiter, “Obtaining Cooperation from Sudan: Where is the

early ICC practice on cases originating from Security Council referrals does not offer any conclusive views in this regard.

Article 18 of the ICC Statute implies that the procedure for preliminary rulings on jurisdiction and admissibility – whereby the Prosecutor communicates the opening of an investigation to all States which would normally exercise jurisdiction over crimes committed in the related situation – does not apply to investigations originating from a Security Council referral. Despite this procedural peculiarity – perhaps due to the idea that, if the Security Council refers a situation to the ICC, it deems it to be the most appropriate judicial forum for it – the entire complementarity framework continues to apply to Security Council referrals. In fact, Articles 17 and 19 contain no exception for situations referred by the Security Council. Notably, Article 19(3) specifies that the Security Council is allowed to submit observations with regard to questions of jurisdiction and admissibility of cases deriving from its referrals. And the Court has already examined the admissibility of cases emanating from Security Council referrals (see the commentary on Article 13, *Gaddafi* and *Al-Senussi* cases).

As with States Party referrals, a Security Council referral does not automatically lead to the formal opening of an investigation. Such opening is conditional upon the Prosecutor’s determination – following a preliminary examination – that there is a reasonable basis to proceed (cf. Article 53). Should a Security Council referral contain information related to the criminal responsibility of specific persons, the Prosecutor would not be bound by the Council’s determination in any way, and would have to make her own decision.¹⁴ If the OTP decides that a reasonable basis to investigate exists, it must inform the Security Council via the UN Secretary General (Regulations of the OTP, Regulation 30). Like referring States Parties, the Security Council too maintains a level of oversight, and can request the Pre-Trial Chamber to review an OTP decision not to investigate or not to proceed after investigation, if such decision concerns a situation arising from a referral ex Article 13(b). This, in turn, may lead the Pre-Trial Chamber to request the Prosecutor to reconsider its decision (see Article 53(3)(a)).

Law?”, in *Journal of International Criminal Justice*, 2008, vol. 6, no. 5, pp. 878–881 (<https://www.legal-tools.org/doc/006e90/>); Sarooshi, 2001, p. 40, fn. 47.

¹⁴ ICC OTP, “Policy Paper on Preliminary Examinations”, November 2013, para. 27 (<https://www.legal-tools.org/doc/acb906/>).

As said above, Security Council referrals might concern situations where alleged crimes are committed on the territory and by nationals of States that are not Party to the ICC Statute. As such, these States would not, in principle, have any obligation to co-operate with the Court during investigations and other proceedings (Article 87(5)), unless the Security Council resolution containing the referral made such obligation explicit.¹⁵ Whilst Resolutions 1593 and 1970 have explicitly obliged the relevant territorial States (that is, Sudan and Libya) to fully co-operate with the Court, all other States (as well as regional and other international organizations) have been simply ‘urged’ to do so, recalling that States that are not Parties do not have prior obligations in this respect (UNSC Res. 1593, para. 2; UNSC Res. 1970, para. 5). As a result, the extent to which States other than Sudan and Libya have to co-operate with the Court has been the object of much debate,¹⁶ beyond the scope of this commentary.

Article 115 provides that the UN shall provide funds to the ICC, in particular to cover expenses brought about by Security Council referrals. The release of such funds shall be regulated by the terms of the Agreement between the UN and the ICC. Whilst Article 115 alone would not oblige the UN to cover the said expenses (either in full or in part), the first two Security Council referrals still contained explicit indication that the UN would not bear any such costs.¹⁷

¹⁵ As confirmed, in passing, in ICC, *Situation in Bangladesh/Myanmar*, Pre-Trial Chamber I, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, ICC-RoC46(3)-01/18-37, para. 43 (<https://www.legal-tools.org/doc/73aeb4/>); cf. also ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr, paras. 136–144, 149 (*‘Al Bashir*, 6 May 2019’) (<https://www.legal-tools.org/doc/0c5307/>).

¹⁶ Especially with regard to the potential arrest of Sudan’s President, Omar Al-Bashir; see Articles 27 and 98 ICC Statute; *Al Bashir*, 6 May 2019; and, among others, Dapo Akande, “The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities”, in *Journal of International Criminal Justice*, 2009, vol. 7, no. 2 (<https://www.legal-tools.org/doc/28cb24/>); Paola Gaeta, “Does President Al Bashir Enjoy Immunity from Arrest?”, in *Journal of International Criminal Justice*, 2009, vol. 7, no. 2 (<https://www.legal-tools.org/doc/83505b/>); Dire Tladi, “The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 1 (<https://www.legal-tools.org/doc/bcfc1f/>); Claus Kreß, *Preliminary Observations on the ICC Appeals Chamber’s Judgment of 6 May 2019 in the Jordan Referral re Al Bashir Appeal*, Occasional Paper Series no. 8 (2019), Torkel Opsahl Academic EPublisher, Brussels, 2019 (<https://www.legal-tools.org/doc/e92532/>).

¹⁷ UNSC Res. 1593, para. 7; UNSC Res. 1970, para. 8; on the possible repercussions of this practice, see Lentner, 2018, pp. 195–198; Victor O. Ayeni and Matthew A. Olong, “Oppor-

Doctrine: For the bibliography, see the final comment on Article 13.

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tunities and Challenges to the UN Security Council Referral under the Rome Statute of the International Criminal Court”, in *African Journal of International and Comparative Law*, 2017, vol. 25, no. 2, pp. 254–255 (<https://www.legal-tools.org/doc/7cc2ha/>); and W. Michael Reisman, “On Paying the Piper: Financial Responsibility for Security Council Referral to the ICC”, in *American Journal of International Law*, 2005, vol. 99 (<https://www.legal-tools.org/doc/z6jy1o/>); of note, the defence of Ali Kushayb had recently filed a request for the Court to engage with the UN too seek funding, which was denied in ICC, *Prosecutor v. Ali Kushayb*, Pre-Trial Chamber II, Decision on the Defence request under article 115(b) of the Rome Statute, 23 July 2020, ICC-02/05-01/20-101 (<https://www.legal-tools.org/doc/cw5ji5/>): the single judge, at para. 8, noted that “[t]he judiciary, indisputably, cannot play any role in the budgetary process, let alone in the negotiation of any financial agreements. There is no legal basis for the Chamber to engage in the financial matters of the Court”.

Article 13(c)

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15.

Analysis:

Proprio Motu Investigation by the Prosecutor

Thanks to the third triggering mechanism listed in Article 13, the ICC jurisdiction can be activated ‘internally’ when the Prosecutor decides to initiate an investigation. Since the Prosecutor – in the absence of a State or Security Council referral – acts on the basis of her own decision, such investigations are commonly known as ‘*proprio motu*’ (‘following one’s own impulse’, in Latin). This does not mean that the OTP acts without any external inputs. Victims, their relatives and non-governmental organizations can file communications to the OTP in order to convince it to open an investigation, and States can provide information to the same effect (see Article 15(1–2)). For instance, the Prosecutor explained how her office received 125 communications related to the situation in Afghanistan alone, prior to its request to the Pre-Trial Chamber for authorization to formally open an investigation.¹

Article 13(c) differs in language from the first two paragraphs of the same article, since it does not mention “a situation in which one or more of such crimes appear to have been committed”. By mentioning an investigation “in respect of such a crime” (that is, a crime under the Court’s jurisdiction) it seems to leave the door open for an investigation into one or more specific cases, as opposed to a broader situation. Whilst *proprio motu* investigations so far have indeed concerned ‘situations’, such difference in the Statute’s language should not surprise. The Prosecutor enjoys indeed great discretion in selecting cases to be prosecuted even after having carried out an investigation into a ‘situation’, so it would theoretically be possible to just investigate one or more specific cases after an in-depth preliminary examination of the general context. However, it also appears evident how a fully-fledged investigation into a more broadly defined situation leads, in many cases, to a more informed Prosecutorial decision about spe-

¹ ICC, *Situation in Afghanistan*, OTP, Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Red, para. 23 (<https://www.legal-tools.org/doc/db23eb/>).

cific cases. Indeed, in its 2016 Policy Paper on Case Selection and Prioritisation, the OTP explained how its choices may be guided – among other things – by a comparative assessment of the scale of crimes, their nature, their manner of commission and their impact.² Such comparative assessment would undoubtedly benefit from a birds-eye view over a broadly defined situation.

In this regard, the ICC OTP prosecutorial discretion appears to be wider when compared to national courts and even *ad hoc* tribunals – considering that only a small amount of all cases falling within the ICC jurisdiction will actually be prosecuted before the Court. This discretion is thrown into sharp relief when considering that the crimes the OTP can decide not to investigate or prosecute are arguably more serious than those that a domestic prosecutor (even assuming they do have some sort of prosecutorial discretion) can decide not to investigate or prosecute.

Nevertheless, this seemingly wide discretion is reduced by the fact that investigations *proprio motu* can only be opened after having sought a Pre-Trial Chamber authorization to do so (Article 15), the procedure for which is governed by Rule 50 RPE. Moreover, should the Prosecutor decide to initiate an investigation following a State referral or *proprio motu*, he or she shall notify all States Parties and those States which would normally exercise jurisdiction over the crimes under scrutiny, giving them a chance to challenge the Court’s jurisdiction or the cases’ admissibility (Articles 18 and 19). These procedures aim, among other things, at avoiding abuse of the *proprio motu* power for politicized or frivolous investigations.

Cross-references:

Articles 5, 6, 7, 8, 8, 11, 12, 14, 15, 17, 18, 19, 26, 27, 42, 53, 57.

Doctrine:

1. Dapo Akande, “The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities”, in *Journal of International Criminal Justice*, 2009, vol. 7, no. 2, pp. 333–352 (<https://www.legal-tools.org/doc/28cb24/>).
2. Victor O. Ayeni and Matthew A. Olong, “Opportunities and Challenges to the UN Security Council Referral under the Rome Statute of the In-

² ICC OTP, “Policy Paper on Case Selection and Prioritisation”, 15 September 2016, para. 50 (<https://www.legal-tools.org/doc/182205/>).

-
- ternational Criminal Court”, in *African Journal of International and Comparative Law*, 2017, vol. 25, no. 2, pp. 239–260 (<https://www.legal-tools.org/doc/7cc2ha/>).
3. Morten Bergsmo, “Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council”, in *Nordic Journal of International Law*, 2000, vol. 69, no. 1, pp. 87–113 (<https://www.legal-tools.org/doc/d82a66/>).
 4. Nerina Boschiero, “The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 3, pp. 625–653 (<https://www.legal-tools.org/doc/f3bd08/>).
 5. Luigi Condorelli and Annalisa Ciampi, “Comments on the Security Council Referral of the Situation in Darfur to the ICC”, in *Journal of International Criminal Justice*, 2005, vol. 3, no. 3, pp. 590–599 (<https://www.legal-tools.org/doc/7g4qvx/>).
 6. Luigi Condorelli and Santiago Villalpando, “Can the Security Council Extend the ICC’s Jurisdiction?”, in Antonio Cassese, Paola Gaeta and John W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, pp. 571–582 (<https://www.legal-tools.org/doc/01addc/>).
 7. Luigi Condorelli, Santiago Villalpando, “Referral and Deferral by the Security Council”, in Cassese, Gaeta and Jones (eds.), 2002, pp. 627–656.
 8. Robert Cryer, “Sudan, Resolution 1593, and International Criminal Justice”, in *Leiden Journal of International Law*, 2006, vol. 19, no. 1, pp. 195–222 (<https://www.legal-tools.org/doc/5a06ec/>).
 9. Talita de Souza Dias, “The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations: An Appraisal of the Existing Solutions to an Under-discussed Problem”, in *Journal of International Criminal Justice*, 2018, vol. 16, no. 1, pp. 65–89 (<https://www.legal-tools.org/doc/grltsx/>).
 10. Talita de Souza Dias, “The Nature of the Rome Statute and the Place of International Law before the International Criminal Court”, in *Journal of International Criminal Justice*, 2019, Vol. 17, No. 3, pp. 507–535 (<https://www.legal-tools.org/doc/2ds19g/>).
-

11. Mohamed El Zeidy, “The legitimacy of withdrawing State Party referrals and ad hoc declarations under the State of the International Criminal Court”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, Leiden/Boston, 2009, pp. 55–78 (<https://www.legal-tools.org/doc/5d1db6/>).
12. Alexander Skander Galand, “The Nature of the Rome Statute of the International Criminal Court (and its Amended Jurisdictional Scheme)”, in *Journal of International Criminal Justice*, 2019, vol. 17, no. 5, pp. 933–956 (<https://www.legal-tools.org/doc/ag8bs9/>).
13. Alexander Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits*, Brill/Nijhoff, Leiden, 2018 (<https://www.legal-tools.org/doc/2qwk7j/>).
14. Kenneth S. Gallant, “Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts”, in *Villanova Law Review*, 2003, vol. 48, no. 3, pp. 763–842 (<https://www.legal-tools.org/doc/6luhzs/>).
15. Paola Gaeta, “Does President Al Bashir Enjoy Immunity from Arrest?”, in *Journal of International Criminal Justice*, 2009, vol. 7, no. 2, pp. 315–332 (<https://www.legal-tools.org/doc/83505b/>).
16. Ahmed Samir Hassanein, “Self-referral of Situations to the International Criminal Court: Complementarity in Practice – Complementarity in Crisis”, in *International Criminal Law Review*, 2017, vol. 17, pp. 107–134 (<https://www.legal-tools.org/doc/j9l8jd/>).
17. Philippe Kirsch and Darryl Robinson, “Referral by State Parties”, in Cassese, Gaeta and Jones (eds.), 2002, pp. 619–626.
18. Philippe Kirsch and Darryl Robinson, “Initiation of Proceedings by the Prosecutor”, in Cassese, Gaeta and Jones (eds.), 2002, pp. 657–664.
19. Jann Kleffner, “ICC (Trigger Mechanisms)”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* Oxford University Press, 2009, pp. 353–354 (<https://www.legal-tools.org/doc/7be65f/>).
20. Claus Kreß, *Preliminary Observations on the ICC Appeals Chamber’s Judgment of 6 May 2019 in the Jordan Referral re Al Bashir Appeal*, Torkel Opsahl Academic EPublisher, Brussels, 2019 (<https://www.toaep.org/ops-pdf/8-kress/>).

21. Gabriel Lentner, *The UN Security Council and the International Criminal Court: The Referral Mechanism in Theory and Practice*, Edward Elgar, Cheltenham, 2018 (<https://www.legal-tools.org/doc/ocvlot/>).
22. Gabriel Lentner, “The Lasting Legacy of Double Standards: The International Criminal Court and the UN Security Council Referral Mechanism”, in *International Criminal Law Review*, 2020, Vol. 20, pp. 251–284 (<https://www.legal-tools.org/doc/6q8n4j/>).
23. Marko Milanović, “Is the Rome Statute Binding on Individuals? (And Why We Should Care)”, in *Journal of International Criminal Justice*, 2011, vol. 9, no. 1, pp. 25–52 (<https://www.legal-tools.org/doc/384f0e/>).
24. Andreas Th. Muller and Ignaz Stegmiller, “Self-Referrals on Trial: From Panacea to Patient”, in *Journal of International Criminal Justice*, 2010, vol. 8, pp. 1267–1294 (<https://www.legal-tools.org/doc/8b40cf/>).
25. Héctor Olásolo, “The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor”, in *International Criminal Law Review*, 2005, vol. 5, no. 1, pp. 121–141 (<https://www.legal-tools.org/doc/ao24e6/>).
26. Héctor Olásolo, *The Triggering Procedure of the International Criminal Court*, Brill/ Nijhoff, Leiden, 2005 (<https://www.legal-tools.org/doc/91b863/>).
27. Rod Rastan, “Situation and Case: Defining the Parameters” in Carsten Stahn and Mohamed El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, 2011, pp. 421–459 (<https://www.legal-tools.org/doc/95c65d/>).
28. Rod Rastan, “The Jurisdictional Scope of Situations before the International Criminal Court”, in *Criminal Law Forum*, 2012, vol. 23, no. 1, pp. 1–34 (<https://www.legal-tools.org/doc/dcf6dc/>).
29. Rod Rastan, “Jurisdiction”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, pp. 141–178 (<https://www.legal-tools.org/doc/729159/>).
30. W. Michael Reisman, “On Paying the Piper: Financial Responsibility for Security Council Referral to the ICC”, in *American Journal of International Law*, 2005, vol. 99, pp. 615–618 (<https://www.legal-tools.org/doc/z6jy1o/>).

31. Darryl Robinson, “The Controversy over Territorial State Referrals and Reflections on ICL Discourse”, in *Journal of International Criminal Justice*, 2011, vol. 9, no. 2, pp. 355–384 (<https://www.legal-tools.org/doc/251dca/>).
32. Deborah Ruiz Verduusco, “The Relationship between the ICC and the United Nations Security Council”, in Stahn (ed.), 2015, pp. 30–64.
33. Leila N. Sadat and Richard S. Carden, “The New International Criminal Court: An Uneasy Revolution”, in *Georgetown Law Journal*, 2000, vol. 88, no. 3, pp. 381–474 (<https://www.legal-tools.org/doc/deccdd/>).
34. Dan Sarooshi, “Aspects of the relationship between the International Criminal Court and the United Nations”, in *Netherlands Yearbook of International Law*, 2001, vol. 32, pp. 27–53 (<https://www.legal-tools.org/doc/cs8h3c/>).
35. William A. Schabas, *An Introduction to the International Criminal Court*, 6th. ed., Cambridge University Press, 2020, pp. 151–180 (<https://www.legal-tools.org/doc/e9fb2f/>).
36. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 367–380 (<https://www.legal-tools.org/doc/b7432e/>).
37. William A. Schabas and Giulia Pecorella, “Article 13”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 690–702 (<https://www.legal-tools.org/doc/040751/>).
38. Göran Sluiter, “Obtaining Cooperation from Sudan: Where is the Law?”, in *Journal of International Criminal Justice*, 2008, vol. 6, no. 5, pp. 871–884 (<https://www.legal-tools.org/doc/006e90/>).
39. Carsten Stahn, Mohamed El Zeidy and Héctor Olásolo, “The International Criminal Court’s Ad Hoc Jurisdiction Revisited”, in *American Journal of International Law*, 2005, vol. 99, no. 2, pp. 421–431 (<https://www.legal-tools.org/doc/abc77d/>).
40. Dire Tladi, “The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 1, pp. 199–221 (<https://www.legal-tools.org/doc/bcfc1f/>).
41. Jennifer Trahan, Revisiting the Role of the Security Council Concerning the International Criminal Court’s Crime of Aggression, in *Journal*

of International Criminal Justice, 2019, vol. 17, pp. 471–483 (<https://www.legal-tools.org/doc/2s4g7g/>).

42. Harmen van der Wilt, “Self-Referrals as an Indication of the Inability of States to Cope with Non-State Actors”, in Stahn (ed.), 2015, pp. 210–227.
43. Manuel J. Ventura, “Escape from Johannesburg?: Sudanese President Al-Bashir Visits South Africa, and the Implicit Removal of Head of State Immunity by the UN Security Council in light of Al-Jedda”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 5, pp. 995–1025 (<https://www.legal-tools.org/doc/2a1c4d/>).

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Article 14

Referral of a Situation by a State Party

General Remarks:

State referrals are mentioned as one of the three trigger mechanisms under Articles 13(a) and 14 of the ICC Statute. Article 14 complements Article 13(a).

State referrals were thought to have little potential for use, but the law-in-action has proven such expectations wrong. As a matter of fact, five out of nine situations before the ICC are based upon State referrals (Uganda, Democratic Republic of Congo, Central African Republic I and II and Mali).

Preparatory Works:

A mechanism for States to trigger the ICC's jurisdiction was uncontroversial, but the original idea focused primarily on "complaints" by injured States against other States.¹ During *ad hoc* Committee meetings in 1995, possibilities for trigger mechanisms were further discussed. Some delegations favoured a broad referral tool, while others wanted to restrict the referral to "interested States". Numerous options were included in brackets in Article 45 [25] of the Zutphen Draft 1998, which found its way into Article 11 of the Preparatory Committee's Draft Statute 1998.²

An alternative draft by the United Kingdom, entitled "Referral of a situation by a State", was included into the Draft Statute 1998. This proposal suggested that 'situations' rather than single cases should be referred, a phrasing that found its way into the final version of the ICC Statute. The UK's proposal, intentionally or not, also altered the language moving away from the term 'complaint'. It was changed to "State referring a situation". No reference to self-referrals or the like can be found in the discussions.

¹ "Draft Statute for an International Criminal Court", in *Yearbook of the International Law Commission*, Vol. 2, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), 22 July 1994, Article 25 (<https://www.legal-tools.org/doc/17ad09/>).

² Draft Statute for an International Criminal Court: Part II. Jurisdiction, Admissibility and Applicable Law, UN Doc. A/AC.249/1998/CRP.8, 2 April 1998 (<https://www.legal-tools.org/doc/e652fe/>).

Analysis of Provisions and Sub-Provisions:

Article 14 partly repeats Article 13(a). The object of the referral is a “situation”. The neutral wording ‘situation’ was introduced to avoid complaint against specific individuals and as such reduces the prospect of States Parties referring individualized complaints rather than a conflict situation as a whole. Any State Party may refer such a conflict situation to the ICC under mentioned articles. In accordance with paragraph 2 of Article 14, the relevant circumstances shall be specified and the referral shall be accompanied by supporting documentation.

Doctrine: For the bibliography, see the final comment on Article 14.

Author: Ignaz Stegmiller.

Article 14(1)

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

“A State Party” refers to any State that has ratified the ICC Statute. A limitation to a certain State, that is, the territorial or national State, was not included.

In the context of Article 12(3) of the ICC Statute the OTP initially denied an investigation with regard to Palestine due to its unclear status under international law.¹ In the context of Article 14, this question would have to be solved already beforehand when a State seeks to become a member of the ICC Statute in accordance with Article 125(3) ICC Statute. It is clear that only State Parties may use the trigger mechanism under Article 14. Non-State Parties are limited to a declaration under Article 12(3) and the appropriate trigger mechanism falls under Articles 13(c) and 15 of the ICC Statute.

In accordance with Article 125(3) ICC Statute, Palestine then acceded to the Statute.² It is worthy to note that, despite its unclear status under international law, the accession was accepted and not only discussed during the Assembly of State Parties. Be that as it may, the OTP opened a new preliminary examination, this time on the basis of Article 14 ICC Statute.³

Referrals of State Parties can be divided into two categories: third party referrals and self-referrals. Earlier drafting history focused on third party referrals, but practice shows an increasing tendency towards self-referrals by States. According to the prevailing interpretations of Articles 13(a) and 14, self-referrals are referrals by a State Party of a situation in which crimes falling within the jurisdiction of the Court appear to have

¹ ICC OTP, “Situation in Palestine”, 3 April 2012 (<https://www.legal-tools.org/doc/f5d6d7/>).

² ICC, “The State of Palestine accedes the Rome Statute”, 7 January 2015, ICC-ASP-20150107-PR1082 (<https://www.legal-tools.org/doc/539afd/>).

³ ICC, “The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine”, 16 January 2015, ICC-OTP-20150116-PR1083 (<https://www.legal-tools.org/doc/16f1c7/>).

been committed on that State Party's territory.⁴ The Office of the Prosecutor adopted a policy of inviting and encouraging such voluntary self-referrals.⁵

In five situations referred to it under Article 14 the Office of the Prosecutor initiated (full) investigations pursuant to Article 53(1) ICC Statute.

In the *Situation of Uganda*, the President of Uganda referred "the situation concerning the LRA" to the ICC in 2004.⁶ Despite the wording of the referral ("concerning the LRA"), the Prosecutor is conducting investigations against all involved parties.⁷ The Prosecutor thus redefines the situation referred to him as encompassing "all crimes committed in Northern Uganda in the context of the ongoing conflict involving the LRA".⁸

The second referral concerned the *Situation in the Democratic Republic of Congo* where the Chief Prosecutor received a letter signed by the President in 2004.⁹

A third self-referral was received by the Chief Prosecutor on behalf of the government of the Central African Republic in 2005,¹⁰ and a fourth referral regarding the Central African Republic ("Situation in the CAR II") was received in May 2014.¹¹

⁴ Andreas Th. Müller and Ignaz Stegmüller, "Self-referrals on Trial, From Panacea to Patient", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, p. 1272 (<https://www.legal-tools.org/doc/8b40cf/>).

⁵ ICC OTP, "Paper on Some Policy Issue before the Office of the Prosecutor", 5 September 2003 (<https://www.legal-tools.org/doc/f53870/>).

⁶ ICC, "President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, 29 January 2004", ICC-20040129-44 (<https://www.legal-tools.org/doc/ff41c3/>).

⁷ ICC OTP, "Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court – Informal meeting of Legal Advisors of Ministries of Foreign Affairs", 24 October 2005, p. 7 (<https://www.legal-tools.org/doc/7bb578/>).

⁸ ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, 2 December 2005, ICC-02/04-01/05-68, para. 5 (<https://www.legal-tools.org/doc/1adaf1/>).

⁹ ICC, "Prosecutor receives referral of the situation in the Democratic Republic of Congo", 19 April 2004, ICC-OTP-20040419-50 (<https://www.legal-tools.org/doc/342978/>).

¹⁰ ICC, "Prosecutor receives referral concerning Central African Republic", 7 January 2005, ICC-OTP-20050107-86 (<https://www.legal-tools.org/doc/cfa72d/>).

¹¹ Central African Republic, "Letter of Referral under Articles 13(a) and 14", 30 May 2014 in ICC, *Situation in the Central African Republic II*, Presidency, Decision Assigning the Situa-

A fifth referral by Mali was received in 2012.¹²

Another self-referral by the Comoros “with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip, requesting the Prosecutor of the International Criminal Court pursuant to Articles 12, 13 and 14 of the ICC Statute to initiate an investigation into the crimes committed within the Court’s jurisdiction, arising from this raid” was also under scrutiny by the Office of the Prosecutor.¹³ The referral by the Comoros was rejected on the basis of Article 53(1) ICC Statute.¹⁴ However, as noted above, the situation of Palestine as a whole has now been referred (again) by Palestine itself and is pending before the ICC-OTP.

It may be noted that in the *Situation of Kenya*, the Office of the Prosecutor initially also favoured a self-referral.¹⁵

The practice of self-referrals was highly disputed amongst scholars and practitioners,¹⁶ but according to the Chambers in *Lubanga* and *Katanga and Ngudjolo* does not face legality concerns.¹⁷

Despite the unclear drafting history, that is only supplementary in nature, the terminology “referral” and “refer” rather than “complaint” is neu-

tion in the Central African Republic II to PTC II, Annex I, 18 June 2014, ICC-01/14-1-Anx1 (<https://www.legal-tools.org/doc/9304eb/>).

- ¹² ICC, Mali, “Renvoi de la situation au Mali”, 13 July 2012 (<https://www.legal-tools.org/doc/06f0bf/>).
- ¹³ Union of Comoros, “Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010”, 14 May 2013 (<https://www.legal-tools.org/doc/93705a/>).
- ¹⁴ ICC OTP, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: “Rome Statute legal requirements have not been met””, 6 November 2014 (<https://www.legal-tools.org/doc/e745a0/>).
- ¹⁵ ICC OTP, “Agreed Minutes of the Meeting between Prosecutor Moreno-Ocampo and the delegation of the Kenyan government”, 3 July 2009 (<https://www.legal-tools.org/doc/27d6b9/>).
- ¹⁶ See, for example, William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, Articles 14, p. 383 et seq. (<https://www.legal-tools.org/doc/b7432e/>).
- ¹⁷ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 24 February 2006, ICC-01/04-01/06-8-US-Corr, para. 35 (*Lubanga*, 24 February 2006”) (<https://www.legal-tools.org/doc/c60aaa/>); *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, ICC-01/04-01/07-1213, paras. 79–80 (*Katanga and Ngudjolo*, 16 June 2009”) (<https://www.legal-tools.org/doc/e4ca69/>).

tral and allows for action by any State Party, be it the State Party on which territory the conflict took place. In *Lubanga*, Pre-Trial Chamber I mentioned that “the self-referral of the DRC appears consistent with the ultimate purpose of the complementarity regime” (*Lubanga*, 24 February 2006, para. 35). In *Katanga and Ngudjolo*, Trial Chamber II further clarified, in the context of an admissibility challenge by the Defence, that:

However, if a State considers that it is more opportune for the Court to carry out an investigation or prosecution, that State will still be complying with its duties under the complementarity regime, if it surrenders the suspect to the Court in good time and cooperates fully with the Court in accordance with Part IX of the Statute. [...] The Chamber is not in a position to ascertain the real motives of a State which expresses its unwillingness to prosecute a particular case. A State may, without breaching the complementarity principle, refer a situation concerning its territory to the Court if it considers it opportune to do so, just as it may decide to carry out an investigation or prosecution of a particular case (*Katanga and Ngudjolo*, 16 June 2009, paras. 79–80).

The possibility of self-referrals was upheld by the Appeals Chamber in *Katanga and Ngudjolo* stating that “the Statute does not prevent a State from relinquishing its jurisdiction in favour of the Court”.¹⁸

Policy concerns of the practice of self-referral are further discussed in doctrine and evaluated more critically.¹⁹ Similarly, withdrawals of self-

¹⁸ ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, 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, 25 September 2009, ICC-01/04-01/07-1497, para. 85 (<https://www.legal-tools.org/doc/ba82b5/>); in the situation in Central African Republic, *Prosecutor v. Bemba*, Trial Chamber III, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, paras. 259–260 (<https://www.legal-tools.org/doc/a5de24/>).

¹⁹ Schabas, 2016, pp. 387–390 (<https://www.legal-tools.org/doc/b7432e/>); Ignaz Stegmiller, “The International Criminal Court and Mali: Towards More Transparency in International Criminal Law Investigations?”, in *Criminal Law Forum*, 2013, vol. 24, no. 4, pp. 131–134 (<https://www.legal-tools.org/doc/f437b5/>); Mahnoush Arsanjani and Michael Reismann, “Developments at the International Criminal Court: The law-in-action of the ICC”, in *American Journal of International Law*, 2005, vol. 99, no. 2, p. 394 (<https://www.legal-tools.org/doc/7d5a50/>); Kasajja Phillip Apuuli, “The ICC Arrest Warrants for the Lord’s Resistance Army Leaders and Peace Prospects in Northern Uganda”, in *Journal of International Criminal Justice*, 2006, vol. 4, no. 1, p. 185 (<https://www.legal-tools.org/doc/9bdf8f/>); Payam Akhavan, “Developments at the ICC: The Lord’s Resistance Army Case: Uganda’s Submis-

referrals, meaning that the State attempts to regain its *ius puniendi* by taking its former referral back, have gained academic interest.²⁰ The issue could have arisen in the Ugandan situation, where Museveni threatened to withdraw the case and solve the Kony problem by himself, but was never taken to the level of challenging the ICC's jurisdiction or admissibility. Article 127(1) of the ICC Statute states that a State that withdraws from the Statute shall not be discharged from the obligations arising from the Statute while it was a party. From a contextual point of view, withdrawals of referrals are not consistent with the procedural system of the ICC, which provides for challenges under Articles 18 and 19 of the ICC Statute. Furthermore, Article 16 ICC Statute regulates a deferral mechanism for the Security Council. Any other withdrawal or deferral possibility cannot be found in the ICC's procedural system.

Doctrine: For the bibliography, see the final comment on Article 14.

Author: Ignaz Stegmiller.

sion of the First State Referral to the ICC”, in *American Journal of International Law*, 2005, vol. 99, no. 2, p. 411 (<https://www.legal-tools.org/doc/80ac95/>).

²⁰ Adel Maged, “Withdrawals of Referrals – A Serious Challenge to the Function of the ICC”, in *International Criminal Law Review*, 2006, vol. 6, no. 3, pp. 419–422 (<https://www.legal-tools.org/doc/c0d902/>); Mohamed El Zeidy, “The Legitimacy of Withdrawing State Party Referrals and Ad Hoc Declarations under the Statute of the International Criminal Court”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill, Leiden-Boston, 2009, pp. 55–56 (<https://www.legal-tools.org/doc/5d1db6/>).

Article 14(2)

2. 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.

The formalities regulated in paragraph 2 are not further specified in the Rules of Procedure and Evidence. Rule 45 foresees a submission in writing. There is little practical relevance of this provision so far. It regulates the accompanying information that a State has to provide to the Office of the Prosecutor. The wording (“shall”) implies a duty to provide information, however the extent remains unclear and should have been further specified by the Rules of Procedure and Evidence. “As far as possible” and “as is available” allow for a variation of a strict duty.

“Supporting” and “relevant” are also open to interpretation.

The Presidency needs to be informed by the Prosecutor pursuant to Regulation 45. Furthermore, OTP Regulation 30 foresees a notification of UN Security Council if a State referral reaches the level of a “reasonable basis” to initiate an investigation under Article 53(1) ICC Statute.

Cross-references:

Article 13(a).

Rule 45.

Regulation 45.

OTP Regulations 25 and 30.

Doctrine:

1. Jann Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press, 2008 (<https://www.legal-tools.org/doc/0e355e/>).
2. Héctor Olásolo, *The Triggering Procedure of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden/Boston, 2005 (<https://www.legal-tools.org/doc/91b863/>).
3. Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC, Criteria for Situation Selection*, Duncker & Humblot, Berlin, 2011 (<https://www.legal-tools.org/doc/b10182/>).

4. Payam Akhavan, “Self-referrals before the International Criminal Court: Are States Villains or the Victims of Atrocities”, in *Criminal Law Forum*, 2010, vol. 21, no. 1, pp. 103–20 (<https://www.legal-tools.org/doc/7a65b3/>).
5. Payam Akhavan, “Developments at the ICC: The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the ICC”, in *American Journal of International Law*, 2005, vol. 99, no. 2, pp. 403–21 (<https://www.legal-tools.org/doc/80ac95/>).
6. Kasaija Phillip Apuuli, “The ICC Arrest Warrants for the Lord’s Resistance Army Leaders and Peace Prospects in Northern Uganda”, in *Journal of International Criminal Justice*, 2006, vol. 4, no. 1, pp. 179–87 (<https://www.legal-tools.org/doc/9bdf8f/>).
7. Mahnoush Arsanjani and Michael Reismann, “Developments at the International Criminal Court: The law-in-action of the ICC”, in *American Journal of International Law*, 2005, vol. 99, no. 2, pp. 385–403 (<https://www.legal-tools.org/doc/7d5a50/>).
8. Mohamed El Zeidy, “The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State Party’s Referral to the ICC”, in *International Criminal Law Review*, 2005, vol. 5, no. 1, pp. 83–119 (<https://www.legal-tools.org/doc/62f3b6/>).
9. Paola Gaeta, “Is the Practice of Self-Referrals a Sound Start for the ICC?”, in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, pp. 949–52 (<https://www.legal-tools.org/doc/082acc/>).
10. Claus Kress, “‘Self-Referrals’ and ‘Waivers of Complementarity’: Some Considerations in Law and Policy”, in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, pp. 944–48 (<https://www.legal-tools.org/doc/b66681/>).
11. Adel Maged, “Withdrawals of Referrals – A Serious Challenge to the Function of the ICC”, in *International Criminal Law Review*, 2006, vol. 6, no. 3, pp. 419–46 (<https://www.legal-tools.org/doc/c0d902/>).
12. Andreas Th. Müller and Ignaz Stegmiller, “Self-referrals on Trial, From Panacea to Patient”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, pp. 1267–94 (<https://www.legal-tools.org/doc/8b40cf/>).
13. Darryl Robinson, “Editor’s Choice: The Controversy over Territorial State Referrals and Reflections on ICL Discourse”, in *Journal of Inter-*

- national Criminal Justice*, 2011, vol. 9, no. 2, pp. 355–84 (<https://www.legal-tools.org/doc/251dca/>).
14. William A. Schabas, “Complementarity in Practice: Some Uncomplimentary Thoughts”, in *Criminal Law Forum*, 2008, vol. 19, no. 1, pp. 5–33 (<https://www.legal-tools.org/doc/3f00d8/>).
 15. Ignaz Stegmiller, “The International Criminal Court and Mali: Towards More Transparency in International Criminal Law Investigations?”, in *Criminal Law Forum*, 2013, vol. 24, no. 4, pp. 475–99 (<https://www.legal-tools.org/doc/f437b5/>).
 16. Phil Clark, “Chasing Cases, The ICC and the Politics of State Referral in the Democratic Republic of the Congo and Uganda”, in Carsten Stahn and Mohamed El Zeidy (eds.), *The International Criminal Court and Complementarity*, 2nd. ed., Cambridge University Press, 2011, pp. 1180–1203 (<https://www.legal-tools.org/doc/95c65d/>).
 17. Mohamed El Zeidy, “The Legitimacy of Withdrawing State Party Referrals and Ad Hoc Declarations under the Statute of the International Criminal Court”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill, Leiden/Boston, 2009, pp. 55–78 (<https://www.legal-tools.org/doc/5d1db6/>).
 18. Philippe Kirsch and Darryl Robinson, “Referral by State Parties”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, pp. 619–25 (<https://www.legal-tools.org/doc/01addc/>).
 19. Jann Kleffner, “Auto-Referrals and the Complementary Nature of the ICC”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill, Leiden/Boston, 2009, pp. 41–53 (<https://www.legal-tools.org/doc/5d1db6/>).
 20. Antonio Marchesi and Eleni Chaitidou, “Article 14”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 703–724 (<https://www.legal-tools.org/doc/040751/>).
 21. William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 382–392 (<https://www.legal-tools.org/doc/b7432e/>).

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Article 15

Prosecutor

General Remarks:

Article 15 of the ICC Statute deals with one of the three ways of initiating an investigation. In combination with Article 13(c) ICC Statute it outlines the *proprio motu* power of the Prosecutor. The expression *proprio motu* means “on his own motion”.

The provision regulates a complex preliminary examination procedure. In contrast to the trigger mechanisms of a State or Security Council referral, the Pre-Trial Chamber must authorize an investigation (Article 15(3), (4) ICC Statute). To-date, such decisions were rendered in the situations of Kenya and Côte d’Ivoire. In the Kenya situation, Pre-Trial Chamber II highlighted that Article 15 of the ICC Statute is “one of the most delicate provisions of this Statute”.¹ The (former) Chief Prosecutor was very reluctant to make practical use of the *proprio motu* power during the first eight years of the ICC’s activities.

Preparatory Works:

The *proprio motu* power was one of the most controversial aspects during the Rome Conference and political issues had to be resolved before the adoption of the ICC Statute. Opponents and proponents of the mechanism did agree that the inclusion or absence of the mechanism would fundamentally affect the ICC system.²

The International Law Commission discussions in 1994 did not even foresee a prosecutorial *proprio motu* power and provided only for State Party and Security Council referrals. This changed during the *Ad Hoc* Committee debates in 1995 and the autonomous power of initiating investigations by the Prosecutor was brought to the negotiation table for the first

¹ ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, para. 17 (*Situation in Kenya*, 31 March 2010) (<https://www.legal-tools.org/doc/338a6f/>).

² Morten Bergsmo/Jelena Pejić/Dan Zhu, “Article 15”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 726 (<https://www.legal-tools.org/doc/040751/>).

time. A draft proposal was then adopted at the Preparatory Committee's 1996 session, followed by Article 25 *bis* of the Preparatory Committee's session in 1997, which was subsequently reproduced without change in Article 46 of the Zutphen Draft Statute:

Article 25 *bis*:

The Prosecutor [may] [shall] initiate investigations [ex officio] [proprio motu] [or] on the basis of information [obtained] [he may seek] from any source, in particular from Governments, United Nations organs [and intergovernmental and non-governmental organizations]. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed. [The Prosecutor may, for the purpose of initiating an investigation, receive information on alleged crimes under Article 20(a) to (d) from Governments, intergovernmental and non-governmental organizations, victims and associations representing them, or other reliable sources.]³

The Preparatory Committee's meetings from 1996–1998 were characterized by opposing debates. Two groups crystallised, the so-called 'like-minded' States in favour of a *proprio motu* power and a strong Prosecutor, and an opposing group that feared politically motivated or frivolous proceedings by the Chief Prosecutor (*Situation in Kenya*, 31 March 2010, para. 18 with fn. 23). A joint Argentine-German proposal of 25 March 1998 led to broader acceptance of a prosecutorial *proprio motu* power. The proposal limited the Prosecutor's preliminary examinations to "receipt of information [...] submitted by [...] any other reliable source" and introduced the approval by the Pre-Trial Chamber.⁴ The current version of Article 15 is largely identical to the Argentine-German proposal.

During the Rome Conference, 76 percent of the participating countries – in total numbers 61 States – supported a *proprio motu* power. It was yet unclear until the end of the negotiations whether the mechanism would find its way into the ICC Statute. Despite opposition by States, such as the United States, China, India and Japan, Article 15 was finally adopted.

³ Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands: Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC-249/1998/L-13, 5 February 1998 ('Zutphen Draft Statute') (<https://www.legal-tools.org/doc/7ba9a4/>).

⁴ Proposal submitted by Argentina and Germany, UN Doc. A/AC.249/1998/WG.4/DP.35, 25 March 1998, para. 1 (<https://www.legal-tools.org/doc/896cf4/>).

Analysis of Provisions and Sub-Provisions:

Preliminary examinations are on-going in Afghanistan, Honduras, Iraq, Ukraine, Palestine, Colombia, Georgia, Guinea, and Nigeria.⁵ Examinations with regard to the Comoros, Korea and Venezuela were closed.

It is worthy to note that preliminary examinations (pre-investigations) are conducted with regard to all three trigger mechanisms. Rules 48 and 104 of the Rules of Procedure and Evidence lead to a partial overlap between Article 15 and 53 ICC Statute and the same factors need to be assessed.⁶

Regulation 25 of the OTP Regulations states:

The preliminary examination and evaluation of a situation by the Office may be initiated on the basis of:

- (a) any information on crimes, including information sent by individuals or groups, States, intergovernmental or non-governmental organisations;
- (b) a referral from a State Party or the Security Council; or
- (c) a declaration pursuant to Article 12, paragraph 3 by a State which is not a Party to the Statute.

Moreover, Regulation 29(1) OTP Regulations spells out:

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.

⁵ ICC OTP, “Report on Preliminary Examination Activities”, November 2013 (<https://www.legal-tools.org/doc/4ca190/>); see also the “Preliminary Examinations” page, available on the ICC-OTP’s web site.

⁶ *Situation in Kenya*, 31 March 2010, para. 23; ICC, *Situation in the Republic of Côte d’Ivoire*, Pre-Trial Chamber III, 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, 3 October 2011, ICC-02/11-14, para. 17 (<https://www.legal-tools.org/doc/7a6c19/>); *Situation in the Republic of Côte d’Ivoire*, Pre-Trial Chamber III, Judge Fernández de Gurmendi’s separate and partially dissenting opinion to the 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, 3 October 2011, ICC-02/11-15, para. 24 (<https://www.legal-tools.org/doc/ea2793/>); Ignaz Stegmüller, *The Pre-Investigation Stage of the ICC, Criteria for Situation Selection*, Duncker and Humblot, Berlin, 2011, pp. 209 et seq. (<https://www.legal-tools.org/doc/b10182/>).

A first report under regulation 29(1) OTP Regulations was published in the Mali Situation.⁷ The process and criteria are thus similar with regard to all trigger mechanisms. However, the process under Article 15 with regard to *proprio motu* information takes significantly longer in practice.

In fact, no provision in the ICC Statute or the Rules of Procedure and Evidence regulates a specific time period for the completion of a preliminary examination. Regulation 29(4) OTP Regulations states, rather generally, that the evaluation shall continue as long as the situation is investigated. The decision whether or not a “reasonable basis” is reached marks the line between preliminary examinations and investigations, but the question remains what happens if the Prosecutor does not officially announce such a decision. The matter led to a controversy in the situation in the Central African Republic when the Prosecutor gave no information on the situation under scrutiny for over two years. The Pre-Trial Chamber emphasized that a preliminary examination must be completed within “reasonable time”, regardless of its complexity.⁸ The Prosecutor provided information on the status of the preliminary examination, but pointed out that this information was given on a voluntary basis as the Pre-Trial Chamber has no supervisory function with regard to this early stage and that the decision to seek the opening of investigations lies within the discretion of the Prosecution alone.⁹ The disagreement was neither explicitly settled by jurisprudence nor by an amendment of the Rules of Procedure and Evidence. The status and length of preliminary examinations could be (partly) resolved by a new rule or regulation (Stegmiller, 2011, p. 235).

Doctrine: For the bibliography, see the final comment on Article 15.

Author: Ignaz Stegmiller.

⁷ ICC, *Situation in Mali*, OTP, Article 53(1) Report, 16 January 2013 (<https://www.legal-tools.org/doc/abb70f/>).

⁸ ICC, *Situation in the Central African Republic*, Pre-Trial Chamber III, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 30 November 2006, ICC-01/05-6, p. 4 (*‘Situation in the Central African Republic, 30 November 2006’*) (<https://www.legal-tools.org/doc/76e607/>).

⁹ ICC, *Situation in the Central African Republic*, OTP, 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, 15 December 2006, ICC-01/05-7 (<https://www.legal-tools.org/doc/1dd66a/>).

Article 15(1)

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

“May initiate” suggests discretion of the Prosecutor. Commentators have stated that the Prosecutor’s initiation right is “unconditional and discretionary, but carefully balanced by the need for authorization by a Pre-Trial Chamber”.¹ The phrasing has to be put into context with the following words: “investigation” and “*proprio motu*”.

Under this paragraph, the Prosecutor may not start full investigations, despite the wording, but may only initiate preliminary examinations. Taking a glance at the whole provision of Article 15, its accompanying rules 48 and 104 of the Rule of Procedure and Evidence and regulations 25 and 29 of the OTP Regulations, paragraph 1 of Article 15 should not be misconstrued. Paragraph 6 of Article 15 refers to the “preliminary examination referred to in paragraphs 1 and 2”. This preliminary state can be clearly distinguished from the investigation stage under Article 54 ICC Statute.

“*Proprio motu*” means on his or her own initiative without any formal referral by a third party. Article 13(c) of the ICC Statute names Article 15 ICC Statute as one of three trigger mechanisms, on equal footing with Articles 13(a), 14, and Article 13(b).

In consequence, the discretionary “may” under paragraph 1 simply means that the Prosecutor has the right to pre-investigate gathered information if he or she thinks fit. Full investigations, however, require authorization under paragraph 3 of Article 15 ICC Statute. The decision of the Pre-Trial Chamber to authorize full investigations under Article 15(4) ICC Statute is then – procedurally – on equal footing with the Article 53(1) ICC Statute. Only after this decision one may speak of investigations in the narrow sense.

Article 15 therefore embraces two different levels: first, preliminary examination methods are regulated in paragraphs 1, 2, and 6. Second, an intermediary phase is foreseen during which the Pre-Trial Chamber ‘checks

¹ Morten Bergsmo, Jelena Pejić and Dan Zhu, “Article 15”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 730, para. 5 (<https://www.legal-tools.org/doc/040751/>).

and balances' the *proprio motu* power of the Prosecutor in accordance with paragraphs 3, 4, and 5.

Doctrine: For the bibliography, see the final comment on Article 15.

Author: Ignaz Stegmiller.

Article 15(2): Analysis of the Seriousness of the Information

2. The Prosecutor shall analyse the seriousness of the information received.

The Prosecutor “shall” analyse “the seriousness” of the “information received”. In practice, the Office of the Prosecutor uses ‘communication’ as an abbreviation and short term rather than “information received” or “information on crimes within the jurisdiction of the Court”. The latter terms are statutory language, but the former (‘communication’) is not. In Regulation 26 of the OTP Regulations it is held that all information shall be registered. The newly drafted OTP Regulations also depart from the term ‘communication’ and the Prosecutor seems to acknowledge the legal notion of “information received”.

The term “shall” indicates a legal duty to analyse all information received. A qualified member of the Office of the Prosecutor must analyse all incoming information. Once information is classified as such under Article 15 ICC Statute, there is thus a statutory obligation to conduct a preliminary examination and inform the information provider of the result. This duty is acknowledged pursuant to Regulation 28(1) OTP Regulation (see further, commentary to Article 15(6)).

Public reports may be made available if confidentiality concerns allow pursuant to Rule 46 Rules of Procedure and Evidence, Regulation 28(1) OTP Regulations. The Office of the Prosecutor issued public reports with regard to examinations that were ceased in Iraq, Venezuela, Palestine, Korea, and Comoros.¹ A policy paper further spells out the Office of the

¹ OTP response to communications received concerning Iraq, 9 February 2006 (<https://www.legal-tools.org/doc/5b8996/>); OTP response to communications received concerning Venezuela, 9 February 2006 (<https://www.legal-tools.org/doc/c90d25/>); ICC OTP, “Situation in Palestine”, 3 April 2012 (<https://www.legal-tools.org/doc/f5d6d7/>); ICC OTP, *Situation in the Republic of Korea*, Article 5 Report, 23 June 2014 (<https://www.legal-tools.org/doc/ef1f7f/>); *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Article 53(1) Report, 6 November 2014 (<https://www.legal-tools.org/doc/43e636/>).

Prosecutor's understanding of preliminary examination activities² and general reports with regard to on-going examinations are given annually.³

“Seriousness” refers to a minimum threshold for information to qualify under Article 15 for further inquiries. The ICC Statute is silent of the content of “information” under Article 15. Too broad and general information might not provide a sufficient evidentiary basis for the Prosecutor to launch an investigation. It is not a test of appropriateness⁴ but rather an initial assessment of information to filter out unfounded, frivolous information. For this purpose, the Office of the Prosecutor makes preliminary distinctions between matters which “manifestly fall outside the jurisdiction of the Court” and other, more profound information pursuant to regulation 27 of the OTP Regulation that is further processed. The Office of the Prosecutor has also established a filtering process comprising four phases, each phase focusing on a distinct statutory factor for analytical purpose: phase 1 deals with an initial assessment of the “seriousness” of information, phase 2 turns to the preconditions of jurisdiction under Article 12 ICC Statute, phase 3 deals with admissibility under Article 17 ICC Statute, and phase 4 examines the “interests of justice” in accordance with Article 53(1)(c) ICC Statute (Policy Paper on Preliminary Examinations, 2013, paras. 77–84).

The Prosecutor thus understands “seriousness” as an initial evaluation of information based on its evidentiary value, taking into account the reliability of the source and the credibility of the information, and examining information from multiple sources as a means of bias control pursuant to Regulation 24 of the OTP Regulations. “Seriousness” is an evidentiary assessment linked to the legal factors of Article 53(1) and implies some degree of sincerity.

Doctrine: For the bibliography, see the final comment on Article 15.

Author: Ignaz Stegmiller.

² ICC OTP, “Policy Paper on Preliminary Examinations”, November 2013 (“Policy Paper on Preliminary Examinations, 2013”) (<https://www.legal-tools.org/doc/acb906/>).

³ ICC OTP, “Report on Preliminary Examination Activities 2013”, Office of the Prosecutor, November 2013 (<https://www.legal-tools.org/doc/dbf75e/>).

⁴ Morten Bergsmo, Jelena Pejić and Dan Zhu, “Article 15”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 731, para. 13 (<https://www.legal-tools.org/doc/040751/>).

Article 15(2): Additional Information

For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

According to the second sentence of Article 15(2) ICC Statute, the Prosecutor “may seek additional information” and “may receive written or oral testimony at the seat of the Court”. The decision to seek further information is discretionary. The investigation steps are yet limited to the two mentioned possibilities and must be interpreted narrowly. The Prosecutor “cannot deploy all his investigative powers”.¹ Forms of co-operation from States are limited and Part 9 of the ICC Statute does not yet apply to preliminary examinations. Rule 104(2) of the Rule of Procedure and Evidence repeats the measures of Article 15(2), introducing the same method for State referrals and SC referrals. Information can be gathered from States, organs of the United Nations, intergovernmental and non-governmental organizations and other reliable sources. The Prosecutor may send requests for information to these sources. Field missions for the purpose of analysing the information are possible, but have to be limited to obtaining further information. Such field missions were conducted *inter alia* in Colombia, Guinea, and Nigeria.²

Testimony is to be received at the seat in The Hague. Rule 47 of the Rule of Procedure and Evidence specifies this further. For example, a record in accordance with Rules 47(1), 111 and 112 Rule of Procedure and Evidence is always necessary. The provision is not to be construed as narrowly as meaning testimony has to be taken at the seat, but refers to receiving it. Therefore, testimony can be gathered through national authorities and be transmitted to The Hague.

¹ ICC, *Situation in the Republic of Côte d’Ivoire*, Pre-Trial Chamber III, Judge Fernández de Gurmendi’s separate and partially dissenting opinion to the 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, 3 October 2011, ICC-02/11-15, para. 29 (<https://www.legal-tools.org/doc/ea2793/>).

² ICC ASP, Report of the Activities of the Court, 21 October 2013, ICC-ASP/12/28, paras. 72, 74 and 77 (<https://www.legal-tools.org/doc/b22709/>).

The Prosecutor may gather information through the measures outlined in Article 93 ICC Statute. While States might assist the Prosecutor, regardless of the application of co-operation provisions under the ICC Statute, in the case on non-compliance, however, Articles 86, 87 and following of the ICC Statute do not apply, thus not imposing a legal duty to co-operate.³ During preliminary examinations, the Prosecutor therefore must rely on voluntary co-operation and gather information through open sources to the extent available.

Doctrine: For the bibliography, see the final comment on Article 15.

Author: Ignaz Stegmiller.

³ ICC OTP, “Policy Paper on Preliminary Examinations”, November 2013, para. 85 (<https://www.legal-tools.org/doc/acb906/>); ICC OTP, “Informal Expert Paper, Fact-Finding and investigative Functions of the Office of the Prosecutor, Including International Co-operation”, September 2003, paras. 25–29 (<https://www.legal-tools.org/doc/ba368d/>).

Article 15(3): Reasonable Basis to Proceed

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected.

The Prosecutor submits a “request for authorization” to the Pre-Trial Chamber if preliminary examinations provide for a “reasonable basis” to proceed with an investigation. At this stage, the intermediary step from pre- to full investigations is foreseen, in other words, the Prosecutor continues the inquiry after the authorization by means of the associated powers under Article 54.

The Prosecutor determines “reasonable basis” at this stage, and he or she “shall” submit a request for authorization. “Shall” refers to the binding obligation to seek authorization, in contrast to State referrals and Security Council referrals, where the Prosecutor enjoys freedom from such an authorization. This notwithstanding, the Prosecutor should, if a “reasonable basis” under Article 15(3) and 53(1) ICC Statute has been reached, in principle, investigate unless exceptions arise. The incorporation of Article 53’s criteria, above all the “interests of justice,” into the Prosecutor’s final determination, provides an opening for prosecutorial discretion and such an exception.

The Prosecutor must be aware of the fact that the Pre-Trial Chamber will subsequently apply the same reasonability test under Article 15(4) ICC Statute. The content of reasonable basis is the same under Article 15(3) and (4) and under Article 53(1) ICC Statute, which is restated by Rule 48 Rules of Procedure and Evidence.

Rule 50(2) Rules of Procedure and Evidence further states that the request shall be made in writing. In accordance with Regulation 49 of the Regulations of the Court, the Prosecutor attaches the information collected in the situation in hand to the authorization request in annexes. As far as possible, the annexes should include a chronology of relevant events, maps detailing relevant information, including the location of the alleged crimes, and an explanatory glossary of relevant names of persons, locations and institutions. Regulation 38(2)(e) of the Court Regulations establishes a limit of 60 pages for the document requesting the authorization. It is thus clear that the wording “any supporting material collected” of Article 15(3) ICC

Statute does not mean ‘any and all’. The Office of the Prosecutor is only obliged to forward as much supporting material as is required to demonstrate to the Pre-Trial Chamber that the conclusion to further investigate is well-founded. “Supporting material” cannot, however, be reduced to incriminating evidence only and the Office of the Prosecutor may not purposefully withhold information which does not support its conclusion. Article 54(1)(a) ICC Statute requires the Office to investigate “incriminating and exonerating circumstances equally”. In accordance with Rule 46 Rule of Procedure and Evidence, supporting material can be submitted as a confidential attachment to the request.

Doctrine: For the bibliography, see the final comment on Article 15.

Author: Ignaz Stegmiller.

Article 15(3): Victim Representations

Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

Victims may make representations to the Pre-Trial Chamber when a request under Article 15 ICC Statute is made. Information of victims may be brought to the attention of the Prosecutor under Article 15(1) and (2) ICC Statute, and as a corollary of the important role of victims in *proprio motu* proceedings their participation is regulated during early procedure. If the Prosecutor intends to seek a request under Article 15(3) ICC Statute, all victims known to the Prosecutor or to the Victims and Witnesses Unit must be informed under Rule 50(1) Rules of Procedure and Evidence. Victims may then make representations in writing according to Rule 50(2) and (3) Rules of Procedure and Evidence. A time limit of 30 days applies pursuant to Rule 50(3) Rule of Procedure and Evidence and Regulation 50(1) Court Regulations. In addition, Regulation 38(2)(a) Court Regulations limits the documents submitted by victims under Article 15(3) and Rule 50(3) to no more than 60 pages. The Chamber may request additional information from victims who have made representations and, “if it considers appropriate, may hold a hearing” pursuant to Rule 50(4) Rules of Procedure and Evidence. In practice, victims sought participation in the situations in Kenya and Côte d’Ivoire. For the qualification as a ‘victim’ the Chambers consulted Rule 85 Rules of Procedure and Evidence.¹ With regard to the participation procedure and victims’ rights at such an early stage, jurisprudence has not yet found a common practice. The Pre-Trial Chamber in Kenya requested the Victims Participation and Reparations Section (‘VPRS’) to:

1. identify, to the extent possible, the community leaders of the affected groups to act on behalf of those victims who may wish to make representations (collective representation);
2. receive victims’ representations (collective and/or individual);

¹ ICC, *Situation in the Republic of Côte d’Ivoire*, Pre-Trial Chamber III, Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute, 6 July 2011, ICC-02/11-6, para. 10 (‘*Situation in Côte d’Ivoire*, 6 July 2011’) (<https://www.legal-tools.org/doc/45f4fd/>).

3. conduct an assessment, in accordance with paragraph 8 of this order, whether the conditions set out in Rule 85 of the Rules have been met; and
4. summarize victims' representations into one consolidated report with the original representations annexed thereto.²

Pre-Trial Chamber III in the *Côte d'Ivoire* situation departed from this approach and, for the sake of expeditiousness, called upon the VPRS to provide "a single, consolidated report on the collective and individual representations".³

Doctrine: For the bibliography, see the final comment on Article 15.

Author: Ignaz Stegmiller.

² ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, 10 December 2009, ICC-01/09-04, para. 9 (<https://www.legal-tools.org/doc/908205/>).

³ *Situation Côte d'Ivoire*, 6 July 2011, p. 6; see also ICC, *Situation in the Republic of Côte d'Ivoire*, Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, ICC-02/11-14, para. 8 (<https://www.legal-tools.org/doc/7a6c19/>).

Article 15(4): Reasonable Basis to Proceed

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation,

The power to authorize an investigation *proprio motu* lies with the Pre-Trial Chamber alone. While the Prosecutor may initiate the preliminary phase, it is the Chamber's prerogative to allow for the start of a formal investigation. From the moment of authorization, the Office of the Prosecutor is entitled to use its powers under Article 54 ICC Statute. Under Rule 50(5) Rule of Procedure and Evidence, the Chamber may issue a decision, including its reasons, authorizing "all or any part of the request of the Prosecutor", and it must give notice to victims that have made representations. Decisions under Article 15(4) ICC Statute can be appealed by the Prosecutor in accordance with Article 82(1)(a) or (d) ICC Statute but not by States or victims.

The Pre-Trial Chamber must consider whether there is a "reasonable basis to proceed with an investigation". The underlying purpose of this check is to control for frivolous or politically motivated charges. The same "reasonable basis" standard is used for all three trigger mechanisms to move from preliminary examinations to investigations. "Reasonable basis" appears in Articles 15(3), (4), and 53(1) ICC Statute. Rule 48 introduces the criteria of Article 53(1) ICC Statute into Article 15(3) ICC Statute, which strongly suggests that the "reasonable basis" standard is identical in Article 15(4) ICC Statute. The drafting history of Articles 15 and 53 of the Statute further reveals that the intention was to use exactly the same standard for these provisions. Therefore, the same "reasonable basis to proceed" standard applies to both the Prosecutor and the Pre-Trial Chamber in Article 15(3) and (4) ICC Statute.¹

¹ ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, paras. 21–25 ('*Situation in Kenya*, 31 March 2010') (<https://www.legal-tools.org/doc/338a6ff/>); *Situation in the Republic of Côte d'Ivoire*, Pre-Trial Chamber III, 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, 3 October 2011, ICC-02/11-14, para. 17 ('*Situation in Côte d'Ivoire*, 3 October 2011') (<https://www.legal-tools.org/doc/7a6c19/>).

In addition, the Pre-Trial Chamber, due to the overlap between Articles 15 and 53 ICC Statute, must first consider whether the requirements set out in Article 53(1)(a)-(c) ICC Statute are satisfied before deciding whether to authorize the commencement of an investigation. The Chamber shall consider whether:

- (a) the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) the case is or would be admissible under Article 17 of the Statute; and
- (c) taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice (*Situation in Côte d'Ivoire*, 3 October 2011, para. 17).

In essence, the standard under Article 15(4) ICC Statute is a very low one, it is meant to “prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility” and the Chamber must be satisfied “that there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being committed’” (*Situation in Kenya*, 31 March 2010, paras. 32, 35).

This notwithstanding, the question of how low the threshold actually is remains unsettled in present ICC jurisprudence. Since all jurisdictional parameters must be covered by the Pre-Trial Chamber’s review, Judge Hans-Peter Kaul did not agree with the standard applied by the majority of the Chamber and issued a dissenting opinion, holding that the context element of crimes against humanity was not fulfilled:

It is my opinion that in the present case, despite the low threshold, an examination of in particular all legal requirements of Article 7 of the Statute, which establish the *ratione materiae* jurisdiction of the Court, including the contextual elements, is still required. It is most striking that in the Prosecutor’s Request of 26 November 2009 the analysis of the contextual element of crimes against humanity, this crucial point of the entire request, was inadequately explored (Dissenting Opinion of Judge Kaul in *Situation in Kenya*, 31 March 2010, p. 9, para. 18).

In the different context of Côte d’Ivoire, Judge Fernández de Gurmendi suggests an even lower standard than the one applied by the majori-

ty in both situations of Côte d'Ivoire and Kenya, emphasizing that the Chamber has no investigative powers and should largely rely upon the Prosecutor's findings:

the examination to be conducted by the Chamber is of a limited nature, namely to ascertain the accuracy of the statement of facts and reasons of law advanced by the Prosecutor with regard to crimes and incidents identified in his own request and determine, on this basis, whether the requirements of Article 53 of the Statute are met.²

Doctrine: For the bibliography, see the final comment on Article 15.

Author: Ignaz Stegmiller.

² ICC, *Situation in the Republic of Côte d'Ivoire*, Pre-Trial Chamber III, Judge Fernández de Gurmendi's separate and partially dissenting opinion to the 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, 3 October 2011, ICC-02/11-15, para. 28 (<https://www.legal-tools.org/doc/ea2793/>).

Article 15(4): Case Appears to Fall Within the Jurisdiction of the Court

and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

The second half of the phrasing under Article 15(4) ICC Statute, “that the case appears to fall within the jurisdiction of the Court”, causes confusion: first, the provision was drafted in an imprecise manner because, at the given stage, the Prosecutor is concerned with situations as opposed to cases. The term “case” should not be read in isolation from the rest of Article 15 and must be put into perspective regarding the preliminary phase. The Pre-Trial Chamber therefore construed a wide understanding of case as relating to ‘potential cases’ within the situation at stake. Second, the phrase “jurisdiction of the Court” could suggest a double-standard as it is mentioned both under Articles 15(4) and 53(1) ICC Statute. However, jurisdiction is only checked once by the Pre-Trial Chamber and there is no need to duplicate its assessment of jurisdiction because the “analysis makes it evident that there is a degree of redundancy in Article 15(4) of the Statute insofar as the first requirement necessitates assessment of a “reasonable basis to proceed” under Article 53(1)(a) of the Statute, and the second requirement equally prescribes assessment of whether “the case appears to fall within the jurisdiction of the Court”.¹

Doctrine: For the bibliography, see the final comment on Article 15.

Author: Ignaz Stegmiller.

¹ ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, para. 66 (<https://www.legal-tools.org/doc/338a6f/>).

Article 15(5)

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

If the Pre-Trial Chamber refuses to authorize an investigation, the Prosecutor may bring subsequent requests “based on new facts or evidence regarding the same situation”. Rule 50(6) Rule of Procedure and Evidence clarifies that the new request is subject to the same procedure as the original request. The request must refer to new information. No refusal by a Pre-Trial Chamber has taken place to date. Therefore, the matter of subsequent requests is yet to be tested in ICC practice and the term “new facts or evidence” needs to be given a practical analysis.

Under this provision, it is possible that the Office of the Prosecutor keeps monitoring a conflict situation and files a new request if violence erupts again. The preliminary examination process is the Prosecutor’s domain and he or she decides about usage of the Office’s resources according to Article 42(2) ICC Statute.

Doctrine: For the bibliography, see the final comment on Article 15.

Author: Ignaz Stegmiller.

Article 15(6)

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

If the Prosecutor decides not to proceed to an investigation, “he or she shall inform those who provided the information”. Pursuant to Rule 49(1) Rule of Procedure and Evidence, such notification must be given promptly and must include reasons for the decision. Rule 105(2) Rules of Procedure and Evidence links the decision to initiate an investigation under Article 53(1) Rome Statute to Rule 49(1) Rules of Procedure and Evidence, in the case the Prosecutor decides in the negative and does not submit a request under Article 15(4) ICC Statute. The information duty is also acknowledged by regulation 28 OTP Regulations and negative decisions by the Office of the Prosecutor are published under this provision if appropriate.

Victims, however, have neither right to a legal remedy against a (negative) decision under Article 15(3) or (4) ICC Statute, nor can they participate in a review procedure of a negative decision by the Prosecutor. A proposal by the French delegation in this respect aimed at granting victims the status of a procedural party *stricto sensu*, but this idea was rejected during the Rome Conference. Therefore, victims, who have provided for information under Article 15 ICC Statute, have the right to be informed, but they have limited participatory rights.

A follow-up question related to the term “those who provided the information”. A narrow interpretation only covers the original information providers, thus the person who transmitted the information to the Prosecutor and filed the “communication”. Beyond the statutory duty to inform the direct information providers, nothing prevents the Prosecutor from notifying other parties simultaneously. The Office of the Prosecutor has taken such a wider approach in practice and sends notification letters to anyone from whom the Prosecutor has sought additional information and persons who have given testimony.

Cross-references:

Articles 13(c) and 53.

Rules 46–50, 102–104 and 111–112.

Regulation 49, 50 and 87.

OTP Regulations 25–31.

Doctrine:

1. Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC, Criteria for Situation Selection*, Duncker & Humblot, Berlin, 2011 (<https://www.legal-tools.org/doc/b10182/>).
2. Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdiction, The Principle of Complementarity*, Martinus Nijhoff Publishers, Leiden/Boston, 2008 (<https://www.legal-tools.org/doc/e05f19/>).
3. Frank Hoffmeister and Sebastian Knoke, “Das Vorermittlungsverfahren vor dem Internationalen Strafgerichtshof – Prüfstein für die Effektivität der neuen Gerichtsbarkeit im Völkerstrafrecht”, in *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht*, vol. 59, 1999, pp. 785–807 (<https://www.legal-tools.org/doc/426f41/>).
4. Dan Sarooshi, “Prosecutorial Policy and the ICC: Prosecutor’s Proprio Motu Action or Self-Denial?”, in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, pp. 940–43 (<https://www.legal-tools.org/doc/43b1b7/>).
5. Jan Wouters, Sten Verhoeven and Bruno Demeyere, “The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?”, in *International Criminal Law Review*, 2008, vol. 8, no. 1, pp. 273–318 (<https://www.legal-tools.org/doc/58bd4a/>).
6. Morten Bergsmo, Jelena Pejić and Dan Zhu, “Article 15”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 725–740 (<https://www.legal-tools.org/doc/040751/>).
7. Håkan Friman, “The Rules of Procedure and Evidence in the Investigation Stage”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag Arno

- Spitz, Berlin, 2001, pp. 191–217 (<https://www.legal-tools.org/doc/2d6196/>).
8. Håkan Friman, “Investigation and Prosecution”, in Roy Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 493–539 (<https://www.legal-tools.org/doc/e34f81/>).
 9. Philippe Kirsch and Darryl Robinson, “Initiation of Proceedings by the Prosecutor”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the ICC: A Commentary*, 2nd. ed., Oxford University Press, 2002, pp. 657–64 (<https://www.legal-tools.org/doc/01addc/>).
 10. William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 393–409 (<https://www.legal-tools.org/doc/b7432e/>).
 11. Giuliano Turone, “Powers and Duties of the Prosecutor”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), 2002, pp. 1137–80.

Author: Ignaz Stegmiller.

Article 15 *bis*

Article 15 *bis*⁵

Exercise of Jurisdiction over the Crime of Aggression

[...]

⁵ Inserted by resolution RC/Res.6 of 11 June 2010.

General Remarks:

Article 15 *bis* regulates the Court's jurisdiction over the crime of aggression where situations are referred to the Court by a State, or where investigations are instigated by the Office of the Prosecutor. Referrals by the Security Council are regulated under Article 15 *ter*. The amendments on the crime of aggression entered into force on 17 July 2018. A State Party that does not wish to be bound by the amendments may file a declaration to the Registry of the Court stating that it does not accept the amendments, which will then not be binding upon the State in question. There is still uncertainty regarding some aspects of the change to the Court's jurisdiction, especially with regard to States Parties that have neither ratified, nor opted out from the amendments in accordance with Paragraph 4. While it is possible for the Prosecutor to proceed with an investigation regarding the crime of aggression without a determination by the UN Security Council that an act of aggression has been committed, this requires authorization by the Pre-Trial Division in accordance with paragraph 8.

Preparatory Works:

In accordance with the now deleted Article 5(2), the ICC would exercise jurisdiction over the crime of aggression "once a provision [was] 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". In order for the States Parties to find a definition and jurisdictional conditions that they could agree upon, the Assembly of States Parties ('ASP') decided to establish a Special Working Group on the Crime of Aggression ('SWGCA') which was to submit proposed provisions to a future Review Conference.¹ The SWGCA held several meetings between 2003 and 2009 and its draft amendments were the starting point for the dis-

¹ ICC ASP, Continuity of Work in Respect of the Crime of Aggression, Resolution ICC-ASP/1/Res.1, 9 September 2002 (<https://www.legal-tools.org/doc/e28718/>).

cussions at the Kampala Review Conference in 2010, where Articles 8 *bis*, 15 *bis*, 15 *ter* and 25(3) *bis* were adopted.

The three main areas of controversy for the SWGCA, and later for the Review Conference, were the definition of ‘an act of aggression’; the individual conduct within the act; and the exercise of jurisdiction by the ICC. While the first two sets of issues are covered by Article 8 *bis*, the jurisdictional conditions are dealt with under this Article and in Article 15 *ter*.

The main questions regarding the Court’s jurisdiction over the crime of aggression concerned the application of the provisions to States Parties that have not ratified, nor accepted, the amendments, as well as the role of the UN Security Council in determining that an act of aggression has been committed. To start with the latter, the role of the Security Council was a sensitive issue in the negotiations leading up to the decision in Kampala. The drafted ICC Statute from 1994 suggested that the Court’s jurisdiction over the crime of aggression should be dependent on a determination by the Security Council that an act of aggression had been committed.² However, to give the Security Council, with its well documented problems and limited number of Member States such a power was considered problematic, even though it was defended by the permanent members of the Council.³ Most notably the UK and France defended the Security Council’s exclusive right to determine an ‘act of aggression’ with reference to such a right being provided to the Council by the UN Charter, to which the now deleted Article 5(2) made a direct reference.

While the majority held that the Security Council should not have an exclusive power to determine an act of aggression, the solution agreed upon in Kampala was to have different procedures in cases where the Security Council has determined that an act of aggression has been committed and where such a determination is absent. Further, it was made clear in Article 15 *bis*(8) that the right of the Security Council to defer a case in accordance

² Report of the International Law Commission on the work of its forty-sixth session (2 May 1994–22 July 1994), UN Doc. A/49/10, para. 7, pp. 36–37 (<https://www.legal-tools.org/doc/f73459/>); “Draft Statute for an International Criminal Court”, in Yearbook of the International Law Commission, Vol. 2, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), 22 July 1994, 2 September 1994, p. 43, Article 23(2) (<https://www.legal-tools.org/doc/9596bb/>).

³ Claus Kress and Leonie von Holtzendorff, “The Kampala Compromise on the Crime of Aggression”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, p. 1194 (<https://www.legal-tools.org/doc/95212b/>).

with Article 16 is applicable also to the crime of aggression, just as to other crimes under the ICC Statute.

The second major question regarding jurisdiction was that of how to regulate aggression by States Parties to the ICC Statute that have not ratified or accepted the amendments. Some argued that the amendments should be binding upon all States Parties in accordance with Article 12(1), whereas others held that States Parties had to agree to be bound by the amendments, in accordance with Article 121(5).⁴ The disagreements were largely based in different interpretations of Article 5(2), but also of Article 121(5) and its applicability to the crime of aggression.

There were several suggestions for how the conditions of jurisdiction should be determined. One was to apply the ‘Adoption Model’, where a two-thirds majority vote to adopt the amendments in accordance with Article 121(3) would suffice. The use of this model without any further requirement of ratification by States Parties for the entry into force of the amendments was unsatisfying to most (Kress and von Holtzendorf, 2010, p. 1196). Others argued for the Article 121(5) model with a ‘negative understanding’, which would give the Court jurisdiction over the crime of aggression for those States that had accepted the amendments, but not for others. Such an interpretation was considered problematic for several reasons, including the question of whether the crime of aggression was an amendment to Article 5, 6, 7 or 8, considering the previous existence of Article 5(1)(d) and Article 5(2) (Kress and von Holtzendorff, 2010, p. 1197). A broader interpretation of Article 121(5) was provided by the supporters of the ‘positive understanding’ model, which held that the second sentence of Article 121(5) should be read together with Article 12(2), giving the Court jurisdiction over the crime of aggression in situations where such jurisdiction had been accepted by the victim State, even if the aggressor had not ratified the amendments. Yet another suggestion was the ‘Article 121(4) Model’, which required the amendments to be ratified by seven-eighths of the States Parties. This was considered problematic partly as it treated the provisions as amendments outside of Articles 5–8, even though the crime of aggression already existed in Article 5(1)(d), but also since it

⁴ ICC ASP, Report of the Special Working Group on the Crime of Aggression, 13 February 2009, ICC-ASP/7/20/Add.1, pp. 21–22 (<https://www.legal-tools.org/doc/6a6ac5/>).

would possibly bind one-eighths of the States Parties without their consent.⁵

There were also some more creative suggestions trying to avoid the lock down in the interpretation of already existing paragraphs. The most notable of these were the opt-in and opt-out solutions proposed by the Chairman of the SWGCA in 2009.⁶ The opt-in solution held that States would have to actively opt-in to be bound, whereas the opt-out solution gave States Parties the possibility to opt-out, in case they did not wish to be bound by the amendments. The latter would thus shift the default situation and require active action by States Parties to avoid being bound. The opt-out regime is now found in the text of Article 15 *bis*(4), however, as discussed under paragraph 4, the large amount of compromises in the lead up to the decision in Kampala and the adoption of the Resolution on the Activation of the jurisdiction of the Court over the crime of aggression in New York,⁷ have led to the jurisdictional provision being far from clear.⁸ The jurisdictional questions arising from this discussion will have to be determined by the Court in the future.

With regard to the principle of complementarity, there were some concerns around the possibility for States to exercise domestic jurisdiction over the crime of aggression. Following from this, Understanding 5 states that the amendments do not create such a right with respect to an act of aggression committed by another State.⁹ It remains to be seen whether and how this understanding will affect domestic legislatures (Kreß and von Holtendorff, 2010, p. 1216).

Doctrine: For the bibliography, see the final comment on Article 15 *bis*.

Author: Marie Aronsson-Storrier.

⁵ Marko Milanovic, “Aggression and Legality Custom in Kampala”, in *Journal of International Criminal Justice*, 2012, vol. 10, p 178 (<https://www.legal-tools.org/doc/f0907d/>).

⁶ “Non-Paper by the Chairman on the Exercise of Jurisdiction”, Informal inter-sessional meeting on the crime of aggression 8–10 June 2009, 28 May 2009, paras. 10–12 (<https://www.legal-tools.org/doc/1b6d76/>).

⁷ ICC ASP, Activation of the jurisdiction of the Court over the crime of aggression, 14 December 2017, ICC-ASP/16/Res.5 (<https://www.legal-tools.org/doc/6206b2/>).

⁸ Claus Kreß, “On the Activation of ICC Jurisdiction over the Crime of Aggression”, in *Journal of International Criminal Justice*, 2018, vol. 16, no. 1 (<https://www.legal-tools.org/doc/038a3c/>).

⁹ ICC ASP, Resolution RC/11, Annex III, Understanding 5 (<https://www.legal-tools.org/doc/de6e31/>).

Article 15 bis(1)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraphs (a) and (c), subject to the provisions of this Article.

The Article regulates State referrals and *proprio motu*, investigations instigated by the Office of the Prosecutor. Referrals by the UN Security Council is regulated by Article 15 *ter*.

Doctrine: For the bibliography, see the final comment on Article 15 *bis*.

Author: Marie Aronsson-Storrier.

Article 15 *bis*(2)

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

Paragraph 2 regulates the earliest time from which the acts committed may be under the ICC's jurisdiction, as long as the requirement in paragraph 3 is fulfilled. The Understandings make clear that for the Court to have jurisdiction of a crime, one year need to have passed since the ratification of thirty States Parties and a decision needs to have been taken in accordance with Article 15 *bis*(3).¹ Such a decision was taken by consensus on 14 December 2017, through Resolution ICC-ASP/16/Res.5, where the ASP activated the Court's jurisdiction over the crime of aggression as of 17 July 2018.²

According to Article 121(5), amendments should enter into force for a ratifying state one year after ratification. Therefore, as it is not certain whether all States Parties are bound by the provisions after the requirements in this paragraph and paragraph 3 have been met (see comment to paragraph 4), it might be the case that the Court may exercise jurisdiction over subsequent ratifying states at different times if they ratify after, or less than a year before, the provisions enter into force.

The application of the amendments with respect to States Parties that have not accepted the amendments at the time when the Court gains jurisdiction, is discussed under paragraph 4.

Doctrine: For the bibliography, see the final comment on Article 15 *bis*.

Author: Marie Aronsson-Storrier.

¹ ICC ASP, The Crime of Aggression, 11 June 2010, Resolution RC/Res.6, Annex III, Understanding 3 (<https://www.legal-tools.org/doc/0d027b/>).

² ICC ASP, Activation of the jurisdiction of the Court over the crime of aggression, 14 December 2017, Resolution ICC-ASP/16/Res.5 (<https://www.legal-tools.org/doc/6206b2/>).

Article 15 bis(3)

3. 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.

According to this paragraph, the Court may only exercise jurisdiction over the crime of aggression if this is decided by at least a two-third majority after 1 January 2017, in accordance with Article 121(3). Thus, while only thirty States Parties need to actively ratify the amendments in accordance with paragraph 2, two-thirds of the States Parties needed to approve of the amendments before the Court may exercise jurisdiction over the crime. Such a decision was taken by consensus on 14 December 2017, through Resolution ICC-ASP/16/Res.5, where the ASP activated the Court's jurisdiction over the crime of aggression as of 17 July 2018.¹

Doctrine: For the bibliography, see the final comment on Article 15 bis.

Author: Marie Aronsson-Storrier.

¹ ICC ASP, Activation of the jurisdiction of the Court over the crime of aggression, 14 December 2017, Resolution ICC-ASP/16/Res.5 (<https://www.legal-tools.org/doc/6206b2/>).

Article 15 bis(4)

4. 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. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

As soon as the requirements in Article 15 bis(2) and (3) are met, the amendments are applicable to the States Parties that have ratified or accepted them, unless they have lodged a declaration with the registrar that they wish not to be bound. An opt-out declaration can be lodged regardless of whether or not the state in question has ratified the amendments. It further follows from the wording of this Paragraph that an opt-out declaration does not affect the protection that a state has as a victim state, but merely the Court's jurisdiction in cases where the state is the aggressor.

Significant uncertainty remains regarding the application of the amendments on States Parties that have not ratified, yet not lodged an opt-out declaration. This uncertainty follows from the contradiction in the adoption of Article 15 bis(4) and the reference to Article 121(5) in the first operational paragraph of Resolution RC/Res.6.¹ Following the adoption of the Kampala Amendments in 2010, some argued that States Parties would be bound by default, unless they opt-out,² whereas others argued that the provisions on the crime of aggression would not bind States Parties that have not ratified the amendments, regardless of whether or not they have opted out.³

¹ ICC ASP, The Crime of Aggression, 11 June 2010, Resolution RC/Res.6 (<https://www.legal-tools.org/doc/0d027b/>).

² Claus Kress and Leonie von Holtendorff, "The Kampala Compromise on the Crime of Aggression", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, p. 1213; Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, pp. 258–259 (<https://www.legal-tools.org/doc/280086/>).

³ Beth Van Schaack, "Negotiating at the Interface of Power & Law: The Crime of Aggression", *Columbia Journal of Transnational Law*, 2010–11, vol. 49, p. 598 (<https://www.legal-tools.org/doc/54174c/>).

In addition to the uncertain relationship between Articles 15 *bis* and 121(5), there are also different readings of the application of Article 12, which is referred to in this Paragraph. One approach is that the Court has jurisdiction in any of the scenarios in Article 12(2), that is, cases where either the alleged aggressor State or the alleged victim State has ratified the amendments. Another approach is that a textual reading of Article 121(5) requires both the aggressor and the victim State to have ratified the amendments in order for the Court to have jurisdiction.

Kevin Jon Heller, Carrie McDougall, Marko Milanovic and Astrid Reisinger Coracini have all presented illustrative and helpful tables over the jurisdiction.⁴ It is agreed that the ICC has jurisdiction in situations where both the aggressor State and the victim State are Party to the Rome Statute and have ratified the amendments without lodging an opt-out declaration, and that it does not have jurisdiction under Article 15 *bis* in cases where the aggressor is a State Party that has lodged an opt-out declaration.

Where the aggressor is a State Party that has not ratified and not opted out, and the victim is a State Party that has ratified the amendments, there seems to be broad agreement that the Court has jurisdiction in accordance with Article 12(2)(a), regardless of whether or not the victim state has lodged an opt-out declaration (McDougall, 2013, p. 261; Reisinger Coracini, 2010, p. 782; Milanovic, 2012, p. 182). Those promoting a narrow interpretation of Article 121(5) however, hold that the Court could not have jurisdiction in this case, since the aggressor State has not accepted the amendments (Milanovic, 2012, p. 182).

In situations where the aggressor is a State Party that has not ratified and not opted out and the victim is a State Party that has not ratified the amendments, the majority of scholars hold that the Court probably does not have jurisdiction, regardless of whether or not the victim state has opted out (McDougall, 2013, p. 261; Reisinger Coracini, 2010, p. 782; Milanovic, 2012, p. 182). Jurisdiction in such cases might be possible if a State

⁴ Kevin Jon Heller, “The Uncertain Legal Status of the Aggression Understandings”, in *Journal of International Criminal Justice*, 2012, vol. 10 (<https://www.legal-tools.org/doc/fb4f4e/>); McDougall, 2013, p. 261; Astrid Reisinger Coracini, “The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression – at Last ... in Reach ... Over Some”, in *Goettingen Journal of International Law*, 2010, vol. 2, p. 782 (<https://www.legal-tools.org/doc/82bd41/>); Marko Milanovic, “Aggression and Legality Custom in Kampala”, *Journal of International Criminal Justice*, 2012, vol. 10, p. 182 (<https://www.legal-tools.org/doc/f0907d/>).

Party that has not ratified the amendments would be allowed to accept the Court's jurisdiction of the crime of aggression in accordance with Article 12(3), but the existence of such possibility is far from certain (McDougall, 2013, p. 264; Reisinger Coracini, 2010, p. 781; Kress and von Holtendorff, 2010, p. 1214).

The remaining uncertainties primarily concern situations where the aggressor is a State Party that has not ratified and not opted out, and the victim is a State Party that has ratified the amendments. Following Kampala, two lines of argumentation have been put forward. The first, often referred to as the 'broad', or 'permissive', view have argued that the Court has jurisdiction in accordance with Article 12(2)(a), regardless of whether or not the victim state has lodged an opt-out declaration (McDougall, 2013, p. 261; Reisinger Coracini, 2010, p. 782; Milanovic, 2012, p. 182). In contrast, promoters of the 'narrow', or 'restrictive', interpretation of Article 121(5), argue that the Court could not have jurisdiction in this case, since the aggressor state has not accepted the amendments.⁵ Similarly, where the aggressor is a State Party that has ratified and not opted out and the victim is a State Party that has not ratified the amendments, a permissive reading would say that the Court has jurisdiction in accordance with this paragraph and Article 12(2)(a), whereas according to a narrow reading of Article 121(5) both the aggressor state and the victim state would need to accept the amendments in order for the Court to have jurisdiction in this situation (Milanovic, 2012, p. 182; Akande, 2011, p. 27).

Promoters of the 'narrow view' have found support in paragraph 2 of the 2017 Resolution on the Activation of the jurisdiction of the Court over the crime of aggression,⁶ which confirms "that in the case of a state referral of *proprio motu* investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments". However, it is important to note that while significant, the Resolution is not binding, and is unlikely to constitute the last word on the matter. As clarified in paragraph 3 of the Resolution, the Court – not the ASP – has the last word on jurisdictional matters. Academic discussion following the

⁵ Dapo Akande, "Prosecuting Aggression: The Consent Problem and the Role of the Security Council", in *Oxford Legal Research Paper Series*, 2011, no. 10, p. 27 (<https://www.legal-tools.org/doc/6ad27b/>).

⁶ ICC ASP, Activation of the jurisdiction of the Court over the crime of aggression, 14 December 2017, Resolution ICC-ASP/16/Res.5 (<https://www.legal-tools.org/doc/6206b2/>).

adoption of the activation resolution has concerned the extent to which the Court is obligated to follow the restrictions in paragraph 2. In particular, it has been discussed whether the resolution amounts to subsequent agreement or subsequent practice, in accordance with Article 31(3)(a) and 31(3)(b) of the Vienna Convention on the Law of Treaties.⁷ Such an argument is weakened by the fact that a number of states voiced their diverging interpretations immediately after the adoption, and that not all members of the ASP were present at the adoption of the resolution. Nonetheless, there is no doubt that this strengthens the position of the ‘narrow’ view – at the very least as supplementary means of interpretation in accordance with Article 32 of the Vienna Convention on the Law of Treaties (Akande and Tzanakopoulos, 2018, p. 948).

As can be seen above, there remains significant uncertainties as to the jurisdiction under this Article, and it will be for the Court to resolve these challenging jurisdictional matters as they arise.

Doctrine: For the bibliography, see the final comment on Article 15 *bis*.

Author: Marie Aronsson-Storrier.

⁷ Vienna Convention on the Law of Treaties, 23 May 1969 (<https://www.legal-tools.org/doc/6bfcd4/>); Akande and Tzanakopoulos, 2018, p. 944 ff.; Clearwater, 2018.

Article 15 bis(5)

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

Paragraph 5 excludes from the Court's jurisdiction acts of aggression committed by, or on the territory of, a non-State Party and constitutes a notable limitation of the application of the crime of aggression under this Statute.

While there have been some suggestions that Article 12(2) applies to the crime of aggression also where the victim State is not party to the ICC Statute, the majority holds that the Court does not have jurisdiction over such situations.¹ If there is some uncertainty regarding the jurisdiction in cases where a State Party that has ratified the amendments attacks a non-State Party, it is clear that the Court does not have jurisdiction over situations where the aggressor is a State Party that has not ratified the amendments, and the victim is a non-State Party. The same is true for situations where the aggressor is a State Party that has opted out, regardless of whether or not it has ratified the amendments. It is further agreed that the Court does not have jurisdiction in cases where the aggressor state is not party to the ICC Statute. The question remains as to whether Article 12(3) is applicable to the crime of aggression, and thus whether or not it is possible for a state to accept the Court's jurisdiction ad hoc.²

¹ Kevin Jon Heller, "Opt-ins and Opt-outs", in *Opinio Juris*, 2010 (<https://www.legal-tools.org/doc/6feb2/>); Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 261 (<https://www.legal-tools.org/doc/280086/>); Astrid Reisinger Coracini, "The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression – at Last ... in Reach ... Over Some", in *Goettingen Journal of International Law*, 2010, vol. 2, p. 782 (<https://www.legal-tools.org/doc/82bd41/>); Marko Milanovic, "Aggression and Legality Custom in Kampala", in *Journal of International Criminal Justice*, vol. 10, 2012, p. 182 (<https://www.legal-tools.org/doc/f0907d/>).

² Akande and Tzanakopoulos, 2018, pp. 954 ff.; Carsten Stahn, "The 'End', the Beginning of the 'End' or the 'End of the Beginning'? Introducing Debates and Voices on the Definition of Aggression", in *Leiden Journal of International Law*, 2010, vol. 23, no. 4, p. 880 (<https://www.legal-tools.org/doc/c25421/>); McDougall, 2013, p. 264; Reisinger Coracini, 2010, p. 781; Claus Kress and Leonie von Holtzendorff, "The Kampala Compromise on the Crime of Aggression", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, p. 1214 (<https://www.legal-tools.org/doc/95212b/>).

Doctrine: For the bibliography, see the final comment on Article 15 *bis*.

Author: Marie Aronsson-Storrier.

Article 15 bis(6)

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

Before proceeding with an investigation, the Prosecutor needs to establish whether or not the UN Security Council has made a determination of an act of aggression in the specific situation. While this will be an easy task in cases where the Security Council uses the phrase ‘act of aggression’, it will be less obvious in cases where the Council might speak of a State being aggressive, or ‘aggressive behaviour’. Questions have been raised of whether the determination needs to be in an operational paragraph, or if it is enough to just raise concerns over a State being aggressive, and it remains to be seen how the Court will interpret this. The notification of the UN Secretary-General is essential for proceeding with the investigation. In cases where the Security Council has not made a determination of an act of aggression, the waiting period of six months in Paragraph 8 starts at the time of the notification.

Doctrine: For the bibliography, see the final comment on Article 15 bis.

Author: Marie Aronsson-Storrier.

Article 15 bis(7)

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

In cases where the Prosecutor, in accordance with Paragraph 6, finds that the UN Security Council has determined an act of aggression, there is no need for a decision by the Pre-Trial Division or by the Pre-Trial Chamber in order to proceed with the investigation. The procedure in cases where no such determination has been made is regulated in Paragraph 8.

In accordance with Paragraph 10, the Prosecutor may still need the authorization by the Pre-Trial Chamber in order to proceed with the investigation of other crimes under the Statute, including in situations where this Paragraph is applicable.

Doctrine: For the bibliography, see the final comment on Article 15 bis.

Author: Marie Aronsson-Storrier.

Article 15 bis(8)

8. 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.

In cases where the UN Security Council has not made determination of an act of aggression within six months after the UN Secretary-General was notified in accordance with Paragraph 6, the Prosecutor may proceed without such a determination. Unlike cases where the Council has determined that an act of aggression has been committed, the proceeding with an investigation in the absence of such a determination is dependent on the authorization by the Pre-Trial Division. In accordance with Article 39(1), the Pre-Trial Division consists of a minimum of six judges.

The reference to Article 15 in this Paragraph clarifies that even though an authorization for the commencement of an investigation for the crime of aggression shall come from the Pre-Trial Division rather than the Pre-Trial Chambers, the procedure is otherwise the same as for other crimes in the Statute, with the difference that the procedure in Article 15 should be followed both for State referrals and *proprio motu* investigations. In accordance with Paragraph 10, the authorization by the Pre-Trial Division of an investigation of the crime of aggression is separate from the authorization by the Pre-Trial Chamber of the investigation of other crimes in the Statute.

The reference to Article 16 is a clarification that the Security Council's power to defer a case up to twelve months is applicable also with regard to the crime of aggression.

Doctrine: For the bibliography, see the final comment on Article 15 bis.

Author: Marie Aronsson-Storrier.

Article 15 *bis*(9)

9. 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.

Paragraph 9 ensures the independence of the ICC in determining whether an act of aggression has been committed. This, in combination with the possibility to proceed with an investigation without a determination by the UN Security Council, was a controversial issue during the negotiations.

The Court may determine that an act of aggression has been committed where such a determination is lacking, and it may also find that no act of aggression has been committed even where the Security Council, the International Court of Justice, or any other organ outside the Court has made a positive determination that such an act has taken place. This paragraph will be of importance in politically sensitive situations where the veto right by the permanent members of the Security Council might stop the Council from determining an act of aggression, but it can also be used against a determination by the ICJ, or any other organ outside of the Court. The Paragraph will further be applied in cases where the ICJ or the Security Council hold that there has been a breach of the prohibition of the use of force, but for various reasons do not refer to it as ‘aggression’, and the ICC still find that the act amounts to aggression.

Doctrine: For the bibliography, see the final comment on Article 15 *bis*.

Author: Marie Aronsson-Storrier.

Article 15 *bis*(10)

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Paragraph 10 clarifies that the special considerations applying to the crime of aggression are not to be interpreted as applying to other crimes.

In cases where a situation may entail several crimes under the Statute, additional authorization of an investigation needs to be sought in accordance with Article 15. This is the case regardless of whether the Prosecutor proceeds with an investigation on the basis of Paragraph 7 or 8. While the need for separate procedures can be considered unsatisfactory, this solution has been adopted in order to avoid unnecessary stalling of investigations of situations where the process of the investigation of a crime of aggression has a different time frame than the investigation of other crimes.¹

It has been suggested that Paragraph 10 can be read to support the view that Article 12(3) does not apply to the crime of aggression, though there is still some uncertainty as to whether or not this is correct.²

Cross-references:

Articles 5(1)(d), 8 *bis*, 12, 15 *ter*, 121 and 123.

Doctrine:

1. Dapo Akande, “Prosecuting Aggression: The Consent Problem and the Role of the Security Council”, in *Oxford Legal Research Paper Series*, no. 10, 2011 (<https://www.legal-tools.org/doc/6ad27b/>).

¹ Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 274 (<https://www.legal-tools.org/doc/280086/>).

² McDougall, 2013, p. 264; Astrid Reisinger Coracini, “The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression – at Last ... in Reach ... Over Some”, in *Goettingen Journal of International Law*, 2010, vol. 2, p. 781 (<https://www.legal-tools.org/doc/82bd41/>); Claus Kress and Leonie von Holtzendorff, “The Kampala Compromise on the Crime of Aggression”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, p. 1214 (<https://www.legal-tools.org/doc/95212b/>).

2. Kevin Jon Heller, “The Uncertain Legal Status of the Aggression Understandings”, in *Journal of International Criminal Justice*, vol. 10, 2012, pp. 229–248 (<https://www.legal-tools.org/doc/fb4f4e/>).
3. Kevin Jon Heller, “Opt-ins and Opt-outs”, in *Opinio Juris*, 2010.
4. Claus Kress and Leonie von Holtzendorff, “The Kampala Compromise on the Crime of Aggression”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, pp. 1179–1217 (<https://www.legal-tools.org/doc/95212b/>).
5. Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, pp. 258–259, 261, 264, 274 (<https://www.legal-tools.org/doc/280086/>).
6. Marko Milanovic, “Aggression and Legality Custom in Kampala”, in *Journal of International Criminal Justice*, 2012, vol. 10, pp. 165–187 (<https://www.legal-tools.org/doc/f0907d/>).
7. Astrid Reisinger Coracini, “The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression – at Last ... in Reach ... Over Some”, in *Goettingen Journal of International Law*, 2010, vol. 2, pp. 745–789 (<https://www.legal-tools.org/doc/82bd41/>).
8. Beth Van Schaack, “Negotiating at the Interface of Power & Law: The Crime of Aggression”, in *Columbia Journal of Transnational Law*, 2010–11, vol. 49, pp. 505–601 (<https://www.legal-tools.org/doc/54174c/>).
9. Carsten Stahn, “The ‘End’, the Beginning of the End’ or the ‘End of the Beginning’? Introducing Debates and Voices on the Definition of Aggression”, in *Leiden Journal of International Law*, vol. 23, no. 4, 2010, pp. 875–882 (<https://www.legal-tools.org/doc/c25421/>).

Author: Marie Aronsson-Storrier.

Article 15 *ter*

Article 15 *ter*⁶

Exercise of jurisdiction over the crime of aggression (Security Council referral)

[...]

⁶ Inserted by resolution RC/Res.6 of 11 June 2010.

General Remarks:

Article 15 *ter* largely resembles Article 15 *bis*, and affirms that the time frame for jurisdiction of the Court is the same for UN Security Council referral as for State Party referral and *proprio motu* investigations. As with other crimes under this Statute, the Security Council refers the situation without the direction of the specific crime, in accordance with Article 13(b). The procedure under this Article is not affected by a determination of an act of aggression by the Security Council.

Preparatory Works :

The exercise of jurisdiction over the crime of aggression through referrals by the Security Council is largely considered uncontroversial, and has thus received much less attention than State referrals and *proprio motu* investigations under Article 15 *bis*. For general comments on the lead up to the adoption of this provision in Kampala in June 2010, see comment on Article 15 *bis*.

Doctrine: For the bibliography, see the final comment on Article 15 *ter*.

Author: Marie Aronsson-Storrier.

Article 15 *ter*(1)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraph (b), subject to the provisions of this Article.

Security Council referrals give the Court jurisdiction over all States, including State Parties that have lodged an opt-out declaration in accordance with Article 15 *bis*(4), as well as States that are not party to the ICC Statute.¹

It should be noted that in accordance with Article 13(b) the Security Council may refer a situation to the ICC where one or more crimes listed in Article 5 “appears to have been committed”. Thus, there might be situations where the Security Council have made a referral without having made a determination that an act of aggression is at hand.² That such a determination does not affect the procedure under this Article is an important difference from cases where the jurisdiction is based on State referrals or *proprio motu* investigations, where extra measures are required under Article 15 *bis*(8) in the absence of such a determination. It remains to be seen how this will affect the Security Council decisions regarding referrals to the ICC.

Doctrine: For the bibliography, see the final comment on Article 15 *ter*.

Author: Marie Aronsson-Storrier.

¹ ICC ASP, The Crime of Aggression, 11 June 2010, Resolution RC/Res.6, Annex III, Understanding 2 (<https://www.legal-tools.org/doc/0d027b/>).

² Claus Kress and Leonie von Holtzendorff, “The Kampala Compromise on the Crime of Aggression”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, p. 1211 (<https://www.legal-tools.org/doc/95212b/>).

Article 15 *ter*(2)

2. *The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.*

Paragraph 2 regulates the time for which the acts committed may be under the ICC's jurisdiction, as long as the requirement in Paragraph 3 is fulfilled. The Understandings make clear that for the Court to have jurisdiction of a crime, one year needs to have passed since the ratification of thirty State Parties and a decision needs to have been taken in accordance with Paragraph 3.¹ That is, despite having reached thirty ratifications on 26 June 2016, this does not automatically mean that the Court will have jurisdiction over acts committed after 26 June 2017. Rather, this will be dependent on a decision taken in accordance with Article 15 *ter*(3).

Doctrine: For the bibliography, see the final comment on Article 15 *ter*.

Author: Marie Aronsson-Storrier.

¹ ICC ASP, The Crime of Aggression, 11 June 2010, Resolution RC/Res.6, Annex III, Understanding 1 (<https://www.legal-tools.org/doc/0d027b/>).

Article 15 *ter*(3)

3. 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.

According to this paragraph, the Court may only exercise jurisdiction over the crime of aggression if this is decided by at least a two-third majority after 1 January 2017, in accordance with Article 121(3). Thus, while only thirty States Parties need to actively ratify the amendments as stated in paragraph 2, two thirds of the State Parties must still approve of the amendments before the Court may exercise jurisdiction over the crime. Jurisdiction will then apply to acts committed one year after the ratification of thirty States Parties, or after the decision taken in accordance with this paragraph, whichever comes last.¹

There is no requirement for a State Party to have ratified or otherwise accepted the amendments in order to cast a positive vote after 1 January 2017.

Doctrine: For the bibliography, see the final comment on Article 15 *ter*.

Author: Marie Aronsson-Storrier.

¹ ICC ASP, The Crime of Aggression, 11 June 2010, Resolution RC/Res.6, Annex III, Understanding 1 (<https://www.legal-tools.org/doc/0d027b/>).

Article 15 *ter*(4)

4. 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.

Paragraph 4 echoes Article 15 *bis*(9) and ensures the independence of the ICC in determining whether an act of aggression has been committed. Thus, the Court may find that no act of aggression has been committed in accordance with Article 8 *bis* even where the Security Council, the International Court of Justice, or any other organ outside the Court, have made a positive determination that such an act has taken place. That the ICC is not bound by a determination by an organ outside of the Court is not to say that findings will be without influence on the Court's analysis.

Doctrine: For the bibliography, see the final comment on Article 15 *ter*.

Author: Marie Aronsson-Storrier.

Article 15 *ter*(5)

5. This Article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in Article 5

Paragraph 5 clarifies that the delayed jurisdiction applying to the crime of aggression is not to be interpreted as applying to other crimes under the ICC Statute. While UN Security Council referrals made before the conditions in paragraphs 2 and 3 are met would not give the Court jurisdiction over the crime of aggression, this does not affect its jurisdiction over the other crimes in Article 5.

Cross-references:

Articles 8 *bis*, 13 and 15 *bis*.

Doctrine:

1. Claus Kress and Leonie Holtzendorff, “The Kampala Compromise on the Crime of Aggression”, *Journal of International Criminal Justice*, vol. 8, no. 5, 2010, pp. 1179–1217 (<https://www.legal-tools.org/doc/95212b/>).

Author: Marie Aronsson-Storrier.

Article 16

Deferral of Investigation or Prosecution

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.

General Remarks:

The present provision provides a vital mechanism for navigating the relationship between the responsibilities of the Security Council under the UN Charter and that of the judicial mandate of the ICC. The provision attempts to reconcile any potential conflict between the interests of peace and the interests of justice in the context of the often referred to ‘peace versus justice’ debate.

Preparatory Works:

Article 16 is rooted in Article 23 of the International Law Commission Draft Statute.¹ The ILC Draft proposed that any court would not have been able to proceed without prior authorization from the Security Council if the situation falls under the auspices of Chapter VII of the UN Charter. At the Rome Conference States expressed a variety of concerns such as the risk of interference with the judicial independence of the court and inappropriate political influence by the Security Council. If a court appeared to be at the disposal of the Security Council, the impartiality and legitimacy of the institution would be at risk and consequently hinder the effective execution of its judicial functions. A proposal put forward by Singapore at the Preparatory Committee in August 1997² formed the basis of what became a difficult compromise as reflected in Article 16.

¹ “Draft Statute for an International Criminal Court with commentaries”, in Yearbook of the International Law Commission, Vol. 2, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), 22 July 1994 (<https://www.legal-tools.org/doc/390052/>); Report of the ILC on the Work of its Forty-sixth session, 2 May-22 July 1994, UN Doc. A/49/10, 2 September 1994 (<https://www.legal-tools.org/doc/f73459/>).

² Proposal by Singapore on Article 23, Non-Paper/WG.3/No. 16, 8 August 1997 (<https://www.legal-tools.org/doc/8ec1f1/>).

Analysis:

The language of Article 16 would suggest that there are a number of requirements that a deferral request would need to feature. The initial point to note is the timing of when a deferral request can be activated. Article 16 refers to the commencement or proceedings of either investigations or prosecutions. This has drawn some discussion as to whether, this means a specific “investigation or prosecution” or it extends to include the preliminary stages of ICC action. Article 16 remains silent on the matter and to this commentator it would be imperative to look to other provisions of the ICC Statute for further guidance. The initiation of investigations is not the first stage of proceedings conducted under the auspices of the Prosecutor. Rather it may be inferred from Article 15(6) of the ICC Statute that there is a formal distinction between the investigative stage and that of “preliminary examinations”. Thus, Article 16 can be viewed in such a manner as to refer to investigations conducted by the Prosecutor only after the Pre-Trial Chamber’s authorization under Article 15(4), but is not applicable to the activities of the Court prior to that stage. Moreover, the location of Article 16 after 14 and 15 has attracted remarks from scholars who maintain that it illustrates that the deferral request requires specific Court proceedings rather than a manifestation of preventive action by the Security Council.³ This position views Article 16 as a mechanism which may only bar the exercise of jurisdiction by the Court once a concrete ‘investigation’ or ‘prosecution’ is underway and indeed the criticisms of Resolutions 1422 (2002) and 1487(2003) would seem to endorse this view.⁴

A further requirement of a deferral request under Article 16 relates to Chapter VII of the UN Charter. It requires a deferral resolution to be “adopted under Chapter VII of the Charter” which necessitates that the Se-

³ Carsten Stahn, “The Ambiguities of Security Council Resolution 1422 (2002)”, in *European Journal of International Law*, 2003, vol. 14, p. 90 (<https://www.legal-tools.org/doc/44e607/>).

⁴ See Mohamed El Zeidy, “The United States Dropped the Atomic Bomb of Article 16 of the ICC: Security Council Power of Deferrals and Resolution 1422”, in *Vanderbilt Journal of Transnational Law*, 2002, vol. 35 (<https://www.legal-tools.org/doc/1fe12f/>); Stahn, 2003; Aly Mokhtar, “The Fine Art of Arm-Twisting: The US, Resolution 1422 and Security Council Deferral Power Under the Rome Statute”, in *International Criminal Law Review*, 2003, vol. 3, no. 4 (<https://www.legal-tools.org/doc/42e808/>); Salvatore Zappala, “Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC”, in *Journal of International Criminal Justice*, 2003, vol.1, no. 3 (<https://www.legal-tools.org/doc/2ac53e/>).

curity Council has determined that a particular situation constitutes a “threat to a peace, breach of the peace or an act of aggression” under Article 39 of the Charter.⁵ In accordance with Article 27 of the Charter, a resolution making an Article 16 request requires nine affirmative votes from members of the Security Council and the absence of a veto from any of the five permanent members. There is no guidance in the UN Charter or the ICC Statute as to which circumstance or situation would invoke an Article 16 deferral. Thus, it remains the exclusive prerogative of the Security Council to determine whether a particular situation satisfies the threshold in Article 39. Although the question remains open as to the likelihood of the ICC undertaking a separate assessment of the validity of deferral request. To this commentator, there is a possibility that the ICC could assess the validity of a deferral resolution under Chapter VII, given the requirements under Article 16, though scholars⁶ have noted that previously international courts have been reluctant to second-guess the Security Council in such matters.⁷

Additionally, Article 16 states that a deferral request may be renewed “under the same conditions”. Theoretically this could result in an indefinite deferral since Article 16 contains no limitation on the number of times a request for deferral may be renewed.⁸ However, any renewal after 12 months would still have to continue to meet the threshold of Article 39 of the Charter. If one looks to the *travaux préparatoires* of Article 16 it would seem that a renewal of a deferral request may continue to assist in restoring and maintaining international peace and security, where the proceedings of

⁵ Morten Bergsmo, Jelena Pejić and Dan Zhu, “Article 16”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 779 (<https://www.legal-tools.org/doc/040751/>); Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 644–46 (<https://www.legal-tools.org/doc/01addc/>).

⁶ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

⁷ ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72 (<https://www.legal-tools.org/doc/866e17/>).

⁸ Bergsmo and Pejić, 1999; Flavia Lattanzi, “The Rome Statute and the State Sovereignty. ICC Competence, Jurisdictional Links, Trigger Mechanism”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, 2nd ed., Il Sirente, Fagnano Alto, 2004 (<https://www.legal-tools.org/doc/fla609/>).

the ICC in a given case would in some fashion be detrimental to the work of the Security Council.

At time of writing this commentary, there are no judicial interpretations of Article 16 offered by the ICC, yet there have been four resolutions adopted by the Security Council invoking Article 16 since the entry of the ICC Statute, which give some indication as to the interpretation of this provision.⁹ The Security Council adopted the first deferral request, Resolution 1422, unanimously on 12 July 2002, a few days after the ICC Statute entered into force.¹⁰ Its preamble declares that the Security Council was “acting under Chapter VII of the Charter of the United Nations”. The essence of the resolution is encapsulated in operative paragraph 1, and in reference to Article 16 of the ICC Statute, it suspends, for a period of 12 months, the Court from commencing or proceeding with an investigation or prosecution of any case involving current or former official or personnel from a contributing State not a Party to the ICC Statute, relating to any UN established or authorized operation (UNSC Resolution 1422, 2002). The second resolution was adopted on 12 June 2003, where the Security Council renewed Resolution 1422 in the form of Resolution 1487 (UNSC Resolution 1487, 2003). This resolution substantively repeats the contents of Resolution 1422 and extends the suspension for an additional 12-month period. Further, the Security Council reiterated, in paragraph 2 its intention to renew the request to the ICC for the next 12 months period. In terms of voting, an interesting point to note is that Resolution 1487 was supported by only 12 out of the 15 members of the Security Council, as France, Germany and Syria abstained from voting in comparison to Resolution 1422 which was unanimously adopted. As opposition to the adoption of Resolution 1487 grew and members of Security Council at that time, namely France, Germany, Brazil, Chile, Romania, Spain and Benin indicated they

⁹ Resolution 1422, UN Doc. S/RES/1422 (2002), 12 July 2002 (‘UNSC Resolution 1422, 2002’) (<https://www.legal-tools.org/doc/1701d5/>); Resolution 1487, UN Doc. S/RES/1487 (2003), 12 June 2003 (‘UNSC Resolution 1487, 2003’) (<https://www.legal-tools.org/doc/20e269/>); Resolution 1597, UN Doc. S/RES/1597 (2005), 20 April 2005 (<https://www.legal-tools.org/doc/2ad5a0/>); and Resolution 1970, UN Doc. S/RES/1970(2011), 26 February 2011 (‘UNSC Resolution 1970, 2011’) (<https://www.legal-tools.org/doc/00a45e/>).

¹⁰ 4572nd meeting, Agenda: United Nations peacekeeping, UN Doc. SP/PV.4572, 12 July 2002 (<https://www.legal-tools.org/doc/51a97f/>).

would abstain from any decision to renew Resolution 1487¹¹ after 12 months the resolution was left to expire. Without any judicial guidance on the matter, there remains an outstanding question as whether the Security Council has to expressly determine that the continuation of ICC proceedings would constitute a threat to international peace and security in order to defer the proceedings in accordance with Article 16. For instance, the absence of such a determination was one of the arguments made against the legality of Resolutions 1422 and 1487 as these actions were considered a pre-emptive manoeuvre the Security Council in the shadow of the United States opposition to the ICC.¹² The increased unpopularity of the overt political manipulation of Article 16 was demonstrated by criticisms made by the UN Secretary General and several states of the Security Council, on the basis that Article 16 did not give such a sweeping power, but only a more specific power to make a deferral request relating to a particular situation (UN Doc. S/PV.4772, 2003).

The next two resolutions are referrals made under Article 13(b) and are not deferral requests per se, but rather make reference to Article 16 in their contents. For the purposes of this commentary, the third resolution adopted by the Security Council on 1 April 2005, referred the situation in the Darfur region of Sudan to the ICC in the form of Resolution 1593 although, notably China and the United States abstained from voting.¹³ The preamble of resolution recalls the power of deferral under Article 16 and, operative paragraph 6 of the resolution excludes the jurisdiction of the ICC over “nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute” participating in UN or African Union peacekeeping operations in Sudan unless “exclusive jurisdiction has been expressly waived by that contributing State”. This provides blanket immunity from ICC jurisdiction to a selective group of individuals, namely nationals of non-state parties. The last resolution in question was adopted on the 26 February 2011, by a unanimous vote,

¹¹ Letter Dated 6 June 2003 from the Permanent Representatives of Canada, Jordan, Liechtenstein, New Zealand and Switzerland to the United Nations Addressed to the President of the Security Council, UN Doc. S/PV.4772, 12 June 2003 (‘UN Doc. S/PV.4772, 2003’) (<https://www.legal-tools.org/doc/ea7c85/>).

¹² Stahn, 2003; Roberto Lavelle, “A Vicious Storm in a Teacup: The Action by the United Nations Security Council to Narrow the Jurisdiction of the International Criminal Court”, in *Criminal Law Forum*, 2003, vol. 14, no. 2 (<https://www.legal-tools.org/doc/6644ca/>).

¹³ Resolution 1593 (2005), UN Doc. S/RES/1593 (2005), 31 March 2005 (<https://www.legal-tools.org/doc/4b208f/>).

where the Security Council referred the situation in Libya to the ICC. Resolution 1970 was adopted under Chapter VII of the UN Charter and was the second occasion in which the Security Council has used the referral power under Article 13(b) to extend the jurisdiction of the ICC to a state that is not party to the ICC Statute. Again, for the purposes of this commentary, the Libya referral invokes Article 16 in the same fashion as Resolution 1593. In identical language to the Sudan resolution the Security Council recalled Article 16 in the preamble and in operative paragraph 6 excluded ICC jurisdiction over “current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute” involved in operations “established or authorized by the Council” (UNSC Resolution 1970, 2011, para. 6). There have been scholarly discussions as to the validity of including the immunity in the content of the resolution, particularly given the jurisdictional regime of Article 12 and the exclusion of immunity in Article 27 of the ICC Statute.¹⁴ While the specific referrals have been discussed in Article 15(b) of this commentary, it remains to be seen what the legal interpretation of the ICC will be in respect of the Article 16 reference and the operative paragraphs, which de facto permanently suspend action over a selective category of nationals. Given the purpose of Article 16, one explanation for the inclusion of the reference to Article 16 in the content of both referrals is the belief that States, and inevitably the Security Council are mindful of the interests of peace and the political consequences of judicial intervention by the ICC. All four resolutions discussed here have highlighted the inherent tension within Article 16, namely that the political trajectory of the Security Council may be misaligned with the judicial approach of the ICC in a given situation and could indeed come into direct conflict. All the resolutions demonstrate that the Security Council may act in a manner that could risk compromising the independence and legitimacy of the ICC.

A pertinent example of the politicization of Article 16 is the request for a deferral of proceedings against President Al Bashir of Sudan. Follow-

¹⁴ Robert Cryer, “Sudan, Resolution 1593, and International Criminal Justice”, in *Leiden Journal of International Law*, 2006, vol. 19 (<https://www.legal-tools.org/doc/5a06ec/>); Jennifer Trahan, “The Relationship Between the International Criminal Court and the UN Security Council: Parameters and Best Practices”, in *Criminal Law Forum*, 2013, vol. 24, no. 4 (<https://www.legal-tools.org/doc/ee17de/>).

ing the arrest warrant being issued for the Al Bashir case,¹⁵ the African Union, Arab League, Non-Aligned Movement, Organization of Islamic Conference called on the Security Council to make a deferral under Article 16. The African Union formally requested the Security Council to invoke Article 16 and suspend any indictment of the Sudanese President when it came to the extend the UNAMID mandate. However, the Security Council took no action on this matter, and Resolution 1828 was absent of any reference to Article 16.¹⁶ In the Security Council debates relating to the Al Bashir case none of the states that addressed the possibility of a deferral argued that the Council did not have the power to invoke Article 16 in that situation.¹⁷ The disapproval of the African Union over the lack of an Article 16 deferral in relation to Al Bashir manifested in the first of many resolutions adopted in July 2009 reiterating its request for an Article 16 deferral and warning that until the request was heeded, African Union members would refrain from co-operating in the arrest and surrender of President Al Bashir.¹⁸ This has resulted not only in tension between the African Union and the ICC more broadly, but also specifically between the ICC and African State Parties who are not fulfilling their obligations under the ICC Statute to arrest and surrender Al Bashir due to the position taken by the AU over the lack of a deferral request.¹⁹

¹⁵ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-1 (<https://www.legal-tools.org/doc/814cca/>).

¹⁶ Resolution 1828 (2008), UN Doc. S/RES/1828 (2008), 31 July 2008 (<https://www.legal-tools.org/doc/cf90b5/>).

¹⁷ Report of the Secretary-General on the Deployment of the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/PV.5947, 31 July 2008 (<https://www.legal-tools.org/doc/e9df6f/>).

¹⁸ African Union, Assembly, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), 3 July 2009, Assembly/AU/Dec. 243-267 (XIII) Rev.1, paras. 8–10 (<https://www.legal-tools.org/doc/bf6f1e/>).

¹⁹ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision pursuant to Article 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, 13 December 2011, ICC-02/05-01/09-140-tENG (<https://www.legal-tools.org/doc/e2c576/>); *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, 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, 26 March 2013, ICC-02/05-01/09-151 (<https://www.legal-tools.org/doc/51390f/>); *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, Decision Regarding Omar Al Bashir's po-

It is worth bearing in mind one final point with respect to Article 16 of the ICC Statute and that is the notion of “interests of justice” in Article 53 of the ICC Statute. Article 53 is a means for the ICC to take into account considerations of peace. Article 53 empowers the Prosecutor with discretion to decide not to initiate either an investigation or prosecution on the grounds that to proceed would be contrary to the “interests of justice”. The ICC might be viewed as not only a challenge to impunity, but additionally as a potential challenge or impediment to peace negotiations simultaneously. While it has to be made clear that the ICC Statute does not make peace deals impossible, indeed some have labelled the ICC as “part of the transitional justice project”,²⁰ it will impact the parties to a conflict in a manner that merits consideration. Article 16 does not dictate that peace usurps justice, or that all conflict situations require the same approach from the Security Council and the ICC. Instead, Article 16 allows for consideration of the ‘interests of peace’ and the ‘interests of justice’ in relation to the same situation.

Cross-references:

Article 12, Article 13(b), Article 15(6), Article 27 and Article 53.

Doctrine:

1. Morten Bergsmo, Jelena Pejić and Dan Zhu, “Article 16”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 770–780 (<https://www.legal-tools.org/doc/040751/>).
2. Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 644–46 (<https://www.legal-tools.org/doc/01addc/>).

tential Visit to the Republic of Chad, 25 March 2014, ICC-02/05-01/09-194 (<https://www.legal-tools.org/doc/983374/>).

²⁰ Luis Moreno-Ocampo, “Transitional Justice in Ongoing Conflicts”, in *International Journal of Transitional Justice*, 2007, vol. 1; Carsten Stahn, “Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court”, in *Journal of International Criminal Justice*, 2005, vol. 3 (<https://www.legal-tools.org/doc/28845d/>).

3. Robert Cryer, “Sudan, Resolution 1593, and International Criminal Justice”, in *Leiden Journal of International Law*, 2006, vol. 19, pp. 195–222 (<https://www.legal-tools.org/doc/5a06ec/>).
4. Mohamed El Zeidy, “The United States Dropped the Atomic Bomb of Article 16 of the ICC: Security Council Power of Deferrals and Resolution 1422”, in *Vanderbilt Journal of Transnational Law*, 2002, vol. 35, pp. 1503–48 (<https://www.legal-tools.org/doc/1fe12f/>).
5. Flavia Lattanzi, “The Rome Statute and the State Sovereignty. ICC Competence, Jurisdictional Links, Trigger Mechanism”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, 2nd. ed., Il Sirente, Fagnano Alto, 2004, pp. 51–67 (<https://www.legal-tools.org/doc/fla609/>).
6. Roberto Lavelle, “A Vicious Storm in a Teacup: The Action by the United Nations Security Council to Narrow the Jurisdiction of the International Criminal Court”, in *Criminal Law Forum*, 2003, vol. 14, no. 2, pp. 195–220 (<https://www.legal-tools.org/doc/6644ca/>).
7. Aly Mokhtar, “The Fine Art of Arm-Twisting: The US, Resolution 1422 and Security Council Deferral Power Under the Rome Statute”, in *International Criminal Law Review*, 2003, vol. 3, no. 4, pp. 295–344 (<https://www.legal-tools.org/doc/42e808/>).
8. Luis Moreno-Ocampo, “Transitional Justice in Ongoing Conflicts”, in *International Journal of Transitional Justice*, 2007, vol. 1, pp. 8–9.
9. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).
10. Carsten Stahn, “The Ambiguities of Security Council Resolution 1422 (2002)”, in *European Journal of International Law*, 2003, vol. 14, pp. 85–104 (<https://www.legal-tools.org/doc/44e607/>).
11. Carsten Stahn, “Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court”, in *Journal of International Criminal Justice*, 2005, vol. 3, pp. 695–720 (<https://www.legal-tools.org/doc/28845d/>).
12. Jennifer Trahan, “The Relationship Between the International Criminal Court and the UN Security Council: Parameters and Best Practices”, in *Criminal Law Forum*, 2013, vol. 24, no. 4, pp. 417–73 (<https://www.legal-tools.org/doc/ee17de/>).

13. Salvatore Zappala, “Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC”, in *Journal of International Criminal Justice*, 2003, vol. 1, no. 3, pp. 671–78 (<https://www.legal-tools.org/doc/2ac53e/>).

Author: Yassin M. Brunger.

Article 17(1)

Issues of Admissibility

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

General Remarks:

Article 17 of the Statute lays out the substantive conditions for the admissibility of a case before the ICC. Under this provision, the admissibility test comprises two main conditions. The first requires consideration of the complementarity criteria to determine whether the case brought before the ICC has been or is being genuinely investigated or prosecuted by a state's national judicial system. The second condition involves the examination of the "gravity threshold" in order to determine whether the case in question is of sufficient gravity to justify further action by the Court.

The Statute does not specify whether the two components of the admissibility test are to be dealt with in any particular order. For the purpose of this analysis, complementarity will be examined first, followed by an analysis of the gravity threshold.

Preparatory Works:

In contrast to the Statutes of the *ad hoc* tribunals, which are based on the notion of primacy of international tribunals over national courts, the ICC's jurisdiction is grounded on the principle of complementarity as a model for regulating relationships between the Court and domestic judicial systems. The negotiating history of the Statute demonstrates that the adoption of the complementarity principle was critical to secure the necessary support from negotiating states for the establishment of a permanent international criminal court.¹

Complementarity Principle:

The complementarity assessment is a two-step process, involving a determination of (i) whether there exists an ongoing or past domestic investigation or prosecution in relation to the same case, and where such proceedings exist, or have existed, (ii) whether they are 'genuine' in the sense of

¹ John T. Holmes, "The Principle of Complementarity", in Roy S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute*, Kluwer Law International, 1999, pp. 41–43 (<https://www.legal-tools.org/doc/d71078/>).

not being vitiated by unwillingness or inability. The various chambers of the Court have consistently followed this two-step approach in determining admissibility, whether in the context of a specific case, or earlier, at the situation stage when considering requests for the opening of an investigation under Article 15(3) of the ICC Statute.

Cross-references:

Paragraph 10 of the Preamble, Articles 1, 12–15, 17–20 and 25(1).
Regulation 112.

Doctrine: For the bibliography, see the final comment on Article 17.

Author: Mohamed Abdou.

Article 17(1)(a)

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

The first two conditions that must be considered in the context of Article 17 admissibility proceedings are (i) whether there exists (or has existed) an investigation or prosecution at the domestic level and, if the answer to the first question is in the affirmative, (ii) whether the State having jurisdiction over the case is not ‘unwilling’ or ‘unable’ to genuinely carry out such proceedings within the terms further elaborated in Articles 17(2) and 17(3) of the ICC Statute.

Failure by a state to take measures aimed at identifying those responsible for the crimes falling within the jurisdiction of the ICC renders the case admissible before the Court (provided that the gravity threshold is satisfied). The Appeals Chamber has characterized the situation where no investigations or prosecutions have been instituted at the national level as a case of “inaction”¹ or “inactivity” justifying the Court’s intervention.² It falls on the State³, or on the party challenging admissibility, to establish the existence of domestic proceedings. Not all cases of ‘inactions’ will however lead to proceedings before the ICC, not least because the Prosecutor retains some margin of discretion to initiate investigations and bring cases under Article 15 of the Statute, that is, when a situation has not been referred by a State Party or the Security Council.⁴

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, 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, 25 September 2009, ICC-01/04-01/07-1497, para. 2 (‘*Katanga and Ngudjolo*, 25 September 2009’) (<https://www.legal-tools.org/doc/ba82b5/>).

² ICC, *Prosecutor v. Yekatom and Ngaïssona*, Appeals Chamber, Judgment on Mr Yekatom’s appeal against Trial Chamber V’s “Decision on the Yekatom Defence’s Admissibility Challenge”, 11 February 2021, ICC-01/14-01/18-678-Red, para. 47 (<https://www.legal-tools.org/doc/mpqdbm/>).

³ ICC, *Prosecutor v. Simone Gbagbo*, Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”, 27 May 2015, ICC-02/11-01/12-75-Red, para. 51 (‘*Simone Gbagbo*, 27 May 2015’) (<https://www.legal-tools.org/doc/cfc2de/>).

⁴ See ICC, *Situation in the Islamic Republic of Afghanistan*, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Repub-

Moreover, the Appeals Chamber has established a notable distinction between “inaction” on one hand, and “unwillingness” and “inability” on the other. It clarified that the terms “unwillingness” and “inability” in Article 17 refer to a situation that only arises after the opening of a formal investigation by the state having jurisdiction over the case, while “inaction” presumes the absence of any investigative step at the domestic level (*Katanga and Ngudjolo*, 25 September 2009, para. 76).

For an admissibility challenge to succeed before the Court, the challenging party must establish the existence of “concrete and progressive” steps to ascertain criminal responsibility (*Simone Gbagbo*, 27 May 2015, para. 122). The Appeals Chamber defined the phrase “the case is being investigated” as “the taking of steps directed at ascertaining whether this individual is responsible for that conduct”.⁵ The Appeals Chamber provided examples of what may qualify as relevant investigative steps such as, “interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses” (*Muthaura, Kenyatta and Ali*, 30 August 2011, paras. 1 and 40). Such investigative steps need to be “actually taken” – the mere preparedness to take these steps is not sufficient (para. 40).

Article 17(1)(a) has consistently been interpreted by the Court as requiring national proceedings to encompass the same case as the one brought before the Court. This implies that the contours of the case being investigated or prosecuted domestically must be clear irrespective of the stage of proceedings.⁶ The parameters of a ‘case’ under Article 17(1)(a) are defined both by the identity of the individual against whom the proceedings are instituted and the underlying conduct giving rise to criminal liability

lic of Afghanistan, 5 March 2020, ICC-02/17-138, para. 31 (<https://www.legal-tools.org/doc/x7kl12/>).

⁵ ICC, *Prosecutor v. Muthaura, Kenyatta and Ali*, Appeals Chamber, 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”, 30 August 2011, ICC-01/09-02/11-274, paras. 1 and 40 (*Muthaura, Kenyatta and Ali*, 30 August 2011’) (<https://www.legal-tools.org/doc/c21f06/>).

⁶ *Simone Gbagbo*, 27 May 2015, para. 88. See also *Prosecutor v. Gaddafi*, Appeals Chamber, 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’, 21 May 2014, ICC-01/11-01/11-547-Red, para. 84 (*Gaddafi*, 21 May 2014’) (<https://www.legal-tools.org/doc/ea070/>).

under the Statute (*Gaddafi*, 21 May 2014, para. 61). This is known as “the same person-same conduct” test, outlined further below.

The same person:

The first prong of the ‘same person-same conduct’ test does not raise any particular difficulty, as it refers to the specific individual(s) for whom a summon to appear or a warrant of arrest has been issued by the Court. A case cannot therefore be found inadmissible before the ICC unless the same person is the subject of the proceedings at the national level. On this issue, Pre-Trial Chamber II rejected Kenya’s request to declare a case inadmissible on the grounds that persons at the same level in the hierarchy as the ICC suspects were being investigated domestically.⁷ The Chamber stated that the admissibility test under Article 17 is more specific and requires national proceedings to cover the same individuals who are subject the subject of the Court’s proceedings (*Muthaura, Kenyatta and Ali*, 30 May 2011, para. 50).

The Same Conduct:

The main difficulty arises in relation to the second prong of the admissibility test, that is, to what extent the conduct described in the incidents under investigation or prosecution domestically must be similar to the charges brought forward before the ICC. In the *Muthaura, Kenyatta and Ali* and *Ruto et al.* cases, the Appeals Chamber explicitly embraced the ‘same person-same conduct’ test, holding that national investigations must cover the same individual “and “substantially the same conduct” as alleged in the proceedings before the Court. (*Muthaura, Kenyatta and Ali*, 30 August 2011, para. 39). In the *Gaddafi* case, it was clarified that the conduct that defines a ‘case’ is both that of the suspect and that described in the incidents under investigation (*Muthaura, Kenyatta and Ali*, 30 August 2011, para. 39). An incident “is understood as referring to a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators” (para. 39). The exact scope of an incident is determined in light of the specific circumstances of each case.

⁷ ICC, *Prosecutor v. Muthaura, Kenyatta and Ali*, Pre-Trial Chamber II, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-02/11-96, para. 48 (*‘Muthaura, Kenyatta and Ali*, 30 May 2011’) (<https://www.legal-tools.org/doc/bb4591/>).

As regards the similarity requirement, it was acknowledged that national proceedings are not expected to cover exactly the same acts charged in a case before the ICC (*Gaddafi*, 21 May 2014, para. 64). The Appeals Chamber held that:

what is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating [...] to carry out this assessment, it is necessary to use, as a comparator, the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect under investigation that gives rise to his or her criminal responsibility for the conduct described in those incidents (*Gaddafi*, 21 May 2014, para. 73).

The Appeals Chamber nonetheless dismissed the argument that it would be sufficient for a State was to investigate or prosecute “discrete aspects” of the broad case before the ICC, stating that the purpose of admissibility proceedings was to resolve jurisdictional conflicts between the State and the Court (*Gaddafi*, 21 May 2014, para. 77).

The Legal Characterization, International v. Ordinary Crimes:

A State is not required to ascribe the same legal characterization of the acts or investigate or prosecute the criminal conduct as an international crime. Pre-Trial Chamber stated that the assessment of domestic proceedings under article 17 of the Statute “should focus on the alleged conduct and not on its legal characterisation” and that the State’s intention to prosecute the relevant criminal conduct as an international crime “is not determinative” (see *Gaddafi and Al-Senussi*, 11 October 2013, para. 85). That being said, the Appeals Chamber clarified that while States are not required to prosecute the relevant conduct as an international crime domestically, proceedings must cover the incidents forming part of the contextual elements of the international crimes charged before the ICC with a view to reflecting the gravity of the criminal conduct. The “substantially same conduct” criterion thus entails a comparative assessment of the gravity requirement.

Evidentiary Threshold and Burden of Proof:

The challenging party bears the burden to establish the inadmissibility of a case before the Court. In cases where the challenging party is a State, the Court seems to apply a more stringent burden of proof. In respect of Kenya’s admissibility challenge, the Pre-Trial Chamber ruled that a State “*must*

provide the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case” (*Muthaura, Kenyatta and Ali*, 30 August 2011, para. 2). Mere assertions that an investigation is ongoing have been deemed to be of low probative value, at least in the absence of more specific and concrete proof.⁸ In cases where the Court acts on its own motion to decide on admissibility, the Prosecutor has the onus of establishing the admissibility of the case. He or she should provide sufficient evidence and information to satisfy the Court that there are either no investigative activities at the domestic level, or that the national proceedings against the defendant do not cover the same case.⁹

Although it may seem from the above pronouncements that the burden of proof is clearly identified, the question arose as to whether the challenging party is required not only to establish that the same case is investigated, but also that the State has the requisite willingness and ability to investigate the case domestically. In the *Gaddafi and Al-Senussi* case, Libya claimed that it was only required to prove the first prong of the admissibility test namely, that it is investigating or prosecuting the same case.¹⁰ The argument was partly approved by the Pre-Trial Chamber, which found that although the State is required to substantiate all aspects of its allegations, the “evidentiary debate on the State’s unwillingness or inability will be meaningful only when doubts arise with regard to the genuineness of the domestic investigations or prosecutions” (*Gaddafi and Al-Senussi*, 31 May 2013, para. 53). This means that the Chamber has discretion to seek additional evidence to satisfy itself that the State is both willing and able to carry out genuine proceedings. The type of evidence that the challenging party may also include, depending on the circumstances, “directions, orders and decisions issued by authorities in charge of the investigation as well as internal reports, updates, notifications or submissions contained in the [investigation] file” (*Gaddafi and Al-Senussi*, 7 December 2012, para. 11).

⁸ *Ibid.*, para. 116.

⁹ ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber I, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 6 July 2007, ICC-01/04-01/07-4 (<https://www.legal-tools.org/doc/5556a6/>).

¹⁰ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Pre-Trial Chamber I, Libyan Government’s consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, 4 March 2013, ICC-01/11-01/11-293-Red, paras. 17–21 (<https://www.legal-tools.org/doc/624764/>).

It is useful to mention that the Court’s analysis under articles 17 and 19 does not extend to determining whether the evidence collated by national authorities is sufficient to establish the defendant’s criminal responsibility. The Court’s assessment is limited to ascertaining whether domestic proceedings are being genuine conducted. Therefore, the inadmissibility of a case “would not be negated by the fact that, upon scrutiny, the evidence may be insufficient to support a conviction by the domestic authorities” (*Gaddafi and Al-Senussi*, 11 October 2013, para. 66 (vii)).

Time Reference:

The Appeals Chamber has indicated that the admissibility of a case is determined on the basis of “the facts as they exist at the time of the proceedings concerning the admissibility challenge”.¹¹ It further clarified that the expression “time of the proceedings” concerns the proceedings on the admissibility challenge “before the Pre-Trial Chamber and not to the subsequent proceedings on appeal”.¹²

There remains some uncertainty as to whether the Court can limit its findings to the facts arising before the admissibility challenge is lodged. Recently, Pre-Trial Chamber I declined to take such an approach, indicating that “a decision on the admissibility of the case must be based on the circumstances prevailing at the time of its issuance” (*Gaddafi and Al-Senussi*, 11 October 2013, para. 66(v)). In any event, the expression “time of the proceedings” used by the Appeals Chamber should be understood to refer to “the time of the proceedings on the admissibility challenge before the Pre-Trial Chamber and not to the subsequent proceedings on appeal”.¹³

¹¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, 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, 25 September 2009, ICC-01/04-01/07-1497, para. 56 (<https://www.legal-tools.org/doc/ba82b5/>).

¹² ICC, *Prosecutor v. Ruto, Kosgey and Sang*, Appeals Chamber, Decision on the “Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility”, 28 July 2011, ICC-01/09-01/11-234, paras. 10–11 (*‘Ruto, Kosgey and Sang, 28 July 2011’*) (<https://www.legal-tools.org/doc/3d65de/>).

¹³ ICC, *Prosecutor v. Muthaura, Kenyatta and Ali*, Appeals Chamber, Decision on the ‘Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility’, 28 July 2011, ICC-01/09-02/11-202, para. 9 (<https://www.legal-tools.org/doc/b33bab/>); *Ruto, Kosgey and Sang*, 28 July 2011, para. 10.

Doctrine: For the bibliography, see the final comment on Article 17.

Author: Mohamed Abdou.

Article 17(1)(b)

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

A case is inadmissible before the ICC if it has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

In assessing whether a case is inadmissible under Article 17(1)(b) of the Statute, consideration must first be given to whether there has been a domestic investigation resulting in a decision by the State not to prosecute the person concerned. It is only when the answer to this question is in the affirmative that the question of unwillingness and inability to prosecute becomes relevant.¹

In *Bemba*, the Appeals Chamber clarified that the ICC would not review *de novo* domestic decisions not to prosecute a suspect to determine whether national courts had correctly applied the law. Rather, the ICC is solely required to determine the status of domestic proceedings and “should accept *prima facie* the validity and effect of the decisions of domestic courts, unless presented with compelling evidence indicating otherwise”.²

Domestic decisions not to prosecute must be final, which excludes preliminary recommendations or decisions under appeal. In *Bemba*, the Appeals Chamber held that the initial recommendation by an investigative judge to terminate proceedings against the accused did not constitute a “decision not to prosecute” within the meaning of Article 17 (1)(b) of the Statute (*Bemba*, 19 October 2010, para. 68). The Appeals Chamber noted that

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, 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, 25 September 2009, ICC-01/04-01/07-1497, para. 78 (*Katanga and Ngudjolo*, 25 September 2009’) (<https://www.legal-tools.org/doc/ba82b5/>).

² ICC, *Prosecutor v. Bemba*, Appeals Chamber, Corrigendum to 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”, 19 October 2010, para. 66 (*Bemba*, 19 October 2010’) (<https://www.legal-tools.org/doc/37e559/>).

the initial recommendation had not been endorsed by national courts, which instead confirmed the charges against the accused and requested that the competent authorities refer the case to the ICC (para. 68).

A decision to conclude a domestic investigation on the basis that the individual concerned surrendered or has been transferred to the ICC does render a case inadmissible or preclude the Court from exercising its jurisdiction over the case. In *Katanga and Ngudjolo*, the Appeals Chamber held that:

if the decision of a State to close an investigation because of the suspect's surrender to the Court was to be considered a decision not to prosecute, the peculiar, if not absurd, result would be that because of the surrender of a suspect to the Court, the case would become inadmissible". The Appeals Chamber further noted that in "such scenario, neither the State nor the ICC would exercise jurisdiction over the alleged crimes, defeating the purpose of the Rome Statute (*Katanga and Ngudjolo*, 25 September 2009, para. 83).

Doctrine: For the bibliography, see the final comment on Article 17.

Author: Mohamed Abdou.

Article 17(1)(c)

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;

A case is inadmissible before the ICC if the person concerned has already been tried for the conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20(3). Article 20(3) of the ICC Statute addresses the principle of *ne bis in idem* and provides that “[n]o person who has been tried by another court’ for crimes under the jurisdiction of the Court shall be tried by the Court with respect to the same conduct”.

Trial by national courts must be completed for a case to be declared inadmissible under Article 17(1)(c).¹ In *Gaddafi*, the Court clarified that the “person must have been the subject of a completed trial, resulting in a final conviction or acquittal, which has acquired *res judicata* effect” (*Gaddafi*, 9 March 2020, para. 48).

In assessing whether a person “has already been tried”, the Court must examine the status of domestic proceedings and may be required to evaluate whether the State concerned had the requisite willingness and ability to genuinely carry out these proceedings (*Gaddafi*, 9 March 2020, para. 58). In this regard, the Appeals Chamber considered that the question

whether domestic proceedings were for the purpose of shielding, or not conducted independently or impartially, cannot be meaningfully determined if only the domestic first-instance proceedings are taken into account, disregarding potential appeals proceedings. This is because it is conceivable that a domestic trial is carried out genuinely at the first-instance level, but that the appellate phase is used to shield the person concerned from criminal responsibility. In such a scenario, the Court would prematurely declare a case inadmissible relying on proceedings which may later be overruled in a way that would make the case admissible. Conversely, it is also con-

¹ ICC, *Prosecutor v. Gaddafi*, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled ‘Decision on the “Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute”’ of 5 April 2019, ICC-01/11-01/11-695, 9 March 2020, para. 63 (*Gaddafi*, 9 March 2020’) (<https://www.legal-tools.org/doc/kdbwwo/>).

ceivable that any shortcomings of a domestic first-instance trial will be corrected on appeal (*Gaddafi*, 9 March 2020, para. 59).

As regards trials conducted *in absentia*, the Appeals Chamber confirmed that the possibility of reinstating judicial proceedings against a person, owing to the *in absentia* nature of a trial, meant that no “final decision on the merits was rendered” and that the requirements for inadmissibility set out in Articles 17(1)(c) and 20(3) of the ICC Statute were not satisfied (*Gaddafi*, 9 March 2020, para. 53).

As for the implications of an amnesty law on the admissibility of a case before the ICC, the Appeals Chamber has to date refrained from reaching definitive conclusions on whether it could amount to “a completed trial” for the purposes of Article 17(1)(c), recognizing that the acceptability of amnesties for grave international crimes is an unsettled question in international law (*Gaddafi*, 9 March 2020, paras. 88 and 96).

Doctrine: For the bibliography, see the final comment on Article 17.

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Article 17(1)(d)

1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where: [...] (d) The case is not of sufficient gravity to justify further action by the Court

Article 17(1)(d) of the Statute provides that the Court shall determine a case to be inadmissible if it is not of sufficient gravity to justify further action by the Court.

The aim of this provision, as the Appeals Chamber clarified, is to exclude unusual cases from the Court’s purview where the underlying conduct fulfils all the elements of a crime under the Statute but is nevertheless of marginal gravity.¹ Gravity is an admissibility rather than a jurisdictional requirement – it “goes to the exercise, as distinct from the existence, of jurisdiction” by the Court (*Al Hassan*, 7 June 2020, para. 54). The requirement reflects the intention of the drafters, as set out in the Preamble and Article 5 of the ICC Statute, to limit the Court’s exercise of jurisdiction to the most serious offences (para. 58).

The negative formulation of the phrase “the case is not of sufficient gravity to justify further action by the Court” implies that the crimes falling within the material jurisdiction of the Court are, in principle, of sufficient gravity (*Al Hassan*, 7 June 2020, para. 55).

The determination of whether a particular case is of sufficient gravity is “always a case-specific assessment” (*Al Hassan*, 7 June 2020, para. 58). The Appeals Chamber has nonetheless identified several quantitative (in particular, the number of victims) and qualitative criteria (such as nature, scale and manner of commission of the alleged crimes, including the human rights violated as a result, their impact on victims, the role and degree of participation of the accused, and whether the acts were committed on the basis of discriminatory motives) that are relevant to consider in this context. Gravity may also be assessed in light of the factors set out in Rule 145(1)(c) and 145(2)(b) of the Rules of Procedure and Evidence relevant to

¹ ICC, *Prosecutor v. Al Hassan*, Appeals Chamber, Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled “Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense”, 7 June 2020, ICC-01/12-01/18-601-Red, para. 53 (*Al Hassan*, 7 June 2020’) (<https://www.legal-tools.org/doc/sywddid/>).

sentencing which include consideration of, *inter alia*, the extent of the damage caused, the nature of the unlawful behaviour, the circumstances of time and the degree of participation of the convicted person (*Al Hassan*, 7 June 2020, para. 90). In this regard, it appears necessary to adopt a holistic approach – reliance on quantitative criteria alone, including the number of victims, is not determinative of the gravity of a given case.

In assessing gravity, the same considerations for the determination of the parameters of the ‘case’ apply to sub-paragraphs 17(1)(a) and (d) of the Statute. A ‘case’ is defined by the suspect against whom the proceedings are instituted and the conduct giving rise to criminal liability under the Statute (*Al Hassan*, 7 June 2020, para. 65). Conduct includes both “that of the suspect and that described in the incidents under investigation” (para. 65). An incident “is understood as referring to a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators” (para. 65). The exact scope of an incident is to be determined in light of the specific circumstances of each case.

The factual allegations underpinning the contextual elements of the crimes charged before the ICC are also relevant to the gravity assessment under article 17(1)(d). In the case of crimes against humanity, the evaluation encompasses the facts relevant to the existence of a state or organizational policy as well as the overall course of conduct pertaining to the attack against the civilian population (*Al Hassan*, 7 June 2020, paras. 68–69).

Doctrine: For the bibliography, see the final comment on Article 17.

Author: Mohamed Abdou.

Article 17(2)

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

Article 17(2) of the ICC Statute enumerates three criteria guiding the Court's determination with respect to unwillingness. It stipulates that the Court must, having regard to the principles of due process under international law, consider whether one or more of the following scenarios exist:

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

Three main scenarios may thus give rise to a finding of unwillingness under Article 17(2) namely, the institution of domestic proceedings for the purpose of shielding the accused, the conduct of proceedings in a manner that results in unjustified delays, and the failure to carry out independent and impartial proceedings. In *Katanga and Ngudjolo*, the Trial Chamber stated that there may be other forms of unwillingness not expressly spelled out in Article 17(2), as is the case where a State seeks to bring a person to justice but not before its national judicial system.¹ The Appeals Chamber declined however to rule on whether the factors set out in Article 17(2) are exhaustive.²

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 12 June 2009, ICC-01/04-01/07-1213-tENG, para. 8 (<https://www.legal-tools.org/doc/e4ca69/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, 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, 25 September 2009, ICC-01/04-01/07-1497, para. 73 (<https://www.legal-tools.org/doc/ba82b5/>).

Cross-references:

Rule 51.

Doctrine: For the bibliography, see the final comment on Article 17.

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Article 17(2)(a)

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;

Article 17(2)(a) addresses the situation where a state conducts sham proceedings with the intention of shielding a person from criminal responsibility for crimes falling within the Court's jurisdiction.

The provision reflects the primary objective expressed in the Preamble to put an end to impunity for the most serious crimes of concern to the international community and the related concern that domestic proceedings might be carried out in a manner that results in the suspect evading justice. The Appeals Chamber clarified that the main reason for including this limitation is not to guarantee fair trial rights for the suspect, but to promote the exercise of criminal jurisdiction domestically in a manner that is consistent with the overall objectives of the Statute.¹

There is a possible overlap between this provision and other manifestations of unwillingness referred to in sub-paragraphs (b) and (c) of Article 17(2). The Appeals Chamber recognized that the intention to shield a person from criminal responsibility is relevant to the assessment of all forms of “unwillingness”, including to the determination of the existence of any “unjustified delays” or lack of “independence” and “impartiality” under sub-paragraphs (b) and (c) (*Gaddafi and Al-Senoussi*, 24 July 2014, para. 218).

Doctrine: For the bibliography, see the final comment on Article 17.

Author: Mohamed Abdou.

¹ ICC, *Prosecutor v. Gaddafi and Al-Senoussi*, Judgment on the appeal of Mr Abdullah Al-Senoussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senoussi”, 24 July 2014, ICC-01/11-01/11-565, para. 217 (*Gaddafi and Al-Senoussi*, 24 July 2014’) (<https://www.legal-tools.org/doc/ef20c7/>).

Article 17(2)(b)

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

In relation to unjustified delays, Pre-Trial Chamber I held that delays in carrying out domestic proceedings may warrant a finding of unwillingness only when such delays appear to be inconsistent with “an intent to bring the person concerned to justice”. Such a determination must be made on the basis of, having regard to all relevant “factual circumstances with a view to ultimately discerning the State’s intent as concerns its on-going domestic proceedings against the specific individual”.¹ In this context, the Court may consider relevant factors such as the chronology of domestic proceedings and the complexity of the case at hand. In reaching a determination on unjustified delays, the Court must therefore not base its assessment on “an abstract ideal of justice” but take into consideration the “specific circumstances surrounding the investigation concerned” (*Gaddafi and Al-Senussi*, 7 December 2012, para. 223).

Doctrine: For the bibliography, see the final comment on Article 17.

Author: Mohamed Abdou.

¹ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Pre-Trial Chamber I, Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, 7 December 2012, ICC-01/11-01/11-239, para. 233 (*‘Gaddafi and Al-Senussi, 7 December 2012’*) (<https://www.legal-tools.org/doc/f8a7cf/>).

Article 17(2)(c)

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Article 17(2)(c) provides that the lack of independent and impartial national proceedings renders a case admissible before the ICC. It must however be shown that the proceedings were not, or are not, being conducted independently or impartially and that they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

The term “independence” incorporates the notion of a court being independent of the executive and the legislature, as well as of the parties to the proceedings. As regards the concept of ‘impartiality’, the Court held that the personal or subjective impartiality of a judge is presumed unless the contrary is shown, although consideration should be given to whether there exist objective reasonable grounds to doubt impartiality.¹

A State may choose to provide information about the independence and impartiality of its courts to assist the ICC in its determination under Article 17 (2) (c) (*Gaddafi and Al-Senussi*, 24 July 2014, para. 2). Rule 51 of the Rules of Procedure and Evidence enables a State to provide information showing that “its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct”.

The question whether the Court can enter a finding of unwillingness against a State on the grounds that its national proceedings violate due process was extensively considered and litigated in the *Gaddafi and Al-Senussi* case. The defence argued that the explicit reference contained in the chapeau of Article 17(2) to the “principles of due process recognized by international law” meant that a State can be found unwilling genuinely to carry out an investigation or prosecution if it does not respect the suspect’s fair

¹ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Appeals Chamber, 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”, 24 July 2014, ICC-01/11-01/11-565, para. 250 (*Gaddafi and Al-Senussi*, 24 July 2014’) (<https://www.legal-tools.org/doc/ef20c7/>).

trial rights. The Pre-Trial Chamber rejected the argument finding that “violations of the accused’s procedural rights are not *per se* grounds for a finding of unwillingness”. It nonetheless noted that, depending on the specific circumstances of each case, certain violations of the procedural rights of the accused may however be relevant to the assessment of the “independence and impartiality of the national proceedings”² and the intent to bring the defendant to justice. A State may not therefore be found “unwilling” on the sole ground that the proceedings violate the principles of due process.

These findings were subsequently upheld by the Appeals Chamber, which clarified that the phrase “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 sham proceedings leading to a suspect evading justice, in the sense of not appropriately being tried genuinely to establish his or her criminal responsibility (*Gaddafi and Al-Senussi*, 24 July 2014, para. 2). The Appeals Chamber nonetheless acknowledged that there may be circumstances where the violations of the rights of the suspect are so egregious that the proceedings may be deemed “inconsistent with an intent to bring the person to justice” (para. 3).

Doctrine: For the bibliography, see the final comment on Article 17.

Author: Mohamed Abdou.

² ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Pre-Trial Chamber I, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11-466-Red, para. 245 (*Gaddafi and Al-Senussi*, 11 October 2013’) (<https://www.legal-tools.org/doc/af6104/>).

Article 17(3)

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

Article 17(3) of the ICC Statute deals with the scenario where the State is “unable” to genuinely carry out domestic proceedings. The provision requires the Court to “consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise is unable to carry out its proceedings”.

The Appeals Chamber clarified that the conditions set out in article 17(3) are cumulative. The Court must therefore be satisfied that there is both a total or substantial collapse or unavailability of the national judicial system and that, as a result, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.¹ The inability assessment thus involves consideration of case-specific factors as well as general aspects pertaining to the efficacy and efficiency of the national judicial system as a whole.

In the *Al Senussi* case, the Court considered whether the lack of counsel in domestic proceedings could result in a finding of inability. The defence argued that the applicable national law required the appointment of a lawyer for the defendant before trial could proceed domestically which, in the circumstances, was not possible. While acknowledging that the unavailability of legal counsel could amount to a form of “inability”, the Appeals Chamber dismissed the argument for lack of evidence, stating that “although in the past it had not been possible to appoint counsel for Mr Al-Senussi because of the security situation, there was a prospect of this happening in the future” (*Gaddafi and Al-Senussi*, 24 July 2014, para. 201).

¹ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Appeals Chamber, 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”, 24 July 2014, ICC-01/11-01/11-565, para. 265 (*Gaddafi and Al-Senussi*, 24 July 2014’) (<https://www.legal-tools.org/doc/ef20c7/>).

In the *Al-Gaddafi* case, the Pre-Trial Chamber found that Libya was unable to investigate and prosecute the case in light of the substantial difficulties faced by national authorities in exercising judicial powers “across the entire territory”.² The Chamber further noted that the “unavailability” of the national judicial system resulted in Libya being unable to, *inter alia*, obtain custody of the defendant and collect necessary evidence from witnesses.

Doctrine:

1. William W. Burke-White and Scott Kaplan, “Shaping the Contours of the Domestic Justice: The ICC and the Admissibility Challenge in the Uganda Situation”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, 2009, pp. 79–114 (<https://www.legal-tools.org/doc/5d1db6/>).
2. William W. Burke-White, “Implementing a Policy of Positive Complementarity in the Rome System of Justice”, in *Criminal Law Forum*, 2008, vol. 19, no. 1, pp. 59–85 (<https://www.legal-tools.org/doc/e36e49/>).
3. Mohamed M. El Zeidy, “From Primacy to Complementarity and Backwards: (Re-)Visiting Rule 11 *bis* of the Ad hoc Tribunals”, in *International & Comparative Law Quarterly*, 2008, vol. 57, pp. 403–15 (<https://www.legal-tools.org/doc/13b48e/>).
4. Kevin Jon Heller, “The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process”, in *Criminal Law Forum*, 2006, vol. 17 (<https://www.legal-tools.org/doc/433a02/>).
5. John T. Holmes, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, pp. 673, 675–76 (<https://www.legal-tools.org/doc/01addc/>).
6. John T. Holmes, “The Principle of Complementarity”, in Roy S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute*, Kluwer Law International, 1999, pp. 41–43, 50, 60–65 (<https://www.legal-tools.org/doc/d71078/>).

² ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Pre-Trial Chamber I, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 31 May 2013, ICC-01/11-01/11-344-Red, para. 205 (<https://www.legal-tools.org/doc/339ee2/>).

7. Charles Jalloh, “Kenya vs. The ICC Prosecutor”, in *Harvard International Law Journal Online*, 2012, vol. 53, p. 237 (<https://www.legal-tools.org/doc/8d1de2/>).
8. Jann K. Kleffner, “The Impact of Complementarity on National Implementation of Substantive International Criminal Law”, in *Journal of International Criminal Justice*, 2003, vol. 1, pp. 86–113 (<https://www.legal-tools.org/doc/4af8c9/>).
9. Ruth B. Philips, “The International Criminal Court Statute: Jurisdiction and Admissibility”, in *Criminal Law Forum*, 1999, vol. 10, no. 1, pp. 61–85 (<https://www.legal-tools.org/doc/02edff/>).
10. William A. Schabas, “Prosecutorial Discretion and Gravity”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 229–46 (<https://www.legal-tools.org/doc/5d1db6/>).
11. William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 446–473 (<https://www.legal-tools.org/doc/b7432e/>).
12. William A. Schabas and Mohamed M. El Zeidy, “Article 17”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 781–831 (<https://www.legal-tools.org/doc/040751/>).
13. Carsten Stahn, “Libya, the International Criminal Court and Complementarity: A Test for ‘Shared Responsibility’“, in *Journal of International Criminal Justice*, 2012, vol. 10, no. 2, pp. 235–349 (<https://www.legal-tools.org/doc/910ab2/>).

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Article 18

Preliminary Rulings Regarding Admissibility

General Remarks:

The Article is primarily procedural in nature. Substantive issues concerning the definition of ‘inadmissibility’, ‘willingness’ and ‘ability’ are addressed by Article 17.

In contrast to Article 19 permits a State to challenge admissibility after a case has been initiated before the ICC, the process delineated in Article 18 permits a State to stave off the Court’s exercise of jurisdiction over potential cases in a pre-emptive manner, if the State in question is investigating or has investigated these potential cases.

The Appeals Chamber has described Article 18 as encompassing the “appropriate procedural mechanisms” for addressing deferral issues: a State cannot raise the existence of domestic investigations within the context of Article 15 deliberations, instead, it must wait for the situation to be opened and notified, and then seek deferral pursuant to Article 18.¹

Article 18 uses the terms ‘States Parties’ and ‘States’ throughout, confirming that the Court’s complementarity regime applies to investigations conducted by both States Parties and non-States Parties. This has been confirmed by the Court’s practice.

In the *Philippines* situation, the Philippines withdrew from the Rome Statute after the initiation of an investigation; it is therefore not a ‘State Party’ for the purpose of this provision. The Prosecution suspended its investigations following the receipt of a deferral request, pursuant to Article 18(1) of the Statute, thereby legitimating the right of non-States Parties to resort to these provisions.²

Since the Statute cannot create legal obligations for non-States Parties, article 18 should be construed as a provision that creates rights rather than obligations for non-States Parties. The article enables non-States Par-

¹ ICC, *Situation in Afghanistan*, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138, para. 43 (*Situation in Afghanistan*, 8 October 2021) (<https://www.legal-tools.org/doc/x7kl12/>).

² ICC, *Situation in the Philippines*, Notification of the Republic of the Philippines’ deferral request under article 18(2), ICC-01/21-14, 18 November 2021, para. 3 (<https://www.legal-tools.org/doc/pkzjon/>).

ties to request the Prosecutor to defer to domestic investigations conducted by a non-State Party and sets out the framework for adjudicating such a request. If the non-State Party fails to avail itself of this provision, its right to conduct domestic investigations remains intact. The ICC Prosecutor will also have the right to continue investigations, but at the same time, is required to take into consideration whether a domestic acquittal or conviction would trigger *ne bis in idem* under Article 20(3) of the Statute, which would operate as a legal bar to further investigation or prosecution before the ICC.

As a result of the use of the term ‘State’, it has been necessary for the Court to consider whether certain authorities can be considered a ‘State’ for the purposes of the Statute. In the *Situation in Afghanistan*, the Pre-Trial Chamber initially decided that it was necessary to make such a determination *before* considering whether there were grounds to defer or resume an ICC investigation, and further averred that:

issues relating to a State’s representation, or to the transition of power within a given State, are complex matters of international and constitutional law, as such not suitable to be addressed, or trivialised, by way of general, sweeping and unsubstantiated assertions. It stresses that it is not within the Prosecutor’s, the Chamber’s or any organ of the Court’s purview to determine any of those matters, especially in a scenario where, for several reasons including the fast pace of relevant developments, and the short time elapsed since they materialised, there is still a large margin of uncertainty as to the legal implications of those events, including for the purposes of international law and international relations.³

The Chamber therefore requested the Secretary-General of the United Nations and the Bureau of the Assembly of States Parties of the International Criminal Court to submit information on the identification of the authorities representing Afghanistan (*Situation in Afghanistan*, 8 October 2021, paras. 19–61). In response, the Secretary-General of the United Nations advised the Chamber that the United Nations Secretariat did “not engage in acts of recognition of Governments, which is a matter for individual Member State”; it was, rather, “guided by the decisions of the intergov-

³ ICC, *Situation in Afghanistan*, Pre-Trial Chamber II, Decision setting the procedure pursuant to rule 55(1) of the Rules of Procedure and Evidence following the Prosecutor’s ‘Request to authorise resumption of investigation under article 18(2) of the Statute’, 8 October 2021, ICC-02/17-165, paras. 16–19 (<https://www.legal-tools.org/doc/m81sm8/>).

ernmental organs regarding the representation of Member States before receiving a treaty action”.⁴ The Bureau of the Assembly of States Parties notified the Chamber that “due to its nature and functions, it does not hold the type of information that is requested”.⁵

When the Chamber failed to receive a clear position as concerns the legal status of the authorities representing Afghanistan, the Chamber modified its stance that it was necessary to adjudicate this question before proceedings further with Article 8 proceedings. Instead, the Chamber noted that first, changes in government do not impact on the continuity of States or the status of legal proceedings concerning such State, second, many States and organisations had engaged with the group that had assumed control of Afghanistan, and third, receiving observations from the group in control of Afghanistan would “ensure the continuity of judicial proceedings in the most rigorous way.”⁶ The Chamber therefore invited the ‘authorities currently representing Afghanistan’ to submit observations.

The procedural requirements delineated in the Article place a relatively strict onus on States to assert their right to prosecute in a diligent and expeditious manner. As enunciated by the Appeals Chamber, “the complementarity principle, as enshrined in the Statute, strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to “put an end to impunity” on the other hand. If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in”.⁷

⁴ ICC, *Situation in Afghanistan*, Pre-Trial Chamber II, Annex I to the Transmission of Communications Submitted by the United Nations and the Bureau of the Assembly of States Parties pursuant to Pre-Trial Chamber II’s Decision ICC-02/17-165 of 8 October 2021, 5 November 2021, ICC-02/17-169-AnxI (<https://www.legal-tools.org/doc/twvvenl/>).

⁵ ICC, *Situation in Afghanistan*, Pre-Trial Chamber II, Annex II to the Transmission of Communications Submitted by the United Nations and the Bureau of the Assembly of States Parties pursuant to Pre-Trial Chamber II’s Decision ICC-02/17-165 of 8 October 2021, 5 November 2021, ICC-02/17-169-AnxII (<https://www.legal-tools.org/doc/fwuiks/>).

⁶ ICC, *Situation in Afghanistan*, Pre-Trial Chamber II, Order setting the schedule for the filing of submissions in the proceedings pursuant to article 18(2) of the Rome Statute and rule 55(2) of the Rules of Procedure and Evidence’, 24 February 2022, ICC-02/17-182, paras. 15–18 (citing para 18) (<https://www.legal-tools.org/doc/nt8t1a/>).

⁷ ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, 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, 25 September 2009, ICC-01/04-01/07-1497, para. 85 (<https://www.legal-tools.org/doc/ba82b5/>).

Preparatory Works:

A contentious issue that arose during the drafting history was whether non-State parties could invoke Article 18:

Those who favoured limiting the right to challenge to States Parties argued that non-States Parties ‘did not share the burden of obligations under the Statute, to share the privilege of challenging the jurisdiction of the Court’ (Italy) [...] Those who favoured extending the right to non-States parties asserted that ‘if a State that was not a party was carrying out an effective prosecution in its own territory, there was no reason for the Court to intervene and also conduct a prosecution’ (United Kingdom), *ibid.*, p. 215 and that it was more consistent with complementarity (Singapore). *Ibid.*, p. 219. ⁸

According to Holmes, the latter view prevailed although there was a general consensus that the right for non-States parties to challenge admissibility should not be open-ended.⁹

The final text does not impose any explicit limit on the rights of non-State parties. Nonetheless, in line with the view of States such as Italy that rights should be linked to obligations, a Prosecution Expert Paper on Complementarity advocates the position that a State’s record of co-operation with the ICC can be a relevant factor to the ICC’s determination as to whether to accept a challenge to admissibility.¹⁰ It follows from this that the fact that a State has ratified the ICC Statute might militate in the State’s favour, as it could be viewed as being reflective of a general willingness to co-operate with the ICC.

Doctrine: For the bibliography, see the final comment on Article 18.

Author: Melinda Taylor.

⁸ Christopher K. Hall, Daniel D. Ntanda Nsereko and Manuel J. Ventura, “Article 19”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 869, fn. 86 (<https://www.legal-tools.org/doc/040751/>).

⁹ John T. Holmes, “The Principle of Complementarity”, in Roy S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute*, Kluwer Law International, 1999, p. 66 (<https://www.legal-tools.org/doc/d71078/>).

¹⁰ ICC, *Prosecutor v. Bemba*, “Informal expert paper: The principle of complementarity in practice”, Annexe 9 to Communication par la Défense des copies de documents référenciés dans les notes de bas de pages de sa requête en contestation de la recevabilité, 15 March 2010, ICC-01/05-01/08-721-Anx9, p. 18 (<https://www.legal-tools.org/doc/ff5cf5/>).

Article 18(1)

1. When a situation has been referred to the Court pursuant to Article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to Articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

Article 18(1) of the Statute obliges the Prosecutor, once he or she has decided to investigate a State referral pursuant to Article 13(a) or has been authorised to initiate an investigation *proprio motu*, to notify all State parties and States, who would normally exercise jurisdiction over the crimes concerned.

Notably, Article 18(1) omits any reference to situations referred by the Security Council pursuant to Article 13(b). If that is the case, then the ICC would exercise automatic primacy as concerns investigations into such situations, although Article 19 would permit the State concerned or the defendant to challenge the admissibility of a specific case.

Nsereko justifies this omission of Article 13(b) referrals by arguing that “the Council has primacy in matters involving international peace and security. Its decisions are binding on all States. Judicial proceedings are some of the measures that it may opt for as a means of maintaining or restoring international peace and security. Once it has opted for and sanctioned such measures there is no need for further authorization from the Pre-Trial Chamber or from any other authority”.¹

Article 18(1) gives the Prosecution a degree of latitude to determine, on the basis of the information known to the Prosecution, which States or State Parties could exercise jurisdiction and should therefore be notified. It

¹ Daniel D. Ntanda Nsereko, “Article 18”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 837 (<https://www.legal-tools.org/doc/040751/>).

is therefore entirely possible that the Prosecution might fail to notify a State or State party in a timely manner, either because the Prosecution was unaware that a particular State was investigating or prosecuting the same acts or, because the Prosecution excluded States from its notification process due to an overly narrow definition of jurisdiction. Recent domestic developments in the field of universal jurisdiction underscore the difficulty of anticipating which States might initiate investigations.

The impact that this could have on the rights of States will be analysed in connection with Article 18(2).

A further issue is that the precise temporal and geographic parameters of a situation might not be completely defined at the time when the situation is referred to the Court by a State party. Since the purpose of Article 18 is to underscore the notion of complementarity and to enable States to fulfil their “duty [...] to exercise [...] criminal jurisdiction over those responsible for international crimes” (Preamble of the ICC Statute), it is arguable that this purpose would be frustrated if the Prosecution were to interpret its obligation as a once off obligation, as opposed to an obligation which is triggered whenever the Prosecution changes or expands the parameters of its investigations.

In the situation in the Democratic Republic of the Congo (‘DRC’), the Prosecution adopted both an expansive definition of the parameters of the investigation it opened into the DRC situation in 2004, and a narrow construction of its notification obligations. In its application for an arrest warrant against Calixte Mbarushimana, the Prosecution asserted that its notification to States in 2004 that it was opening an investigation into the DRC satisfied its Article 18(1) notification obligations as concerns investigations conducted much later into alleged crimes in the Kivus.²

Although the Pre-Trial Chamber did not expressly address the notification issue, it ruled that in order to fall within the parameters of the initial referral from the DRC, the investigated allegations must fall “within the boundaries of the situation of crisis for which the jurisdiction of the Court was activated [...] 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

² ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Prosecution’s Application under Article 58, 20 August 2010, ICC-01/04-01/10-11-Red, para. 163 (<https://www.legal-tools.org/doc/c67ece/>).

the situation of crisis referred to the Court as ongoing at the time of the referral”.³

In line with this reasoning, it follows that the Prosecution would need to reinitiate the ‘notification’ process if the crimes being investigated are not sufficiently linked to the crimes which formed the basis of the initial notification process.

Since Article 18 is concerned with potential rather than actual cases, the ICC Appeals Chamber has also underscored that the phrases ‘crimes concerned’ (Article 18(1)) and “criminal acts which may constitute crimes” (Article 18(2)) should be interpreted relatively broadly, particularly as “[o]ften, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear”.⁴

Finally, Article 18(1) permits the Prosecution to notify States on a confidential basis, and to limit the information provided to States if it believes that publicity would adversely affect the protection of persons, the integrity of evidence, or the ability of the ICC to apprehend suspects. It does not, however, appear possible for the Prosecution to rely on these reasons to refrain from notifying a State altogether. This lacuna could present problems in a situation where the target of the Prosecution’s investigations is the Head of State, or an official who is likely to have access to all confidential information in the State in question.

Cross-reference:

Rule 52.

Doctrine: For the bibliography, see the final comment on Article 18.

Author: Melinda Taylor.

³ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Prosecutor’s Application for an Arrest Warrant against Calixte Mbarushimana, 28 September 2010, ICC-01/04-01/10-01, para. 6 (<https://www.legal-tools.org/doc/04d4fa/>).

⁴ ICC, *Prosecutor v. Ruto, Kosgey and Sang*, 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”, 30 August 2011, ICC-01/09-01/11-307, para. 39 (<https://www.legal-tools.org/doc/ac5d46/>).

Article 18(2)

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

Article 18(2) specifies that once States or States Parties have been notified, they have a deadline of 1 month within which to notify the Court that they are investigating or have investigated the acts in question.

The black-letter text of the Statute affords States with a very limited temporal window through which to assert primacy. Article 18(2) does not provide States with the legal right to either seek a reasonable extension of this deadline, or to request the Court to defer its investigations if the State can demonstrate a change in circumstances (that is, which is now conducting investigations into the acts in question).

It could be argued from the perspective of States that the one-month fixed deadline is inimical to the complementarity principle. Many States might be willing in principle to investigate or prosecute the 'criminal acts' but might lack the technical means to do so in the immediate aftermath of the conflict or unrest in question. A genuinely willing and able State might therefore fail to meet the threshold of proving to the Court that they are investigating or have investigated the acts in question at the specific time of the Article 18 notification.

This Statutory emphasis on expedition has, however, been tempered by case law and practice, emphasising the importance of dialogue and constructive co-operation between the Prosecution and States within the framework of Article 18(2).¹ In the *Venezuela* situation, the Prosecution justified its decision to grant Venezuela a three month extension to report

¹ ICC, *Situation in Afghanistan*, Pre-Trial Chamber II, Decision setting the procedure pursuant to rule 55(1) of the Rules of Procedure and Evidence following the Prosecutor's 'Request to authorise resumption of investigation under article 18(2) of the Statute', 8 October 2021, ICC-02/17-165, para. 16 ('*Situation in Afghanistan*, 8 October 2021') (<https://www.legal-tools.org/doc/m81sm8/>).

on the progress of domestic investigation by reference to the “spirit of cooperation, dialogue and fairness”.²

Article 18(2) establishes the presumption that if a notified State requests the Prosecution to defer to its domestic investigations, the Prosecutor shall defer to the State in question. This presumption is only displaced if and when the Pre-Trial Chamber rules in favour of a Prosecution application to continue its investigations.

The Prosecution has advanced the position that the burden of proof and argumentation falls on the State requesting deferral to demonstrate that the parameters of its domestic investigation sufficiently mirror that of the Prosecutor’s.³ Such an interpretation would align Article 18 with ICC jurisprudence concerning Article 19, which places the burden on State challenging admissibility to adduce “evidence with a sufficient degree of specificity and probative value in order to demonstrate that all of the elements of the admissibility criteria are met”.⁴ There are, however, key textual differences between the two provisions. Article 18(2) only requires States to ‘inform’ the Court of the existence of domestic investigations, whereas Article 19(2) requires States to file a ‘challenge’. The last sentence of Article 18(2) also specifies that the Prosecution must submit an ‘application’ to continue its investigation. This language suggests that the burden may fall on the Prosecution to justify why its application should be granted. Conversely, Rule 53 frames the ‘information’ filed by the State as a ‘request’ and further specifies that the requesting State must submit information in support of the request. Rule 55(2) then empowers the Pre-Trial Chamber to ‘examine’ both the Prosecution’s application and any observations submitted by the

² ICC, Pre-Trial Chamber I, *Situation in Venezuela*, Notification on the status of article 18 notifications in the Situation in the Bolivarian Republic of Venezuela I, 17 January 2022, ICC-02/18-16, para. 10 (<https://www.legal-tools.org/doc/8uazt0/>), referencing directions established by the Chamber in a confidential decision (ICC-02/18-9-Conf, p. 12).

³ ICC, *Situation in Bolivia*, Office of the Prosecutor, Prosecution’s communication of materials and further observations pursuant to article 18(2) and rule 54(1), 29 August 2022, ICC-02/17-195, para. 24 (<https://www.legal-tools.org/doc/65gjw9/>).

⁴ ICC, *Prosecutor v. Ruto et al.*, Appeals Chamber, 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”, 30 August 2011, ICC-01/09-01/11-307, para. 2 (<https://www.legal-tools.org/doc/ac5d46/>); *Prosecutor v. Gaddafi et al.*, Pre-Trial Chamber I, ‘Public Redacted Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi’, 31 May 2013, ICC-01/11-01/11-344-Red, para. 52 (<https://www.legal-tools.org/doc/339ee2/>).

State requesting a deferral. This suggests that rather than placing an exclusive burden on either the State or the Prosecution, the Chamber must satisfy itself on the basis of the information before it, whether an investigation would be consistent with the factors set out in Article 17 of the Statute. This would be consistent with the jurisprudential emphasis on dialogue rather than confrontation.

In terms of the type of information that is relevant to the Chamber's assessment, Pre-Trial Chamber II underscored that "statements or assumptions of political nature have no place in a Court of law"; the Chamber therefore refused to give any weight to submissions predicated on political statements in its deferral assessment.⁵

Article 18(2) states that the Prosecutor may apply for authorisation to continue its investigations but is silent as concerns whether the Pre-Trial Chamber could rule *proprio motu* or at the request of victims or other States on the issue as to whether Prosecution should defer to national investigations. In the Afghanistan situation, Pre-Trial Chamber II construed the provision as excluding such possibilities:⁶

Article 18(2) of the Statute contemplates a Pre-Trial Chamber's intervention only upon the application of the Prosecution, in the event that the Prosecution does not intend to defer to the relevant State's investigations. This provision confers upon the Prosecution the exclusive power to review the Deferral Request with the modalities and the timing it regards as appropriate. The decision as to whether, and to what extent, to provide information on the procedure under article 18(2) of the Statute to potential victims and the general public also falls under the sole discretion of the Prosecution.

Article 18(2) is also silent as concerns whether and how victims can present their views and concerns in relation to a Prosecution application to continue investigations. In the *Situation of the Philippines*, Pre-Trial

⁵ ICC, *Situation in Afghanistan*, Pre-Trial Chamber II, Order instructing the Prosecution to submit observations and relevant materials pursuant to article 18(2) of the Rome Statute and 54(1) of the Rules of Procedure and Evidence', 22 July 2022, ICC-02/17-194, fn. 32 (<https://www.legal-tools.org/doc/eue6ws/>), citing *Situation in Afghanistan*, 8 October 2021, para. 18.

⁶ ICC, *Situation in Afghanistan*, Pre-Trial Chamber II, Decision regarding applications related to the Prosecution's 'Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request, 3 September 2021, ICC-02/17-156, para. 23 (<https://www.legal-tools.org/doc/a1rdha/>).

Chamber I recognised that the personal interests of victims would be impacted by such a determination and further decided that “the system as set forth by the Statute and the Rules in respect of proceedings pursuant to article 15 of the Statute provides a suitable model for collecting victims views and concerns in the context of article 18(2) proceedings”.⁷

Cross-references:

Rule 52, 53, 54 and 55.

Regulation 38.

Doctrine: For the bibliography, see the final comment on Article 18.

Author: Melinda Taylor.

⁷ ICC, *Situation in the Philippines*, Pre-Trial Chamber I, Order inviting observations and victims’ views and concerns, 14 July 2022, ICC-01/21-47, para. 14 (<https://www.legal-tools.org/doc/n5qj2v/>).

Article 18(3)

3. The Prosecutor’s deferral to a State’s investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State’s unwillingness or inability genuinely to carry out the investigation.

If the Prosecution has deferred to a State, or the Pre-Trial Chamber has rejected the Prosecutor’s application for non-deferral, the Prosecution may nonetheless review the status of domestic proceedings with a view to filing a request for authorisation from the Pre-Trial Chamber to continue its investigations (Article 18(3) and Rule 65(1)). The Prosecution may do so either after six months has elapsed or upon a significant change of circumstances concerning whether the State’s investigations meet the Article 17 criteria of willingness and ability (Article 18(3)). The existence of such a power implies that in order for this provision to be effective, the Prosecution would need to monitor the progress of domestic investigations continuously with a view to assessing whether they comport to the criteria set out in Article 17. It is unclear from the phrase “at any time” whether there is any limit as concerns the number of times that the Prosecutor may review the deferral of the investigation or prosecution.

Cross-reference:

Rule 56.

Doctrine: For the bibliography, see the final comment on Article 18.

Author: Melinda Taylor.

Article 18(4)

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with Article 82. The appeal may be heard on an expedited basis.

This Article confirms that for the purpose of Article 18 proceedings, a State can be considered as a ‘party’ for the purposes of initiating an automatic right to appeal pursuant to Article 82(1)(a) of the Statute. Article 82(1)(a) enables ‘parties’ to appeal a decision on admissibility or jurisdiction as of rights (that is, without first seeking leave to appeal from the Chamber, which issued the decision).

It has been extrapolated from the fact that Article 18(4) expressly iterates the right of States to appeal certain decisions that in the absence of such express language concerning a right for States to appeal a particular category of decisions, States cannot otherwise avail themselves of the appellate avenues set out in Articles 81 and 82.¹

Doctrine: For the bibliography, see the final comment on Article 18.

Author: Melinda Taylor.

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on two requests for leave to appeal the “Decision on the request by DRC-DO1-WWWW-0019 for special protective measures relating to his asylum application, 4 August 2011, ICC-01/04-01/06-2779, para. 11 (<https://www.legal-tools.org/doc/c7c8f2/>).

Article 18(5)

5. 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.

This sub-Article specifies that where the Prosecution has deferred to a State's investigation, it may request the State in question to inform the Prosecution on a periodic basis concerning the status of its investigations and prosecutions.

Notably, the Article also specifies that "States Parties" shall respond to such requests without undue delay. The explicit reference to State Parties implies that no such obligation is imposed on non-State Parties. The absence of an obligation to submit such information renders it particularly difficult for the Prosecution to assess the progress of the case, as the Prosecution also has no right to conduct investigations in non-State parties.

Thus, whereas non-State parties can request the Prosecution to defer to its investigations, the Prosecution has no corollary power or effective ability to monitor whether the State in fact investigates and prosecutes the case in a manner, which is consistent with the admissibility criteria under Article 17.

In order to ensure the underlying ICC Statute objectives of eliminating impunity and ensuring effective prosecutions, it is arguable that the fact that the requesting State is a non-State party might be a relevant criterion as concerns the Prosecution's decision as to whether to defer to the State's investigation, or apply to the Chamber to authorise an ICC investigation.

Similarly, even if a non-State party is not obliged to submit periodic reports, it might be appropriate to draw adverse inferences if it refuses to do so, for the purposes of deciding whether there has been a significant change of circumstances, which would warrant a reversal of the Prosecution's deferral to the investigations or prosecutions of the State.

This would be consistent with the recommendation in the ICC Informal Expert Paper on Complementarity that a State's record of co-

operation with the ICC can be a relevant factor in the Court’s assessment as to whether the State meets (or continues to meet) the admissibility criteria.¹

Hall has also argued that where information, which might be germane to the ICC’s determination of admissibility, is within the custody of a State and the State fails to proffer it or grant the ICC access to it, it would be appropriate to draw adverse inferences against the State in question.²

Doctrine: For the bibliography, see the final comment on Article 18.

Author: Melinda Taylor.

¹ ICC, *Prosecutor v. Bemba*, “Informal expert paper: The principle of complementarity in practice”, Annexe 9 to Communication par la Défense des copies de documents référenciés dans les notes de bas de pages de sa requête en contestation de la recevabilité, 15 March 2010, ICC-01/05-01/08-721-Anx9, p. 18 (<https://www.legal-tools.org/doc/ff5cf5/>).

² Christopher K. Hall/Daniel D. Ntanda Nsereko/Manuel J. Ventura, “Article 19”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 862 and 875 (<https://www.legal-tools.org/doc/040751/>).

Article 18(6)

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this Article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

In order to ensure that potential future prosecution or investigations before the ICC are not prejudiced during this ‘ping pong’ match between the jurisdiction of domestic authorities and the ICC, Article 18(6) permits the Prosecutor to apply to the Pre-Trial Chamber to take measures to preserve evidence if there is a unique opportunity to obtain important evidence or there is a significant risk that the evidence might not be subsequently available. Rule 57 specifies that such an application shall be considered on an expedited and *ex parte* basis. Presumably, in order to ensure that any evidence so collected would be potentially admissible during a future trial at the ICC, the invocation of a unique investigative opportunity by the Prosecution pursuant to Article 18(6) would also attract the provisions and procedures set down by Article 56 (the Role of the Pre-Trial Chamber in relation to a unique investigative opportunity). This includes the duty of the Pre-Trial Chamber to consider what measures may be necessary to “ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence” (Article 56(1)(b)). These measures can include the appointment of a defence counsel to represent the interests of the defence (Article 56(2)(d)).

Cross-references:

Rule 57.

Regulation 38.

Doctrine: For the bibliography, see the final comment on Article 18.

Author: Melinda Taylor.

Article 18(7)

7. A State which has challenged a ruling of the Pre-Trial Chamber under this Article may challenge the admissibility of a case under Article 19 on the grounds of additional significant facts or significant change of circumstances.

The fact that a State has unsuccessfully challenged the admissibility of a situation does not prevent it from subsequently challenging the admissibility of a particular case under Article 19, but it must then base its Article 19 challenge on additional significant facts or a significant change of circumstances (Article 18(7)).

It has been suggested that such new facts or significant change in circumstances could include “cessation of hostilities in a country that was previously embroiled in war; the coming to power of a new government that is better disposed to exercise national jurisdiction fairly and effectively; and genuine national peace and reconciliation arrangements under which the defendants might have been granted amnesty or pardon”.¹

Doctrine:

1. Christopher K. Hall, Daniel D. Ntanda Nsereko and Manuel J. Ventura, “Article 19”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 849–898 (<https://www.legal-tools.org/doc/040751/>).
2. John T. Holmes, “The Principle of Complementarity”, in Roy S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999 (<https://www.legal-tools.org/doc/d71078/>).
3. ICC Informal Expert Paper, “The Principle of Complementarity in Practice”, 2003 (<https://www.legal-tools.org/doc/8mksx9/>).
4. Daniel D. Ntanda Nsereko, “Article 18”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A*

¹ Daniel D. Ntanda Nsereko, “Article 18”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 848 (<https://www.legal-tools.org/doc/040751/>).

Commentary, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 832–848 (<https://www.legal-tools.org/doc/040751/>).

Author: Melinda Taylor.

Article 19

General Remarks:

Articles 17, 18 and 19 of the ICC Statute are the main provisions governing the complementarity regime of the ICC. While Article 17 addresses the substantive conditions for admissibility, Article 19 deals with the procedural aspects related to both jurisdiction and admissibility of a case. Such procedural matters include the identification of the competent chamber for deciding on admissibility and jurisdictional challenges, the parties entitled to lodge a challenge, those authorized to participate in the proceedings and submit observations, and the conditions related to the timeliness of a challenge.¹ Article 19 differs from Article 18 on preliminary challenges to admissibility insofar that it applies to concrete and clearly-defined cases, whereas Article 18 deals with challenges made earlier in the proceedings against the opening of an investigation into a whole situation.²

Preparatory Work:

The drafting history of the Statute reveals that states had converging views regarding the scope and content of Article 19. Among the significant questions contemplated was whether challenges should be permitted in respect of both admissibility and jurisdiction (Holmes, 1999, p. 61). There was a common understanding among delegations about the conceptual differences between jurisdiction and admissibility. As regards jurisdiction, it was widely accepted that it is Court's duty to satisfy itself that it has jurisdiction over a case "throughout all stages of the proceedings". As concerns admissibility, the prevailing view was that admissibility "was less the duty of the Court to establish than a bar to the Court's consideration of a case" (Holmes, 1999, p. 61). As a result of this conceptual distinction, it was ultimately decided that consideration of admissibility challenges should, in principle, be limited to the early stages of the proceedings.

¹ ICC Statute, Article 19; John T. Holmes, "The Principle of Complementarity", in Roy S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute*, Kluwer Law International, 1999, pp. 60–65 (<https://www.legal-tools.org/doc/d71078/>).

² William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 487 (<https://www.legal-tools.org/doc/b7432e/>).

Doctrine: For the bibliography, see the final comment on Article 19.

Author: Mohamed Abdou.

Article 19(1)

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with Article 17.

Article 19 provides that the Court shall satisfy itself that it has jurisdiction over any case brought before it and that it may examine the question of admissibility on its own motion.

In contrast to jurisdiction, the Court’s power to determine the admissibility of a case on its own motion under Article 19 is discretionary.¹ The Appeals Chamber noted that:

although article 19(1) of the Statute imposes an obligation on the Court to always satisfy itself that it has jurisdiction over any case brought before it, there is no similar obligation in relation to admissibility. Chambers are entitled to rely on the presumption that the Prosecutor has made an earnest and objective assessment of the domestic situation before launching a criminal investigation into a particular case. Accordingly, unless the admissibility of a case is challenged by a State, an accused, or a person for whom a warrant of arrest or summons to appear has been issued, Chambers are allowed to proceed without considering the admissibility of the case before them.²

A *proprio motu* determination of admissibility is subject to limited review by the Appeals Chamber, whose sole purpose would be to ensure that the relevant chamber properly exercised its discretion. The Appeals Chamber will not interfere with a pre-trial chamber’s exercise of discretion unless it is shown that its determination was vitiated by an error of law, fact or procedure which materially affected the decision (*Ongwen et al.*, 16 September 2009, para. 80). A *proprio motu* determination does not preclude a suspect from bringing an admissibility challenge before the Court at a

¹ ICC, *Prosecutor v. Ongwen et al.*, Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19 (1) of the Statute” of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408, para. 48 (*Ongwen et al.*, 16 September 2009’) (<https://www.legal-tools.org/doc/c40d73/>).

² ICC, *Prosecutor v. Yekatom and Ngaïssona*, Public redacted version of “Judgment on Mr Yekatom’s appeal against Trial Chamber V’s Decision on the Yekatom Defence’s Admissibility Challenge”, 11 February 2021, ICC-01/14-01/18-678-Red, para. 41 (<https://www.legal-tools.org/doc/mpqdbm/>).

later stage of the proceedings under Article 19(2), but may be relevant to the assessment of the subsequent admissibility challenge (para. 86).

Article 19(1) of the Statute is silent on whether a suspect has a right to legal representation in jurisdiction and admissibility proceedings, particularly in circumstances where he or she has not yet appeared before the Court. The Appeals Chamber found that the Court had no obligation to appoint counsel to represent the interests of individual suspects for the specific purposes of these proceedings (*Ongwen et al.*, 16 September 2009, para. 68).

Cross-references:

Rules 59 and 133.

Doctrine: For the bibliography, see the final comment on Article 19.

Author: Mohamed Abdou.

Article 19(2)

2. Challenges to the admissibility of a case on the grounds referred to in Article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under Article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under Article 12.

Article 19(2) identifies the parties entitled to bring a challenge to the jurisdiction of the Court or to the admissibility of a case as follows : (i) the accused or the person against whom a warrant of arrest or summon to appear has been issued; (ii) a State which has jurisdiction over the case, or (iii) a State that has accepted the jurisdiction of the Court under Article 12.

A *proprio motu* determination of admissibility does not preclude a suspect, who does not take part in the proceedings, from bringing an admissibility challenge under Article 19(2)(a) at a later stage. Such an initial determination may however be relevant to the assessment of a subsequent admissibility challenge.¹ In the *Situation in the Democratic Republic of the Congo*, the Appeals Chamber elaborated on the concern that subsequent proceedings might be perceived as predetermined by the outcome of an initial determination of admissibility.² In *Kony et al.*, the Appeals Chamber dismissed a claim of predetermination finding that, in the specific circumstance of the case, the defence was unlikely to be prejudiced from the Court's initial ruling on admissibility (*Ongwen et al.*, 16 September 2009).

The Prosecutor, the defence and the victims may participate in Article 19 proceedings. There remain however some doubts as to the status and

¹ ICC, *Prosecutor v. Ongwen et al.*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408, para. 86 (*Ongwen et al.*, 16 September 2009) (<https://www.legal-tools.org/doc/c40d73/>).

² ICC, *Situation in the Democratic Republic of the Congo*, 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", 13 July 2006, ICC-01/04-169, para. 50 (<https://www.legal-tools.org/doc/8c20eb/>).

scope of participation of states. In *Muthaura et al.*, Pre-Trial Chamber II held that a state may not participate in the proceedings on admissibility when such proceedings are initiated by the defence, stating that: “a State becomes a participant to the proceedings on admissibility only in particular instances where the interests of a State are envisaged by the Court’s statutory documents. This is the case, for example, where the State has challenged the admissibility of the case under Article 19(2)(b) of the Statute. However, this is not the case in the context of the present proceedings as the admissibility challenge was lodged by a suspect – although this does not mean that a State will never have an interest when it is not the triggering entity of such a challenge”.³

Cross-references:

Rule 59.

Regulation 38(1)(c).

Doctrine: For the bibliography, see the final comment on Article 19.

Author: Mohamed Abdou.

³ ICC, *Prosecutor v. Muthaura, Kenyatta and Ali*, Pre-Trial Chamber II, Decision on the “Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings, 20 September 2011, ICC-01/09-02/11-340, para. 9 (<https://www.legal-tools.org/doc/79a169/>).

Article 19(3)

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under Article 13, as well as victims, may also submit observations to the Court.

Article 19(3) provides the Prosecutor with a procedural mechanism for seeking guidance from the Court on a question of jurisdiction or admissibility at an early stage of the proceedings, before any determination by Court and prior to the lodging of a challenge by a person or a State. Such mechanism is intended to assist the Prosecutor in properly discharging its investigative and prosecutorial functions by requesting a preliminary ruling from the Pre-Trial Chamber.¹

A question arose whether a ruling on a jurisdictional matter may be sought under Article 19(3) before a case is brought before the Court. In the situation of *Palestine*, the Pre-Trial Chamber stated that a ruling pursuant to Article 19(3) of the ICC Statute may be sought after the opening of an investigation and before a case is brought forward by the Prosecutor (*Situation in Palestine*, 5 February 2021, para. 70). The Pre-Trial Chamber highlighted the benefits of an early ruling on jurisdiction for the purposes of determining the precise scope of an investigation to be conducted following a referral by a State Party, noting that it would prevent “unnecessarily delaying judicial scrutiny of matters of jurisdiction until an application under article 58 of the Statute is submitted” (para. 82).

Victims may participate in proceedings under Article 19(3). In the situation of *Myanmar*, the Pre-trial Chamber acknowledged the victims’ right to participate in the proceedings and submit observations pursuant to Article 68(3) of the Statute.²

¹ ICC, *Situation in the State of Palestine*, Pre-Trial Chamber I, Decision on the “Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine”, 5 February 2021, ICC-01/18-143, para. 75 (*Situation in Palestine*, 5 February 2021’) (<https://www.legal-tools.org/doc/haitp3/>).

² ICC, Pre-Trial Chamber I, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, ICC-RoC46(3)-01/18-37, 6 September 2018, para. 21 (‘Request under Regulation 46(3) of the Regulations of the Court, 6 September 2018’) (<https://www.legal-tools.org/doc/73aeb4/>).

A State may be permitted by the Court to submit an *amicus* brief pursuant to Rule 103(1) of the Rules of Procedure and Evidence on specific matters. Such participation is limited and does not imply an automatic right to submit responses (Request under Regulation 46(3) of the Regulations of the Court, 6 September 2018, para. 19).

Cross-references:

Rules 59 and 60.

Regulation 38(2)(b).

Doctrine: For the bibliography, see the final comment on Article 19.

Author: Mohamed Abdou.

Article 19(4)

4. 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. 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).

Pursuant to Article 19(4) of the Statute, a challenge to the Court’s jurisdiction or to the admissibility of a case must, in the absence of exceptional circumstances, only be made once and made prior to, or at the commencement of, the trial. Challenges made after the commencement of trial may only be based on factors set out in article 17(1)(c) concerning the principle of *ne bis in idem*.

A challenge lodged by one defendant does not limit or preclude other co-defendants or the State from making a subsequent challenge in the same case. Pre-Trial Chamber II stated that “nowhere is it said that a challenge brought by either of these parties forecloses the bringing of a challenge by another equally legitimate party, nor that the right of either of the parties to bring a challenge is curtailed or otherwise affected by the Chamber’s exercise of its *proprio motu* powers”.¹

Timing:

As regards the appropriate timing for lodging an admissibility challenge, Trial Chamber II indicated the following:

[...] the Statute provides a three-phase approach in respect of challenges to admissibility. During the first phase, which runs until the decision on the confirmation of charges is filed with the Registry, all types of challenges to admissibility are permissible, subject to the requirement, for States, to make them at the earliest opportunity. In the second phase, which is fairly short, running from the filing of the decision on the confirma-

¹ ICC, *Prosecutor v. Kony et. al*, Pre-Trial Chamber II, Decision on the admissibility of the case under Article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377, para. 25 (<https://www.legal-tools.org/doc/44f5b3/>).

tion of charges to the constitution of the Trial Chamber, challenges may still be made if based on the *ne bis in idem* principle. In the third phase, in other words, as soon as the chamber is constituted, challenges to admissibility (based only on the *ne bis in idem* principle) are permissible only in exceptional circumstances and with leave of the Trial Chamber.²

While it appears from this pronouncement that the commencement of trial is the date at which the Trial Chamber is constituted, it should be noted that other trial chambers have adopted a different approach. In the *Bemba* and *Ntaganda* cases, the Trial Chamber determined that a trial commences when “the evidence in the case is called and counsel – by speeches, submissions, statements and questioning – address the merits of the respective cases”.³ According to this view, an admissibility challenge lodged after the constitution of the Trial Chamber and before the delivery of opening statements by the parties should not be treated as exceptional within the meaning of Article 19(4) of the Statute (*Bemba*, 24 June 2010, paras. 210–211).

Exceptional Circumstances:

In the *Ntaganda* case, Trial Chamber VI agreed to consider a second challenge to the jurisdiction of the Court by the defendant in respect of the charges of rape and sexual slavery committed against child soldiers. While noting that a similar challenge was made at the pre-trial stage, the Chamber acknowledged the existence of exceptional circumstances justifying a second consideration of the same arguments— lack of appellate scrutiny over the Pre-Trial Chamber’s determination of jurisdiction, and inadvisability of calling witnesses to testify about traumatic events if there is no real prospect of a conviction for the alleged conduct.

Doctrine: For the bibliography, see the final comment on Article 19.

Author: Mohamed Abdou.

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, ICC-01/04-01/07-1213-tENG, para. 49 (<https://www.legal-tools.org/doc/e4ca69/>).

³ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, paras. 210–211 (*‘Bemba*, 24 June 2010’) (<https://www.legal-tools.org/doc/a5de24/>). See also *Prosecutor v. Ntaganda*, Trial Chamber VI, Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9, 4 January 2017, ICC-01/04-02/06-1707, para. 17 (<https://www.legal-tools.org/doc/2de239/>).

Article 19(5)

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

Article 19(5) provides that the State challenging the admissibility of a case shall make the challenge at “the earliest opportunity”.

In the *Muthaura et al.* and *Ruto et al.* cases, the Appeals Chamber rejected the argument put forward by Kenya that the “earliest opportunity” requirement implies that a State cannot be expected to have prepared every aspect of its admissibility application in detail before lodging a challenge.¹ The Appeals Chamber clarified that Article 19(5) of the Statute requires a State to challenge admissibility “as soon as possible once it is in a position to actually assert” that it is investigating the same case. A State should not challenge admissibility just because the Court has issued an arrest warrant or a summon to appear (*Muthaura, Kenyatta and Ali*, 30 August 2011, para. 45).

Doctrine: For the bibliography, see the final comment on Article 19.

Author: Mohamed Abdou.

¹ ICC, *Prosecutor v. Muthaura, Kenyatta and Ali*, Appeals Chamber, 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”, 30 August 2011, ICC-01/09-02/11-274, para. 45 (*Muthaura, Kenyatta and Ali*, 30 August 2011’) (<https://www.legal-tools.org/doc/c21f06/>). See also ICC, *Prosecutor v. 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’, 21 May 2014, ICC-01/11-01/11-547-Red, para. 84 (<https://www.legal-tools.org/doc/0499fd/>).

Article 19(6)

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with Article 82.

Article 19(6) provides that decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber under Article 82 of the Statute. Article 82(1)(a) of the Statute specifies that either party may appeal “a decision with respect to jurisdiction or admissibility”.

Decisions with respect to jurisdiction or admissibility are directly appealable by the parties to the proceedings (the Prosecution, the Defence or the State) without the need to seek prior leave from a pre-trial or trial chamber, as is the case for other interlocutory appeals brought under Article 82(1)(b). The Appeals Chamber has narrowly defined the scope of Article 19(6), affirming that “the right to appeal a decision on jurisdiction or admissibility is intended to be limited only to those instances in which a Pre-Trial or Trial Chamber issues a ruling specifically on the jurisdiction of the Court or the admissibility of the case”.¹ It further stated that the phrase “decision with respect to admissibility” requires “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” (*Situation in Kenya*, 10 August 2011, para. 15).

In the situation of the *Union of the Comoros*, the Appeals Chamber found that a decision by the pre-trial chamber requesting the Prosecutor to reconsider his or her decision not to initiate an investigation did not amount

¹ ICC, *Situation in the Republic of Kenya*, Appeals Chamber, 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’”, 10 August 2011, ICC-01/09-78, para. 16 (*Situation in Kenya*, 10 August 2011’) (<https://www.legal-tools.org/doc/872314/>).

to a ruling on admissibility under Article 82(1)(b).² While the Appeals Chamber recognized that the Pre-Trial Chamber’s request may require the prosecution to revisit its assessment in relation to admissibility when re-considering the initial decision not to initiate an investigation, it nonetheless concluded that such request was not by its nature a decision on admissibility.

Appellate proceedings concerning jurisdiction or admissibility are not a mere continuation of the proceedings before the trial or pre-trial chamber. They are corrective in nature and do not involve a *de novo* consideration of the matters determined at first instance.³ The Appeals Chamber clarified that the proceedings on appeal are “determined by the scope of the relevant proceedings before the Pre-Trial Chamber”, which entails that a party may not rely on facts which postdate the admissibility decision at the appeal stage (*Ruto et al.*, 28 July 2011, para. 13).

Cross-reference:

Rule 60.

Doctrine: For the bibliography, see the final comment on Article 19.

Author: Mohamed Abdou.

² ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Appeals Chamber, Decision on the admissibility of the Prosecutor’s appeal against the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation”, 6 November 2015, ICC-01/13-51, para. 50 (<https://www.legal-tools.org/doc/a43856/>).

³ ICC, *Prosecutor v. Ruto et al.*, Appeals Chamber, Decision on the “Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility”, 28 July 2011, ICC-01/09-01/11-234, para. 13 (*Ruto et al.*, 28 July 2011’) (<https://www.legal-tools.org/doc/3d65de/>).

Article 19(7) and (8)

7. If a challenge is made by a State referred to in paragraph 2(b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with Article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in Article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under Article 58.

Article 19(7) provides that, when a State challenges admissibility or jurisdiction, the Prosecutor “shall suspend the investigation until such time as the Court makes a determination”. The Prosecutor may still however seek a ruling from the Court: (a) to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available; (b) to take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and (c) in co-operation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under Article 58. Pursuant to Rules 58 and 61 of the Rules of Procedure and Evidence, the Prosecutor request for provisional measures shall be considered *ex parte* and *in camera*, and the Pre-Trial Chamber shall rule on it expeditiously.

While the Prosecutor is, required to suspend her investigation pending the determination of an admissibility challenge brought by a State, there is no requirement that a domestic investigation be also suspended during that period.¹ Domestic proceedings may thus continue during the pendency of an admissibility challenge, without prejudice to the State’s obligations to co-operate with the Court.

¹ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Appeals Chamber, Decision on the request for suspensive effect and the request to file a consolidated reply, 22 November 2013, ICC-01/11-01/11-480, para. 16 (<https://www.legal-tools.org/doc/11a20e/>).

Cross-references:

Rules 58 and 61.

Regulation 38(2)(c).

Doctrine: For the bibliography, see the final comment on Article 19.

Author: Mohamed Abdou.

Article 19(9)

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

Article 19(9) specifies that the lodging of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court before it was made. However, it should be noted that in *Al-Senussi* case, the Pre-Trial Chamber found that the filing of an admissibility challenge allows the challenging State to postpone the execution of a surrender request pending the determination of the admissibility challenge under Article 95 of the Statute.¹

Doctrine: For the bibliography, see the final comment on Article 19.

Author: Mohamed Abdou.

¹ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Pre-Trial Chamber I, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to Article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163, para. 37 (<https://www.legal-tools.org/doc/ae7c48/>).

Article 19(10)

10. If the Court has decided that a case is inadmissible under Article 17, the Prosecutor may submit a request for a review of the 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.

Under Article 19(10), the Prosecutor may submit a request for the review of the admissibility decision if he or she is satisfied “that new facts have arisen which negate the basis on which the case had previously been found inadmissible under Article 17”. Such a request shall be presented to the same chamber that made the initial ruling on admissibility, in accordance with the provisions of Rules 58, 59 and 61 of the Rules of Procedure. A state that has previously filed an admissibility challenge shall be notified and should be afforded an opportunity to make legal representations.

To date, there exists no precedent for an application by the Prosecution under article 19(10). In the *Al Senussi* admissibility decision, Pre-Trial Chamber I found the case against the defendant inadmissible before the Court but observed that the Prosecutor may still submit a request for review of the decision in accordance with Article 19(10) if new facts come to light negating the basis for the Chamber’s ruling.¹

The language of Article 19(10) demonstrates that admissibility assessments are not “static” but must take account of the changes of circumstances that may occur following an initial determination by the Court.² The Appeals Chamber explained that “the admissibility of a case under Article 17 (1)(a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of the States having jurisdiction. These activities may change over time. Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the con-

¹ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Pre-Trial Chamber I, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11-466-Red, para. 312 (<https://www.legal-tools.org/doc/af6104/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, 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, 25 September 2009, ICC-01/04-01/07-1479, para. 56 (*‘Katanga and Ngudjolo, 25 September 2009’*) (<https://www.legal-tools.org/doc/ba82b5/>).

cerned State and vice versa” (*Katanga and Ngudjolo*, 25 September 2009, para. 56).

As regards the term “new facts”, the Appeals Chamber clarified that it refers to “facts that become known after the initial admissibility decision”.³

Cross-references:

Rules 62 and 185.

Doctrine:

1. John T. Holmes, “The Principle of Complementarity”, in Roy S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 41–3, 50, 60–5.
2. Charles Jalloh, “Kenya vs. The ICC Prosecutor”, in *Harvard International Law Journal Online*, 2012, vol. 53, p. 237 (<https://www.legal-tools.org/doc/8d1de2/>).
3. William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 483–501 (<https://www.legal-tools.org/doc/b7432e/>).
4. William W. Burke-White and Scott Kaplan, “Shaping the Contours of the Domestic Justice: The ICC and the Admissibility Challenge in the Uganda Situation”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 79–114 (<https://www.legal-tools.org/doc/5d1db6/>).
5. Mohamed El Zeidy, “From Primacy to Complementarity and Backwards: (Re-)Visiting Rule 11 *bis* of the Ad hoc Tribunals”, in *International & Comparative Law Quarterly*, 2008, vol. 57, pp. 403–15 (<https://www.legal-tools.org/doc/13b48e/>).
6. Jann K. Kleffner, “The Impact of Complementarity on National Implementation of Substantive International Criminal Law”, in *Journal of International Criminal Justice*, 2003, vol. 1, no. 1, pp. 86–113 (<https://www.legal-tools.org/doc/4af8c9/>).

³ ICC, *Prosecutor v. Gaddafi*, Appeals Chamber, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled ‘Decision on the “Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute”’ of 5 April 2019, ICC-01/11-01/11-695, 9 mars 2020, para. 60 (<https://www.legal-tools.org/doc/kdbwwo/>).

7. William W. Burke-White, “Implementing a Policy of Positive Complementarity in the Rome System of Justice”, in *Criminal Law Forum*, 2008, vol. 19, no. 1, pp. 59–85 (<https://www.legal-tools.org/doc/e36e49/>).
8. Carsten Stahn, “Libya, the International Criminal Court and Complementarity: A Test for ‘Shared Responsibility’”, in *Journal of International Criminal Justice*, 2012, vol. 10, no. 2, pp. 235–49 (<https://www.legal-tools.org/doc/910ab2/>).
9. William A. Schabas, “Prosecutorial Discretion and Gravity”, in Carsten Stahn and Göran Sluiter (eds.), 2009, pp. 229–46.
10. Ruth B. Philips, “The International Criminal Court Statute: Jurisdiction and Admissibility”, in *Criminal Law Forum*, 1999, vol. 10, no. 1, pp. 61–85 (<https://www.legal-tools.org/doc/02edff/>).

Author: Mohamed Abdou.

Article 20

Article 20⁷

Ne bis in idem

[...]

⁷ As amended by resolution RC/Res.6 of 11 June 2010 (inserting the reference to article 8 *bis*).

General Remarks:

Background to *Ne Bis in Idem*:

The principle that a person should not be prosecuted more than once for the same criminal conduct, reflected in the maxim *ne bis in idem* and also referred to as the rule against double jeopardy, is found among legal systems throughout the world.¹ The phrase is derived from the Roman law maxim *nemo bis vexari pro una et eadem causa* (a person shall not be twice vexed or tried for the same cause). The term ‘double jeopardy’ is derived from the wording of the Fifth Amendment to the Constitution of the United States of America, which states, *inter alia*, “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb”. It is the criminal law version of a broader principle aimed at protecting the finality of judgments and reflected in the doctrine of *res judicata*.² Although differing views can be found among writers and publicists, a substantial body of opinion has held to the view that the principle of *ne bis in idem* has not been recognised as a rule of custom, although there is somewhat more support for the rule as a general principle of international law. In the context of extradition law, *ne bis in idem* is more generally accepted as a rule of public international law, particularly as between the requested and requesting state where a prior prosecution and/or sentence has been imposed in the former (as opposed to where a prior prosecution took place in a third

¹ For example, M. Cherif Bassiouni, “Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions”, in *Duke Journal of Comparative and International Law*, 1993, vol. 3 (<https://www.legal-tools.org/doc/7e01b5/>), who surveys approximately fifty national constitutions containing the principle.

² Rosa Theofanis, “The Doctrine of Res Judicata in International Criminal Law”, in *International Criminal Law Review*, 2003, vol. 3, no. 3 (<https://www.legal-tools.org/doc/4f1617/>).

state).³ Support also exists, however, for the contrary view in relation to third states, that is, the view that *ne bis in idem* is not a rule of international law apart from treaty provisions where the prior trial has occurred in a third state.⁴ It can also be argued that an identifiable core of *ne bis in idem* can be found in international practice as a basis of a customary rule or general principle.⁵ Article 20 provides for *ne bis in idem* to apply both to prior proceedings by the ICC itself (Article 20(1)–(2)) and, somewhat more qualified, to proceedings before national courts related to the same conduct (Article 20(3)).

In the context of the ICC, *ne bis in idem* can be seen as an aspect of the general issue of the complementarity of the jurisdiction of the ICC to the jurisdiction of national courts. The wording of Article 20 of the ICC Statute, on *ne bis in idem*, closely reflects the wording of Article 17 on admissibility. Article 17 and Article 20 together implement the principle of complementarity and, logically and as indicated by the practice of the ICC (see below), should be dealt with as a preliminary issue.⁶ Complementarity was seen as a necessary limitation on the powers of the ICC in order to induce states to accept the limitations on their sovereignty that flow from ratification of the ICC Statute.⁷ The ICC is permitted to exercise jurisdiction where national authorities have decided not to prosecute where the decision not to prosecute resulted from an inability or unwillingness of the state concerned to pursue investigation or prosecution (Article 17(2)(a)-(b)) or where a prior national proceeding was for the purpose of shielding a person or was not conducted independently (Article 20(3), cross-referenced in Article 17(2)(c)), Article 17(2) is reflected in the grounds of inadmissibility

³ Dietrich Oehler, “The European System”, in M. Cherif Bassiouni (ed.), *International Criminal Law: Procedural and Enforcement Mechanisms*, 2nd ed., Transnational Publishers, Berlin, 1999, pp. 617–618 (<https://www.legal-tools.org/doc/a10567/>).

⁴ See, for example, Federal Constitutional Court of Germany, Judgment, 31 March 1987, BverfGE 75, 1 2 BvM 2/86 (<https://www.legal-tools.org/doc/f55af5/>).

⁵ Gerard Conway, “Ne Bis in Idem in International Law”, in *International Criminal Law Review*, 2003, vol. 3, no. 3 (<https://www.legal-tools.org/doc/94f554/>).

⁶ Generally, see Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press, 2008, pp. 99–120 (<https://www.legal-tools.org/doc/0e355e/>); Mohamed El-Zeid, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, Brill, The Hague, 2008, pp. 239 ff., 284–286 (<https://www.legal-tools.org/doc/87df18/>).

⁷ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II, UN Doc. A/51/22(SUPP), 14 September 1996, Article D, note, p. 87 (<https://www.legal-tools.org/doc/03b284/>).

under Article 17(1), which essentially is the converse of Article 17(2), except that Article 17(1) refers also to *ne bis in idem* and to a situation where there are grounds of insufficient gravity (Article 17(1)(d)). In the *Gadaffi and Al-Senussi* case, the Appeals Chamber noted that “As the two provisions contain such similar language it is reasonable to assume that they were intended to have the same meaning”.⁸ The connection between the jurisdiction of the ICC and *ne bis in idem* means that Article 20 is “the last safeguard in allocating the tasks of national and international criminal justice according to the notion of complementarity”.⁹

The reference to the “the Court” in Article 20 indicates that it is a vertical or ‘upward’ *ne bis in idem* provision, that is, it bars prosecution by the ICC for conduct previously tried by the ICC, rather than applying *ne bis in idem* in a horizontal or ‘downward’ way regarding trials of conduct by other courts.¹⁰ However, implicitly, a horizontal application of *ne bis in idem* is applied in so far as the ICC is barred from prosecuting for the same conducts proscribed under Articles 6,7 or 8 of the Statute unless a previous national trial has been for the purpose of shielding a person or not conducted independently or impartially (Article 20(3)) (Kleffner, 2008, p. 119). Curiously, the wording does present the possibility that a prior trial before a different international court or tribunal would not exclude ICC jurisdiction under Article 20, for example if a future international court with jurisdiction over international terrorism were to be established where terrorist offences might overlap with offences within the jurisdiction of the ICC.¹¹

⁸ ICC, *Prosecutor v. Saif Al-Islam Gadaffi and Abdullah Al-Senussi*, Appeals Chamber, 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”, 24 July 2014, ICC-01/11-01/11-565, para. 222 (<https://www.legal-tools.org/doc/ef20c7/>).

⁹ Immi Tallgren and Astrid Reisinger Coracini, “Article 20: Ne bis in Idem”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd. ed., C.H. Beck/Hart/Momos, Munich/Oxford/Baden-Baden, 2008, p. 672 (<https://www.legal-tools.org/doc/a9e9f7/>).

¹⁰ On this terminology, see Christine Van Den Wyngaert and Tom Ongena, “Ne Bis in Idem Principle, including the Issue of Amnesty”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 723–724 (<https://www.legal-tools.org/doc/01addc/>); Kleffner, 2008, p. 119.

¹¹ On an international court for terrorism, see Ignacio de la Rasilla, “An International Terrorism Court in nuce in the Age of International Adjudication”, in *Asian Yearbook of Human Rights and Humanitarian Law*, 2017, vol. 1.

Bassiouni notes that a general understanding behind the adoption of the ICC Statute was that contracting States would enact similar crimes to those in Article 5 of the ICC Statute in their national legislation, as otherwise, States will find it difficult to exercise their rights regarding complementarity. The possibility also exists, however, for the ICC to forgo its jurisdiction where a national court tries somebody for a lesser crime than those in Article 5, for example, a national court tries somebody for murder. He notes that “Article 20’s *ne bis in idem* limitation supports such an approach, relying more on the similarity of the facts upon which a previous prosecution occurred than on the identity of the charges”.¹² Further, it seems that Article 20 would actually automatically prevent an ICC trial after a national trial relating to the same facts or conduct due to the phrasing in Article 20(3) “conduct also proscribed under article 6, 7 or 8”, which applies *ne bis in idem* irrespective of the classification of the crime under national law (Kleffner, 2008, pp. 119–120), although the formulation is perhaps ambiguous as to whether it applies *ne bis in idem in concreto* or *in abstracto*. A problem could arise whereby a national court charges an accused with a relatively minor offence (for example, assault), in order to seek to activate Article 20 and prevent a trial by the ICC for more serious conduct.¹³ This is an example of a problem in general with the application of *ne bis in idem* to convictions in another jurisdiction (Conway, 2003), p. 239), but it can be addressed by adopting an interpretation of Article 20(3)(a) that such a prosecution for a minor offence is in reality an attempt to shield an accused from criminal responsibility for crimes within the jurisdiction of the ICC. that is, the concept of ‘shield’ under Article 20(3) is to be interpreted in conjunction with the rest of the sentence so that prior proceedings are a shield if their purpose is to prevent the gravity of the crimes within the jurisdiction of the ICC being prosecuted against an accused. This may be especially necessary because the ICC Statute as adopted does not distinguish between international crimes and ordinary crimes (discussed further below).

¹² M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text*, Transnational Publishers, Ardsley, 2005, p. 100 (<https://www.legal-tools.org/doc/ed0d4b/>).

¹³ See, for example, Tijana Surlan, “*Ne Bis in Idem* in Conjunction with the Principle of Complementarity in the Rome Statute”, in *European Society of International Law*, 2005, p. 4.

In Concreto and in Abstracto Applications of Ne Bis in Idem:

A central issue in the jurisprudence and literature on *ne bis in idem* is whether the principle operates to prevent further prosecution on the same facts or conduct (Article 20 uses the term ‘conduct’) as formed the basis of an existing conviction or acquittal (that is, an *in concreto* application, relating to the identity of the conduct) or if only further prosecution for the same offence or legal head of liability is prohibited (that is, an *in abstracto* application, relating to the legal identity of the offences). The latter limits the scope of the principle in that the same set of facts could ground a further prosecution so long as the subsequent prosecution charges the accused with a different offence. The Anglo-Saxon tradition has been to apply the *ne bis in idem* principle *in abstracto*, that is, more narrowly, whereas many continental or civil law countries reflect the principle *in concreto*, more broadly. The practical difference between the two views could be lessened by the adoption of a *ne bis poena in idem* rule applied *in concreto* where *ne bis in idem* as such is not accepted or is only applied *in abstracto*. Article 20 of the ICC Statute contains a mixture of *ne bis in idem in concreto* and *in abstracto*. An *in concreto* formulation is used in Article 20(1), so that the ICC itself may not try an accused regarding the same conduct that formed the basis of a previous acquittal or conviction before the ICC. This seems to exclude the possibility that successive prosecutions could take place before the ICC relating to the same facts, but with a different crime being charged, over which the ICC has jurisdiction, in each prosecution, although the expression “conduct which formed the basis of crimes” is perhaps ambiguous as to *in concreto* and *in abstracto* applications. Under Article 20(2), an *in abstracto* rule clearly applies to other courts (presumably this applies to both national and international courts other than the ICC): they may not try a person for the same crimes for which the person has already been tried before the ICC. In contrast, under Article 20(3), the ICC may not exercise jurisdiction relating to the same facts, an *in concreto* rule, as have been the subject of a national trial and, it seems, any national trial, irrespective of where it was (Cherif Bassiouni, 2005, p. 160), in a contracting State or otherwise.

Ne bis poena in idem is a related or corollary principle to that of *ne bis in idem* and is to the effect that sentencing and penalties already served or paid by an accused for the same offence or set of facts should be discounted when a subsequent penalty is imposed that relates to the same offence or facts. Unlike Article 9(3) of the Statute of the Special Court for

Sierra Leone, which does contain a *ne bis poena in idem* provision,¹⁴ the ICC Statute does not provide for *ne bis poena in idem*.

Comparing the ICC Statute with the Statutes of the International Criminal Tribunals:

A further feature distinguishing the approach in the ICC Statute from the Statutes of the *ad hoc* tribunals is the inclusion in the latter and not in the ICC Statute of the concept of ‘ordinary crimes’: the international tribunals are prohibited from retrying someone if the accused has already been tried for acts constituting serious violations of international humanitarian law except where the act for which he or she was tried was characterised in the national court as an ordinary crime (or where the national trial was essentially a show trial). The ICC Statute eventually omitted the first exception relating to ordinary crimes, confining itself in Article 20 to the ‘show trial exception’, because of disagreement at the negotiations as to the compatibility of the ‘ordinary crimes’ rule with the underlying *ne bis in idem* protection.¹⁵ It seems that arguments made in favour of including the exception because the characterisation of a crime as an international one had a particular deterrent or retributive effect (greater than that associated with a conviction for ordinary crimes) were rejected (Holmes, 1999, p. 58). The effect is that the ICC Statute applies *ne bis in idem* largely *in concreto* to prior national trials, that is, more fully, and that the international criminal tribunals apply it *in abstracto* (except for the Special Tribunal for Lebanon).

In another way, the ICC Statute can be seen as restricting *ne bis in idem*.¹⁶ The reason for this is that the ICC has jurisdiction under the complementarity principle where there has already been a trial, but where the proceedings (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC or (b) otherwise were not conducted independently or impartially. In other words, complementarity in effect institutes a qualified *ne bis in idem* prin-

¹⁴ Statute of the Special Court for Sierra Leone, 14 August 2000, Article 9(3) (<https://www.legal-tools.org/doc/aa0e20/>).

¹⁵ John T. Holmes, “The Principle of Complementarity”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, pp. 57- 58 (<https://www.legal-tools.org/doc/d71078/>).

¹⁶ See the discussion in Lorraine Finlay, “Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute”, in *University of California Davis Law Review*, 2009, vol. 15, no. 2, pp. 221–248 (<https://www.legal-tools.org/doc/95f264/>).

ple. However, this is so in the case of most jurisdictions, given the end to ensure that the guilty are punished (Finlay, 2009, p. 224), that is, *ne bis in idem* is quite often qualified in some way. Given the seriousness of the crimes over which the ICC has jurisdiction, the moral outrage felt against the accused is likely to be stronger than in the case with ordinary crimes, which increases the importance of ensuring the guilty are brought to justice (Finlay, 2009, p. 227).

The reason for the inclusion of *ne bis in idem* in the ICC Statute are similar to its operation at national level, albeit that the relationship with national courts in the context of State sovereignty is an additional consideration (Finlay, 2009, p. 226) (one dealt with by the complementarity principle in the context of the ICC): consideration of fairness to an accused being the primary consideration. A second trial disadvantages an accused in several respects: (i) it subjects the accused to continued and more prolonged anxiety of punishment; (ii) it may undermine the defence by allowing the prosecution more advance notice of what will likely be raised by the defence at trial; (iii) it puts further strain on the resources of the accused to sustain a defence at trial, and (iv) it increases the risk of an innocent person being convicted.¹⁷ Other reasons for *ne bis in idem* include judicial economy in avoiding repeated trials of the same conduct, the importance of finality and certainty as to the outcome of legal proceedings, and the incentivising of thorough investigations and prosecutions (because the police and prosecutors will only get one opportunity of a trial) (Finlay, 2009, p. 226).

As Kittichaisaree observes, a notable feature of the ICC Statute is that Article 20 appears in Part 2, on jurisdiction, admissibility, and applicable law, rather than Part 3, on general principles of criminal law (in which, *inter alia*, grounds for excluding criminal responsibility are set out in Article 31)¹⁸ (the Statute of the Special Court for Sierra Leone is not organised into parts). However, this is not necessarily because *ne bis in idem* is not a ‘general principle of criminal law’ in the broad sense of a general principle used in Article 38(c) of the Statute of the International Court of Justice. As Kittichaisaree notes, the placing of the *ne bis in idem* provisions in the Statute reflects the fact that *ne bis in idem* is so closely related in the

¹⁷ Finlay, 2009, p. 223, citing United States Supreme Court, *Green v. United States*, Opinion of the Court by Mr. Justice Black, 16 December 1957, 355 U.S. 184, 187–88 on points i. and iv. in particular.

¹⁸ Kriangsak Kittichaisaree, *International Criminal Law*, Oxford University Press, 2001, p. 29 (<https://www.legal-tools.org/doc/9f10ee/>).

scheme of the Statute to admissibility; it is a procedural bar to the ICC's jurisdiction (rather than a ground for excluding responsibility) (Kittichaisaree, 2001, p. 29). More critically, Bassiouni comments:

Finally, there is no valid methodological explanation for the separation and placement of the provisions concerning the presumption of innocence (Article 66) in Part 6 and the provisions concerning *ne bis in idem* (Article 20) and the applicable law (Article 21) in Part 2. All of these provisions properly belong in Part 3 of the Statute, which deals with the general principles of criminal responsibility (Bassiouni, 2005, p. 85).

La Rosa points out that the admission of evidence of conduct that has sustained prior convictions, on the basis that it is evidence of a consistent pattern of conduct, may result in a violation of *ne bis in idem* in that the same evidence could ground further convictions.¹⁹ However, given that the ICC chambers will be staffed by professional and experienced judges, the likelihood that the prejudicial effect of such evidence will unfairly tilt the Court's findings against the accused is arguably less than is the case in a jury system (the general rationale for the exclusion of character evidence in the common law tradition, as noted above, relates to the role of the jury as triers of fact). One possible approach to the issue would be to admit such evidence, but not to treat it as being alone a sufficient basis for a conviction, other accompanying or corroborating evidence being necessary. Adoption of such an approach in the ICC and other international criminal tribunals, coupled with the role of the judges as arbiters of fact, could ensure that an exaggerated significance is not attributed to evidence that has sustained a prior conviction or that such evidence might be used to compensate for a lack of compelling evidence in a current case.²⁰

¹⁹ Ann-Marie La Rosa, "A Tremendous Challenge for the International Criminal Tribunals: Reconciling the Requirements of International Humanitarian Law with Those of Fair Trial", in *International Review of the Red Cross*, 1997, p. 323 (<https://www.legal-tools.org/doc/dc54c1/>).

²⁰ See generally Attila Bogdan, "Cumulative Charges, Convictions and Sentencing at the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda", in *Melbourne Journal of International Law*, 2002, vol. 3 (<https://www.legal-tools.org/doc/960db6/>); Gerard Conway, "Ne Bis in Idem and the International Criminal Tribunals", in *Criminal Law Forum*, 2003, vol. 14, pp. 377–382 (<https://www.legal-tools.org/doc/3e4472/>).

Preparatory Works:

Ne bis in idem as it is referred to now Article 17(1)(c) was omitted from the 1994 Draft Statute prepared by the International Law Commission, as it was considered to be a self-evident principle, but was included in the final Statute subsequently for the sake of clarity after the 1998 Preparatory Committee raised the issue (Tallgren and Reisinger Coracini, 2008, p. 68).

Trial Chamber II in the case of *Prosecutor v. Katanga and Ngudjolo* provided an explanation of the drafting process regarding *ne bis in idem*:

Originally, the *ne bis in idem* principle was not included in Article 35 (current Article 17) of the Draft Statute for an International Criminal Court. The only reference to *ne bis in idem* was contained in Article 42 of the Draft Statute (current Article 20), which followed Article 41, which became the current Article 67, which defined the rights of the accused, in Part V “The Trial”. This belated inclusion of the *ne bis in idem* principle in Article 17(1)(c) as a basis for challenging admissibility is therefore explained essentially by the need to protect the rights of the accused, in contrast to sub-paragraphs (a), (b) and (d) of the same Article, the purpose of which is to safeguard the sovereign rights of States and to ensure the cases brought before the Court are of sufficient gravity. Moreover, it should be recalled that the *ne bis in idem* principle is defined in Article 20 to which Article 17(1)(c) only makes reference.²¹

Tallgren and Coracini note that during the last session of the Preparatory Committee in 1998, Article 20(2) was worded so as to include subsequent trials “for conduct constituting a crime referred to in Article 5”, that is, a broader *in concreto* application. The committee changed the wording to ensure that a State could charge a person with a crime relating to the same conduct forming the basis of an ICC conviction, that is, a narrower *in abstracto* application. A number of delegations objected “that the proposed additions would undermine the protection of *ne bis in idem* completely” (Tallgren and Coracini, 2008, p. 686, and further references therein).

Doctrine: For the bibliography, see the final comment on Article 20.

Author: Gerard Conway.

²¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, ICC-01/04-01/07-1213-tENG, para. 48 (<https://www.legal-tools.org/doc/e4ca69/>).

Article 20(1): Appeals and Revisions

1. Except as provided in this Statute,

This makes it clear that *ne bis in idem* is without prejudice to the appeals and revisions that are provided for under Part 8 of the ICC Statute.¹

Doctrine: For the bibliography, see the final comment on Article 20.

Author: Gerard Conway.

¹ Lorraine Finlay, “Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute”, in *University of California Davis Law Review*, 2009, vol. 15, no. 2, p. 229 (<https://www.legal-tools.org/doc/95f264/>).

Article 20(1): Only Tried Once Before the Court

No person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

One of the main issues of interpretation that arises here is the meaning of acquittal, at what stage in proceedings is a person considered to be acquitted. In theory, it might be argued that anytime a prosecution is ceased, there is an acquittal, even if the prosecution is terminated prior to the trial of the merits occurring. The issue is yet to be decided, but has been addressed in submissions to the ICC (see case law in the comment on Article 20(3)(b)).

Doctrine: For the bibliography, see the final comment on Article 20.

Author: Gerard Conway.

Article 20(2)

No person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court

Article 20(2) prevents a person convicted or acquitted by the ICC from being subsequently tried by another court only for the offenses for which he has already been convicted or acquitted by the ICC. Thus, unlike the provision regarding prior national trials in Article 20(3), subsequent national trials are only subject to *ne bis in idem in abstracto*, that is, a national court may try an accused for the same conduct, but just not for the same offence that formed the ICC conviction. As Finlay notes, this also means that a national court could try an accused for an offence under Article 5 of the ICC Statute, so long as that offence had not formed the ICC conviction, for example, a national court could try for a crime against humanity, after an accused has been convicted for genocide before the ICC.¹ This reflects that the crimes over which the ICC has jurisdiction have a very specific mens rea (Finlay, 2009, p. 231), which cannot be assimilated to the mens rea of ordinary crimes. If *ne bis in idem* prevented subsequent national trials on an *in concreto* basis, there could occur a gap in prosecution, because evidence of mens rea for an Article 5 crime was found to be insufficient at trial before the ICC, but any national prosecution for a ‘lesser’ crime would still be prevented (Finlay, 2009, p. 232).

A practical issue that may arise is the scenario whereby national proceedings, whether investigation or prosecution, would commence while ICC proceedings were ongoing, that is, where the ICC proceedings had not yet resulted. This is not addressed in Article 20(2). The issue has been raised in submissions of the prosecutor and the Libyan government in its submission in *Gaddafi and Al-Senussi*, the Libyan government, for example, noted that this involved a degree of speculation as to what is likely to be the result of both processes and that the test of this issue must be undertaken in a manner appropriate to the stage reached at the time of the admissibility assessment by both the domestic and the international processes and, further, that the question must be whether the co-existence of both the

¹ Lorraine Finlay, “Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute”, in *University of California Davis Law Review*, 2009, vol. 15, no. 2, p. 230 (<https://www.legal-tools.org/doc/95f264/>).

international and the domestic processes could violate the principle of *ne bis in idem*. Applying this test, it concluded that only where the domestic prosecution has reached a verdict could there be a question of the violation of *ne bis in idem*.² In its response, the Prosecutor commented that it did not wish to rely on *ne bis in idem*, but that jurisprudence related to *ne bis in idem* may be of assistance given the close interlink between *ne bis in idem* and the complementarity provisions, their common function in determining forum allocation and, most notably, the similarity in the inquiry regarding whether the two cases are indeed ‘the same’, and what ‘same’ means.³

for which the person has been convicted or acquitted

As with Article 20(1), the main issue of interpretation here under Article 20(2) is what stage an accused could be said to be acquitted. At what stage or point must be reached for a prior ICC proceeding to trigger Article 20, for example, if the case is dealt with by the Pre-Trial Chamber only, or is withdrawn by the prosecutor during the trial stage, that is, before the Trial Chamber? This awaits a judgment from the Appeals Chamber itself, but in 2014, parties to the proceedings, including the prosecution, have argued that *ne bis in idem* applies only if there is a decision on the merits of the case resulting in a verdict of conviction or acquittal, and not at the confirmation stage before the Pre-Trial Chamber.⁴ For example, in *Kenyatta*, the prosecutor noted that Article 20 should “apply only to *res judicata* and not to proceedings discontinued for technical reasons”.⁵ This argument was supported by the Trial Chamber in December 2014 and March 2015, when

² ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Appeals Chamber, The Libyan Government’s further submissions in reply to the Prosecution and Gaddafi Responses to ‘Document in Support of Libya’s Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi’, 23 September 2013, ICC-01/11-01/11-454-Red, paras. 32–34 (without citing any authority) (<https://www.legal-tools.org/doc/940249/>).

³ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Appeals Chamber, Prosecution Response to ‘The Libyan Government’s further submissions in reply to the Prosecution and Gaddafi Responses to Document in Support of Libya’s Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi’, 30 September 2013, ICC-01/11-01/11-460, paras. 43–45 (without citing any authority) (<https://www.legal-tools.org/doc/f42f3d/>).

⁴ ICC, *Prosecutor v. Kenyatta*, Prosecutors’ Submissions on the Ne Bis In Idem Principle, 10 February 2014, ICC-01/09-02/11 (‘*Kenyatta*, 10 February 2014’) (<https://www.legal-tools.org/doc/3acef9/>); *Prosecutor v. Kenyatta*, Victims’ Observations on the Ne Bis In Idem Principle, 17 February 2014, ICC-01/09-02/11 (<https://www.legal-tools.org/doc/4cc415/>).

⁵ *Kenyatta*, 10 February 2014, p. 5, citing 1996 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, UN Doc. A/51/22, 14 September 1996, Article 42, para. 170 (<https://www.legal-tools.org/doc/e75432/>).

the prosecutor withdrew charges following a direction from the Trial Chamber (in December 2014) to withdraw the charges or provide an indication that the evidentiary base had improved to a degree which would justify proceeding to trial. In its decision of December 2014, it had noted that the principle of *ne bis in idem* would not apply, and it would be open to the prosecution to bring “new charges against the accused at a later date, based on the same or similar factual circumstances, should it obtain sufficient evidence to support such a course of action”.⁶

A further issue is what significance attaches to Rule 150(1) of the Rules of Procedure and Evidence, according to which a conviction becomes non-appealable 30 days after notification of the decision or sentence. The same issue arises here, to use terminology from the USA, as to when ‘jeopardy attaches’: is it immediately upon conviction or acquittal or 30 days after when the possibility of appeal ceases? Tallgren and Coracini note that the wording of Article 20(1) excludes *ne bis in idem* regarding appeals and revisions under Chapter VIII because it only prevents a person from being subsequently tried before the ICC “except as provided in this Statute”. This wording would be superfluous if *ne bis in idem* only applied when a judgment become ‘final’, or non-appealable. Tallgren and Coracini note that this interpretation strengthens the *ne bis in idem* protection for an accused,⁷ that is in relation to subsequent national trials relating to the same conduct.

Doctrine: For the bibliography, see the final comment on Article 20.

Author: Gerard Conway.

⁶ ICC, *Prosecutor v. Kenyatta*, Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute, 3 December 2014, ICC-01/09-02111-981, para. 56 (<https://www.legal-tools.org/doc/731d89/>), cited in Decision on the withdrawal of charges against Mr Kenyatta, 13 March 2015, ICC-01/09-02/11-1005, para. 9 (<https://www.legal-tools.org/doc/2c921e/>).

⁷ Immi Tallgren and Astrid Reisinger Coracini, “Article 20: Ne bis in Idem”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd. ed., C.H. Beck/Hart/Momos, Munich/Oxford/Baden-Baden, 2008, pp. 683–684 (<https://www.legal-tools.org/doc/a9e9f7/>).

Article 20(3)

No person who has been tried by another court for conduct also proscribed under Article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

The main interpretative issue here relates to interpreting the ‘same conduct’. No jurisprudence from the ICC exists on this issue to date. It has been the subject of submissions in *Prosecutor v. Gaddafi and Al-Senussi*. Essentially, this appears to be a question of fact. One approach may be to apply a Blockburger-style approach. In *United States v. Blockburger*, the United States Supreme Court held that multiple convictions can be imposed under different statutory provisions if each statutory provision requires proof of a fact which the other does not.¹ The Blockburger test was confirmed in *Rutledge v. United States*.² Applied to the same conduct scenario here, the issue is whether the same conduct could supply the elements of an offence both before the ICC and at national level. This latter test is potentially less demanding than a ‘same conduct test’,³ but would depend on how ‘same conduct’ was characterised, narrowly or broadly, and the two approaches could run into each other.

The distinction between prior conduct and prior offences, that is between *in concreto* and *in abstracto* applications of *ne bis in idem*, was confirmed in *Prosecutor v. Katanga* by the Presidency decision on the scope of Article 108(1) of the ICC Statute.⁴ Article 108(1) of the Statute provides that “[a] sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment [...] for any conduct engaged in prior to that person’s delivery to the State of enforcement, unless such prosecution [or] punishment [...] has been approved by the Court at the

¹ United States Supreme Court, *United States v. Blockburger*, 4 January 1932, 284 US 299 (1932) (<https://www.legal-tools.org/doc/fc9ccc/>).

² United States Supreme Court, *Rutledge v. United States*, 27 March 1996, 517 US 292 (1996) (<https://www.legal-tools.org/doc/38a74c/>).

³ See, for example, the discussion in Linda E. Carter, “The Principle of Complementarity and the International Criminal Court”, in *Santa Clara Journal of International Law*, 2010, vol. 8, no. 1, p. 171 (<https://www.legal-tools.org/doc/031dbf/>).

⁴ ICC, Presidency, *Prosecutor v. Katanga*, Decision pursuant to Article 108(1) of the Rome Statute, 7 April 2016, ICC-01/04-01/07-3679 (‘*Katanga*, 7 April 2016’) (<https://www.legal-tools.org/doc/6565f5/>).

request of the State of enforcement”. Article 108(3) provides that this provision ceases to apply if a sentenced person, *inter alia*, remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court. The Presidency decided that it should apply Article 108(1) in conjunction with Article 20(2), and that in doing so it could not widen the scope of the latter, which only prohibits trial for a *crime* referred to in Article 5 for which that person has already been convicted or acquitted by the Court and does not prohibit trials for conduct within the ambit of the ICC’s investigations. In other words, when the Presidency considered, under Article 108(1), whether the prospective prosecution of Mr. Katanga could offend the principle of *ne bis in idem*, it did so by reference only to the content of that rule specified in Article 20(2) (*Katanga*, 7 April 2016, para. 23), the interpretation of which was not changed by Article 108. This approach reflects a combination of textual and systemic principles and clearly follows the wording and scheme of the ICC Statute.

Doctrine: For the bibliography, see the final comment on Article 20.

Author: Gerard Conway.

Article 20(3)(a)

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

This is amongst the more difficult provisions in the ICC Statute to define. It essentially relates to the intention of prosecuting or judicial authorities, which essentially a subjective matter of the state of mind of national authorities. It is unlikely that national authorities would make explicit any intention that national proceedings were be essentially a sham to protect the accused. Thus, it seems that evidence to satisfy this provision would only emerge accidentally or without it being intended by the national authorities involved. As with almost any legal provision, Article 20(3)(a) can be interpreted narrowly or broadly. Here, the narrowness or breadth would seem to depend on what threshold of evidence is required to trigger Article 20(3)(a). By analogy with common law authority on bias as a breach of natural justice, for example, it could be interpreted quite broadly as applying where a reasonable apprehension¹ could exist that national proceedings were for the purpose of shielding an accused and to allow circumstantial evidence to support this.

Doctrine: For the bibliography, see the final comment on Article 20.

Author: Gerard Conway.

¹ For example, United Kingdom, House of Lords, *R. v. Gough*, Judgment, 20 May 1993, AC 658, 668, 670 [1993], 2 All ER 724 (<https://www.legal-tools.org/doc/9766fb/>).

Article 20(3)(b)

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Compared to Article 20(3)(a), this is a more objective test. As with that provision, it is open to broader or narrower interpretations. A broad interpretation would allow strict scrutiny of national procedural law to determine its compliance with due process. However, given that the ICC itself is a product of different national legal traditions and has many compromise elements in its procedure, it is more likely that the ICC would apply an approach based on minimum notions of due process reflected in international legal instruments.

Case Law:

Ne bis in idem could arise at various stage of the trial process before the ICC. The Pre-trial Chamber may need to address the issue or it may be raised later by the defence so that the Trial Chamber itself must address it. The Appellate Chamber will ultimately decide on issues of interpretation. To date, the Trial Chambers or Appellate Chamber have not fully dealt with Article 20, but submissions to the ICC in pending cases have been referred to above.

Case law from the Trial Chambers has dealt with the procedural question of when *ne bis in idem* should be raised. In *Ngudjolo*, the Trial Chamber held that once a trial chamber has been set up, *ne bis in idem* should only be raised exceptionally and with the permission of the Trial Chamber itself. This indicates that *ne bis in idem* should normally be dealt with by the Pre-Trial Chamber.¹

Cross-references:

Article 108, 17(1)(c).

¹ ICC, *Prosecutor v. Ngudjolo*, Trial Chamber II, Oral Decision, 12 June 2009, ICC-01/04-01/07, p. 4; see also *Prosecutor v. Bemba*, Trial Chamber III, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, para. 209 (<https://www.legal-tools.org/doc/a5de24/>).

Rule 168.

Doctrine:

1. Attila Bogdan, “Cumulative Charges, Convictions and Sentencing at the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda”, in *Melbourne Journal of International Law*, 2002, vol. 3, pp. 1–32 (<https://www.legal-tools.org/doc/960db6/>).
2. Linda E. Carter, “The Principle of Complementarity and the International Criminal Court”, in *Santa Clara Journal of International Law*, 2010, vol. 8, no. 1, pp. 165–98 (<https://www.legal-tools.org/doc/031dbf/>).
3. M. Cherif Bassiouni, “Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions”, in *Duke Journal of Comparative and International Law*, 1993, vol. 3, pp. 235–97 (<https://www.legal-tools.org/doc/7e01b5/>).
4. M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text*, Transnational Publishers, Ardsley, 2005 (<https://www.legal-tools.org/doc/ed0d4b/>).
5. Gerard Conway, “Ne Bis in Idem in International Law”, in *International Criminal Law Review*, 2003, vol. 3, no. 3, pp. 217–44 (<https://www.legal-tools.org/doc/94f554/>).
6. Gerard Conway, “Ne Bis in Idem and the International Criminal Tribunals”, in *Criminal Law Forum*, 2003, vol. 14, pp. 351–383 (<https://www.legal-tools.org/doc/3e4472/>).
7. Ignacio de la Rasilla, “An International Terrorism Court In Nuce in the Age of International Adjudication”, in *Asian Yearbook of Human Rights and Humanitarian Law*, 2017, vol 1.
8. Mohamed El-Zeid, “The Principle of Complementarity in International Criminal Law: Origin, Development and Practice”, Brill, The Hague, 2008 (<https://www.legal-tools.org/doc/87df18/>).
9. Lorraine Finlay, “Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute”, in *University of California Davis Law Review*, 2009, vol. 15, no. 2, pp. 221–48 (<https://www.legal-tools.org/doc/95f264/>).
10. John T. Holmes, “The Principle of Complementarity”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Stat-*

- ute – *Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999 (<https://www.legal-tools.org/doc/d71078/>).
11. Michael G. Karnavas, “Amnesty Part III: *Ne Bis in Idem* in International Criminal Law”, in *International Criminal Law Blog*.
 12. Kriangsak Kittichaisaree, *International Criminal Law*, Oxford University Press, 2001 (<https://www.legal-tools.org/doc/9f10ee/>).
 13. Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press, 2008 (<https://www.legal-tools.org/doc/0e355e/>).
 14. Ann-Marie La Rosa, “A Tremendous Challenge for the International Criminal Tribunals: Reconciling the Requirements of International Humanitarian Law with Those of Fair Trial”, in *International Review of the Red Cross*, 1997, pp. 635, 637–642 (<https://www.legal-tools.org/doc/dc54c1/>).
 15. Dietrich Oehler, “The European System”, in M. Cherif Bassiouni (ed.), *International Criminal Law: Procedural and Enforcement Mechanisms*, 2nd. ed., Transnational Publishers, Berlin, 1999 (<https://www.legal-tools.org/doc/a10567/>).
 16. Jean Paul Pierini, “The *Ne Bis in Idem* Principle and Alleged Drifts in the International Practice: The “Mistrial Without Prejudice” in the Kenyan ICC Cases”, *University of Catania Online Working Paper*, 2016, no. 78.
 17. Immi Tallgren and Astrid Reisinger Coracini, “Article 20: *Ne Bis in Idem*”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 899–931 (<https://www.legal-tools.org/doc/040751/>).
 18. Tijana Surlan, “*Ne Bis in Idem* in Conjunction with the Principle of Complementarity in the Rome Statute”, in *European Society of International Law*, 2005.
 19. Rosa Theofanis, “The Doctrine of *Res Judicata* in International Criminal Law”, in *International Criminal Law Review*, 2003, vol. 3, no. 3, pp. 195–216 (<https://www.legal-tools.org/doc/4f1617/>).
 20. Christine Van Den Wyngaert and Tom Ongena, “*Ne Bis in Idem* Principle, including the Issue of Amnesty”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the Interna-*

tional Criminal Court: A Commentary, Oxford University Press, 2002
(<https://www.legal-tools.org/doc/01addc/>).

Author: Gerard Conway.

Article 21(1)

Applicable Law

General Remarks:

Article 38(1) of the Statute of the International Court of Justice ('ICJ') is often viewed as a provision that enumerates the "well-established sources of international law".¹ There treaty law, customary international law ('CIL') and general principles of law are named as the primary sources of international law, and judicial decisions and the doctrine as subsidiary means for the determination of rules of law. Early on the drafters of the ICC Statute, however, felt a need for a special provision on applicable law for the ICC.² The outcome was Article 21 of the ICC Statute, which includes both ICC-specific sources of law (internal sources) (Article 21(1)(a) and 21(2)) and general sources of international law (external sources) (Article 21(1)(b)-(c)).³ The aim of the Article was to modify the applicable law to better suit the criminal law context in which the Court operates.⁴ This was mainly achieved by enhancing the legal relevance of the Court's internal sources of law. As the *ad hoc* tribunals ICTY and ICTR applied the general sources of international law and the ICC has always followed its Article 21, the applicable law was a part of international criminal law where the law was fragmented. In contrast to the ICTY and ICTR statutes, which were "retrospective and [...] not themselves [substantive criminal] law" but "rather, pointers to a law existing in some form in the rarefied sphere of international

¹ ICTY, *Prosecutor v. Kupreškić et al.*, Trial Chamber, Judgement, 14 January 2000, IT-95-16-T, para. 540 (<https://www.legal-tools.org/doc/5c6a53/>).

² See further, for example, William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 513–514 (<https://www.legal-tools.org/doc/b7432e/>).

³ Gilbert 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 Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, Leiden, 2009, pp. 288 and 293 (<https://www.legal-tools.org/doc/3e6014/>).

⁴ Margaret M. deGuzman, "Article 21 – Applicable Law", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 933 (<https://www.legal-tools.org/doc/040751/>).

law”,⁵ the ICC Statute is a non-retroactive written instrument which aim is to function as a code of criminal law and procedure.

Article 21 focuses on enumerating and ranking the applicable legal sources, rather than on elaborating how they should be identified (especially relevant in connection to non-written sources of law) or interpreted (especially relevant in connection to written sources of law). This entails that there are many aspects of the applicable law that still requires recourse to general international law. General international law, for example, guides how CIL and general principles of law should be identified. The relationship between the sources of international law is complicated as the same evidence (most notably State practice in the form of national legislation and case law) is used to establish both CIL and general principles of law. Treaty law also has a connection to CIL, as treaty ratification is a form of State practice. The inclusion of external sources of law in Article 21 signifies that this complex relationship between the various sources of international law also is part of the ICC system of applicable law. In this regard, Cryer has noted that the “interrelationship of sources is more complex than Article 21’s apparently rigid hierarchy implies” as “the overlap between the sources is too complex to reduce to simple formulae, including reference to hierarchy”.⁶

It should also be observed that, Article 21 does not explicitly address the legal relevance of all types of material used in legal argumentation before the ICC. Article 21 is, for instance, quiet on the legal weight of international case law, the writings of highly qualified publicists, *travaux préparatoires*, and instruments adopted by international organizations, such as UN General Assembly resolutions. There are also ICC internal legal instruments, such as the Regulations of the Court, which legal position is not explicitly addressed in Article 21. Likewise, for example, the official actions taken by the ICC Assembly of States Parties are not mentioned in Article 21.⁷

⁵ Alexander Zahar and Göran Sluiter, *International Criminal Law – A Critical Introduction*, Oxford University Press, 2008, p. 80 (<https://www.legal-tools.org/doc/b27edd/>).

⁶ Robert Cryer, “Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources”, in *New Criminal Law Review*, 2009, vol. 12, no. 3, pp. 393–394 (<https://www.legal-tools.org/doc/f83aae/>).

⁷ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgement on the Appeals against the “Decision Establishing the Principles and Procedures to Be Applied to Reparations” of 7 August 2012 with Amended Order for Reparations (Annex A) and Public Annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129, para. 46 (<https://www.legal-tools.org/doc/c3fc9d/>).

Doctrine: For the bibliography, see the final comment on Article 21.

Author: Mikaela Heikkilä.

Article 21(1)(a)

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

In Article 21(1)(a), the ICC Statute, the Elements of Crimes (‘Elements’) and the Rules of Procedure and Evidence (‘RPE’) are enumerated as the legal sources that the Court shall apply in the first place. Article 21(1) thus establishes a hierarchy between the various sources of law and puts the Court’s own internal legal instruments at the top of the hierarchy. Article 21(1)(a) does not, however, clearly settle the internal relationship between these three sources of law. A hierarchy is instead established elsewhere. Article 51(5) provides that in the event of conflict between the Statute and the RPE, the Statute shall prevail. In an explanatory note to the RPE, it is furthermore emphasized that, in all cases, the RPE should be read in conjunction with and subject to the provisions of the Statute. Article 9, on its part, stipulates the Elements shall be consistent with the Statute, and that their function is to assist the Court in the interpretation and application of the crime definitions in the Statute.

The hierarchical relationship between the Statute and the RPE has been reaffirmed in the Court’s case law. For example, in a decision in the Situation in Democratic Republic of the Congo, a Pre-Trial Chamber noted that the RPE are an instrument that is subordinate to the Statute and that a provision of the RPE cannot be interpreted in such a way as to narrow the scope of an Article of the Statute.¹ Bitti has, however, argued that the initial strong stance in favour of Statute supremacy today is challenged by some new rules adopted by the Assembly of State Parties, which compatibility with the Statute can be debated. He also expresses concern over the fact that “at times, ICC Chambers have either disregarded the Rules or adopted procedures not foreseen in those Rules”.²

¹ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 47 (<https://www.legal-tools.org/doc/2fe2fc/>).

² Gilbert Bitti, “Article 21 and the Hierarchy of Sources of Law before the ICC”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, pp. 416–420 and 443 (<https://www.legal-tools.org/doc/3e6014/>). See also ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Decision on Victims’ Representation and

The question to what extent the judges are obliged to follow the Elements has, however, been more controversial. Whereas Article 21(1) stipulates that the Court shall apply the Elements, Article 9 seems to give them merely an assisting role. The question has been considered in a Pre-Trial Chamber decision, where the majority held that the Elements must be applied unless a Chamber finds an irreconcilable contradiction between the Elements and the Statute.³ The minority Judge, on the other hand, held that the wording in Article 9 of the ICC Statute clearly gives forth that the Elements are not binding for the judges.⁴ The minority view has been supported by a number of scholars.⁵

The ICC's internal legal sources furthermore include some instruments, which hierarchical position is not explicitly settled in Article 21. Some of these are, however, anticipated in the ICC Statute. Article 44(3) stipulates that the Assembly of State Parties shall adopt Staff Regulations, and Article 52 that the judges shall adopt Regulations of the Court. The Regulations of the Office of the Prosecutor, the Regulations of the Registry, and the Code of Professional Conduct for Counsel, on the other hand, are foreseen by Rules 9, 14, respectively 8 of the ICC RPE. While it is clear that all these documents are subordinate to the three major internal sources of law, their internal relationship and relationship to the Court's external sources is not as evident. Schabas has, in this regard, submitted that "in the event of conflict judges will have to find solutions based on general principles of interpretation [...] and with reference to the authority of the body

Participation, 3 October 2012, ICC-01/09-01/11-460, paras. 27–29 (<https://www.legal-tools.org/doc/e037cc/>).

³ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 128 ('*Al Bashir*, 4 March 2009') (<https://legal-tools.org/doc/e26cf4/>).

⁴ *Al Bashir*, 4 March 2009, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 17.

⁵ For example, Gudrun Hochmayr, "Applicable Law in Practice and Theory – Interpreting Article 21 of the ICC Statute", in *Journal of International Criminal Justice*, 2014, vol. 12, p. 658, and Otto Triffterer, "Can the 'Elements of Crimes' Narrow or Broaden Responsibility for Criminal Behaviour Defined in the Rome Statute?", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, Leiden, 2009, pp. 387–388 (<https://www.legal-tools.org/doc/32e54f/>), Herman von Hebel, "The Decision to Include Elements of Crimes in the Rome Statute", in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 7–8 (<https://www.legal-tools.org/doc/e34f81/>).

responsible for adopting the text”.⁶ All internal written sources of law furthermore appear to rank higher than the Court’s external sources of law. In the *Lubanga* case, the Appeals Chamber did not find it necessary to consider whether Regulation 55 of the Court was consistent with general principles of international law. The central question was rather whether the Regulation was consistent with the Statute and the RPE.⁷

When the Court applies its internal legal instruments, the question of how the instruments should be interpreted can be disputed. Interpretation in general is not addressed in the ICC Statute. Article 21(3) only stipulates that interpretations must be consistent with internationally recognized human rights, and Article 22(2) that the definition of crimes shall be strictly construed and shall not be extended by analogy. As the ICC Statute is a treaty, the Court has held that guidance for interpretation can be found in the 1969 Vienna Convention on the Law of Treaties.⁸ Article 31 of the Vienna Convention gives forth that in interpretation, the focus shall be on literal, contextual and teleological considerations. More specifically, the Appeals Chamber has held 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

⁶ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 517 (<https://www.legal-tools.org/doc/b7432e/>).

⁷ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgement 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”, 8 December 2009, ICC-01/04-01/06-2205, paras. 66–81 (<https://www.legal-tools.org/doc/40d015/>).

⁸ Vienna Convention on the Law of Treaties, 23 May 1969 (<https://www.legal-tools.org/doc/6bfd4/>). For example, see ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/01-04-168, para. 33 (*Situation in the Democratic Republic of the Congo*, 13 July 2006’) (<https://www.legal-tools.org/doc/a60023/>); see also *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, para. 8 (<https://www.legal-tools.org/doc/dd3a88/>).

general tenor of the treaty (*Situation in the Democratic Republic of the Congo*, 13 July 2006, para. 33).

In line with Article 32 of the Vienna Convention, the *travaux préparatoires* of the Rome Statute can be used to confirm interpretations made based on literal, contextual and teleological readings.⁹

Cross-references:

Articles 9(1) and 9(3), 22(2), 44(3), 51(4)–(5) and Article 52.
Rules 8, 9, and 14.

Doctrine: For the bibliography, see the final comment on Article 21.

Author: Mikaela Heikkilä.

⁹ For example, *Situation in the Democratic Republic of the Congo*, 13 July 2006, paras. 40–41; ICC, *Prosecutor v. Katanga*, Appeals Chamber, Judgement on the Appeal of Mr. Germain Katanga against the Decision of Pre-Trial Chamber I Entitled “Decision on the Defence Request Concerning Languages”, 27 May 2008, ICC-01/04-01/07-522, para. 50 (<https://www.legal-tools.org/doc/62dbba/>). See also ICC, *Prosecutor v. Lubanga*, Trial Chamber, Judgement Pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 621 (<https://www.legal-tools.org/doc/677866/>); *Prosecutor v. Ruto and Sang*, Appeals Chamber, 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”, Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Ušacka, 25 October 2013, ICC-01/09-01/11-1066, para. 11 (<https://www.legal-tools.org/en/doc/575657/>).

Article 21(1)(b)

(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;

Even though the aim of the ICC’s internal legal sources is to comprehensively establish the legal framework according to which the Court shall function, situations can emerge where a legal question cannot be answered with reference to these instruments. As such, it is important that there are other sources of applicable law to which the Court may rely on in situations where the Court’s internal legal sources are quiet or unclear. In this regard, Article 21(1)(b) establishes that the Court shall apply, in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.

The phrase “in the second place” emphasizes that the applicable treaties and the principles and rules of international law in the ICC legal system are legal sources that hierarchically are below the legal sources mentioned in Article 21(1)(a). This has also been stressed in case law. The ICC has held that the external sources of law generally only can be resorted to when two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements and the RPE; and (ii) the lacuna cannot be filled by the application of the criteria of interpretation provided in the Vienna Convention on the Law of Treaties of 1969 and Article 21(3) of the ICC Statute.¹ In this regard, the ICC has in relation to modes of responsibility found that since the Statute in detail regulates the applicable modes of

¹ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 44 (<https://legal-tools.org/doc/e26cf4/>). See also ICC, Pre-Trial Chamber I, *Prosecutor v. Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11, para. 289 (*Ruto et al.*, 23 January 2012”) (<https://www.legal-tools.org/doc/96c3c2/>); and *Prosecutor v. Gbagbo and Blé Goudé*, Trial Chamber I, Dissenting Opinion to the Chamber’s Oral Decision of 15 January 2019, 15 January 2019, ICC-02/11-01/15-1234, paras. 14–15 (<https://www.legal-tools.org/doc/bd0ffc/>).

responsibility, it is not necessary to consider whether customary international law ('CIL') admits or discards some modes of responsibility.²

The reference to the "established framework of international law" in Article 8 on war crimes does, however, according to the Appeals Chamber entail that the "statute permits recourse to customary and conventional law regardless of whether any lacuna exists" to ensure the correct interpretation of the Article.³

Importantly, the fact that a question is not regulated in ICC's internal legal instruments does not necessarily mean that there is a lacuna that must be filled by applying external legal sources.⁴ Article 21(1)(b) contains the criterion of "where appropriate", which emphasizes that the judges have a certain discretion in the use of the external legal sources. When deliberating on witness proofing, the *Lubanga* Trial Chamber indicated that especially in connection to procedural questions a detailed analysis must be conducted before a norm that cannot be found in the internal "ICC legislation" is recognized based on Article 21(1)(b). More specifically, the Trial Chamber held that:

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

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 508 ('*Katanga and Ngudjolo*, 30 September 2008') (<https://www.legal-tools.org/doc/67a9ec/>).

³ ICC, *Prosecutor v. Ntaganda*, Appeals Chamber, Judgment on the Appeal of Mr Ntaganda against the "Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9, 15 June 2017, ICC-01/04-02/06, para. 53 (<https://www.legal-tools.org/doc/a3ec20/>).

⁴ ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paras. 33–39 (<https://www.legal-tools.org/doc/a60023/>).

and jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis.⁵

Schabas has noted that Article 21(1)(b) “actually contains two distinct sources, with no suggested rank amongst them”,⁶ namely (1) applicable treaties; and (2) principles and rules of international law. As regards treaties, the meaning of the word “applicable” has been debated.⁷ It appears that applicable treaties at least include those to which the Court itself is a party, viz. the Negotiated Relationship Agreement between the International Criminal Court and the United Nations of 2004 and the Headquarters Agreement between the International Criminal Court and the Host State signed in 2007.⁸ A more difficult question is, however, the applicability of other treaties, such as human rights and international humanitarian law treaties. As noted by Pellet, it is difficult to see how inter-governmental treaties, in general, would be applicable as treaty law before the ICC.⁹ The main rule in connection to treaties is that they only are binding for those States that have ratified them.¹⁰ The ICC has, however, in its jurisprudence, characterized, inter alia, the Vienna Convention on the Law of Treaties, the

⁵ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049, para. 44 (<https://www.legal-tools.org/doc/ac1329/>).

⁶ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 519 (<https://www.legal-tools.org/doc/b7432e/>).

⁷ See further, for example, Gudrun Hochmayr, “Applicable Law in Practice and Theory – Interpreting Article 21 of the ICC Statute”, in *Journal of International Criminal Justice*, 2014, vol. 12, p. 666, and Margaret M. deGuzman, “Article 21 – Applicable Law”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 938–939 (<https://www.legal-tools.org/doc/040751/>).

⁸ Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004 (<https://www.legal-tools.org/doc/5edc7c/>); Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, 1 March 2008 (<https://www.legal-tools.org/doc/45e340/>).

⁹ Alain Pellet, “Applicable Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, pp. 1068–1069 (<https://www.legal-tools.org/doc/01addc/>).

¹⁰ See further, for example, Marko Milanović, “Is the Rome Statute Binding on Individuals? (And Why We Should Care)”, in *Journal of International Criminal Justice*, 2011, vol. 9, pp. 25 ff. (<https://www.legal-tools.org/doc/384f0e/>).

Convention on the Rights of the Child, and the Genocide Convention as “applicable”.¹¹

Secondly, Article 21(1)(b) refers to the “principles and rules of international law”. This concept is perplexing in that it differs from the concept of customary international law that is generally used in public international law. While most scholars agree that principles and rules of international law include CIL, there are different opinions as to whether there are also other principles and rules of international law (see further for example deGuzman, 2016, pp. 939–941, and Pellet, 2002, pp. 1070–1073). It should namely be noted that general principles of law derived from national laws of legal systems of the world are covered by Article 21(1)(c). deGuzman has, in this regard, suggested that principles and rules could be based on the international legal conscience, the nature of the international community and natural law.¹² She thus suggests that there is something that could be characterized as general principles of a genuinely international origin¹³ that are not created by States through their practice and will in the same way as positive international law. The existence of such international law is, however, disputed and as such the deGuzman’s submission must be regarded as controversial. There are, however, also other understandings of general principles of law. Some scholars find that there are general principles of international law that generally have their origin in state practice (or the existing sources of international law), but which “have been so long and so generally accepted as to be no longer directly connected with state practice”.¹⁴ Exactly how such general principles emerge and how they should be identified is, however, unclear.

¹¹ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08, para. 70 (<https://www.legal-tools.org/doc/edb0cf/>). See also, for example, ICC OTP, “Policy on Children”, 23 January 2016, p. 10, fn. 19 (<https://www.legal-tools.org/doc/c2652b/>), and Zeegers, 2016, p. 68).

¹² deGuzman, 2016, p. 940 (<https://www.legal-tools.org/doc/040751/>).

¹³ Cf. Birgit Schlütter, *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*, Martinus Nijhoff, Leiden, 2010, p. 75 (<https://www.legal-tools.org/doc/8a3ae5/>).

¹⁴ Ian Brownlie, *Principles of Public International Law*, 2nd ed., Oxford University Press, 2008, p. 19 (<https://www.legal-tools.org/doc/3b1104/>). See also for example Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th ed., Routledge, London, 1997, pp. 48–49 (<https://www.legal-tools.org/doc/bfe8e0/>).

In this regard, it is interesting that the ICC sometimes has referred to the practice of other international or hybrid criminal tribunals by reference to Article 21(1)(b).¹⁵ The case law of these tribunals has then often been put forward as evidence of a “widely accepted practice in international criminal law” regarding a certain matter.¹⁶ The ICC has also referred to case law from other courts, such as the ICJ.¹⁷ Such argumentation could be seen as evidence of a viewpoint that international case law can function as an autonomous source of law before the ICC. Despite some statements to this effect, it, however, appears that the prevailing approach of the ICC to international case law is that “decisions of other international courts and tribunals are not part of the directly applicable law under Article 21”.¹⁸ The case law can only be “indicative of a principle or rule of international law” (*Ruto et al.*, 23 January 2012, para. 289), but exactly how remains unclear.¹⁹ While the case law of domestic, multinational (Nuremberg) and potentially hybrid (ECCC, SCSL, STL) criminal courts can be seen as evidence of State practice (relevant for, for example, the creation of CIL), the case law of fully international criminal courts (ICTY, ICTR) cannot readily be characterized as such. It should be noted that also the ICTY and the ICTR have been criticized for their heavy reliance on jurisprudence as evidence of ex-

¹⁵ See for example ICC, *Prosecutor v. Mudacumura*, Pre-Trial Chamber I, Decision on the Prosecutor’s Application under Article 58, 13 July 2012, ICC-01/04-01/12-1-Red, para. 63, fn. 128 (<https://www.legal-tools.org/doc/ecfae0/>); and *Prosecutor v. Al Hassan*, Pre-Trial Chamber I, Decision on the Prosecutor’s Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 22 May 2018, ICC-01/12-01/18-35-Red2-tENG, para. 106 (<https://www.legal-tools.org/doc/182fc7/>).

¹⁶ Cf. ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, para. 33 (<https://www.legal-tools.org/doc/dd3a88/>).

¹⁷ See for example *Katanga and Ngudjolo*, 30 September 2008, para. 238; and *Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, ICC-RoC46(3)-01/18, paras. 29–30 (<https://www.legal-tools.org/doc/73aeb4/>).

¹⁸ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 603 (*‘Lubanga*, 14 March 2012’) (<https://www.legal-tools.org/doc/677866/>).

¹⁹ On the legal relevance of international case law, see also Volker Nerlich, “The Status of ICTY and ICTR Precedent in Proceedings before the ICC”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, Leiden, 2009, pp. 305–325 (<https://www.legal-tools.org/doc/ca6714/>).

isting law.²⁰ In public international law, case law is generally regarded as a subsidiary means for the determination of rules of law (ICJ Statute, Article 38(1)(d)).

Even though the wording of Article 21 gives forth that external sources of law only exceptionally will be applicable in ICC proceedings, it is possible to find many references to treaty law, CIL and international case law in the jurisprudence of the Court. This may be explained with the fact that these sources often have been found relevant when interpreting the Court's internal legal sources.²¹ Sometimes the phrasing of an ICC norm indicates that the drafters of the norm have been aware of a similar provision in another tribunal's statute or a convention.²² In this regard, for example, the 1949 Geneva Conventions, the 1977 Additional Protocols to the Geneva Conventions, and the 1948 Genocide Convention are of importance. Regarding war crimes, the Elements explicitly stipulate that the crime shall be "interpreted within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea". Article 8 in the ICC Statute furthermore makes some references to the 1949 Geneva Conventions. The external norms may also be directed at the same objective as the corresponding ICC provisions (*Lubanga*, 14 March 2012, para. 603), which may make them relevant when the ICC norms are interpreted teleologically. External sources of law can, however, generally only be used as interpretational aid when the interpretation has not been predetermined by a more high-level internal norm. In the *Lubanga* case, the Appeals Chamber found that it did not matter if ICTY Rule 33(B) had the same wording as the ICC Regulation 24 *bis*(1) of the Regulations of the Court, as the legal

²⁰ See for example Ilias Bantekas, "Reflections on Some Sources and Methods of International Criminal and Humanitarian Law", in *International Criminal Law Review*, 2006, vol. 6, pp. 128–132 (<https://www.legal-tools.org/doc/a8734d/>).

²¹ See for example ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr, paras. 97–98 and 103 (<https://www.legal-tools.org/doc/0c5307/>).

²² Cf. ICC, *Prosecutor v. Mbarushimana*, 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", 30 May 2012, ICC-01/04-01/10-514, para. 43 (<https://www.legal-tools.org/doc/6ead30/>).

question was exhaustively settled by explicit provisions in the ICC Statute.²³

Cross-reference:

Article 8.

Doctrine: For the bibliography, see the final comment on Article 21.

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²³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the “Registrar’s Submissions under Regulation 24bis of the Regulations of the Court in Relation to Trial Chamber I’s Decision ICC-01/04-01/06-2800” of 5 October 2011, 21 November 2011, ICC-01/04-01/06-2823, para. 16 (<https://www.legal-tools.org/doc/e8a246/>). See also Article 21(3).

Article 21(1)(c)

(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.

If the ICC cannot find a solution to a legal question in its own internal sources of law or in the applicable treaties and the principles and rules of international law, it may seek for the solution in general principles of law derived from national laws of legal systems of the world. The application of this legal source is always dependent on the condition that the application is not inconsistent with the Rome Statute and with international law and internationally recognized norms and standards. The low hierarchical position of general principles of law derived from national laws of legal systems of the world has meant that the ICC has not often made investigations into domestic legal practices based on Article 21(1)(c).¹ When addressing the acceptability of witness proofing, the Court, however, made such an inquiry.² The fact that Article 31(3) refers to “a ground for excluding criminal responsibility other than those referred to [in the Statute] where such ground is derived from applicable law as set forth in Article 21” gives forth that general principles of law derived from national laws could also be relevant when identifying factors that can exclude criminal responsibility.

The use of general principles of law derived from national laws of legal systems of the world makes it necessary to decide what domestic legal systems should be examined, as all national laws cannot be considered

¹ See for example ICC, *Prosecutor v. Katanga*, Appeals Chamber, Public Redacted Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017 Entitled “Order for Reparations pursuant to Article 75 of the Statute”, 8 March 2018, ICC-01/04-01/07-3778-Red, para. 148 (<https://www.legal-tools.org/doc/0a95b7/>).

² ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, paras. 35–42 (<https://www.legal-tools.org/doc/dd3a88/>). See also, regarding the right to appeal, ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paras. 5, 32 and 39 (<https://www.legal-tools.org/doc/a60023/>).

and the selection of the systems may affect the result of the inquiry. Article 21(1)(c) itself stipulates that at least the national laws of States that would normally exercise jurisdiction over the crime shall be considered as appropriate. This has been found to include at least the laws of the State where the crime was committed and the laws of the State of which the accused is a national.³ More generally, it has been submitted that the inquiry should include the principal legal systems of the world, including at least representatives from civil law countries and common law countries, and probably some Islamic law countries.⁴ In connection to admissibility of evidence, the Court emphasized that it is not bound by the national law of a particular State.⁵ The Court may hence, based on Article 21(1)(c) only derive general principles from several domestic legal systems.

While general principles of law derived from national laws rarely is an applicable legal source per se, practices followed in domestic legal systems can function as an interpretational aid when the Court's internal legal sources are applied. In the *Katanga and Ngudjolo* case, a Pre-Trial Chamber, for example, found that its interpretation of the Statute which incorporated the concept of perpetration through control over an organisation was supported by the fact that “[p]rior and subsequent to the drafting of the Statute, numerous national jurisdictions relied on the concept”.⁶ As an interpretational aid, general principles of law derived from national laws can therefore, in practice, be influential. In his separate opinion in the *Lubanga*

³ Margaret M. deGuzman, “Article 21 – Applicable Law”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 944 (<https://www.legal-tools.org/doc/040751/>).

⁴ Alain Pellet, “Applicable Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, pp. 1073–1074 (<https://www.legal-tools.org/doc/01addc/>). See also ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049, para. 41 (<https://www.legal-tools.org/doc/ac1329/>); and *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision Revoking the Prohibition of Contact and Communication between Germain Katanga and Mathieu Ngudjolo Chui, 13 March 2008, ICC-01/04-01/07-322, p. 12 (<https://www.legal-tools.org/doc/8b150d/>).

⁵ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 69 (<https://www.legal-tools.org/doc/b7ac4f/>). See also Article 68(9).

⁶ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, para. 502 (<https://www.legal-tools.org/doc/67a9ec/>).

Trial Judgment, Judge Fulford, in this regard, criticized the Court for an imprudent reliance on domestic practices:

In these two instances, the judges relied heavily on the scholarship of the German academic Claus Roxin as the primary authority for the control theory of co-perpetration, and in the result, this approach was imported directly from the German legal system. 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.⁷

Similarly, Judge Van den Wyngaert has cautioned for the adoption of domestic practices under the guise of treaty interpretation:

I believe that it is not appropriate to draw upon subsidiary sources of law [...] to justify incorporating forms of criminal responsibility that go beyond the text of the Statute. Reliance on the control over the crime theory [...] 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. [...] 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.⁸

⁷ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, Separate Opinion of Judge Adrian Fulford, 14 March 2012, ICC-01/04-01/06-2842, para. 10 (<https://www.legal-tools.org/doc/677866/>).

⁸ ICC, *Prosecutor v. Ngudjolo*, Trial Chamber II, Judgment Pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, ICC-01/04-02/12-4, para. 17 (<https://www.legal-tools.org/doc/7d5200/>).

Hence, while the ICC at times has allowed “inspirational influences of domestic legal methods for the legal solutions to similar difficulties”,⁹ the imports of domestic practices and legal concepts have often been controversial.

Cross-references:

Article 31(3) and 69(8).

Doctrine: For the bibliography, see the final comment on Article 21.

Author: Mikaela Heikkilä.

⁹ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decision on Defence Applications for Judgments of Acquittal, Reasons of Judge Eboe-Osuji, 5 April 2016, ICC-01/09-01/11-2027-Red-Corr, para. 192 (<https://www.legal-tools.org/doc/6baecd/>).

Article 21(2)

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

Article 21(2) provides that the Court has the right to apply principles and rules of law as interpreted in its previous decisions. The paragraph uses the noun “may”, which emphasizes that the use of precedent is discretionary. It has been noted that this provision seems to state the obvious, as it seems evident that the application of the same legal provisions in different cases should result in similar outcomes.¹ The function of Article 21(2) is primarily to reject the doctrine of binding precedent or *stare decisis* that can be found in some domestic legal systems. According to Bitti, it is possible to find many examples in the ICC jurisprudence where chambers have deviated from earlier case law, which shows that the ICC judges have used the discretion granted to them by Article 21(2).²

Doctrine: For the bibliography, see the final comment on Article 21.

Author: Mikaela Heikkilä.

¹ Alain Pellet, “Applicable Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, p. 1066 (<https://www.legal-tools.org/doc/01addc/>) and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 526 (<https://www.legal-tools.org/doc/b7432e/>).

² See Gilbert Bitti, “Article 21 and the Hierarchy of Sources of Law before the ICC”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, pp. 422–425 (<https://www.legal-tools.org/doc/3e6014/>).

Article 21(3)

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

Article 21(3) establishes that the application and interpretation of law pursuant to Article 21 must be consistent with internationally recognized human rights including the non-discrimination principle. The provision thus creates a substantial hierarchy of law which supersedes the formal hierarchy between sources established by Article 21(1).¹ This kind of “super-legality” (Pellet, 2002, pp. 1079 and 1082) is not unique for the ICC. In many domestic legal systems (and, for example, in European Union law), fundamental rights or human rights are given a special legal position. Also in international law there are peremptory *jus cogens* norms.

Article 21(3) raises the question of what those human rights are that are “internationally recognized”. Of the various human rights, Article 21(3) only explicitly mentions the principle of non-discrimination. In its case law, the Court has, however, identified some other human rights principles that it regards as “internationally recognized”: for example, the *ne bis in idem* principle,² the *nullum crimen sine lege* principle,³ and the right to self-determination.⁴ These are examples of firmly established principles or

¹ Alain Pellet, “Applicable Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, p. 1077 (<https://www.legal-tools.org/doc/01addc/>).

² ICC, *Prosecutor v. Saif al-Islam Gaddafi*, Appeals Chamber, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled ‘Decision on the “Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute”’ of 5 April 2019, 9 March 2020, ICC-01/11-01/11-695, para. 62 (<https://www.legal-tools.org/doc/kdbww/>).

³ ICC, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, Appeals Chamber, Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’ (ICC-02/05-01/20-302)”, 1 November 2021, ICC-02/05-01/20-503 OA8, para. 83 (<https://www.legal-tools.org/doc/tffwvd/>).

⁴ ICC, *Situation in the State of Palestine*, Pre-Trial Chamber I, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’, 5 February 2021, ICC-01/18-143, para. 122 (<https://www.legal-tools.org/doc/haip3/>).

rights that can be found in many different human rights instruments. In its initial case law, the ICC has frequently referred to the ECHR and the IC-CPR, but also to other human rights conventions, such as the Convention on the Rights of the Child.⁵ There are, however, also more unestablished human rights norms originating in little ratified treaties and soft law instruments. In this regard, it is interesting that the Court has also found soft law instruments, such as 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 Law⁶ and 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 Africa⁷ as legally relevant.⁸ Also human rights case law has often been referred to.⁹ As such, the ICC seems to give the concept of internationally recognized human rights a broad reading. Also in connection to the non-discrimination principle, Article 21(3) enu-

⁵ For example, ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 604 (<https://www.legal-tools.org/doc/677866/>); see also Judge Pikis' separate opinion, in which he argues that: "Internationally recognized may be regarded those human rights acknowledged by customary international law and international treaties and conventions". ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the Prosecutor's "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'", 12 September 2006, ICC-01/04-01/06-424, para. 3 (<https://www.legal-tools.org/doc/2da466/>).

⁶ For example, ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Victims' Participation, 18 January 2008, ICC-01/04-01/06-1119, para. 35 (<https://www.legal-tools.org/doc/4e503b/>).

⁷ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision Establishing the Principles and Procedures to Be Applied to Reparations, 7 August 2012, ICC-01/04-01/06-2904, para. 185 (<https://www.legal-tools.org/doc/a05830/>).

⁸ See also ICC, *Prosecutor v. Ngudjolo*, Presidency, 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", 10 March 2009, ICC-RoR217-02/08-8, para. 27 (<https://www.legal-tools.org/doc/0c30bd/>).

⁹ For example, ICC, *Prosecutor v. Lubanga*, Appeals Chamber, 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", 21 October 2008, ICC-01/04-01/06-1486, paras. 46–47 (<https://www.legal-tools.org/doc/485c2d/>); and *Prosecutor v. Gbagbo and Blé Goudé*, Appeals Chamber, Second Public Redacted Judgment on the Prosecutor's Appeal against the Oral Decision of Trial Chamber I pursuant to Article 81(3)(c)(i) of the Statute, 21 February 2019, ICC-02/11-01/15, para. 50 (<https://www.legal-tools.org/doc/00e8f2/>).

merates many possible grounds for discrimination. It has been noted that the possible discriminatory grounds constituted the controversial part of the provision's negotiations and that the numeration is both provocative (starting with gender) and curious (placing age before the traditional grounds of discrimination, such as race and religion).¹⁰

The Appeals Chamber has emphasized that every article in the ICC Statute has to be interpreted and applied according to Article 21(3).¹¹ In practice, the judges must, however, make a decision whether a particular ICC norm has a human rights dimension or not. In relation to certain questions, it is evident that human rights law must be consulted, for example, in relation to fair trials of the accused (Article 67).¹² It is, however, not merely this type of provisions which interpretation and application must be guided by human rights. Human rights law can, for example, be relevant when crimes such as incitement to commit genocide and modes of responsibility such as instigation are addressed.¹³ The ICC has also held that victim participation can be considered a human rights question,¹⁴ even though the leading human rights instruments do not grant victims explicit procedural

¹⁰ Margaret M. deGuzman, "Article 21 – Applicable Law", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 947–948 (<https://www.legal-tools.org/doc/040751/>) and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2016, p. 533 (<https://www.legal-tools.org/doc/b7432e/>). See also ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Reasons for the Decision on Excusal from Presence at Trial under Rule 134 *quater*, 18 February 2014, ICC-01/09-01/11-1186, paras. 59–60 (<https://www.legal-tools.org/doc/8b7d3e/>).

¹¹ ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 12 July 2006, ICC-01/04-168, para. 38 (<https://www.legal-tools.org/doc/a60023/>).

¹² See also, for example, ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG, para. 24 (<https://www.legal-tools.org/doc/fb80c6/>).

¹³ Cf. in this regard the 'Media case', ICTR *Prosecutor v. Nahimana et al.*, Trial Chamber, Judgement and Sentence, 3 December 2003, ICTR-99-52, paras. 983–999 (<https://www.legal-tools.org/doc/45b8b6/>).

¹⁴ See for example ICC, *Prosecutor v. Katanga*, Trial Chamber II, Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the Disqualification of Judge Christine Van den Wyngaert from the Case of the Prosecutor v Germain Katanga, 18 February 2014, para. 42; and ICC, Pre-Trial Chamber I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18, 6 September 2018, para. 88 (<https://www.legal-tools.org/doc/73aeb4/>).

rights.¹⁵ In relation to victim participation, the ICC has, for example, found that based on “Article 21(3) of the Statute, read in conjunction with Article 12(1) of the Convention on the Rights of the Child, victims cannot be excluded from participation solely on the basis of their age”.¹⁶

Finally, it should be noted that Article 21(3) refers to the interpretation and application of the law. In this regard, the Appeals Chamber has stressed that human rights friendly interpretation is not always enough. It must be ensured that human rights also are applied.¹⁷ The application of human rights may support the identification of a lacuna in the ICC internal legal system, which filling demands the use of ICC’s external legal sources. In this regard, the ICC has held that it is possible to order a stay of proceedings in the case of breach of accused’s fundamental rights even though the Court’s internal legal sources do not foresee such a response to a breach (*Lubanga*, 14 December 2006, paras. 37 and 39).

More controversially, Article 21(3) could entail that an ICC norm, even a Statute provision, is set aside or its application is suspended. Hochmayr has noted that this is not merely a question of “theoretical interest”.¹⁸ When three detained witnesses in 2011 applied for asylum in the Netherlands, the Court first based on Article 21(3) found that it was unable to return them to the Democratic Republic of Congo according to Article 93(7) to ensure their right to for example apply for asylum was not violated.¹⁹ More generally, it must be therefore asked to what extent Article 21(3)

¹⁵ See further Anne-Marie de Brouwer and Mikaela Heikkilä, “Victim Issues: Participation, Protection, Reparation, and Assistance”, in Göran Sluiter et al. (eds.), *International Criminal Procedure – Principles and Rules*, Oxford University Press, 2013, pp. 1337–1341.

¹⁶ ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Trial Chamber I, Decision on Victims’ Participation Status, 7 January 2016, ICC-02/11-01/15-379, para. 60 (<https://www.legal-tools.org/doc/69c3c6/>).

¹⁷ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 37 (*Lubanga*, 14 December 2006) (<https://www.legal-tools.org/doc/1505f7/>).

¹⁸ Gudrun Hochmayr, “Applicable Law in Practice and Theory – Interpreting Article 21 of the ICC Statute”, in *Journal of International Criminal Justice*, 2014, vol. 12, p. 677.

¹⁹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, 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” (Articles 68 and 93(7) of the Statute), 9 June 2011, ICC-01/04-01/07-3003-tENG, para. 73 (<https://www.legal-tools.org/doc/e411d5/>); and, *Prosecutor v. Katanga*, Trial Chamber II, Decision on the application for the interim release of detained Witnesses

can function as a legal basis to set aside, for example, a provision of the ICC Statute which challenges the internal legal framework of the ICC.²⁰ In this regard, Arsanjani has noted that: “While the original intention behind this paragraph may have been to limit the court’s powers in the application and interpretation of the relevant law, it could have the opposite effect and broaden the competence of the court on these matters. It provides a standard against which all the law applied by the court should be tested”.²¹ In some domestic legal systems, constitutional law provisions requiring courts to ensure adherence to fundamental human rights have significantly affected interpretations of criminal law provisions. Before the ICC, Judge Blattman expressed concern over the fact that some judges according to him have overlooked the will of the drafters of the ICC with reference to Article 21(3):

I am concerned by the Majority application of 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. While the Majority opinion lists the Basic Principles in the relevant provisions which are taken into account by the Chamber, I caution that this is not a strongly persuasive or decisive authority which the Chamber should be using in its legal determination of victims and in particular the definition of victims and participation. I support and follow Article 21(3), which requires that decisions of the Chamber must be consistent with internationally recognized human rights. However, the particular provisions relied on in the Majority

DRC02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, Dissenting Opinion of Judge Christiane Van Den Wyngaert, 1 October 2013, ICC-01/04-01/07-3405-Anx, para. 3 (<https://www.legal-tools.org/doc/5014f6/>). See also ICC, *Prosecutor v. Ngudjolo*, Appeals Chamber, Order on the Implementation of the Cooperation Agreement between the Court and the Democratic Republic of the Congo Concluded Pursuant Article 93 (7) of the Statute, 20 January 2014, ICC-01/04-02/12-158, paras. 26–30 (<https://www.legal-tools.org/doc/d554f7/>).

²⁰ Gilbert Bitti, “Article 21 and the Hierarchy of Sources of Law before the ICC”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, pp. 438–439 and 442 (<https://www.legal-tools.org/doc/3e6014/>).

²¹ Mahnoush H. Arsanjani, “The Rome Statute of the International Criminal Court”, in *American Journal of International Law*, 1999, vol. 93, p. 29 (<https://www.legal-tools.org/doc/94254d/>).

decision were specifically considered and rejected during the preparatory stages of the drafting of the Rome Statute.²²

Cross-reference:

Article 67.

Doctrine:

1. Mahnoush H. Arsanjani, “The Rome Statute of the International Criminal Court”, in *American Journal of International Law*, 1999, vol. 93, pp. 22–43 (<https://www.legal-tools.org/doc/94254d/>).
2. Ilias Bantekas, “Reflections on Some Sources and Methods of International Criminal and Humanitarian Law”, in *International Criminal Law Review*, 2006, vol. 6, pp. 121–136 (<https://www.legal-tools.org/doc/a8734d/>).
3. Gilbert Bitti, “Article 21 and the Hierarchy of Sources of Law before the ICC”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 411–443 (<https://www.legal-tools.org/doc/3e6014/>).
4. Gilbert 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 Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 285–304 (<https://www.legal-tools.org/doc/3e6014/>).
5. Ian Brownlie, *Principles of Public International Law*, 2nd. ed., Oxford University Press, 2008 (<https://www.legal-tools.org/doc/3b1104/>).
6. Robert Cryer, “Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources”, in *New Criminal Law Review*, 2009, vol. 12, no. 3, pp. 390–405 (<https://www.legal-tools.org/doc/f83aae/>).
7. Anne-Marie de Brouwer and Mikaela Heikkilä, “Victim Issues: Participation, Protection, Reparation, and Assistance”, in Göran Sluiter et al. (eds.), *International Criminal Procedure – Principles and Rules*, Oxford University Press, 2013, pp. 1299–1374.

²² ICC, *Prosecutor v. Lubanga*, Trial Chamber I Decision on Victims’ Participation, Separate and Dissenting Opinion of Judge René Blattman, 18 January 2008, ICC-01/04-01/06-1119, para. 5 (<https://www.legal-tools.org/doc/4e503b/>).

8. Gudrun Hochmayr, “Applicable Law in Practice and Theory – Interpreting Article 21 of the ICC Statute”, in *Journal of International Criminal Justice*, 2014, vol. 12, pp. 655–79.
9. Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th. ed., Routledge, London, 1997 (<https://www.legal-tools.org/doc/bfe8e0/>).
10. Marko Milanović, “Is the Rome Statute Binding on Individuals? (And Why We Should Care)”, in *Journal of International Criminal Justice*, 2011, vol. 9, pp. 25–52 (<https://www.legal-tools.org/doc/384f0e/>).
11. Margaret M. deGuzman, “Article 21 – Applicable Law”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 932–948 (<https://www.legal-tools.org/doc/040751/>).
12. Volker Nerlich, “The Status of ICTY and ICTR Precedent in Proceedings before the ICC”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 305–325 (<https://www.legal-tools.org/doc/ca6714/>).
13. Alain Pellet, “Applicable Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002 (<https://www.legal-tools.org/doc/01addc/>).
14. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 511–536 (<https://www.legal-tools.org/doc/b7432e/>).
15. Birgit Schlütter, *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*, Martinus Nijhoff Publishers, Leiden, 2010 (<https://www.legal-tools.org/doc/8a3ae5/>).
16. Otto Triffterer, “Can the “Elements of Crimes” Narrow or Broaden Responsibility for Criminal Behaviour Defined in the Rome Statute?”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 381–400 (<https://www.legal-tools.org/doc/32e54f/>).

17. Herman von Hebel, “The Decision to Include Elements of Crimes in the Rome Statute”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 4–8 (<https://www.legal-tools.org/doc/e34f81/>).
18. Alexander Zahar and Göran Sluiter, *International Criminal Law – A Critical Introduction*, Oxford University Press, 2008 (<https://www.legal-tools.org/doc/b27edd/>).
19. Krit Zeegers, *International Criminal Tribunals and Human Rights Law: Adherence and Contextualization*, Springer/T.M.C. Asser Press, The Hague, 2016.

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PART 3.
GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22

Nullum Crimen sine Lege

General Remarks:

Together with *nulla poena sine lege*, contained in Article 23 of the ICC Statute, the principle of *nullum crimen sine lege* forms the principle of legality which is of fundamental importance to international criminal law. The principles of *nullum crimen* and *nulla poena* are well-established in customary international law, a fact that was reflected by the effortlessly drafting of Articles 22 and 23 of the ICC Statute.¹ The need for a provision acknowledging the principle of *nullum crimen* was agreed upon already by the 1996 Preparatory Commission which stated that “the crimes within the jurisdiction of the Court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality (*nullum crimen sine lege*)”.² It may be noted that the statutes of the ICTY and ICTR does not contain provisions equivalent to Article 22 of the ICC Statute.

The principle of *nullum crimen* contributes to a foreseeable legal system as it stipulates that only actions which are prohibited by law can be deemed as criminal. This is an important part of the legitimacy of a legal system, and in the case of the ICC it works both in relation to the individuals under investigation and in relation to states (Broomhall, 2016, p. 952). The principle of *nullum crimen* also acknowledges that the individual virtually always is the weaker part in the criminal process and that the individual therefore has a need to be protected from a misuse of powers by the judiciary.

¹ Susan Lamb, “Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, pp. 734–735 (<https://www.legal-tools.org/doc/01addc/>).

² Bruce Broomhall, “Article 22 – Nullum crimen sine lege”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 951 (<https://www.legal-tools.org/doc/040751/>).

Nullum crimen is harder to apply and fulfil in international criminal law than in national criminal law since international criminal law often is more vague than national law. This is a problem which was at the centre of the proceedings in Nuremberg. At the end of World War II the international crimes had not been exhaustively defined, which led the judges of the Nuremberg Tribunal to define many of the elements of the crimes themselves. The proceedings of Nuremberg have thus received criticism of creating new law. With regard to *nullum crimen*, the judges of Nuremberg concluded that it is a moral principle and that it is allowed to punish actions that were not prohibited at the time of the conduct in cases where it would be “unjust” not to punish the actions (Lamb, 2002, pp. 735–736).

After World War II and Nuremberg the principle of *nullum crimen sine lege* has been codified in a number of international treaties on human rights. The first sentence of Article 11(2) of the 1948 Universal Declaration of Human Rights states that “[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed”. The essentially identical first sentence of Article 15 of the International Covenant on Civil and Political Rights states that “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed”.

When creating the ICTY the United Nations Secretary-General stated in a report that “the application of the principle *nullum crimen sine lege* requires that the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law”.³ The principle of *nullum crimen* has also been addressed by the ICTY, for example in *Tadić* where the Trial Chamber found that common Article 3 of the Geneva Conventions “is beyond doubt part of customary international law, therefore the principle of *nullum crimen sine lege* is not violated by incorporating the prohibitory norms of common Article 3 in Article 3 of the Statute of the International Tribunal”⁴ and that “[i]mposing criminal re-

³ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 34 (<https://www.legal-tools.org/doc/c2640a/>).

⁴ ICTY, *Prosecutor v. Tadić*, Trial Chamber, Decision on the Defence Motion on Jurisdiction, 10 August 1995, IT-94-1-T, para. 72 (*Tadić*, 10 August 1995) (<https://www.legal-tools.org/doc/ddd6b0/>).

sponsibility upon individuals for these violations does not violate the principle of *nullum crimen sine lege*” (*Tadić*, 10 August 1995, para. 65).

The ICC Elements of Crimes has an important role in the fulfilling of the objectives of Article 22 since it defines the crimes within the jurisdiction of the Court. The need for the Element of Crimes was observed by the United States in the Preparatory Committee. The United States argued that the Elements of Crimes were consistent with “the need to define crimes with the clarity, precision and specificity many jurisdictions require for criminal law”.⁵ The need for the Elements of Crimes was also stressed by Japan during the Rome Conference (Schabas, 2016, pp. 543–544).

Cross-reference:

Article 23.

Doctrine: For the bibliography, see the final comment on Article 22.

Author: Camilla Adell.

⁵ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 543–544 (<https://www.legal-tools.org/doc/b7432e/>), citing the Proposal submitted by the United States of America, Elements of offences of the International Criminal Court, UN Doc, A/AC.249/1998/DP.11, 3 April 1998 (<https://www.legal-tools.org/doc/50fc48/>).

Article 22(1)

1. 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.

Not only was the need for a provision on the *nullum crimen* principle noticed early in the preparation of the ICC Statute but the need for a provision on non-retroactivity, which as well was considered fundamental to a criminal legal system, was also specifically addressed by the 1996 Preparatory Committee.¹ According to Article 22(1), which states the principle of non-retroactivity, a certain conduct can only be deemed as illegal if that specific conduct was prohibited at the time when the conduct took place. In cases when the specific conduct was not criminalised at the time of the conduct Article 22(1) prescribes that the person shall not be convicted. The individual responsibility of the perpetrator of the crime does however arise directly under international law, meaning that the criminal conduct does not have to be criminalised in national law in order to fulfil the principle of *nullum crimen*.²

The term “conduct” refers both to acts and omissions. In cases where a continuous conduct is under examination Article 22(1) prescribes that all elements of the crime must be fulfilled during the time that the conduct was criminalised (Broomhall, 2016, pp. 959).

Article 22(1) refers to the jurisdiction of the Court. To determine whether a person can be held criminally responsible under the ICC Statute it is therefore necessary to establish the jurisdiction of the Court. The jurisdiction *ratione materiae* of the ICC is found in Article 5 of the ICC Statute, which states that the crimes within the jurisdiction of the Court are the crimes of genocide, crimes against humanity, war crimes and the crime of aggression. However, to establish jurisdiction Article 11, stating the juris-

¹ Susan Lamb, “Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, p. 751 (<https://www.legal-tools.org/doc/01addc/>).

² Bruce Broomhall, “Article 22 – Nullum crimen sine lege”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 954–955 (<https://www.legal-tools.org/doc/040751/>).

diction *ratione temporis* and Article 12, stating preconditions to the exercise of jurisdiction, must be taken into consideration. According to Article 11(1), the Court may only exercise jurisdiction with respect to crimes committed after the entry into force of the ICC Statute. The ICC Statute entered into force on 1 July 2002. For those states that has become parties to the ICC Statute after 1 July 2002 Article 11(2) states that the ICC may only exercise jurisdiction with respect to crimes committed after the entry into force of the ICC Statute for that individual state. Article 126(2) states further conditions on the entry into force of the ICC Statute for a state as it prescribes that the Statute enters into force on the first day of the month after the 60th day following the deposit of the state's instrument of ratification, acceptance, approval or accession.

Article 22(1) is not only a reminder of the principle of legality but also serves as a principle of interpretation according to which rules can be interpreted in such a way that the principle of legality is respected.³ Article 22(1) has been used as a tool of interpretation in *Katanga*, when the Pre-Trial Chamber defined “other inhumane acts” in Article 7(1)(k) as “serious violations of international customary law and the basic rights pertaining to human beings, being drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute”.⁴

Non-State Parties and International Customary Law:

When addressing Article 22(1) the Court will typically examine whether a certain conduct was prohibited by the ICC Statute at the time of that certain conduct. It is however possible that the Court may have to take international customary law in consideration in addressing Article 22(1) when a situation is referred to the Court by the United Nations Security Council or when a state makes a declaration of the acceptance of jurisdiction in accordance with Article 12(3). According to one view, advocated by Bruce Broomhall, the Court can only establish criminal responsibility for a person investigated on international customary law since the state of which the person investigated is a national was not a party to the ICC Statute when

³ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 545 (<https://www.legal-tools.org/doc/b7432e/>).

⁴ ICC, *Prosecutor v. Katanga et al.*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 448 (<https://www.legal-tools.org/doc/67a9ec/>).

the conduct took place. Consequently, in the absence of relevant criminal prohibitions in national law or customary international law, the ICC Statute cannot provide a prohibition of that certain conduct in those cases (Broomhall, 2016, p. 956). This issue was however not discussed by the Pre-Trial Chamber neither when deciding to issue a warrant of arrest for President Omar Al Bashir of Sudan, a state that is not a party to the ICC⁵ nor when deciding to issue warrants of arrest in relation to any of the other persons that allegedly are responsible of having committed international crimes in Sudan. In later decisions, Pre-Trial Chamber II and the Appeals Chamber have however found that the referral of the situation in Darfur to the Court by the United Nations Security Council renders the ICC Statute applicable also in relation to Sudan.⁶

International crimes are also investigated in Côte d'Ivoire, a state that has accepted the jurisdiction of the ICC pursuant to Article 12(3) of the ICC Statute. The government of Côte d'Ivoire lodged an Article 12(3)-declaration on 18 April 2003, declaring that it accepted the jurisdiction of the court for crimes committed on its territory since the events of 19 September 2002. This declaration was reconfirmed by the President of the Côte d'Ivoire on 14 December 2010. Two cases were investigated in the *Situation of Côte d'Ivoire*: the case of Simone Gbagbo never went to trial, and Laurent Gbagbo and Charles Blé Goudé were acquitted of all charges. Both cases concerned alleged crimes against humanity committed in Côte d'Ivoire during the period of 16 December 2010 to 12 April 2011. Since that period occurred after the Article 12(3)-declaration on the acceptance of the jurisdiction of the ICC Article 22 should not provide any obstacles for the Court when exercising its jurisdiction. This might be considered confirmed by Pre-Trial Chamber II which did not address the issue when it issued the arrest warrants of the persons allegedly responsible for crimes in Côte d'Ivoire.

⁵ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3 (<https://legal-tools.org/doc/e26cf4/>).

⁶ See ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, ICC-02/05-01/09-302, para. 85 (<https://www.legal-tools.org/doc/68ffc1/>); and ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr, para. 135 (<https://www.legal-tools.org/doc/0c5307/>).

The Appeals Chamber has, with regard to the *Situation in Darfur, Sudan*, which was referred to the ICC by the UN Security Council in June 2005, in the case of Ali Muhammad Ali Abd-Al-Rahman, stated that the Court when interpreting Article 22(1) must look beyond the Statute and take into consideration also the criminal laws which applied to the suspect or accused at the time of the conduct investigated. According to the Appeals Chamber, the Court must assess whether “a reasonable person could have expected, at that moment in time, to find himself or herself faced with the crimes charged”.⁷

Doctrine: For the bibliography, see the final comment on Article 22.

Author: Camilla Adell.

⁷ ICC, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘*Ali Kushayb*’), Appeals Chamber, Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’ (ICC-02/05-01/20-302)”, 1 November 2021, ICC-02/05-01/20-503 OA8, para. 86 (<https://www.legal-tools.org/doc/tffwvd/>).

Article 22(2)

2. 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.

The rule of strict interpretation that is enshrined in Article 22(2) protects both the state parties of the ICC Statute as it ensures that the judges will interpret the Statute narrowly, and the individual that is under investigation by guarantying that the criminal responsibility of that individual will be judged according to the legislation and nothing else. According to this rule of interpretation and the prohibition of analogy the judges of the ICC cannot create new crimes as the creation of new crimes is exclusively within the power of the Assembly of States Parties. Article 22(2) is aimed at prohibiting the use of analogy for law-making, but it allows the judges of the Court to use analogies as a last resort to interpret and fill gaps in the ICC Statute.¹ In other words, the use of analogy as a tool of law-making is prohibited by Article 22(2) but analogy as a tool of interpretation is not prohibited.² As Article 22(2) states that cases of ambiguity shall be interpreted in favour of the person being investigated, prosecuted or convicted it also contains the principle of *in dubio pro reo*.

Since Article 22(2) refers to the interpretation of crimes it is only applicable to Articles 6–8 *bis* of the ICC Statute, which are Articles that contain the definitions of the crimes enlisted in Article 5 (Broomhall, 2016, pp. 960–961). It is however argued that Article 22(2) could also be applicable to Articles and principles that have a direct impact on the application of Articles 6–8 *bis*.³ Pre-Trial Chamber II has in *Bemba* referred to the principles of *nullum crimen* and strict interpretation in Article 22(2) when inter-

¹ Bruce Broomhall, “Article 22 – Nullum crimen sine lege”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 961 (<https://www.legal-tools.org/doc/040751/>).

² Susan Lamb, “Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, pp. 752–753 (<https://www.legal-tools.org/doc/01addc/>).

³ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 547 (<https://www.legal-tools.org/doc/b7432e/>).

preting whether the chapeau of Article 28(a) includes an element of causality between a superior's dereliction of duty and the underlying crimes.⁴

i. Al Bashir

According to Pre-Trial Chamber I of the ICC, Article 22(2) “fully embraces the general principle of interpretation *in dubio pro reo*”, which means that in cases of uncertainty the interpretation that is more favourable to the investigated person shall be used.⁵ In the same decision, the majority of the Pre-Trial Chamber argued that the Elements of Crimes must be applied in order to respect Article 22 (*Al Bashir*, 4 March 2009, para. 131). Judge Ušacka did however in her separate opinion state that the Elements of Crimes shall be consistent with the ICC Statute according to Article 9(3) and that the definitions of crime therefore only can be found in the ICC Statute itself (*Al Bashir*, 4 March 2009, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 18).

ii. Lubanga

On 14 March 2012 Trial Chamber I delivered the first judgment of the ICC in which Thomas Lubanga Dyilo was found guilty of war crimes consisting of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities. Article 22(2) was addressed during this process. The Defence argued in its closing submission that various interpretations made by the Pre-Trial Chamber in its Decision on the confirmation of charges was in breach with Article 22(2).⁶

In the judgment the judges used Article 22(2) as a test of whether the interpretation of Article 8(2)(e)(vii) was acceptable: “[t]herefore, consistently with Article 22 of the Statute, a child can be ‘used’ for the purposes of the Statute without evidence being provided as regards his or her earlier

⁴ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424 (<https://www.legal-tools.org/doc/07965c/>).

⁵ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 156 (*‘Al Bashir*, 4 March 2009’) (<https://legal-tools.org/doc/e26cf4/>).

⁶ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Closing submissions of the Defence, 15 July 2011, ICC-01/04-01/06-2773, see for example paras. 23, 39 and 65 (<https://www.legal-tools.org/doc/ca1fcd/>).

‘conscription’ or ‘enlistment’ into the relevant armed force or group”.⁷ The Appeals Chamber in its judgment on the appeal did not expressly take Article 22(2) into account, but instead used ordinary means of interpretation of an international treaty when interpreting the ICC Statute. However, the Appeals Chamber did confirm that Article 22 does set the limits for the interpretation of the ICC Statute and that all issues of interpretations must be resolved within the limits set by Article 22.⁸

iii. Katanga

Article 22(2) and its impact on the interpretation was also discussed by Trial Chamber II in its judgment in *Katanga*. The Trial Chamber noted that Article 22(2) must be taken into consideration when interpreting the rules of the ICC Statute as it prescribes that “any meaning from a broad interpretation that is to the detriment of the accused” shall be discarded⁹ and that the principle of legality poses “clear and explicit restrictions on all interpretative activity” (*Katanga*, 7 March 2014, para. 51). Because of this, the judges of the Court may not create new law, but only apply already existing law (para. 53). The Chamber however also noted that the principle of *in dubio pro reo* that is enshrined in Article 22(2) only is applicable in cases of ambiguity and that it does not take precedence over the conventional method of interpretation according to the Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Lastly, the Chamber concluded that the rules of interpretation in the VCLT is in accordance with Article 22(2). The Chamber hence used the general rule of interpretation in the VCLT when interpreting the rules of the ICC statute.

Doctrine: For the bibliography, see the final comment on Article 22.

Author: Camilla Adell.

⁷ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06, para. 620 (<https://www.legal-tools.org/doc/677866/>).

⁸ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, para. 460 (<https://www.legal-tools.org/doc/585c75/>).

⁹ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgment pursuant to Article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 50 (*Katanga*, 7 March 2014) (<https://legal-tools.org/doc/f74b4f/>).

Article 22(3)

3. This Article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 22(3) acknowledges that the *nullum crimen* principle in Article 22 does not affect customary international law and that it applies only to the definitions of crimes in the ICC Statute.¹ This third subparagraph only limits the impact of Article 22 and not the whole ICC Statute.²

Cross-references:

Article 23 and 24.

Doctrine:

1. Susan Lamb, “Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, pp. 733–766 (<https://www.legal-tools.org/doc/01addc/>).
2. Bruce Broomhall, “Article 22 – Nullum crimen sine lege”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 949–966 (<https://www.legal-tools.org/doc/040751/>).
3. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 539–549 (<https://www.legal-tools.org/doc/1435ae/>).

Author: Camilla Adell.

¹ Bruce Broomhall, “Article 22 – Nullum crimen sine lege”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, p. 955 (<https://www.legal-tools.org/doc/040751/>).

² Susan Lamb, “Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, p. 754 (<https://www.legal-tools.org/doc/01addc/>).

Article 23

Nulla Poena sine Lege

A person convicted by the Court may be punished only in accordance with this Statute.

General Remarks:

Article 23 contains the principle of *nulla poena sine lege*, which is part of the principle of legality and prohibits retroactive penalties. It is closely related to *nullum crimen sine lege*, a principle that prohibits retroactive application of law (see Article 22). As *nullum crimen*, *nulla poena* is part of a number of human rights treaties and declarations, for example the International Covenant on Civil and Political Rights (Article 15(1)) and the 1948 Universal Declaration on Human Rights (Article 11(2)). The principle of *nulla poena* is uncontroversial and was widely accepted and supported at the Rome conference.¹

Analysis:

Article 23 shall, since *nulla poena* is a principle regarding penalties, be read together with Part 7 of the ICC Statute. Article 77(1) of the ICC Statute states the penalties available to the Court. These are imprisonment, either for a maximum of 30 years or for life, a fine or a forfeiture of proceeds, property and assets derived either directly or indirectly from the crime at hand. Factors that shall be taken into consideration when determining the sentence are stated in Article 78.

It may be noted that the drafters of the ICC Statute did not choose to regulate the penalties available to the court in the same manner as in the ICTY statute. According to Article 24 of that statute, the ICTY shall, when determining sentences, consider the general practice regarding prison sentences in the former Yugoslavia. The ICTY has however, despite the fact that the national penal code of Yugoslavia only allowed sentences of a maximum of 20 years of imprisonment, concluded that it may sentence convicted persons to life imprisonment (see Lamb, 2002, p. 759). The ICC Statute contains no reference to the penal codes of its state parties.

¹ Susan Lamb, “Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, p. 756 (<https://www.legal-tools.org/doc/01addc/>).

ICC Case Law:

In its sentencing decision the Trial Chamber in *Lubanga* acknowledged Article 23 as one of the Articles that according to Article 21(1), which states applicable law, shall be applied when passing sentence. The Trial Chamber did however not discuss it further.² After acknowledging Article 23 and the principle of *nulla poena* the Trial Chamber went on with discussing and applying Articles related to sentencing. The conclusion may be drawn that the Trial Chamber was not of the opinion that Article 23 and its implications needed further discussion and that the Articles of the ICC Statute was in accordance with Article 23.

Article 23 was also mentioned in *Katanga* where the Trial Chamber in its sentencing decision acknowledged that Article 23 of the Statute and *nulla poena sine lege* “prevents arbitrary imposition of criminal sanctions, thereby ensuring legal certainty”.³ It shall also be noted that the Trial Chamber made the same statement in *Al Mahdi* as the Trial Chamber in its judgment stated that Article 23 was part of the applicable law when determining the sentence.⁴ However, no further discussion about Article 23 and its meaning or implications has been made in any of these cases.

Cross-references:

Articles 22 and 77.

Doctrine:

1. Susan Lamb, “Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, pp. 733–766 (<https://www.legal-tools.org/doc/01addc/>).

Author: Camilla Adell.

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, ICC-01/04-01/06-2901, paras. 17–18 (<https://www.legal-tools.org/doc/c79996/>).

³ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Decision on Sentence pursuant to Article 76 of the Statute, 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 39 (<https://www.legal-tools.org/doc/5af172/>).

⁴ ICC, *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171, para. 65 (<https://www.legal-tools.org/doc/042397/>).

Article 24

Non-retroactivity *Ratione Personae*

General Remarks:

Article 24 completes Articles 22 and 23, which sets out the principle of legality. It is also closely related to Article 11, which determines the jurisdiction *ratione temporis* of the ICC. However, Article 24 does not have any predecessor in international human rights instruments, as is the case for Articles 22 and 23. The need for Article 24 was noted early in the drafting process, and its drafting was undramatic.¹

Doctrine: For the bibliography, see the final comment on Article 24.

Author: Camilla Adell.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 555–556 (<https://www.legal-tools.org/doc/b7432e/>).

Article 24(1)

No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

Article 24(1) provides that no person shall be held criminally responsible for conduct prior to the entry into force of the Statute. The statement is a reflection of Article 11(1) concerning jurisdiction *ratione temporis*, which provides that “[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute”. The ICC Statute entered into force on 1 July 2002. When determining the jurisdiction *ratione temporis* in relation to states that have ratified the ICC Statute after its entry into force, Article 126(2) must be taken into consideration. The Article states that the entry into force for such states occurs on the first day of the month after the 60th day following the deposit by that state. This day is important to the application of Article 24(1) as it prohibits criminal responsibility for conduct prior to that date.

Article 24(1) refers to “conduct”, which covers both actions and omissions. It may however prove difficult to determine when an omission takes place, and it may therefore be difficult to determine whether an omission falls within the scope of the ICC Statute.¹

A difficulty with Article 24(1) and the temporal limitation of application of the ICC Statute is that the Statute does not provide a solution to the problem of continuing crimes.² It is possible that situations may arise when a criminal conduct begun before the entry into force of the Statute and where the criminal conduct is of a continuing nature and continues after the entry into force of the Statute. Pre-Trial Chamber I stated in Lubanga that the crime of enlisting and conscripting children under the age of fifteen is of a continuing nature and that it continues to be committed during the time children under fifteen remain in armed groups or forces.³ The status of con-

¹ Raul C. Pangalangan, “Article 24 – Non-retroactivity *ratione personae*”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 977 (<https://www.legal-tools.org/doc/040751/>).

² See William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 557 (<https://www.legal-tools.org/doc/b7432e/>).

³ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision of the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803, para. 248 (<https://www.legal-tools.org/doc/b7ac4f/>).

tinuing crimes is however uncertain and the matter is yet to be determined by the Court.

Doctrine: For the bibliography, see the final comment on Article 24.

Author: Camilla Adell.

Article 24(2)

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 24(2) states that the law more favourable to the person being investigated, prosecuted or convicted shall be applied if the law changes before the judgment. It completes the statements concerning retroactive application in Articles 22 and 23. The wording of Article 24(2) makes it broad, and it may be invoked at any stage of the proceedings before the ICC, meaning that it may also be invoked when a case reaches the Appeals Chamber.¹

Article 24(2) uses the word “law”. Applicable law is determined by Article 21, which states that the Court first and foremost shall apply the Statute, the Elements of Crimes and the Rules of Procedure and Evidence. The Court may however in second place also apply treaties and customary international law according to Article 21(1)(b). Treaties and customary international law may therefore be part of the applicable law and the Court may hence have to determine whether a change in customary international law has taken place to fully respect Article 24(2) (see Schabas, 2016, p. 558).

Cross-references:

Articles 11, 22, 23.

Doctrine:

1. Raul C. Pangalangan, “Article 24 – Non-retroactivity *ratione personae*”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 971–978 (<https://www.legal-tools.org/doc/040751/>).
2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 555–558.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 557–558 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Camilla Adell.

Article 25

Article 25⁸

Individual Criminal Responsibility

[...]

⁸ As amended by resolution RC/Res.6 of 11 June 2010 (adding paragraph 3 *bis*).

General remarks:

Article 25 provides the various modes of individual liability within the jurisdiction of the ICC. This is the core of a case, providing the legal theory which connects the accused to the crimes charged. The ICC Statute provides a general framework for determining individual criminal responsibility. However, the approach taken to individual criminal responsibility differed greatly from that of previous international tribunals. As well the elements of each mode of liability have evolved through case law with various ICC Pre-Trial and Trial Chambers interpreting the diverse elements differently. The Appeals Chamber in the *Lubanga* case has issued the only decision thus far that deals with Article 25 at the appeals level, essentially confirming the approach taken at the Pre-Trial and Trial level of the case. Continued jurisprudence from the Appeals Chamber will assist in providing certainty moving forward and ending superfluous litigation over diverse opinions at the pre-trial and trial level.

Compared with the previous laws on individual criminal responsibility, the provisions contained within the ICC Statute mark a turning point in regulating modes of participation under international criminal law. The *ad hoc* tribunals were in their early years during the drafting and adopting of the ICC Statute in 1998, and the modes of liability were a key focus of the development of the *ad hoc* jurisprudence during this time. In particular, and in contrast to the ICC, the *ad hoc* tribunals developed their modes of liability in the absence of guidance from their Statutes. Central to this was the concept of joint criminal enterprise, and the extent to which this concept falls within the ICC Statute is debatable.

The ICC Statute is much more precise than the ICTY-ICTR Statutes in that it adopts a scheme that clearly differentiates between a four-tiered system of participation. In contrast to both the ILC Draft Codes of Crimes against the Peace and Security of Mankind and the Statutes of the *ad hoc* tribunals, paragraph 3 differentiates between perpetration and other forms of participation. The distinguishing criterion is the concept of ‘control over

the crime'.¹ Accordingly, the perpetrators exert control over the commission of the crime, while accessories do not possess such a degree of domination over the commission. In particular, perpetration corresponds to the most serious qualification of individual criminal responsibility and it is expressly provided for under letter (a) in three different forms: (i) as an individual; (ii) jointly with another person (co-perpetration) and (iii) through another person (indirect perpetration). Based on the new drafting of the ICC Statute a new format of perpetration has emerged at the ICC based on the notion of 'indirect perpetration'. Pursuant to this new interpretation, commission of crimes encompasses the concept of 'control over the crime', including control over an organized apparatus of power, whereby indirect perpetration interacts with co-perpetration in such a way that the two forms of participation complement each other. This new doctrine on perpetration serves to make clearer the distinction between principal and accessorial liabilities within the context of the collective and multi-level commission of crimes. The Pre-Trial Chamber of the ICC has taken this all one step further in a decision in the *Katanga and Ngudjolo* case, where the judges decided that the 'control over the crime' amounted to 'control over the organization'.² Now, the requirements of indirect perpetration include the existence of an organized apparatus of power, within which the direct and indirect perpetrators operate, and which enables the indirect perpetrator to secure the commission of the crimes (*Katanga and Ngudjolo*, 30 September 2008, paras. 515–518).

Doctrine: For the bibliography, see the final comment on Article 25.

Authors: Kirsten Bowman and Nikola Hajdin.

¹ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436, para. 1396 (<https://www.legal-tools.org/doc/f74b4f/>); ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06, para. 338 (<https://www.legal-tools.org/doc/b7ac4f/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Confirmation of Charges Decision, 30 September 2008, ICC-01/04-01/07-717, para. 500 ('*Katanga and Ngudjolo*, 30 September 2008') (<https://www.legal-tools.org/doc/67a9ec/>).

Article 25(1)

1. The Court shall have jurisdiction over natural persons pursuant to this Statute

Preparatory Works:

Article 25(1) of the ICC Statute reads: “The Court shall have jurisdiction over natural persons pursuant to this Statute”. The decision regarding whether to include ‘legal’ or ‘juridical’ persons within the jurisdiction of the court was controversial. During the conference in Rome there was a working paper circulated by the French delegation which articulated a proposal for ICC jurisdiction over ‘juridical persons’. There was considerable debate on this point with many delegations concerned that the legal systems of their countries did not provide for such a concept or that the concept would be difficult to apply in the context of an international criminal court. The French delegation noted these concerns, but felt that the Statute should go at least as far as the Nuremberg Charter, which had provided for the criminal responsibility of criminal organizations. The debate was mainly based upon Romano-Germanic versus common law system countries. Romano-Germanic countries generally do not have mechanisms under their national systems to prosecute legal entities, effectively conferring automatic jurisdiction on the ICC in such circumstances. In the end, the concerns regarding the French proposal were too great to overcome and the ICC Statute would not accept jurisdiction over legal persons.¹

Article 25(1) of the ICC Statute establishes the principle of ‘personal jurisdiction’, giving the ICC jurisdiction over natural persons accused of crimes within its jurisdiction. This provision and in particular paragraphs 1 and 2 of the Article confirm the universal acceptance of the principle of individual criminal responsibility. Subparagraphs (a) through (c) of paragraph 3 establish the basic concepts of individual criminal attribution. Subparagraph (a) refers to three forms of perpetration: on one’s own, as a co-perpetrator or through another person. Subparagraph (b) contains different forms of participation; ordering, soliciting or inducing commission. Subparagraph (c) establishes criminal responsibility for aiding and abetting and

¹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2, 15 June – 17 July 1998 (<https://www.legal-tools.org/doc/732f58/>).

subparagraphs (d), (e) and (f) provide for expansions of attribution: contributing to the commission or attempted commission of a crime by a group, incitement to genocide and attempt.

Doctrine: For the bibliography, see the final comment on Article 25.

Authors: Kirsten Bowman and Nikola Hajdin.

Article 25(2)

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

Article 25(2) articulates the principle of individual criminal responsibility. “A crime within the jurisdiction of the Court” refers to genocide, crimes against humanity, war crimes and the crime of aggression according to Articles 5(1)(a)-(c) and 6–8 *bis*. The possible punishment follows from Article 77.

Doctrine: For the bibliography, see the final comment on Article 25.

Authors: Kirsten Bowman and Nikola Hajdin.

Article 25(3)(a): Direct Perpetration

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual [...]

Subparagraph (a) distinguishes between three forms of perpetration: direct, co-perpetration and perpetration by means.

The naturalistic manifestation of perpetration is the direct physical act of commission.¹ At the *ad hoc* tribunals, direct perpetration was defined simply as the physical perpetration of the crime.² Similarly, Gal defined direct perpetration as a situation where the individual “completed all elements of the crime without involving anyone else”.³ This definition, however, is incongruent with the basic structure of international crimes. The actor need not ‘complete’ anything; she *merely* has to voluntarily engage in the complex action (for example, firing a pistol) that causes the criminal result.

In a situation where many individuals contribute to the realization of the offence, the physical commission may not be restricted to a single person. Direct perpetration does not mean physical fulfilment of the *actus reus* or anything similar; the direct perpetrator may hypothetically do as little as blink and cause the criminal result. Direct perpetration means precisely what the notion asserts: (in the causal chain of events) directly causing the criminal result. This means that between the direct perpetrator’s act (for example, firing a pistol, actively engaging in the complex action of creating

¹ ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Judgment, 15 July 1999, IT-94-1, para. 188 (<https://www.legal-tools.org/doc/8efc3a/>).

² The ICTY Appeals Chamber tackled the issue of terminology with respect to individuals who carry out the material elements of the crime (*actus reus*). The terminology that was used to describe the ‘people on the ground’ who ‘pulled the trigger’ at the ICTY included ‘material perpetrators’, ‘physical perpetrators’, or ‘Relevant Physical Perpetrators’ (‘RPPs’). The Appeals Chamber raised the issue of crimes committed by omission, where the adjectives ‘physical’ or ‘material’ would fall short in describing perpetrators. Therefore, the Appeals Chamber opted for the term ‘principal perpetrators’ to label those who bring about the *actus reus* of the crime. See ICTY, *Prosecutor v. Brđanin*, Appeals Chamber, Judgment, 3 April 2007, ICTY-99-36-A, para. 362 (<https://www.legal-tools.org/doc/03069c/>).

³ Tom Gal, “Direct Commission”, in Jérôme de Hemptinne *et al.* (eds.), *Modes of Liability in International Criminal Law*, Cambridge University Press, 2019, p. 19.

malware, etcetera) and the particularly relevant occurrence in space and time (the criminal result, for example death), there is an uninterrupted sequential causal chain of events.⁴ If another *person* actively engages in the complex action of causing the criminal result and interrupts and advances the sequence of events with her contribution, then she is the direct perpetrator.⁵

Doctrine: For the bibliography, see the final comment on Article 25.

Author: Nikola Hajdin.

⁴ Emphasis added.

⁵ Of course, this person (direct perpetrator) has to satisfy the necessary *mens rea*.

Article 25(3)(a): Co-perpetration

Commits such a crime [...] jointly [...]

With respect to co-perpetration, it is no longer included in the complicity concept but recognized as an autonomous form of perpetration. Co-perpetration is characterized by a functional division of the criminal tasks between the different co-perpetrators, who are interrelated by a common plan or agreement. Every co-perpetrator fulfils a certain task which contributes to the commission of the crime and without which the commission would not be possible. The common plan or agreement forms the basis of a reciprocal or mutual attribution of the different contributions holding every co-perpetrator responsible for the whole crime.

Perpetration by means presupposes that the person who commits the crime can be used as an instrument by the indirect perpetrator as the mastermind or individual in the background. He or she is normally an innocent agent, not responsible for the criminal act.

The jurisprudence for this issue began with the Pre-Trial Chamber I's Confirmation of Charges decision in *Lubanga*.¹ Rather than rely on any precedent established by the ICTY, the *Lubanga* Pre-Trial Chamber chose to forge a new path relying on its own theoretical analysis. The Pre-Trial Chamber noted that the ICC Statute contains a much more differentiated regime of forms of individual and joint responsibility than the ICTY Statute. It referred in particular to Article 25(3)(d) of the ICC Statute, which establishes responsibility for contributing to the activities of "a group of persons acting with a common purpose", as probably covering some forms of joint criminal enterprise ('JCE'). However, the Chamber voiced substantial reservations against accepting JCE as a form of primary liability under the ICC Statute, associating JCE with a 'subjective' approach toward distinguishing between principals and accessories, an approach that moves the focus from the objective level of contribution to the "state of mind in which the contribution to the crime was made".

Rather, the Pre-Trial Chamber in *Lubanga* identified five factors of individual criminal liability in order to find co-perpetration under Article

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803 ('*Lubanga*, 29 January 2007') (<https://www.legal-tools.org/doc/b7ac4f/>).

25(3)(a). These five elements were confirmed and used in the trial chamber decision of *Lubanga*, as well as by the appeals chamber decision of *Lubanga*, in order to find the accused guilty as a co-perpetrator under Article 25(3)(a). The five elements include two objective and three subjective elements.

Objective Requirements:

In the confirmation of charges, the Pre-Trial Chamber set forth two objective elements: (i) the existence of a common plan between two or more persons; and (ii) the co-ordinated essential contribution made by each co-perpetrator that results in the realization of the objective elements of the crime. The Lubanga Trial Chamber then, following the reasoning set forth by the Pre-Trial Chamber, agreed that under the co-perpetration theory two or more individuals must act jointly within the common plan, which must include “an element of criminality” (*Lubanga*, 29 January 2007, para. 344). As well, the Pre-Trial Chamber found that the plan did not need to be specifically directed at the commission of a crime.

However, the *Lubanga* Trial Chamber did find that it is necessary to prove that if events followed the ordinary course of events, there would be a sufficient risk that a crime will be committed.² Noting that the crime in question need not be the overarching goal of the co-perpetrators, nor explicit in nature, the Chamber did stress that the existence of a common plan can be inferred from circumstantial evidence (*Lubanga*, 14 March 2012, para. 988).

With regard to the requirement of an ‘essential contribution’ the Trial Chamber majority stated that the Statute’s wording required that the offence “be the result of the combined and coordinated contributions of those involved [...]. None of the participants’ exercises, individually, control over the crime as a whole but, instead, the control over the crime falls in the hands of a collective as such” (*Lubanga*, 14 March 2012, para. 994). Here, the Chamber notes that the Prosecution does not have the burden to demonstrate that the contribution of the accused, if taken alone, would have caused the crime. Rather, the Prosecutor must prove mutual attribution, based on joint agreement or common plan. The Majority states that what is decisive is ‘whether the co-perpetrator performs an essential role in accord-

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 984 (*Lubanga*, 14 March 2012’) (<https://www.legal-tools.org/doc/677866/>).

ance with the common plan, and it is in this sense that his contribution, as it relates to the exercise of the role and functions assigned to him, must be essential’ (para. 1000).

Subjective Requirements:

The Lubanga Pre-Trial and Trial Chamber named the three subjective requirements, including that (i) the accused was aware that by implementing the common plan, the criminal consequences would ‘occur in the ordinary course of events’; (ii) the accused was aware that he provided an essential contribution to the implementation of the common plan and (iii) the accused was aware of the factual circumstances that established the existence of an armed conflict, and of the link between these facts and his conduct (*Lubanga*, 14 March 2012, para. 1008).

The Elements of Crimes and the Mental Element:

It is important to note that the Chambers have chosen to examine the subjective requirements based on Article 30 – the mental element requirements, noting that “the general mental element contained in Article 30(1) (intent and knowledge) applies to all crimes under the jurisdiction of the Court unless otherwise provided” (*Lubanga*, 29 January 2007, para. 351; *Lubanga*, 14 March 2012, paras. 1007–1014).

At the *Lubanga* Pre-Trial stage, the Chamber implicitly confirmed the status of the Elements of Crimes as law to be applied by the Court, suggesting that is equal to the Statute itself. Even in the drafting process of the Elements, some participants thought that the Elements could not provide for ‘downward’ departures from offence requirements listed in the Statute unless there was a clear mandate in the Statute itself.³ This was exactly the situation that was presented to the Pre-Trial Chamber. The question presented to the Pre-Trial Chamber was: With respect to the age of the soldiers enlisted, does the general requirement of intent and knowledge (Article 30(1) ICC Statute) apply, or has the subjective threshold been lowered by the Elements, which require only that ‘the perpetrator knew or should have known that such person or persons were under the age of 15 years’ (Element (3) of Article 8(2)(b)(xxvi) ICC Statute)? The Pre-Trial Chamber stated that the crime definition in Article 8(3)(b)(xxvi) of the ICC Statute does not contain a special subjective element and Article 30 is

³ See Roger S. Clark, “The Mental Element in International Criminal Law”, in *Criminal Law Forum*, 2001, vol. 12, pp. 320–321 (<https://www.legal-tools.org/doc/554e66/>).

therefore applicable. The Chamber then further specified that they “note that the third element listed in the Elements of Crimes for these specific crimes requires that, in relation to the age of the victims [t]he perpetrator knew or should have known that such person or persons were under the age of 15 years” (*Lubanga*, 29 January 2007, para. 357). The Chamber then went on to explain that ‘should have known’ requires more negligence. Thus, the Pre-Trial Chamber concludes that the ‘should have known’ requirement is an exception to the ‘intent and knowledge’ requirement embodied in Article 30 of the Statute (para. 359).

The Dissent of Judge Fulford:

Judge Fulford, dissented in the Trial Chamber Judgment in the *Lubanga* case, favouring a plain text reading of Article 25(3)(a), which would result in a lower standard of proof for the Prosecution, requiring a finding that at least two persons acted to implement a common plan. Additionally, his standard would require only a ‘contribution to the crime’, direct or indirect. In Judge Fulford’s reasoning, a plain text reading of Article 25(3)(a) would establish the following elements for co-perpetration:

1. The involvement of at least two individuals;
2. Co-ordination between those who commit the offence, which may take the form of an agreement, common plan or joint understanding, express or implied, to commit a crime or to undertake action that, in the ordinary course of events will lead to the commission of the crime;
3. A contribution to the crime which may be direct or indirect, provided either way there is a causal link between the individual’s contribution and the crime;
4. Intent and knowledge, as defined in Article 30 of the Statute, or as ‘otherwise provided’ elsewhere in the Court’s legal framework.

Essentially, Judge Fulford was concerned about hypothetical and counterfactual reasoning that would be required by the control theory as applied by the Chamber’s approach. Because this control theory requires the ‘essential contribution’ finding, it is necessary to decide if the crime would have still occurred in the absence of the defendant’s contribution (*Lubanga*, 14 March 2012, Separate Opinion of Judge Adrian Fulford, para. 17). As well Judge Fulford discusses that the Majority’s approach creates a distinction between principals and accomplices, which Judge Fulford deems unnecessary since there are no international statutory sentencing

guidelines (para. 9). In this discussion, he refers to the question of whether the new language of individual criminal liability found in Article 25 has created a hierarchy of seriousness in crimes (with 25(3)(a) representing the most serious of crimes and 25(3)(d) representing the least). He rejects this notion, stating that:

there is no proper basis for concluding that ordering, soliciting, or inducing a crime (Article 25(3)(b)) is a less serious form of commission than committing it ‘through another person’ (Article 25(3)(a) [...] 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 the result of the coordinated actions of groups of individuals, who jointly pursued a common goal (para. 8).

Lastly, as an interesting note Judge Fulford states that within the *Lubanga* case, he agrees that the test laid out by the Pre-Trial Chamber should be applied as the “case has been conducted on the basis of the legal framework established by the Pre-Trial Chamber”. His opinion stems from fear of prejudicing the accused’s right to be informed of the charges against him. He states that, in his view, “this requirement [...] means that the accused should not only be aware of the basic outline of the legal framework against which those facts will be determined. This ensures that the accused knows, at all stages of the proceedings, what he is expected to meet” (para. 20).

In the case of *Katanga and Ngudjolo*, Pre-Trial Chamber I in its confirmation of charges reiterated its position on Article 25(3)(a), continuing to use the formulation developed in *Lubanga* and adding to its analysis to incorporate the issue of perpetration through another person, found in the language of Article 25(3)(a). The Trial Chamber in *Katanga* followed the same approach.⁴ The Pre-Trial Chamber interpreted the concept of indirect perpetration in order to charge the co-accused as co-perpetrators based on the theory that they exercised ‘joint control’ over the crimes committed.⁵ The prosecutor charged the defendants, in the alternative, as accessories

⁴ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436, para. 1399 (<https://www.legal-tools.org/doc/f74b4f/>).

⁵ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 473 (*Katanga and Ngudjolo*, 30 September 2008’) (<https://www.legal-tools.org/doc/67a9ec/>).

under Article 25(3)(b) for ‘ordering’ the crimes committed by the militia members. The Chamber decided that accessorial liability was ‘rendered moot’ by a finding of liability as principals under Article 25(3)(a) and hence did not further pursue the alternative of accessorial liability (*Katanga and Ngudjolo*, 30 September 2008, paras. 470–471). The Chamber thus sidestepped the question whether it is permissible for the prosecutor to present alternative charges although Reg. 52(c) of the ICC Regulations requires “[a] legal characterization 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”. Following its lead in *Lubanga*, the Pre-Trial Chamber of Katanga defined ‘control’ as the criteria for distinguishing principal and accessory liability. However, here, the Chamber expanded upon their statement, interpreting the ‘control or mastermind’ formula to include the situation where a person “has control over the will of those who carry out the objective elements of the offence” (para. 488). As well, the Chamber concludes that ‘control’ over an immediate actor can be exerted by means of an organization. Since the Article explicitly declares it irrelevant whether the person through whom the crime is committed acts culpably or not, the Chamber here concludes that the ‘control’ over the immediate actor can be exerted through an organization. The Chamber notes that, “the 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’” (para. 498). Importantly, the Pre-Trial Chamber then goes on to define the necessary elements of an ‘organization’ for these purposes:

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 subordinate, then by another. These criteria ensure that orders given by the recognized leadership will generally be complied with by their subordinates (*Katanga and Ngudjolo*, 30 September 2008, para. 512).

The Chamber goes on to explain that perpetration by means of an organization can also be committed jointly by several leaders acting in concert, provided that each leader supplied a contribution necessary for the completion of the common plan (*Katanga and Ngudjolo*, 30 September 2008, paras. 524–526).

In the *Al Bashir* arrest warrant, the Prosecution broke new ground, exclusively basing the charges on the concept of indirect perpetration. According to the Prosecutor's application, this mode of liability under Article 25(3)(a) included the following three elements:

(a) First, the Prosecution must establish the existence of a relationship such that the indirect perpetrator may impose his dominant will over the direct perpetrator to ensure that the crime is committed. Where, as in this Application, the indirect perpetrator is alleged to have committed the crime through an organization or group, that institution must be "hierarchically organized".

(b) Second, the indirect perpetrator must have sufficient authority within the organization such that he has 'the final say about the adoption and implementation' of the policies and practices at issue.

(c) Third, the indirect perpetrator must be 'aware of his unique role within the [organization] and actively use it' in furtherance of the crimes charged.⁶

The Prosecutor based his approach on the findings of Pre-Trial Chamber I in the *Lubanga* case (*Al Bashir*, 12 September 2008, para. 309). The Chamber then provided further reasoning on indirect co-perpetration based on the notion of control over an organization within the *Al Bashir* Warrant of Arrest with respect to the Darfur situation. The judges contemplated three different forms of perpetration (indirect, co, and indirect co-perpetration) to qualify the participation of the accused in the alleged crimes that were directly carried out by members of the Sudanese Armed Forces, the allied militia, the Janjaweed and other individuals.⁷ The Chamber found that Al Bashir played an essential role in co-ordinating the design and the implementation of the common plan, which consisted in the unlawful attack on a part of the civilian population of Darfur, belonging to specific ethnic groups. Thus, the Chamber reiterated that, "the notion of indirect co-perpetration is applicable when some or all of the co-perpetrators carry

⁶ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Public Redacted Version of the Prosecution's Application under Article 58, 12 September 2008, ICC-02/05-157-AnxA, para. 248 ('*Al Bashir*, 12 September 2008') (<https://www.legal-tools.org/doc/b25e05/>).

⁷ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, paras. 209–223 ('*Al Bashir*, 4 March 2009') (<https://www.legal-tools.org/doc/e26cf4/>).

out their respective essential contributions to the common plan through another person. As the Chamber has underscored, in these types of situations co-perpetration or joint commission through another person is not possible if the suspects behaved without the concrete intent to bring about the objective elements of the crime and if there is a low and unaccepted probability that such would be a result of their activities” (*Al Bashir*, 4 March 2009, para. 213).

It is important to note here though that the judges had differing views over the need to resort to indirect co-perpetration (*Al Bashir*, 4 March 2009, paras. 211–213; see also Separate and Partly Dissenting Opinion of Judge Ušacka, paras. 103–104). Judge Ušacka, offering a dissenting view, noted that because she was not able to find that Al Bashir had full control, or whether it was shared by others so that each person had the power to frustrate the completion of the crime, she would not subscribe to the Majorities assessment of indirect co-perpetration and would rather have found as the sole mode of liability indirect perpetration (*Al Bashir*, 4 March 2009, Separate and Partly Dissenting Opinion of Judge Ušacka, para. 104).

Doctrine: For the bibliography, see the final comment on Article 25.

Authors: Kirsten Bowman and Nikola Hajdin.

Article 25(3)(a): Indirect Perpetration

through another person, regardless of whether that other person is criminally responsible;

Indirect Perpetration:

Indirect perpetration, commonly referred to as ‘perpetration through another person’ or ‘perpetration by means’, is a relatively new concept in international criminal law. It was explicitly mentioned for the first time in Article 25(3)(a) of the ICC Statute (‘commits [crime] [...] *through another person*’). According to that provision, an individual who makes use of another person to carry out criminal conduct, regardless of whether the second person is to be blamed for the wrongdoing, is regarded as a principal even though she does not physically (that is, *directly*) commit the offence.¹ Thus, given her peculiar role in the crime, the indirect perpetrator is referred to as the ‘mastermind’ or, in German, ‘woman in the background’ (*Hinterfrau*).²

Indirect perpetration has been traditionally recognized in domestic criminal law. In the continental legal tradition, it emerged in the nineteenth century and was ostensibly envisaged as a legal tool to punish offenders in cases of ‘innocent agency’.³ Pragmatic examples of this concept are *instructing* an individual who does not have the necessary mental capacity to be blamed for the offence (a child or an insane person) or *compelling* an agent to commit a crime. The person who instructs/compels metaphorically uses the other person as ‘means’ (hence ‘perpetrator-by-means’)⁴ or a ‘human tool’ to achieve the criminal purpose without having ‘blood on her hands’. Since both a child and a person acting under duress lack the necessary blameworthiness to be criminally responsible, the *Hinterfrau* could not be prosecuted for instigation, as this mode of complicit liability at the

¹ Art 25(3)(a) ICC Statute: “[...] a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) [c]ommits such a crime [...] through another person, regardless of whether that other person is criminally responsible”.

² See Kai Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, Oxford University Press, 2013, p. 154.

³ See Thomas Weigend, “Problems of Attribution in International Criminal Law: A German Perspective”, in *Journal of International Criminal Justice*, 2014, vol. 12, no. 2, p. 258.

⁴ See George P. Fletcher, *Rethinking Criminal Law*, Oxford University Press, 2000, p. 639.

time required a responsible direct perpetrator. To resolve this quandary, scholars of the nineteenth century developed the theory of indirect perpetration, which ascribes principalship to the mastermind(s) in such cases.

Indirect perpetration still represents the quintessence of prosecutorial strategy in cases of innocent agency in domestic criminal trials. Usually, the factors that preclude criminal responsibility of the agent are mistakes of facts or law, duress, incapacity such as being underage, or mental illness (*Katanga and Ngudjolo*, 30 September 2008, para. 495).⁵

According to Article 25(3)(a) of the ICC Statute, an indirect perpetrator is a person who “[c]ommits such a crime [under the ICC Statute] [...] through another person, *regardless of whether that other person is criminally responsible*”.⁶ The ICC Statute also recognizes instigation as a mode of complicity in Article 25(3)(b) without, however, drawing an apparent distinction from indirect perpetration. In both cases, the ‘man behind’ influences the direct actor either by instructing or compelling him. How can we distinguish between these two concepts if both are predicated on the same legal construction that the man behind exerts an influence over the person who carries out the criminal conduct regardless of whether that person is criminally responsible or not?

In order to distinguish between perpetration and complicity, ICC Trial Chamber I applied the Control Theory and stated the following:

The concept of control over the crime constitutes a third [together with subjective and objective] approach for distinguishing between principals and accessories which, contrary to the Defence claim, is applied in numerous legal systems. The notion underpinning this third approach is that principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.⁷ The chamber added further that:

⁵ See ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 495 (*‘Katanga and Ngudjolo*, 30 September 2008’) (<https://www.legal-tools.org/doc/67a9ec/>).

⁶ Article 25(3)(a) ICC Statute.

⁷ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06, para. 330 (<https://www.legal-tools.org/doc/b7ac4f/>).

the most typical manifestation of the concept of control over the crime, which is the commission of the crime through another person, is expressly provided for in article 25(3)(a) of the [ICC] Statute [...] this provision extends to the commission of a crime not only through an innocent agent [...] but also through another person who is fully criminally responsible.⁸

Both the indirect perpetrator and the instigator exert influence on the direct actor. However, the difference lies in the *level of intensity*.⁹ Accordingly, the indirect perpetrator exerts a higher degree of influence (*subjugation*), which places her in a position of control over the criminal result. In effect, the indirect perpetrator is in a position to determine whether the criminal result will occur. Conversely, the instigator *brings about* the volitional element of the perpetrator's *mens rea* but is in no position to *determine* whether or how the crime is going to happen. The latter part of this proposition captures the difference between the concepts of perpetration and complicity as understood in current international criminal law.

Indirect Co-Perpetration:

A variant of co-perpetration – the so-called concept of *indirect co-perpetration* – is likely to be the most relevant form of perpetration for prosecuting the crime of aggression. In the pursuit of describing leadership responsibility for international crimes, the ICC propounded indirect co-perpetration as a third manifestation of the Control Theory.

In its *Decision on the Confirmation of Charges* against Germain Katanga and Mathieu Ngudjolo Chui, ICC Pre-Trial Chamber I averred that the connective ‘or’ in Article 25(3)(a) of the ICC Statute that refers to commission of the crime (‘jointly with another *or* through another person’) could be understood as either an inclusive disjunction (‘either one or the other, and possibly both’) or as an exclusive disjunction (‘either one or the other, but not both’) (*Katanga and Ngudjolo*, 30 September 2008, para.491). Pre-Trial Chamber I held that indirect co-perpetration comports with the ICC Statute and thus construed the connective ‘or’ as an inclusive disjunction. By way of combining horizontal and vertical modes of liabil-

⁸ *Ibid.*, para. 339.

⁹ See Thomas Weigend, “Perpetration through an Organization: The Unexpected Career of a German Legal Concept”, *Journal of International Criminal Justice*, 2011, vol. 9, no. 1, p. 104 (note 54).

ity, the ICC developed the notion of *indirect co-perpetration*. Even though it appears to be accepted in the scholarship, this proposition did not escape criticism. Let us now briefly examine what prompted the pre-trial chamber to develop this mode of responsibility.

Katanga and Ngudjolo were leaders of two separate military organizations in the Eastern Congo region of Ituri. In 2003, they devised a plan to ‘wipe out’ the village of Borgo and ordered their troops to do so accordingly. Consequently, they were charged with war crimes and crimes against humanity (*Katanga and Ngudjolo*, 30 September 2008, paras. 11–36). Acknowledging that ‘due to ethnical loyalties within the respective organization led by Germain Katanga (Force de résistance patriotique d’Ituri) and Mathieu Ngudjolo Chui (Front des nationalistes et intégrationnistes), some members of these organizations accepted orders only from leaders of their own ethnicity’, the chamber nevertheless declared that Katanga may be held responsible for the crimes of Ngudjolo’s subordinates and *vice versa*, as they committed these crimes ‘jointly through another person’.

Katanga and Ngudjolo did not physically commit the crimes in question, but they were still labelled as co-perpetrators who divided tasks in order to realize the common plan. Pre-Trial Chamber I applied two separate modes of responsibility under Article 25(3)(a) of the ICC Statute with a view to their horizontal co-operation and their vertical control over their organizations, and by blending co-perpetration based on control over the crime with indirect perpetration, it devised a new mode of ‘cross-liability’¹⁰ – namely, indirect co-perpetration.

The ICC applied this mode of liability in the *Decision on the Confirmation of Charges against Charles Blé Goudé*, where the suspect was charged with having committed the alleged crimes jointly with another person, Laurent Gbagbo, and the latter’s inner circle – pro-Gbagbo forces. Pre-Trial Chamber I appraised Blé’s responsibility as a co-perpetrator under a four-limbed test: (i) was there an agreement or common plan between Charles Blé Goudé and his alleged co-perpetrators to commit the crimes in question; (ii) did he have control over the crimes by virtue of his essential contribution within the framework of the common plan with the resulting power to frustrate the commission of the crimes; (iii) did he rely on the

¹⁰ Alicia Gil Gil and Elena Maculan, “Current Trends in the Definition of ‘Perpetrator’ by the International Criminal Court”, *Leiden Journal of International Law*, 2015, vol. 28, no. 2, p. 353; Elies van Sliedregt, *Individual Criminal Responsibility in International Law*, 2012, Oxford University Press, p. 69.

pro-Gbagbo forces to carry out the material elements of the crimes, over which they exercised joint control subjugating the individual will of the direct perpetrators; and (iv) did he satisfy the required *mens rea* pursuant to Article 30 of the ICC Statute?¹¹

This doctrine provides for principal responsibility based on mutual attribution for a group of individuals acting in concert, irrespective of who or whose subordinates directly commit the crime. It should be noted that in such a case of vertical-horizontal imputation, each defendant, being indirect and co-perpetrator at the same time, must have the *mens rea* of the crime even though the direct commission is carried out by someone else. If the ICC continues focusing on the highest political and military actors, who usually collaborate on the leadership level before they dispense orders to their subordinates to commit crimes, this doctrine has the potential to become the main prosecutorial strategy.

Doctrine: For the bibliography, see the final comment on Article 25.

Author: Nikola Hajdin.

¹¹ ICC, *Prosecutor v. Blé Goudé*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 11 December 2014, ICC-02/11-02/11-186, para. 137 (<https://www.legal-tools.org/doc/0536d5/>).

Article 25(3)(b)

Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

The forms of participation listed under Article 25(3)(b) are specific and distinct from those provided for in the other sub paragraphs.¹ Here a person ordering a crime is not merely an accomplice, but a perpetrator by means. In fact, Article 2(3)(b) of the 1996 Draft Code was intended to provide for the criminal responsibility of mid-level officials who order their subordinates to commit crimes.

This form of individual criminal liability has not been litigated judicially within the framework of the ICC and thus, there is no jurisprudence from which to analyse. In the Katanga warrant of arrest, individual criminal responsibility was pled under 25(3)(a) or 25(3)(b).² However, the Pre-Trial Chamber confirmed the charges based on liability under 25(3)(a), leaving no discussion or jurisprudence on subparagraph (b) (*Katanga and Ngudjolo*, 26 June 2008, para. 94).

It is important to note the close relationship that sub paragraph (b) has with Article 28 which governs command responsibility. The first alternative in subparagraph (b), “orders”, complements the command responsibility provision in Article 28. In the Article 28 provision the superior is liable for an omission while in the case of an order to commit a crime (Article 25(3)(b)) the superior is liable for commission for having ‘ordered’. According to Ambos, “the first alternative in subparagraph (b) actually belongs to the forms of perpetration provided for in subparagraph (a), being a form of commission ‘through another person’”.³ Other commentators have pondered whether ordering a crime is not more appropriately dealt with within Article 28, rather than naming ordering a crime as a case of instiga-

¹ ICC, *Prosecutor v. Bemba et al*, Trial Chamber VII, Judgment, 19 October 2016, ICC-01/05-01/13, paras. 76–77, 847–848 (<https://www.legal-tools.org/doc/fe0ce4/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, 26 June 2008, ICC-01/04-01/07-649-AnxIA, para. 94 (*Katanga and Ngudjolo*, 26 June 2008’) (<https://www.legal-tools.org/doc/9cc58b/>).

³ Kai Ambos, “Article 25”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1003 (<https://www.legal-tools.org/doc/040751/>).

tion, which could be seen as inappropriately degrading a form of perpetration to mere complicity.

Commenting on the latter two provisions within subparagraph (b), Ambos notes that “soliciting a crime” means, *inter alia*, to command, encourage, request or incite another person to engage in specific conduct to commit it, while to “induce” means to influence another person to commit a crime. Inducing is an umbrella term which covers soliciting. Inducing is a broad enough term to cover any conduct which leads another person to commit a crime, including solicitation. It is important to note that neither solicitation nor inducement require a superior-subordinate relationship.

A last useful note on subparagraph (b) is to keep in mind that according to commentary, excesses of the perpetrator cannot be attributed to an instigator. This is key as the instigator’s scope of intent limits his responsibility and is important in cases where a principal may commit a further crime than he was instigated to do. In other respects, the drafting of this subparagraph is consistent with previous international laws concerning instigation crimes and there is not expected to be much confusion in how to apply this law, once cases come before the Court.

Doctrine: For the bibliography, see the final comment on Article 25.

Authors: Kirsten Bowman and Nikola Hajdin.

Article 25(3)(c)

For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

Subparagraph (c) is set to cover the field of complicity by assistance which falls short of instigation (sub paragraph (b)) but goes beyond ‘other contributions’ such as contributing to group activities within subparagraph (d).¹ This form of liability under Article 25(3)(c) has not yet been adjudicated at the ICC. However, the *Mbarushimana* Pre-Trial Chamber commented, with reference to this sub-provision, in its Confirmation of Charges decision that “the application of analogous modes of liability at the *ad hoc* tribunals suggests that a substantial contribution to the crime may be contemplated”²

One difference that has been pointed out with regard to sub paragraph (c) of the ICC Statute as compared to the jurisprudence of the *ad hoc* tribunals is that the latter does not require the aider and abettor to share the intent of the perpetrator to commit the crime. With the drafting of subparagraph (c) “the aider and abettor must act with the purpose of facilitating the commission of that crime”.

As well, there has been debate as to whether the *actus reus* required should likewise differ from the *ad hoc* tribunals’ ‘substantial contribution’ requirement (*Mbarushimana*, 16 December 2011, para. 281). However, the Lubanga Trial Chamber did address the contribution threshold requirement of subparagraph (c) in relation to defining the contribution threshold for Article 25(3)(a) as a principal actor versus an accessorial actor suggesting that if accessories must have had “a substantial effect on the commission of the crime” to be held liable, then co-perpetrators must have had “more than a substantial effect”.³ Thus, they seem to implicitly assume or endorse the substantial effect standard for contribution as an aider and abettor.

¹ ICC, *Prosecutor v. Bemba et al*, Trial Chamber VII, Judgment, 19 October 2016, ICC-01/05-01/13, paras. 84–96 (<https://www.legal-tools.org/doc/fe0ce4/>).

² ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 279 (*Mbarushimana*, 16 December 2011’) (<https://www.legal-tools.org/doc/63028f/>).

³ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 997 (<https://www.legal-tools.org/doc/677866/>).

Scholarly commentary on the subparagraph has noted that the language used in the *ad hoc* tribunals’ ‘aiding and abetting’ formulation, is slightly different in the ICC Statute. The Statute speaks of a person who “aids, abets or otherwise assists” in the attempt or accomplishment of a crime, including “providing the means for its commission”. This wording may suggest that (i) aiding and abetting are not one unit but rather each term has its own meaning, (ii) aiding and abetting are only two forms of possible assistance, with “otherwise assists” being an umbrella term to encompass other forms of possible assistance and (iii) “providing the means” for the commission of a crime is merely an example of assistance.

Doctrine: For the bibliography, see the final comment on Article 25.

Authors: Kirsten Bowman and Nikola Hajdin.

Article 25(3)(d)

In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

Article 25(3)(d) of the ICC Statute regulates a new form of criminal participation: contributing to the commission of a crime or an attempted crime by a group. Some have argued that the jurisprudence of the *ad hoc* tribunals' joint criminal enterprise ('JCE') theory and Article 25(3)(d) of the ICC Statute might be considered 'little cousins'. In contrast, others have argued that Article 25(3)(d) "certainly cracks open the door, but it is far from clear how much of the ICTY's complex JCE doctrine will be able to slip through it".¹

In the Prosecutions submission in the *Mbarushimana* case requesting a warrant for arrest, they sought the arrest warrant based on the accused's individual responsibility as a co-perpetrator under Article 25(3)(a) and in the alternative as an accessory under Article 25(3)(d) of the Statute.²

In its analysis on accessorial liability based on Article 25(3)(d), the Pre-Trial Chamber stated the objective and subjective elements required in order to find individual responsibility. The three objective elements were stated as: (i) a crime within the jurisdiction of the Court is attempted or committed; (ii) the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose; and (iii) the individual contributed to the crime in any way other than those set out in Article 25(3)(a) to (c) of the Statute. The subjective elements were

¹ Thomas Weigend, "Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges", in *Journal of International Criminal Justice*, 2008, vol. 6, no. 3, p. 478 (<https://www.legal-tools.org/doc/a56516/>).

² ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Prosecution's Application under Article 58, 20 August 2010, ICC-01/04-573, p. 68 (<https://www.legal-tools.org/doc/f9b78d/>).

elaborated as: (i) the contribution shall be intentional; and (ii) shall either (a) be made with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime.³

In its Decision on the Confirmation of Charges, the Pre-Trial Chamber rejected the idea that Article 25(3)(d) only applied to ‘outside contributors’ who are essentially assisting in a collective crime from the outside, but who are not themselves a member of the criminal group.⁴ The Chamber reasoned that “[t]o adopt an essential contribution test for liability under Article 25(3)(a) of the Statute, as this Chamber has done, and accept the Defence argument that 25(3)(d) liability is limited only to non-group members would restrict criminal responsibility for group members making non-essential contributions in ways not intended” (*Mbarushimana*, 16 December 2011, para. 273). While not imposing the high ‘essential contribution’ language, the Chamber did require a threshold of ‘significant contribution’ for the accused to have made toward crimes committed or attempted. (para. 283).

Doctrine: For the bibliography, see the final comment on Article 25.

Authors: Kirsten Bowman and Nikola Hajdin.

³ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, 11 October 2010, ICC-01/04-01/10-1, para. 39 (<https://www.legal-tools.org/doc/04d4fa/>).

⁴ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 273 (*Mbarushimana*, 16 December 2011’) (<https://www.legal-tools.org/doc/63028f/>).

Article 25(3)(e)

In respect of the crime of genocide, directly and publicly incites others to commit genocide;

Article 25(3)(e) of the ICC Statute criminalizes direct and public incitement of others to commit genocide. It is in substance identical to Article III(c) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and the ICTY and ICTR Statutes. Genocide is the only international crime to which public incitement has been criminalized. The reason for this provision is to prevent the early stages of genocide even prior to the preparation or attempt thereof.

To incite ‘publicly’ means that the call for criminal action is communicated to a number of individuals in a public place or to members of the general public at large particularly by technological means of mass communication, such as by radio or television. To incite ‘directly’ means that a person is specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion. This incitement comes very close to, if not even substantially covered by, instigation according to Article 25(3)(b), thus losing much of its own significance. The difference between ordinary form instigation, for example, instigation on the one hand and incitement to genocide on the other, lies in the fact that the former is specifically directed towards a certain person or group of persons in private while the latter is directed to the public in general. There is one important difference between incitement to genocide and the forms of complicity under subparagraphs (b), (c) and (d): incitement with regard to genocide does not require the commission or even attempted commission of the actual crime, that is, genocide. As such, incitement to commit genocide is an inchoate crime.

Doctrine: For the bibliography, see the final comment on Article 25.

Author: Nikola Hajdin

Article 25(3)(f)

Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Article 25(3)(f) provides for the criminal responsibility of an individual who attempts to commit a crime within the jurisdiction of the Court if a person commits an act to carry out his or her intention and fails to successfully complete the crime only because of some independent factor which prevents him or her from doing so.¹ The phrase “does not occur” recognizes that the notion of attempt by definition only applies to situations in which an individual endeavours to commit a crime and fails in this endeavour. Thus, an individual incurs criminal responsibility for unsuccessfully attempting to commit a crime only when the following elements are present: (i) intent to commit a particular crime; (ii) an act designed to commit it; and (iii) non-completion of the crime for reasons independent of the perpetrator's will.

On the other hand, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime is not criminally responsible. The provision does not clarify at what stage of the commission abandonment is still admissible or under which circumstances the abandonment is voluntarily. This problem is left for the Court. However, some guidance may be sought in the phrase “by taking action that commences its execution” which is used to indicate that the individual has performed an act which constitutes a significant step towards the completion of the crime.

In *Katanga and Ngudjolo*, Pre-Trial Chamber I endorsed “the doctrine that establishes that the attempt to commit a crime is a crime in which the objective elements are incomplete, while the subjective elements are

¹ ICC, *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber I, Decision on the Conformation of Charges, 7 March 2011, ICC-02/05-03/09, paras. 96–99 (<https://www.legal-tools.org/doc/5ac9eb/>).

complete. Therefore, the *dolus* that embodies the attempt is the same than the one that embodies the consummated act. As a consequence, in order for an attempt to commit a crime to be punished, it is necessary to infer the intent to further an action that would cause the result intended by the perpetrator, and the commencement of the execution of the act”.²

Doctrine: For the bibliography, see the final comment on Article 25.

Author: Nikola Hajdin.

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 460 (<https://www.legal-tools.org/doc/67a9ec/>).

Article 25(3) *bis*

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.

Article 25(3) *bis* echoes the requirement in Article 8 *bis*(1) that a “perpetrator was a person 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”. The purpose of this paragraph is to clarify that the leadership requirement, discussed under Article 8 *bis*(1), applies also when making assessments under Article 25(3). Since the Nuremberg and Tokyo trials, there has been an understanding that the crime of aggression is ‘reserved’ for prosecuting state leaders. It has been suggested that as acts of aggression are generally collective in nature, joint criminal enterprise will be the most applicable entry through which to assess individual responsibility.¹ In addition to the standard rules of attribution of criminal responsibility, the leadership clause requires decisive influence over the state policy to use armed force.

While the various forms of participation are explained under Article 25(3)(a-f), it should be noted here that it is uncertain whether it is possible to attempt to commit a crime of aggression in accordance with Article 25(3)(f), since the elements of the crimes clearly states that an act of aggression will have had to be committed in order for there to be a crime of aggression under the ICC Statute (Element 3). The Special Working Group on the Crime of Aggression held this to be a largely theoretical question, and decided not to actively exclude Article 25(3)(f) due to its unlikely application on the crime of aggression.²

Cross-reference:

Article 8 *bis*.

¹ Antonio Cassese, “On Some Problematical Aspects of the Crime of Aggression”, in *Leiden Journal of International Law*, 2007, vol. 20, no. 4, p. 848 (<https://www.legal-tools.org/doc/2c5743/>).

² Stefan Barriga, “Negotiating the Amendments on the Crime of Aggression”, in Stefan Barriga and Claus Kress (eds.), *The Travaux Préparatoires of the Crime of Aggression*, Cambridge University Press, 2012, pp. 23–24 (<https://www.legal-tools.org/doc/19103c/>).

Doctrine: For the bibliography, see the final comment on Article 25.

Authors: Marie Aronsson-Storrier and Nikola Hajdin.

Article 25(4)

No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

The ICC has no direct power to ascertain State responsibility. Nevertheless, the paragraph affirms the parallel validity of the rules of state responsibility.

Doctrine:

1. Kai Ambos, “Article 25”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 979–1029 (<https://www.legal-tools.org/doc/040751/>).
2. Roger S. Clark, *The Mental Element in International Criminal Law*, Criminal Law Forum, 2001, vol. 12, pp. 291, 320–321 (<https://www.legal-tools.org/doc/554e66/>).
3. Albin Eser, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 767–801, 803–818 (<https://www.legal-tools.org/doc/01addc/>).
4. Stefano Manacorda and Chantal Meloni, “Indirect Perpetration versus Joint Criminal Enterprise”, in *Journal of International Criminal Justice*, 2011, vol. 9, pp. 167, 174–76 (<https://www.legal-tools.org/doc/bb850d/>).
5. Hector Olasolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes*, Oxford, Hart, 2009 (<https://www.legal-tools.org/doc/c51ded/>).
6. Thomas Weigend, “Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges”, in *Journal of International Criminal Justice*, 2008, vol. 6, no. 3, pp. 471–487 (<https://www.legal-tools.org/doc/a56516/>).
7. Stefan Barriga, “Negotiating the Amendments on the Crime of Aggression”, in Stefan Barriga and Claus Kress (eds.), *The Travaux Préparatoires of the Crime of Aggression*, Cambridge University Press, 2012, pp. 3–57 (<https://www.legal-tools.org/doc/19103c/>).

8. Antonio Cassese, “On Some Problematical Aspects of the Crime of Aggression”, in *Leiden Journal of International Law*, 2007, vol. 20, no. 4, pp. 841–849 (<https://www.legal-tools.org/doc/2c5743/>).
9. Nikola Hajdin, *Individual Responsibility for the Crime of Aggression*, Ph.D. thesis, Stockholm University, 2021.
10. Micaela Frulli, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), 2002, p. 533.

Author: Nikola Hajdin.

Article 26

Exclusion of Jurisdiction over Persons under Eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

The time limit of 18 is an absolute border completely independent of maturity or immaturity. The Statutes of the International Military Tribunal, the UN *ad hoc* tribunals provide no age of criminal responsibility. Article 7 of the Statute of the Special Court for Sierra Leone had the limit of fifteen but no teenagers were ever prosecuted. Article 40(3)(a) of the Convention on the Rights of the Child provides that States shall seek to establish “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”, without a specification of an age limit.

Turning to immaturity for person above the age of 18, responsibility of such persons may be excluded by a defence listed in Article 31(1)(a), when their immaturity results from a mental disease. It can also be a mitigating factor under Article 78(1). This article only applies to the jurisdiction of the ICC which means that youngsters may be tried by national courts.

Doctrine:

1. Otto Triffterer and Roger S. Clark and, “Article 26”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1030–6 (<https://www.legal-tools.org/doc/040751/>).
2. Micaela Frulli, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 533–35 (<https://www.legal-tools.org/doc/01addc/>).
3. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Mark Klamberg.

Article 27

Irrelevance of Official Capacity

General Remarks:

The principles of state sovereignty and the equality of all states are fundamental to international relations and international law. As an extension of these principles certain state officials who represent their states are granted immunity from prosecution by international law. International law distinguishes between two types of immunity; immunity *ratione materiae*, which shields certain acts, and immunity *ratione personae*, which shields specific state officials.

Immunity *ratione materiae* (often also referred to as functional immunity) is attached to such acts that can be regarded as being acts of a state, that is, non-private, sovereign acts. Anyone carrying out such state acts are protected by immunity *ratione materiae*. Immunity *ratione personae* (personal immunity) on the other hand relates to a specific office held by certain state officials. It is only a small group of senior state officials who enjoy immunity *ratione personae*. The ICJ stated in the Arrest Warrant Case that it is a firmly established principle in international law that immunity *ratione personae* attaches to heads of states and heads of government.¹ Furthermore, the ICJ stated that also ministers of foreign affairs enjoys immunity *ratione personae*.

Since immunity *ratione personae* attaches to the office itself and not a certain category of acts it shields the state official from prosecution for both official, non-private and private acts. However, while immunity *ratione materiae* never ceases to protect the protected acts immunity *ratione personae* ceases to exist when the state official in question leaves his or her office. However, all official acts carried out during the time of office are protected by immunity *ratione materiae* also for these persons.

The scope of immunity *ratione materiae* and immunity *ratione personae* is mainly determined by customary international law, in which an exception from immunity *ratione materiae* has developed since the Nuremberg trials. The exception provides that a state official cannot rely on

¹ ICJ, *Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement, 19 December 2005, para. 51 (<https://www.legal-tools.org/doc/8f7fa3/>).

immunity *ratione materiae* with regard to international crimes.² The ICTY has confirmed this exception in the *Milošević* case when the Trial Chamber confirmed that Article 7(2) of the ICTY Statute, which provides that the official capacity of a person shall not relieve him or her from criminal responsibility, reflects customary international law.³ The Trial Chamber found that the fact that Slobodan Milošević was the former president of the Federal Republic of Yugoslavia did not prevent the ICTY from having jurisdiction over him. The ICTY addressed Milošević's immunity *ratione materiae* by concluding that he no longer was the incumbent president and therefore did not enjoy immunity *ratione personae*. Two years later, the ICTY confirmed its earlier findings in the case of *Krstić* (who was found guilty of *inter alia* aiding and abetting genocide):

It may be the case (it is unnecessary to decide here) that, between states, such a functional immunity exists against prosecution for those acts, but it would be incorrect to suggest that such an immunity exists in international criminal courts.⁴

Whether customary law provides for an exception from immunity *ratione personae* with regard to criminal proceedings before international courts is at this point not certain and the issue is widely discussed. The Appeals Chamber of the ICC has taken one step towards ending that discussion when it found that there is no immunity with regard to proceedings before international courts.⁵ However, the status of immunity *ratione personae* in customary law is of no importance in the relationship between the ICC and its member states. When becoming a member state to the ICC, and consenting to Article 27 of the ICC Statute, every member state waives the immunity *ratione personae* that would otherwise be accorded to its state officials. Article 27 is therefore one of the more important Articles in the ICC Statute when it comes to reaching the aim set out in the preamble of putting an end to the impunity of perpetrators of international crimes since

² Claus Kreß and Kimberley Prost, “Article 98 – Cooperation with Respect to Waiver of Immunity and Consent to Surrender”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 2126 (<https://www.legal-tools.org/doc/040751/>).

³ ICTY, *Prosecutor v. Milošević*, Trial Chamber, Decision on Preliminary Motions, 8 November 2001, IT-02-54 para. 28 (<https://www.legal-tools.org/doc/fl5771/>).

⁴ ICTY, *Prosecutor v. Krstić*, Appeals Chamber, Decision on Application for Subpoenas, 1 July 2003, IT-98-33, para. 26 (<https://www.legal-tools.org/doc/f828ae/>).

⁵ See ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397 (<https://legal-tools.org/doc/0c5307/>).

the Article grants the ICC jurisdiction over the highest state officials of the States Parties.⁶

Cross-reference:

Article 98(1).

Doctrine: For the bibliography, see the final comment on Article 27.

Author: Camilla Adell.

⁶ Otto Triffterer/Christoph Burchard, “Article 27 – Irrelevance of Official Capacity”, in Otto Triffterer and Kai Ambos (eds.), 2016, pp. 1048–1049.

Article 27(1)

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.

According to Article 27(1), state officials, for example – but not exclusively – those mentioned in the article, that would otherwise be protected by immunity *ratione materiae* or immunity *ratione personae* can be held responsible for committing international crimes.¹ The aim of Article 27(1) is to remove any immunity that may be attached to any official capacity, not only the immunities applying to the official capacities mentioned in the Article. Article 27(1) therefore focuses on the functional immunity of state officials.²

Cross-reference:

Article 98(1).

Doctrine: For the bibliography, see the final comment on Article 27.

Author: Camilla Adell.

¹ Otto Triffterer and Christoph Burchard, “Article 27 – Irrelevance of Official Capacity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1049 (<https://www.legal-tools.org/doc/040751/>).

² Paola Gaeta, “Official Capacity and Immunities”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 990 (<https://www.legal-tools.org/doc/01addc/>).

Article 27(2)

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.

Article 27(2) aims at providing the ICC with jurisdiction over crimes committed by state officials normally enjoying immunity *ratione materiae* or immunity *ratione personae*.¹ Also immunity accorded to state officials by customary international law is irrelevant according to the article since it explicitly refers to both national and international law.²

i. Waiver of Immunity for State Parties:

Article 27 is to be interpreted as a waiver of immunity accorded to the state officials by the State Parties to the ICC Statute.³ By acceding to the ICC Statute the state consents to Article 27 and the provision stating that immunities shall not bar the Court from exercising jurisdiction over their state officials. Thereby the state has waived the immunity that would otherwise be accorded to its state officials. The waiver of immunity is, according to most authors, to be interpreted as having effect not only in the relation between the State Party and the ICC, but also in the relation between two or more State Parties to the ICC Statute since all State Parties has consented to waive the immunities of its state officials (Kreß and Prost, 2016, p. 2125). Also, it has been argued that not giving the waiver effect in the relationship between different State Parties would deprive the Article of all practical meaning. If it only would have effect in the relationship between the individual member state and the ICC the Article would be practically useless since the ICC then would have to obtain a specific waiver from the member state of a state official when requesting other State Parties to co-

¹ Otto Triffterer/Christoph Burchard, “Article 27 – Irrelevance of Official Capacity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1054 (<https://www.legal-tools.org/doc/040751/>).

² William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 599 (<https://www.legal-tools.org/doc/b7432e/>).

³ Schabas, 2016, p. 600; Claus Kreß and Kimberley Prost, “Article 98 – Cooperation with Respect to Waiver of Immunity and Consent to Surrender”, in Otto Triffterer and Kai Ambos (eds.), 2016, pp. 2125 (<https://www.legal-tools.org/doc/040751/>).

operate with the arrest and surrender of that state official.⁴ This view has been confirmed by Pre-Trial Chamber II in *Al Bashir*, when the Pre-Trial Chamber stated that Article 27(2) applies both in the horizontal relationship between the Court and a State Party and in the vertical relationship between different State Parties, meaning that a state party cannot refuse to cooperate with the Court on the basis that a state official of another State Party enjoys immunity.⁵

ii. The Relationship Between Article 27 of the ICC Statute and Non-Member States to the Statute:

When it comes to the relationship between the ICC and non-member states the general rule in Article 34 of the Vienna Convention on the Law of Treaties, which provides that a treaty does not create obligations or rights for states which are not parties to a convention, must be held in mind. This is true also when it comes to the ICC Statute and Article 27. It has been argued that this would mean that state officials of non-State Parties to the ICC Statute still may be accorded immunity in accordance with international law since the State Parties to the Statute cannot remove the immunity of state officials of non-State Parties (Schabas, 2016, p. 600). Whether Article 27 grants for example heads of states of non-State Parties immunity in relation to the ICC, and consequently bars the Court from exercising jurisdiction, has been discussed not only in the literature but also in a number of decisions in the case of *Al Bashir*. A few of these decisions shall be commented on here. When reading the decisions it shall be kept in mind that Omar Al Bashir was the incumbent president of Sudan until 11 April 2019, and that Sudan is not a member state to the ICC Statute. The situation in Sudan was referred to the ICC pursuant to Article 13(b) of the ICC Statute by the United Nations Security Council through Resolution 1593 (2005).

Pre-Trial Chamber's Decision of 4 March 2009:

The question of whether Al Bashir's status as head of state of a non-State Party to the ICC would shield him from proceedings before the ICC was

⁴ Kreß and Prost, 2016, p. 2125; Dapo Akande, "International Law Immunities and the International Criminal Court", in *American Journal of International Law*, 2004, vol. 98, no. 3, p. 420 (<https://www.legal-tools.org/doc/0252ea/>).

⁵ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, ICC-02/05-01/09-302, paras. 76–80 (*Al Bashir*, 6 July 2017) (<https://www.legal-tools.org/doc/68ffc1/>).

addressed already when Pre-Trial Chamber I issued the first arrest warrant concerning Al Bashir.⁶ Pre-Trial Chamber I concluded that Al Bashir did not enjoy immunity from proceedings before the ICC (*Al Bashir*, 4 March 2009, para. 41). When reaching that conclusion, the Chamber considered, among other things, that one of the clearly stated goals of the ICC Statute is to end the impunity of perpetrators of international crimes (para. 42). The Chamber also relied on three core principles derived from Article 27: “(i) [the ICC Statute] shall apply equally to all persons without any distinction based on official capacity”; (ii) “official capacity as a Head of State or Government, a member of 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”; and (iii) “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” (para. 43). The Pre-Trial Chamber also stated that there is a provision in the ICC Statute dealing with the immunity of state officials and that this provision must, according to its interpretation of Article 21 of the ICC Statute, be used also in relation to non-party states (para. 44).

The Pre-Trial Chamber’s decision of 4 March 2009 has been widely discussed. According to Schabas, the Pre-Trial Chamber interpreted the applicability of Article 27(2) incorrectly as the Pre-Trial Chamber interpreted Article 27 as being applicable also to states that are not parties to the ICC Statute even though the Vienna Convention on the Law of Treaties explicitly provides that a treaty cannot create obligations for third states (Schabas, 2016, p. 601). Gaeta is however of the same opinion as the Pre-Trial Chamber and argues that Article 27(2) is indeed applicable also to state officials of non-party states even though she admits that the arguments put forward by the Pre-Trial Chamber in its decision are unconvincing.⁷ Kreß is also of the view that Article 27(2) is applicable to state officials of non-State Parties. He argues that when a situation is referred to the ICC

⁶ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3 (*Al Bashir*, 4 March 2009’) (<https://www.legal-tools.org/doc/e26cf4/>).

⁷ Paola Gaeta, Official Capacity and Immunities, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 322–325 (<https://www.legal-tools.org/doc/01addc/>).

from the United Nations Security Council, the Security Council can (and has, in the case of Sudan, indeed intended to) place a non-State Party in a position that is analogous to the position of a State Party. Consequently, the ICC can apply the provisions of the ICC Statute regardless of whether the state concerned is a party to the ICC Statute.⁸ As will be evident below, the Court has in later decision in the same case argued differently when reaching the conclusion that the Court is not barred from exercising jurisdiction over Al Bashir.

Pre-Trial Chamber's Decision of 12 December 2011 and Subsequent Decisions:

On 12 December 2011, the Pre-Trial Chamber stated that heads of states of non-parties to the ICC Statute do not enjoy immunity according to international law.⁹ The Pre-Trial Chamber supported its finding by referring to the statutes of the ICTY and the ICTR and the fact that the ICTY has stated that the corresponding article in the ICTY Statute is declaratory of customary international law (*Al Bashir*, 12 December 2011, paras. 29–31). It is however worth noting that the statutes of the ICTY and ICTR does not explicitly waive the immunity accorded to state officials, which Article 27 of the ICC Statute does. A reference was also made by the Pre-Trial Chamber to an *obiter dictum* in the Arrest Warrant Case stating that incumbent high ranking state officials may be subject to proceedings before some international courts, including the ICC (para. 33) and to an argument given by Cassese that the underlying rationales for immunity *ratione personae* are different depending on whether a national or an international court is exercising jurisdiction (para. 34). According to the Pre-Trial Chamber, Article 27 of the ICC Statute is declaratory of customary international law not only when it comes to immunity *ratione materiae* but also with regard to immunity *ratione personae*.

⁸ Claus Kreß, “The International Criminal Court and Immunities under International Law for States Not Party to the Court’s Statute”, in Morten Bergsmo and Ling Yan (eds.), *State Sovereignty and International Criminal Law*, FICHL Publication Series No. 15, Torkel Opsahl Academic EPublisher, Beijing, 2012, pp. 241–242 (<https://www.legal-tools.org/doc/a634d0/>).

⁹ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, ICC-02/05-01/09-139, para. 36 (*Al Bashir*, 12 December 2011’) (<https://www.legal-tools.org/doc/476812/>).

When issuing a decision regarding the co-operation of the Democratic Republic of the Congo ('DRC'), Pre-Trial Chamber II acknowledged the issue with determining the scope of Article 27 in relation to non-State Parties and stated that "the exception to the exercise of the Court's jurisdiction provided in article 27(2) should, in principle, be confined to those States Parties who have accepted it" (*Al Bashir*, 12 December 2011, para. 26). However, the Pre-Trial Chamber found that the Security Council of the United Nations with its resolution referring the situation in Darfur to the Court had lifted Al Bashir's immunities as such immunities otherwise would be a procedural bar from prosecution, rendering "the SC decision requiring that Sudan 'cooperate fully' and 'provide any necessary assistance to the Court' senseless".¹⁰ That customary international law provides for immunity of heads of state with regard to proceedings before international courts was also stated by Pre-Trial Chamber II in a decision in relation to South Africa (*Al Bashir*, 6 July 2017, paras. 68 and 72). However, also in that decision Pre-Trial Chamber II found that the United Nations Security Council Resolution triggering the jurisdiction of the Court had made the ICC Statute in its entirety applicable with regard to the referred situation. Consequently, also Article 27(2) of the ICC Statute was applicable with respect to Sudan, meaning that any immunity based on official capacity was inapplicable (paras. 85 and 91).

Pre-Trial Chamber I reached the conclusion that Al Bashir's status as head of state did not bar the Court from exercising its jurisdiction in a decision regarding the non-compliance of the Republic of Chad,¹¹ and Pre-Trial Chamber II reached the same conclusion in decisions with regard to the non-compliance by Djibouti and Uganda.¹²

¹⁰ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, 9 April 2014, ICC-02/05-01/09-195, para. 29 (<https://www.legal-tools.org/doc/89d30d/>).

¹¹ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision pursuant to Article 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, 13 December 2011, ICC-02/05-01/09 (<https://www.legal-tools.org/doc/e2c576/>).

¹² ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, 11 July 2016, ICC-02/05-01/09-266 (<https://www.legal-tools.org/doc/a09363/>); and *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar

The Appeals Chamber's Judgment of 6 May 2019:

The question of Al Bashir's capacity as head of state of a non-State Party to the ICC Statute has also recently been subject of the scrutiny of the Appeals Chamber, after Jordan failed to comply with a request of the Court to arrest Al Bashir and surrender him. Pre-Trial Chamber II issued a decision regarding the non-compliance on 11 December 2017,¹³ which Jordan appealed. The Appeals Chamber delivered its judgment on 6 May 2019.¹⁴ It shall be noted that Al Bashir was at that point no longer the head of state of Sudan, but that he still held that office when Jordan was requested to arrest and surrender him.

In its judgment, the Appeals Chamber reached the conclusion that customary international law does award immunity to heads of state vis-à-vis international courts as there is no state practice or *opinion juris* that supports that such an immunity exists. In other words, customary international law does not bar an international court from exercising jurisdiction over persons who would otherwise enjoy immunity *ratione personae*. Consequently, Article 27(2) of the ICC Statute reflects customary international law (paras. 103 and 113). Furthermore, the Appeals Chamber stated that "it is clear that the purpose of article 27(2) is to ensure that immunities do not stand in the way of the exercise of the Court's jurisdiction; the Court's jurisdiction must be effective" (*Al Bashir*, 6 May 2019, para. 122).

Whether this judgment will put an end to the discussion of the immunity *ratione personae* of high-ranking state officials of non-State Parties of the ICC Statute remains to be seen. It is however clear that the Court's opinion is that customary international law does not prevent the Court from exercising its jurisdiction even with regard to persons who would be granted immunity from criminal proceedings before national courts.

Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, 11 July 2016, ICC-02/05-01/09-267 (<https://www.legal-tools.org/doc/51c322-1/>).

¹³ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or [*sic*] Omar Al-Bashir, 11 December 2017, ICC-02/05-01/09-309 (<https://www.legal-tools.org/doc/5bdd7f/>).

¹⁴ ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-387-Corr ('*Al Bashir*, 6 May 2019') (<https://www.legal-tools.org/doc/0e5307/>).

Cross-reference:

Article 98(1).

Doctrine:

1. Paola Gaeta, “Official Capacity and Immunities”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002. pp. 975–1001 (<https://www.legal-tools.org/doc/01addc/>).
2. Claus Kreß and Kimberley Prost, “Article 98 – Cooperation with Respect to Waiver of Immunity and Consent to Surrender”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 2117–2146 (<https://www.legal-tools.org/doc/040751/>).
3. Claus Kreß, “The International Criminal Court and Immunities under International Law for States Not Party to the Court’s Statute”, in Morten Bergsmo and Ling Yan (eds.), *State Sovereignty and International Criminal Law*, FICHL Publication Series, No. 15, Torkel Opsahl Academic EPublisher, Beijing, 2012, pp. 223–265 (<https://www.legal-tools.org/doc/a634d0/>).
4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 594–606 (<https://www.legal-tools.org/doc/b7432e/>).
5. Otto Triffterer/Christoph Burchard, “Article 27 – Irrelevance of Official Capacity”, in Otto Triffterer and Kai Ambos (eds.), n, 2016, pp. 1037–1055.
6. Paola Gaeta, “Does President Al Bashir Enjoy Immunity from Arrest?”, in *Journal of International Criminal Justice*, 2009, vol. 7, no. 2, pp. 315–332 (<https://www.legal-tools.org/doc/83505b/>).
7. Dapo Akande, “International Law Immunities and the International Criminal Court”, in *American Journal of International Law*, 2004, vol. 98, no. 3, pp. 407–433 (<https://www.legal-tools.org/doc/0252ea/>).

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Article 28

Responsibility of Commanders and other Superiors

General Remarks:

Article 28 sets out the parameters for how the ICC shall apply the doctrine of superior responsibility under which, in specific circumstances, military commanders, persons effectively acting as military commanders and certain other superiors are held accountable for the crimes undertaken by their subordinates, or perhaps more accurately, with regard to the crimes of their subordinates.

Superior responsibility has its origins in military law and finds its basis in the principle that armed forces always should be “commanded by a person responsible for his subordinates” as expressed in Article 1(1) of the Hague Regulations from 1899 and the corresponding legal duty of the superior to “ensure that members of the armed forces under their command are aware of their obligations” and to prevent and repress breaches undertaken by subordinates as expressed in Article 87 and 86 of Additional Protocol I from 1977 respectively.¹ The doctrine has successively been developed and refined and is now understood to also cover relationships that are not military in nature (see commentary on Article 28(2)(b) below). Article 28 has kept the old distinction between the responsibility of military commanders and persons effectively acting as military commanders on the one hand and other superiors (often referred to as ‘non-military’ or ‘civilian superiors’) on the other. The responsibility of the former is addressed in Article 28(a) whereas the responsibility of the latter, non-military superiors, are regulated in Article 28(b). Hereinafter the term ‘command responsibility’ will be used when referring to the responsibility under Article 28(a), the term ‘non-military superior responsibility’ will be used when referring to the responsibility under Article 28(b), and the term ‘superior responsibility’ will be used when referring to the overall responsibility covered under Article 28. Early ICTY case law articulated a three-prong-test under which one would determine whether a person could be convicted on the basis of

¹ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/d9328a/>).

superior responsibility under ICTY Statute Article 7(3) (the Article corresponding to ICC Statute Article 28):

- Existence of a superior-subordinate relationship:

Put in simple terms, this entails that in situations where a certain individual (military as well as non-military), in a *de jure* or *de facto* position of authority, possesses a material ability to prevent and punish subordinates from committing international crimes, there exists a superior-subordinate relationship.

- Subjective element (*mens rea*):

There are different standards set out as the subjective element for superior responsibility.

- Actual knowledge:

The superior has actual knowledge that his subordinates are about to commit or have committed crimes (the actual knowledge can be proven with direct or circumstantial evidence).

- ‘Reason to know’- standard:

that is, the superior possesses information of a nature which would put him on notice of the risk of such offences by indicating a need for additional investigation in order to ascertain whether the crimes were about to be or had been committed.

If fulfilled, either of these subjective elements would give rise to responsibility under the doctrine of superior responsibility.

- The superior’s failure to prevent or punish the crimes.

The superior can incur responsibility for either:

- Failing to prevent the crimes before they occur, or,
- Failing to punish the subordinates for committing the crimes after they have occurred.²

The same three elements are also present in Article 28 of the ICC Statute. The elements do however differ in some respects from the standards set out in the jurisprudence from the ICTY and other *ad hoc* tribunals. These elements, as well as some additional requirements (for example, causality) and interpretations of the doctrine, will be presented and ex-

² Kai Ambos, “Superior Responsibility”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 833–835 (<https://www.legal-tools.org/doc/cbffe9/>).

plained in the following commentary. It is however important to bear in mind that the ICC is not bound by the case law of the other international courts and tribunals.³ The case law of the *ad hoc* tribunals is however vast with regard to the doctrine of superior responsibility and may hence assist the Chambers in its interpretation of the Statute. The elements of the doctrine will however, as far as possible, be presented in the same order as they appear in the wording of the article and will therefore follow the structure as laid out therein.

Doctrine: For the bibliography, see the final comment on Article 28.

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³ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343, para. 72 (<https://www.legal-tools.org/doc/edb0cf/>).

Article 28: In Addition to Other Grounds

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

According to the first line of the article, superior responsibility adds to “other grounds of criminal responsibility” which are to be found elsewhere in the ICC Statute. These “other grounds of criminal responsibility” (hereinafter referred to as ‘modes of participation’) are specifically listed in Article 25.

Superior responsibility is thus distinct from, for example, “ordering” under Article 25 which requires the superior to have actively contributed to the crime in question.¹ With regards to accountability under Article 28, there need not be proof of any order or action undertaken by the superior him- or herself. Rather, under this doctrine, the superior incurs responsibility on the basis of his or her inaction, or more accurately, for the failure or omission to prevent or punish the actions of the perpetrators. However, the exact nature of the doctrine of superior responsibility has long been discussed and differing opinions on the subject have emerged in both academic debate and case law.

It has, for example, sometimes been questioned as to what extent the doctrine is merely disciplinary as opposed to penal or criminal in nature. This question partly originates from the wording of and the discussions held during the adoption of Article 86(2) of Additional Protocol I from 1977.² Article 86(2) reads: “The fact that a breach of the Conventions or this Protocol was committed by a subordinate does not absolve his superiors from *penal* or *disciplinary* responsibility, *as the case may be*”. (emphasis added) The ICC Statute has eliminated any such confusion, making Article 28 equally relevant to all “crimes within the jurisdiction of the Court” and by, at the outset of the article, specifying that it is criminal responsibility of the superior that the Article gives rise to.

¹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 405 (<https://www.legal-tools.org/doc/07965c/>).

² Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977, Article 86(2) (‘AP I’) (<https://www.legal-tools.org/doc/d9328a/>).

Another interesting question relating to the nature of the doctrine is precisely what the superior is held criminally responsible for if he or she is found guilty strictly on the basis of Article 28. Put in simple terms, the issue at hand is how superior responsibility relates to the ‘principal crime’ (that is, the crime committed by the subordinates; war crime, crimes against humanity or genocide). In other words, should the superior, if convicted strictly based on the doctrine of superior responsibility, for example be held criminally responsible merely for his or her own “derelection of duty” or should he or she be held accountable for the ‘principal crime’? This is not merely a theoretical question. Depending on what one believes that the superior is responsible for, there will be practical consequences, not only in relation to the stigma attached to a guilty verdict under the doctrine, but also in respect of, for example, sentencing considerations, evidentiary demands and possibly even the interpretation of the elements of the doctrine.

The wording of Article 28 suggests that the superior should be responsible for the crimes committed by his subordinates. A literal interpretation hereof would thus lead to the conclusion that the superior should be held responsible for the “principal crime”. The interpretation of the Article is nevertheless, not as clear cut as it might seem *prima facie*. The issue is still under debate and so far unresolved. A straight forward answer to these questions could hence not be provided until it has properly been addressed by the ICC, however, various thoughts have been purported in the academic debate and case law emanating from the *ad hoc* tribunals. The following is a brief presentation of a few examples of differing opinions concerning the interpretation of the nature of the doctrine.

First, one possible interpretation as to the nature of the doctrine is that the superior is responsible for actually having participated in the commission of the “principal crime”. As such the superior becomes responsible for the ‘principal crime’ under the theory of ‘commission by omission’.

The general rules pertaining to criminal omission is a complex area of law wherefore a few words about the meaning hereof seem to be called for in this respect. A simplified explanation of the concept (or rather one variant hereof) is that where there is a duty to act prescribed by law, a person omitting to fulfil such a duty could be held criminally responsible for the crime.

An article dealing with a general responsibility for omission, as suggested in the Draft Statute, was excluded from the final version of the ICC

Statute. It could be argued that the only remnants of a rule on omission in the Statute, is enshrined in Article 28.³

The basis of the doctrine of superior responsibility is, unquestionably, the superior's legal duty to control subordinates. Since the adoption of Article 86(2) of AP I from 1977 there has been a clear, codified legal duty in international humanitarian law for a superior to prevent and punish criminal activities undertaken by his or her subordinates. Omitting to fulfil this legal duty gives rise to criminal responsibility. It could thus be argued that these rules are in line with general rules on commission by omission.

However, whether the criminal responsibility covers solely the superiors own 'failure to supervise' or the 'principal crime', with respect to theories of omission, is still under debate. The idea that superior responsibility should give rise to direct responsible for the 'principal crime' under the theory of commission by omission, has been heavily criticized.

Second, another possible interpretation of the nature of the doctrine is whether superior responsibility is a mode of participation and the superior in this manner is convicted as a participant in the 'principal crime'. Superior responsibility shares a common feature with other modes of participation in that they are accessory to the principal crimes committed by other perpetrator/s. The difference is however that in respect of the other modes of participation there needs to be a positive act or, at least, a certain level of contribution to the commission of the principal crime. As stated earlier, superior responsibility is rather characterized by inaction or non-action of the superior. Despite this fact, there have been strong proponents for an interpretation of that superior responsibility should be interpreted as a mode of participation.⁴

Case law emanating from the aftermath of WWII tends to view superior responsibility as a Mode of Participation and the superiors were convicted for the principal crime committed by the subordinates.⁵

³ Kai Ambos, "Superior Responsibility", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 857 (<https://www.legal-tools.org/doc/cbffe9/>).

⁴ ICTY, *Prosecutor v. Orić*, Appeals Chamber, Prosecution Appeals Brief, 16 October 2006, IT-03-68-A, para. 162 (<https://www.legal-tools.org/doc/cfd93/>).

⁵ United States Military Tribunal at Nuremberg, *US v. Leeb (German High Command Trial)*, Judgment, 28 October 19348, TWC Vol. XI, pp. 512–543 (<https://www.legal-tools.org/doc/702b19/>); *US v. List (Hostages Trial)*, Judgment, 19 February 1948, TWC Vol. X and XI, 1271 (<https://www.legal-tools.org/doc/9df653/>).

The early case law from the ICTY also tend to treat superior responsibility as a mode of participation or at least that the superior is responsible for the principal crime.⁶ According to a survey undertaken by the Trial Chamber in the *Halilović* judgement, it was concluded that, up to that date, the superior had consistently been “responsible for the crimes of his subordinates [when convicted] under Article 7(3)“, that is, the responsible for the ‘principal crime’.⁷ Exactly what is meant by the fact that the superior is responsible for “the crimes of his subordinates” is, however, still not clear.

In the *Halilović* judgement, the Trial Chamber did however reach a different conclusion than what had been indicated in previous case law. The interpretation given in that case was that the superior is merely responsible for his neglect of duty with regard to the crimes committed by subordinates (*Halilović*, 16 November 2005, para. 54). This view was subsequently reiterated in, for instance, the *Orić* and *Hadžihasanović* Appeals Chamber judgements (see below).

A shift does accordingly seem to have occurred from the early case law, where superior responsibility was viewed as a Mode of Participation, alternatively that the superior in some other form was held responsible for the ‘principal crime’, to later case law purporting a more restrictive view concerning the nature of the doctrine.

A third possible interpretation of the nature of the doctrine is that the criminal responsibility of the superior is limited to his or her own failure to act with regard to, or in relation to, the ‘principal crime’. In accordance with this interpretation, the superior is convicted, not for the ‘principal crime’, but merely for his or her own failure to act or. This interpretation does however evaluate the level of responsibility, not only to the gravity of the superior’s own failure, but also to the gravity of the ‘principal crime’.

This view is supported by the *Halilović* Trial Chamber judgement which deemed that the superior does not share the same responsibility as the subordinates and that superior responsibility solely is limited to his or her failure to perform the duties prescribed by international law. The Trial

⁶ For example, ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Judgment 16 November 1998, IT-96-21-T, para. 333 (<https://www.legal-tools.org/doc/6b4a33/>); *Prosecutor v. Delalić et al.*, Appeals Chamber, Judgment, 20 February 2001, IT-96-21-A, para. 198 (<https://www.legal-tools.org/doc/051554/>); *Prosecutor v. Aleksovski*, Trial Chamber, Judgment, 25 June 1999 IT-95-14/1-T, para. 67 (<https://www.legal-tools.org/doc/52d982/>).

⁷ ICTY, *Prosecutor v. Halilović*, Trial Chamber, Judgment, 16 November 2005, IT-01-48-T, para. 53 (‘*Halilović*, 16 November 2005’) (<https://www.legal-tools.org/doc/abda04/>).

Chamber did however stress the connection to the gravity of the principal crime in the following: “The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered *in proportion to the gravity of the offences committed*” (*Halilović*, 16 November 2005, para. 54, emphasis added). The connection between the responsibility of the superior and the gravity of the “principal crime” is further developed in the *Hadžihasanović* Appeals judgement.⁸

The conclusion of some is that command responsibility is a “*sui generis* form of culpable omission” which has (no equivalence, is incomparable, or is distinct) from any other responsibility in either domestic or international criminal law.⁹ In the Bemba judgement the Trial Chamber concluded that the responsibility under Article 28 indeed is a mode of liability, albeit distinct from the other modes of liability found in Article 25.¹⁰

It furthermore stressed that it is “important to recognise that the responsibility of a commander under Article 28 is different from that of the person who ‘commits’ a crime within the jurisdiction of the Court”. (*Bemba*, 21 March 2016, para. 173). It finally concluded that Article 28 encompasses a *sui generis* mode of liability (para. 174). Exactly how these statements relate to all the alternative explanations thus far presented in case law and in the academic debate is not clear.

It could however be suggested that the first alternative mentioned above thus is off the table, whereas the view with regards to the second and third alternative interpretations still is not properly investigated.

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

⁸ ICTY, *Prosecutor v. Hadžihasanović*, Appeals Chamber, Judgement, 22 April 2008, IT-01-47-A, paras. 312–318 (<https://www.legal-tools.org/doc/2705b3/>).

⁹ Chantal Meloni, “Command Responsibility – Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?”, in *Journal of International Criminal Justice*, 2007, vol. 5, no. 3 (<https://www.legal-tools.org/doc/42e95b/>); Guénael Mettraux, *The Law of Command Responsibility*, Oxford University Press, 2009, p. 38 (<https://www.legal-tools.org/doc/1f6159/>); Ambos, 2002.

¹⁰ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343, paras. 171, 173 (*Bemba*, 21 March 2016’) (<https://www.legal-tools.org/doc/edb0cf/>).

Article 28(a): Military Commander

A military commander or person effectively acting as a military commander

As mentioned in the opening paragraph to the commentary on Article 28, the elements of the doctrine of superior responsibility consists of three major parts; (i) the existence of a superior-subordinate relationship, (ii) the subjective element (*mens rea*), and (iii) the failure to prevent and punish.¹ Thus, the second paragraph of Article 28, deals with the first part; the conditions established for determining the existence of a superior-subordinate relationship.

Explained in broad strokes, the existence of a superior-subordinate relationship entails that the superior (military or non-military) is in a position of effective ‘command and control’ or ‘authority and control’ (as the case may be) to the extent that he or she possesses the material ability to prevent or punish the subordinate when the latter are about to or have committed crimes. There are however, several details that need further consideration and clarification. These clarifications will be offered following the structure provided by the wording of the Article. The first step in the assessment of the existence of a superior-subordinate relationship, is determining the status of the superior. Secondly, the ‘principal crime’ has to be identified and evaluated. Thirdly, the status of the subordinate as well as his or her relation to the ‘principal crime’ has to be assessed. The fourth aspect to consider is the requirements placed on the relationship as such (that is, the quality or effectiveness thereof). Finally, the link between the superior, subordinate and the ‘principal crime’ needs to be tied together through a causality test.

As to the first step of the evaluation, that is, the status of the superior, Article 28(a) strictly deals with military commanders and persons effectively acting as a military commander (unless otherwise provided, these two will hereinafter be referred to as commanders). The particular status of and elements relating to non-military superiors are covered in Article 28(b) and are explained in the commentary provided with respect thereof. Non-military superiors are dealt with in a separate section of the Article.

¹ ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Judgment, 16 November 1998, IT-96-21-T, para. 346 (*‘Delalić et al.*, 16 November 1998’) (<https://www.legal-tools.org/doc/6b4a33/>).

A “military commander” is *generally* a member of the armed forces who is formally assigned authority to issue direct orders to subordinates or, given that there are generally several commanders in a chain-of-command, a commander may also have the authority to issue orders to commanders of units further down the chain-of-command. The rank of the commander is not of importance as such (for example, be he or she a section leader, a platoon commander, a company commander, a battalion commander, a brigade commander, a division commander and others in ascending seniority),² wherefore a Head of State also may be considered a commander who may incur responsibility under the present doctrine.³ Superiors high up in the line of command may be held responsible with regard to crimes undertaken by units in much lower echelons in the chain-of-command.⁴ This standpoint is also reflected in the Bemba decision: “In this respect, a military commander could be a person occupying the highest level in the chain of command or a mere leader with few soldiers under his or her command”.⁵

It is hence not necessary that the commander is the direct superior of the subordinate who commits the principal crime. Of importance for the formal assessment of the status of the superior is whether the commander indeed possesses the authority to issue orders in a formal hierarchical structure.⁶

A “person effectively acting as military commander” is a wider category and may include police officers who have been assigned command over armed police units or persons responsible for paramilitary units not incorporated into the armed forces (Fenrick, 1999, p. 517).

² Otto Triffterer and Roberta Arnold, “Article 28”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1091–1092 (<https://www.legal-tools.org/doc/040751/>).

³ William Fenrick, “Article 28”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 517 (<https://www.legal-tools.org/doc/434159/>).

⁴ ICTY, *Prosecutor v. Orić*, Trial Chamber, Judgment, 30 June 2006, IT-03-68-T, para. 310 (<https://www.legal-tools.org/doc/37564c/>).

⁵ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 408 (‘*Bemba*, 15 June 2009’) (<https://www.legal-tools.org/doc/07965c/>).

⁶ *Delalic*, 16 November 1998, confirmed in *Prosecutor v. Delalić et al.*, Appeals Chamber, Judgment, 20 February 2001, IT-96-21-A, paras. 251–252 (‘*Delalić et al.*, 20 February 2001’) (<https://www.legal-tools.org/doc/051554/>).

The above-mentioned examples deal with the determination of the legal status of the commanders who have been *formally* assigned authority to issue orders. Situations where someone is formally assigned command are referred to as being ‘*de jure* commanders’ or having a ‘*de jure* position of command’. In conflict situations it is nevertheless common that a person, who is *not* formally assigned command, despite this fact, assumes command over units or other subordinates. If the units indeed pay heed to the instructions of such a person (that is, if the person in reality possesses ‘effective command and control’ or ‘effective authority and control’), he or she is said to be a ‘*de facto* commander’ or having a ‘*de facto* position of command’. The concept “person effectively acting as military commander” may accordingly also include persons who have assumed *de facto* control over armed forces, armed police units or paramilitary units (Fenrick, 1999, p. 518). That a person may be accountable under the doctrine of superior responsibility based on “*de facto* command” finds support in the case law of both the *ad hoc* Tribunals and the ICC. Representative of this opinion is the following quote from the *Delalić et al.* Trial Chamber: “Formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person’s *de facto*, as well as *de jure*, position as a commander” (*Delalić et al.*, 16 November 1998, para. 370). The same pronouncement is encapsulated in the following quote from the ICC: “With respect to a “person effectively acting as a military commander”, the Chamber considers that this term is meant to cover a distinct as well as a broader category of commanders. This category refers to those who are not elected by law to carry out a military commander’s role, yet they perform it *de facto* by exercising effective control over a group of persons through a chain of command” (*Bemba*, 15 June 2009, para. 409).

It is furthermore not necessary that the commander is in the direct chain-of-command to the subordinate, as long as effective “command and control” or “authority and control” can be established (*Delalić et al.*, 20 February 2001, paras. 251–252).

A person who formally has been assigned the authority to issue orders may nevertheless have lost control of the subordinates in real life. Despite attempts to make the subordinates adhere to his or her orders, the commander might not be able to reach them. In these situations, the commander lacks *de facto* command notwithstanding his or her *de jure* position of command. According to Ambos, these cases should be interpreted in a

restrictive manner, see below.⁷ In these cases, it is of course the actual material ability of the commander that needs to be considered and the disobedience of the subordinates can instead be counted as evidence of the lack of effective control.⁸ As stated by the Trial Chamber in the *Delalić et al.* case, “Instead, the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates” (*Delalić et al.*, 16 November 1998, para. 370).

The status of the commander is thus closely connected to the interpretation of the elements ‘effective command and control’ as well as ‘effective authority and control’.

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

⁷ Kai Ambos, “Superior Responsibility”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 857 (<https://www.legal-tools.org/doc/cbffe9/>).

⁸ ICTY, *Prosecutor v. Blaškić*, Appeals Chamber, Judgement, 29 July 2004, IT-95-14-A, paras. 69, 399 (<https://www.legal-tools.org/doc/88d8e6/>).

Article 28(a): Criminal Responsibility

shall be criminally responsible for the crimes within the jurisdiction of the Court committed

For a comment about “criminally responsible for the crimes” please refer to the discussion provided on above under the heading “In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court”.

“Crimes within the jurisdiction of the Court” under the Statute refers to genocide, crimes against humanity, war crimes and the crime of aggression according to Articles 5(1)(a)-(c) and 6–8 *bis*.

According to the text of Article 28, one of the above listed ‘principal crimes’ needs to have been “committed” in order for the superior to incur responsibility under the doctrine. There are however differing opinions as to the meaning of the term “committed” as well as the consequences that might follow from this term. One such opinion is that the term “committed” means that the crime has to have been “successfully brought to an end”.¹ Another opinion is that the word “committed” is a generic term with no particular legal significance. When viewed as a generic term there are not many problems arising from this element, however, some problems are encountered if committed should entail that the crime has to have been successfully brought to an end.

A crucial issue in this respect is whether “committed” means that the superior never could incur liability under the doctrine for so called “‘inchoate offences’ (for example, attempt, situations when the primary perpetrator voluntarily withdraws, solicitation, incitement, complicity).

Responsibility for attempted commission of the crimes in the Statute is provided under Article 25(3)(f) ICC Statute. Consequently, the Statute is in general open to holding people responsible for the attempted commission of a crime.² However, the term “committed” in Article 28 creates some

¹ Otto Triffterer and Roberta Arnold, “Article 28”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1088 (<https://www.legal-tools.org/doc/040751/>).

² Kai Ambos, “Article 25”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1022–1025 (<https://www.legal-tools.org/doc/040751/>).

confusion with regard to the applicability of the doctrine of superior responsibility to attempted or inchoate crimes. The issue of inchoate offences was addressed in the *Hadžihasanović* case, where it was concluded that the doctrine was not applicable to inchoate offences.³ The Trial Chamber in the *Orić* case seemed to disagree with this position. In the latter case the Trial Chamber, concluded that the duty of the superior to prevent crimes starts already at the preparation phase of the crime, and that the doctrine hence is applicable to inchoate offences.⁴

With regards to the voluntary withdrawal of the principal perpetrator, there seems to be a tendency to conclude that, as superior responsibility is accessory to the principal crime, it would be unfair to hold the superior more liable than the principal perpetrator. Article 28 would thus not be applicable in these situations.

Another discernible problem is the issue as to whether the superior can be charged under the doctrine when the subordinates are merely convicted for the ‘principal crime’ as an accomplice or linked to the crime under any other mode of participation under Article 25(3)(b-e). In the international discourse, arguments have been brought forth contending that the word “committed” should be isolated to crimes undertaken by the principal perpetrator (that is, solely those covered under ICC Statute, Article 25(3)(a)). However Ambos asserts that a person can “commit” a crime by any Mode of Participation listed in Article 25(3), at least in the context of that same Article (Ambos, 2008, p. 747). An extensive interpretation of the term “committed” in this respect has also been preferred with regard to the ICTY Statute. An example hereof is provided by the expansion of Article 7(1) to include the concept of joint criminal enterprise (via the word “committed”). The *Orić* Trial Chamber addressed the issue as to the interpretation of the term “committed” with regards to other modes of participation in direct connection to its applicability to the doctrine of superior responsibility; “For these and other reasons which, taking into account the relevant case law of this Tribunal, are elaborated in more detail in the *Boškoski* case, the Trial Chamber holds that the criminal responsibility of a superior under Article 7(3) of the Statute is not limited to crimes committed by subordinates in person but encompasses any modes of criminal respon-

³ ICTY, *Prosecutor v. Hadžihasanović*, Trial Chamber, Decision on Joint Challenge to Jurisdiction, 22 April 2008, IT-01-47-PT, para. 209 (<https://www.legal-tools.org/doc/c64fc0/>).

⁴ ICTY, *Prosecutor v. Orić*, Trial Chamber, Judgment, 30 June 2006, IT-03-68-T, para. 328 (<https://www.legal-tools.org/doc/37564c/>).

sibility” (*Orić*, 30 June 2006, para. 301). Statements made in the *Orić* Appeals judgment supports such a conclusion.⁵ The issue is however still open for debate.

Another interesting question is whether the crime can be considered to have been “committed” if the primary perpetrator is not identified or for any other reason is not convicted of the crime. It can thus be established that the *actus reus* of the crime have been perpetrated, nevertheless, since the primary perpetrator has not been identified or convicted for the crime, it cannot be fully proven that all the elements of the crime are fulfilled (for example, the mental element). The question is whether the crime can be considered as “committed” despite the fact that some of the material elements of the crime thus cannot be established. The Appeals Chamber addressed the issue of unidentified subordinates in relation to the doctrine of superior responsibility in the *Orić* case: “The Appeals Chamber considers 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*, 3 July 2008, paras. 35, 48). Reasonably, some level of identification must hence take place, however the level of specificity hereof is still open to debate.

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

⁵ ICTY, *Prosecutor v. Orić*, Appeals Chamber, Judgment, 3 July 2008, IT-03-68-A, para. 47 (*‘Orić*, 3 July 2008’) (<https://www.legal-tools.org/doc/e053a4/>).

Article 28(a): Structure of Forces

forces

In the following section the status of the subordinate is addressed. Up to this point, the person that committed the ‘principal crime’, with regard to which the superior bears responsibility under the doctrine, has been referred to as a “subordinate”. This is an overarching term meant to also include the civilian aspect of the relationship. This is furthermore the term used in the ICTY Statute, Article 7(3). However, in Article 28(a) the subordinates are referred to as “forces” (as opposed to Article 28(b) which also utilizes the term subordinate). The precise significance of the choice to use this term is not clear, however, if interpreted in accordance with its ordinary meaning the term ought to entail certain restrictions in line with similar definitions provided in international humanitarian law.

In order for members of irregular armed forces to be counted as combatants and granted prisoner of war status, they need to be under a command responsible for the conduct of his or her subordinates, as well as be subjected to an internal disciplinary system which enforces compliance with international humanitarian law.¹ According to Fenrick, “forces” ought to be interpreted in lines herewith and may thus signify the armed forces of a party to a conflict, that is, all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.² According to Arnold, the concept of forces does not merely include the regular and irregular armed forces under a responsible command, but also *guerilla* groups and private subcontractors (even when the illegal actions undertaken by such groups are not imputable to the state) so long as effective “command and control” or “authority and control” can be traced back to a person in a position of responsible command. Arnold also is of the view that the term forces include armed police and paramilitary units. The concept of “forces” may thus be broader than what it seems *pri-*

¹ Geneva Convention (III) relative to the treatment of prisoners of war, 12 August 1949, Article 4(A)§2 (<https://www.legal-tools.org/doc/365095/>).

² William Fenrick, “Article 28”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 518 (<https://www.legal-tools.org/doc/434159/>).

ma facie and might be closer to the concept of subordinates as it has been applied in most international tribunals.³

One interesting question relating to the status of the subordinates is whether he or she needs to be the principal perpetrator of the principal crime, or whether superior-subordinate relationship also can be established between a superior and a subordinate who is merely an accomplice to the principal crime. Another question concerning to the status of the subordinates, is whether the requirements of superior-subordinate relationship can be satisfied in cases where the subordinates cannot be individually identified. These questions were addressed above under the discussions with regards to the meaning of the term ‘committed’.

In the *Bemba* confirmation decision it seems as if the Trial Chamber has chosen to avoid these complexities, consequently using the terms forces and subordinates synonymously.⁴

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

³ Otto Triffterer and Roberta Arnold, “Article 28”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1086 (<https://www.legal-tools.org/doc/040751/>).

⁴ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 428 (<https://www.legal-tools.org/doc/07965c/>).

Article 28(a): Effective Command and Control or Effective Authority and Control

under his or her effective command and control or effective authority and control

As for the distinction between the phrases “command and control” or “authority and control” a few thoughts have been presented in both the academic debate and ICC case law. According to Ambos, “control” is an umbrella term encompassing both command and authority.¹ According to Fenrick, forces under the commander’s “command and control” are subordinated to the commander in a direct chain-of-command. This chain-of-command may however, as mentioned above, be either a *de jure* or *de facto*. Forces under the “command and control” also encapsulate forces in lower echelons of the chain-of-command, as long as it can be ascertained that the commander is able to issue orders, either directly or through intermediate subordinate commanders.² This view is furthermore upheld in the *Orić* case.³

“Authority and control” is a somewhat broader concept than “effective command and control” according to Fenrick. Effective authority and control also encompasses commanders who exercise control over forces which are not placed under him or her in a direct chain-of-command (for example, third parties who do not belong directly to the chain of command or armed forces under said commander). One such example is the occupational zone commander who has the authority to give orders to all forces within their occupational zone, relating to matters of public order and safety (Fenrick, 1999, p. 518).

The definition and the distinction between these terms was addressed by the ICC in the *Bemba* case, where it was concluded that:

¹ Kai Ambos, “Superior Responsibility”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 857 (<https://www.legal-tools.org/doc/cbffe9/>).

² William Fenrick, “Article 28”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 518 (<https://www.legal-tools.org/doc/434159/>).

³ ICTY, *Prosecutor v. Orić*, Trial Chamber, Judgment, 30 June 2006, IT-03-68-T, para. 313 (<https://www.legal-tools.org/doc/37564c/>).

Article 28(a) of the Statute refers to the terms “effective command and control” or “effective authority and control” as applicable alternatives in situations of military commanders *strictu sensu* and military-like commanders. In this regard, the Chamber considers that the additional words “command” and “authority” under the two expressions has no substantial effect on the required level or standard of “control” [...] In this context, the Chamber underlines that the term “effective command” certainly reveals or reflects “effective authority”. Indeed, in the English language the word “command” is defined as “authority, especially over armed forces”, and the expression “authority” refers to the “power or right to give orders and enforce obedience”.⁴

The “command and control” as well as the “authority and control” has to be “effective”. Read as a whole, this phrase encapsulates the “qualitative test” as to the nature of the superior-subordinate relationship as such; the commander needs to have effective “command and control” alternatively “effective authority and control” over forces (that is, subordinates, see discussion above) under his or her command. As a reiteration of previous statements provided above, the cornerstone of the qualitative aspect of the relationship, namely the effectiveness hereof, is that the superior possesses “the material ability to prevent or punish the criminal conduct of his/her subordinates”.⁵ The Appeals Chamber, in the same case, stresses the fact that it is not sufficient that a superior has “substantial influence” as to incur responsibility under the doctrine of superior responsibility. The interesting question to be addressed here, is however, what precisely is meant by the effectiveness prerequisite, that is, possessing the material ability to prevent and punish. The issue has been addressed in several international cases, however the Appeals Chamber in the *Blaškić* case succinctly expresses the requirement in the following terms: “The indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators

⁴ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, paras. 412–413 (*Bemba*, 15 June 2009) (<https://www.legal-tools.org/doc/07965c/>).

⁵ ICTY, *Prosecutor v. Delalić et al.*, Appeals Chamber, Judgment, 20 February 2001, IT-96-21-A, para. 256 (*Delalić et al.*, 20 February 2001) (<https://www.legal-tools.org/doc/051554/>).

where appropriate”.⁶ In order to evaluate the effectiveness of the commander’s control, it is hence necessary to look on the evidence provided on a case by case basis. A *de jure* position of command (see above note 330) as well as the ability to issue orders can be seen as good evidence of effective control (*Delalić et al.*, 20 February 2001, para. 197). However, disrespect of a *de jure* commander or disobedience of orders issued from such a commander could instead be evidence of lack of effective control (*Blaškić*, 29 July 2004, paras. 69, 399; Friman, 2008, p. 857). In accordance herewith, it is the *de facto* control, that is, the actual, real life, material ability of the commander that is of the highest significance when ascertaining whether effective control actually exists. Nonetheless, Ambos asserts that a duty to control may only be rejected if there is no control at all. This may be the case where the subordinate is totally out of control and no longer obeys the orders of the commander, committing widespread or isolated excesses (as the case may well be with regards to a commander with solely administrative control as opposed to operational control). In such a case, the commander is, in any way, at least supposed to use the available administrative means or sanctions to prevent the commission of crimes.⁷ Fenrick furthermore stresses that the lack of competence, should not be viewed as a factor which in and of itself negates the existence of the effective control prerequisite within the superior subordinate relationship all together: “The subjective competence of a commander is not a basis for an argument that the forces were not under his or her effective command and control” (Fenrick, 1999, p. 518).

However, again, the material ability has to be evaluated on a case-by-case basis. The material ability may differ depending on the distinct role and function of various commanders; whether it is operational, tactical, administrative or otherwise. The assessment of whether there is a superior-subordinate relationship in existence and if such a relationship is effective, that is, the commander possesses the material ability to prevent and punish the principal crime, can hence not be made in isolation from the evaluation of which measures that in all actuality are within the commander’s powers. The evaluation of the qualitative nature of the superior-

⁶ ICTY, *Prosecutor v. Blaškić*, Appeals Chamber, Judgement, 29 July 2004, IT-95-14-A, para. 69 (*‘Blaškić, 29 July 2004’*) (<https://www.legal-tools.org/doc/88d8e6/>).

⁷ Kai Ambos, “Superior Responsibility”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 857 (<https://www.legal-tools.org/doc/cbffe9/>).

subordinate relationship does therefore have to be made in relation to which “all necessary and reasonable measures within his or her power” are.

The ICC succinctly summarized several factors which “may indicate the existence of a superior’s position of authority and effective control. These factors may include: (i) the official position of the suspect; (ii) his power to issue or give orders; (iii) the capacity to ensure compliance with the orders issued (that is, ensure that they would be executed); (iv) his position within the military structure and the actual tasks that he carried out; (v) the capacity to order forces or units under his command, whether under his immediate command or at a lower levels, to engage in hostilities; (vi) the capacity to re-subordinate units or make changes to command structure; (vii) the power to promote, replace, remove or discipline any member of the forces; and (viii) the authority to send forces where hostilities take place and withdraw them at any given moment” (*Bemba*, 15 June 2009, para. 417).

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

Article 28(a): Causal Link

as a result of

These words indicate that a new, rather controversial element of superior responsibility has been introduced in Article 28, namely the need to prove a causal link between the superior and the commission of the principal crime by the subordinates. Generally, in criminal law, the existence of a causality element entails that the prosecution would have to prove that, the criminal conduct is somehow related to the action of the defendant. Normally causality is attached to a positive action, whereas in the case of superior responsibility we are dealing with inaction/non-action. This fact creates some difficulties in and of itself which has furthermore been addressed in both the Bemba confirmation decision and the final judgement in Trial Chamber III.¹

It could be argued that there are different degrees of causality, where the strongest is a so-called *conditio sine qua non*, (meaning ‘without which it could not be’ – requirement). In the case of superior responsibility this would entail that, but for the inaction of the superior, the principal crimes would not have occurred. It becomes logically complicated to place such a strict condition as a prerequisite for responsibility under the current doctrine. This has also been the views presented in the case law of the ICTY.

Notwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates. Accordingly, the Trial Chamber has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law,

¹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 425 (*‘Bemba*, 15 June 2009’) (<https://www.legal-tools.org/doc/07965c/>); and *Prosecutor v. Bemba*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343, paras. 210–213, 735–741 (*‘Bemba*, 21 March 2016’) (<https://www.legal-tools.org/doc/edb0cf/>).

the formulation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject.²

At the same time, the *Delalić et al.* Trial Chamber finally concludes that “the superior may be considered to be causally linked to the offence, in that, but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed”.³

The issue of causation becomes even more complicated when considering the fact that it is not only the superior’s failure to prevent that is covered within the doctrine of superior responsibility, but also the superior’s failure to punish. Providing the necessity to establish a causal link between the commission of the principal crime and the superiors’ failure to punish said crime, is impossible. This difficulty has been pointed out by the *Orić* Trial Chamber where the causal element was discredited in its totality: “As concerns objective causality, however, it is well established case law of the Tribunal that it is not an element of superior criminal responsibility to prove that without the superior’s failure to prevent, the crimes of his subordinates would not have been committed”.⁴

In dealing with the issue of the causal link between the superiors’ failure to punish and the possible future commission of crimes, the Trial Chamber in *Delalić et al.* concluded that there of course exists such a connection, however, this has no bearing on the causal connection to past crimes (*Delalić et al.*, 16 November 1998, para. 400).

Ambos also adheres to the idea that there cannot be a *condition sine qua non* requirement between the inaction of the superior and the commission of the principal crime. Ambos states that, if there indeed would be such a causation requirement, as the text of Article 28 suggests, it must suffice that the superior’s failure of supervision *increases the risk* that the subordinates commit certain crimes, also referred to as the *risk theory*.⁵

² ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Judgment 16 November 1998, IT-96-21-T, para. 398 (‘*Delalić et al.*, 16 November 1998’) (<https://www.legal-tools.org/doc/6b4a33/>).

³ *Delalić et al.*, 16 November 1998, para. 399, supported in *Prosecutor v. Blaškić*, Appeals Chamber, Judgment, 29 July 2004, IT-95-14-A, paras. 75–77 (<https://www.legal-tools.org/doc/88d8e6/>), and *Prosecutor v. Halilović*, Trial Chamber, Judgment, 16 November 2005, IT-01-48-T, para. 77 (<https://www.legal-tools.org/doc/abda04/>).

⁴ ICTY, *Prosecutor v. Orić*, Trial Chamber, Judgment, 30 June 2006, IT-03-68-T, para. 338 (<https://www.legal-tools.org/doc/37564c/>).

⁵ Kai Ambos, “Superior Responsibility”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 860, emphasis added (<https://www.legal-tools.org/doc/cbffe9/>).

This idea is furthermore the position taken in the *Bemba* confirmation decision at the ICC.

There is no direct causal link that needs to be established between the superior's omission and the crime committed by his subordinates. Therefore, the Chamber considers that it is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible under Article 28(a) of the Statute [...] Accordingly, to find a military commander or a person acting as a military commander responsible for the crimes committed by his forces, the Prosecutor must demonstrate that his failure to exercise his duty to prevent crimes increased the risk that the forces would commit these crimes (*Bemba*, 15 June 2009, paras. 425–426).

Ambos concurs with this decision in his commentary to the decision.⁶ Trial Chamber III upheld the same position in the final judgment of the *Bemba* case. It concluded that this element “does not require the establishment of a ‘but for’ causation between the commander’s omission and the crimes committed” (*Bemba*, 21 March 2016, para. 211). It furthermore stated that a nexus requirement would be satisfied “when it is established that the crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly” (para. 213). The Chamber did not go further into a legal clarification of the content of this element. It did however conclude that the crimes would not have been committed had Mr. Bemba exercised control properly by taking the following measures; ensuring that the forces are aware of their obligations under the Geneva Conventions and Additional Protocol I (whereas the training regime employed by the Armée de Libération du Congo was inconsistent and minimal), provide a Code of Conduct including a prohibition on pillaging, ensuring adequate supervision; issuing clear and consistent orders not to commit the crimes and genuinely and fully investigate allegations of crimes as well as try, remove, replace, dismiss and punish those found responsible. All of these measures were identified to deter, diminish, reduce and maybe even eliminate the crimes charged (paras. 736–741). This requirement is hence not generally accepted as a requirement to liability under the doctrine of superior responsibility.

⁶ Kai Ambos, “Critical Issues in the Bemba Decision”, in *Leiden Journal of International Law*, 2009, vol. 22, pp. 715–726 (<https://www.legal-tools.org/doc/3e4213/>).

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

Article 28(a): Failure to Exercise Control Properly

his or her failure to exercise control properly

Article 87 of Additional Protocol (I) to the Geneva Conventions of 1977 codifies a duty of commanders to take all practicable measures to ensure his forces comply with international humanitarian law.¹ Examples of measures that the commander is obliged to undertake in order to exercise control properly could be:

- Provide adequate training in international humanitarian law;
- Ensure that international humanitarian law is regarded in operational decision making;
- Ensure the existence of and properly monitor an effective reporting system;
- Take corrective action if violations are under way or have been committed.²

Failing to exercise this control properly is one of the cornerstones of the doctrine of superior responsibility. However, the most interesting part in this phrase is not this, but rather the words “as a result of”. A commentary to this element is offered in the following.

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

¹ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/d9328a/>).

² William Fenrick, “Article 28”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 518 (<https://www.legal-tools.org/doc/434159/>); Otto Triffterer and Roberta Arnold, “Article 28”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1095 (<https://www.legal-tools.org/doc/040751/>).

Article 28(a)(i)

That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes

This phrase encompasses the second part of the three-prong-test to the doctrine of superior responsibility, namely the requirement of a certain mental state or attitude of the commander. Hereinafter the mental element will be referred to with the Latin term *mens rea*. For more general information concerning the *mens rea* requirement in the ICC Statute, refer to the commentary on Article 30 and Article 25.

Article 30 of the ICC Statute states that: “*unless otherwise provided, a person shall be criminally responsible [...] only if the material elements are committed with intent and knowledge*” (emphasis added). Since Article 28 provides an alternative *mens rea* element, it shall hence be seen as *lex specialis* which, as such, trumps the default provision provided in Article 30. In the following section focus shall thus be given specifically to the requirements in Article 28(a) (whereas the *mens rea* standard in Article 28(b), which differs significantly, will be covered in the commentary dealing herewith).

Article 28(a)(i) establishes that the commander either needs to have known or, owing to the circumstances at the time, *should have known*, that the forces were about to or had committed the principal crime. There is thus two alternative *mens rea* standards provided in the Article; (1) actual knowledge or (2) a so-called ‘should have known’ -standard.

Several cases from the ICTY, ICTR and SCSL have dealt with the mental element of the doctrine of superior responsibility as formulated in the statutes of these tribunals (Article 7(3) and 6(3) respectively). The second alternative *mens rea* standard in Article 28(a)(i), that is, that the commander ‘should have known’, is somewhat controversial and, according to many, differs from the standard provided in the statutes of these tribunals.¹ The ‘actual knowledge’ -standard, however, is considered to be the same in all statutes, wherefore the jurisprudence concerning this point, can offer

¹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 432 (*Bemba*, 15 June 2009’) (<https://www.legal-tools.org/doc/07965c/>)

some insight into the interpretation of its content. In previously mentioned case law, it has been settled that actual knowledge cannot be presumed but has to be proven by either direct or indirect (circumstantial) evidence which also has been verified as the standard applicable for the ICC in the *Bemba* case.² These factors could be: the number, type, scope or time of the illegal acts, the type of troops or the logistics involved, as well as the location or the spread of occurrence. In the *Bemba* Pre Trial decision of 2009 it was suggested that previous case law has held that “actual knowledge may be proven if, ‘apriori, a military commander is part of an organized structure with established reporting systems’” (*Bemba*, 15 June 2009, para. 431). However, in the *Bemba* judgment it was stated that the evidence has to relate directly to the accused’s knowledge and can thus not merely be an inference to the knowledge of the “general public or others in the organization to which the accused belongs” which seemingly would contradict this previously given interpretation (*Bemba*, 21 March 2016, para. 192). Otherwise it has been confirmed that the interpretation of actual knowledge provided in the *ad hoc* tribunals, also is applicable with respect of Article 28(a)(i) (*Bemba*, 15 June 2009, paras. 430–431). However, in the final judgment of the *Bemba* case, Trial Chamber III elaborated further on this particular element. It stated that even if the notoriety of the illegal acts and whether they are reported in the media could be used as circumstantial evidence, this must be further supported by evidence of that the commander took some kind of action in relation to such information. It also stressed that the commander does not need to know the specific identity of the perpetrators or every detail of the crimes committed (*Bemba*, 21 March 2016, paras. 193–194). Hence, even if Mr. Bemba was remote from the operations on the ground, the Chamber concluded that he had direct knowledge of the crimes perpetrated by the Mouvement de liberation du Congo (‘MLC’) forces during the Central African Republic (‘CAR’) Operation in 2002–2003. This conclusion was based on the notoriety of the crimes, that they were reported in local and international media, meetings held with UN representatives in CAR, presence of communication equipment enabling MLC commanders to report occurrences, reports sent, received and discussed between Mr. Bemba and his subordinate commanders. Mr. Bemba’s actual knowledge of said evidence was supported by the fact that Mr. Bem-

² ICC, *Prosecutor v. Bemba*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343, para. 191 (‘*Bemba*, 21 March 2016’) (<https://www.legal-tools.org/doc/edb0cf/>).

ba had acted on said information and reports by establishing, for example, the Mondoga Inquiry that was charged with investigating allegations of crimes during the initial days of the 2002–2003 CAR Operation, the Gbadolite court-martial, the Zongo Commission as well as a speech in which Mr. Bemba referred to the MLC troops “misbehaviour” and a letter noting the receipt of the so-called International Federation for Human Rights (FIDH) Report (*Bemba*, 21 March 2016, paras. 706–718).

The “should have known”-standard in Article 28(a)(i) is much more complicated. With regard hereto it is not as easy to take direct guidance from the jurisprudence provided in *ad hoc* tribunals. The reason for this being that these statutes provide for a “reason to know”- standard, which *generally* (nevertheless not according to some scholars, see below) is considered to be much higher than the “should have known” standard.³

A commander has “reason to know” according to the case law of the *ad hoc* tribunals, “where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates”.⁴ The concept was further explained by stating that “a showing that a superior had *some general information in his possession*, which would put him on notice of possible unlawful acts by his subordinates would be sufficient”. The evaluation of the ‘reason to know’ -standard was further exemplified by “a military commander who has received information that some of the soldiers 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” (, 20 February 2001, para. 238).

In the *Bemba* confirmation decision, the Trial Chamber pointed out that the ‘had reason to know’ -standard in the statutes of the *ad hoc* tribunals differ from the ‘should have known’ -standard in ICC Statute Article 28(a)(i) (*Bemba*, 15 June 2009, para. 434). It concluded that the ‘should have known’ -standard merely requires that the superior has been negligent

³ Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, p. 325 (<https://www.legal-tools.org/doc/e35f82/>); *Bemba*, 15 June 2009, para. 434.

⁴ ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Judgment 16 November 1998, IT-96-21-T, para. 383 (<https://www.legal-tools.org/doc/6b4a33/>), confirmed in *Prosecutor v. Delalić et al.*, Appeals Chamber, Judgment, 20 February 2001, IT-96-21-A, paras. 223, 241 (<https://www.legal-tools.org/doc/051554/>).

in failing to acquire knowledge of his subordinates' illegal conduct (para. 432) and that the new standard in Article 28(a) "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 of information*" (para. 433, emphasis added). The Chamber, nevertheless also makes an *obiter dictum* where it concludes that the "criteria or *indicia* developed by the *ad hoc* tribunals to meet the standard of "had reason to know" may also be useful when applying the "should have known" requirement". Considering the fact that Trial Chamber III concluded that there was sufficient evidence proving actual knowledge on the part of Mr. Bemba, the final judgment did not cover any aspects of the 'should-have-known' -standard (*Bemba*, 21 March 2016, para. 196).

Important to note in this context is that some scholars view both the 'reason to know' and 'should have known' -standards, solely as different aspects of negligence. Two such proponents seem to be Ambos and Arnold.⁵ With regards to this matter, Ambos further stresses that "it should be clear now [...] that the 'should have known' standard must be understood as negligence and that it, therefore, requires neither awareness nor considers sufficient the imputation of knowledge on the basis of purely objective facts". Ambos, furthermore, makes a specific comment as to this point with regard to the Bemba confirmation decision. He thus points out that both of these standards ought to constitute a negligence standard and that it would be beneficial for the ICC to apply a restrictive interpretation of the 'should have known' -standard in order to bring it closer in line with the 'reason to know' -standard.⁶ Ambos views are in stark contrast to views expressed by the ICTY and ICTR Appeals Chambers, which have rejected the negligence standards with emphasis: "the Appeals Chamber recalls that the ICTR Appeals Chamber has on a previous occasion rejected criminal negligence as a basis of liability in the context of command responsibility, and that it stated that "it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in

⁵ Kai Ambos, "Superior Responsibility", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 868 (<https://www.legal-tools.org/doc/cbffe9/>); Otto Triffterer and Roberta Arnold, "Article 28", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1099 (<https://www.legal-tools.org/doc/040751/>).

⁶ Kai Ambos, "Critical Issues in the Bemba Decision", in *Leiden Journal of International Law*, 2009, vol. 22, p. 722 (<https://www.legal-tools.org/doc/3e4213/>).

international criminal law [...] The Appeals Chamber expressly endorses this view”.⁷

When comparing these standards, it is important to make note of the words “owing to the circumstances at the time”. This phrase may help in the interpretation of bridging the possible gap between the concepts. However, as it stands today, the interpretation of the ‘should have known’ - standard is still undetermined and under scholastic debate.

One issue that has caused considerable debate and still is unresolved is how the low *mens rea* requirement for superior responsibility shall be reconciled with special intent crimes, such as, for example, genocide (for further information concerning special intent, refer to the commentary on ICC Statute Article 6 and Article 30).

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

⁷ ICTY, *Prosecutor v. Blaškić*, Appeals Chamber, Judgement, 29 July 2004, IT-95-14-A, para. 63 (<https://www.legal-tools.org/doc/88d8e6/>).

Article 28(a)(ii)

That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

The last part of the three-prong-test entails determining whether the superior has failed in his duty to control his subordinates; that is, if he or she has taken all necessary and reasonable measures within his or her power to prevent or punish the subordinate's criminal undertakings?

The wording with regards to this final prerequisite for incurring responsibility under the doctrine, is differently phrased in Article 28(a)(ii) of the ICC Statute as compared to the ICTY, ICTR and SCSL Statutes' Article 7(3) and 6(3) respectively. The *ad hoc* tribunals use the phrase: "the superior failed to take the necessary and reasonable measures to *prevent* such acts or to *punish* the perpetrators thereof" (emphasis added) when formulating this prerequisite. The duties placed on the superior in these statutes are thus two-fold. Responsibility for the superior is incurred for his or her (i) failure to prevent or (ii) failure to punish. Whereas, the ICC Statute distinguishes between three separate duties which the commander may fail to undertake, consequently giving rise to responsibility under the doctrine for; (i) failing to prevent (ii) failing to repress or (iii) failing to submit the matter to the competent authorities for investigation and prosecution. *Prima facie*, these differences may appear rather significant. However, in reality they indicate very similar duties for the commander.

The three-stage approach to the duties of the commander signifies duties attached to different stages in the commission of the crime. The superior has a duty to (i) prevent *before* (ii) repress *during* and (iii) submit and/or report *after* the commission of the crime.

Initially it is important to note that, despite the fact that the wording of Article 28(a)(ii) signifies the three duties in the alternative (that is, by the usage of the word 'or'), the commander could be convicted based on failing to undertake either one of the different duties *or* all. A commander can hence not avoid responsibility under the doctrine if he or she fails to prevent and repress, nevertheless reports the commission of the principal crime to the competent authorities *after* the completion of the crimes. The Pre-Trial Chamber in the Bemba confirmation decision thus held that "fail-

ure to prevent crimes [...] cannot be *cured* by fulfilling the duty to repress or submit the matter to the competent authorities”.¹ This view was subsequently upheld in the actual judgment.²

A commentary on each of these three duties to control subordinates will be presented separately below. However, there is one important common factor to consider when dealing with all three alternatives. The duties all need to be determined from the perspective of what is considered to be “necessary and reasonable measures” as well as within the superior’s powers. This will be addressed in the subsequent paragraphs.

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

¹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 436, emphasis added (<https://www.legal-tools.org/doc/07965c/>).

² ICC, *Prosecutor v. Bemba*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343, para. 201 (<https://www.legal-tools.org/doc/edb0cf/>).

Article 28(a)(ii): All Necessary and Reasonable Measures

all necessary and reasonable measures within his or her power

This phrase corresponds to the nearly literal wording used in the statutes of the *ad hoc* tribunals as well as the prerequisites established in Article 86(2) of Additional Protocol I from 1977, namely that the countermeasures that the superior is under a duty to carry out needs to be “feasible”.¹ Any requirement that is not possible for the particular superior in question to carry out is, generally, considered to be above and beyond his or her duty, wherefore he or she may not be held responsible for a failure in this regard.

The powers of the superior, as well as what is necessary and reasonable measures, have to a certain extent already been discussed when dealing with the first part of the three-prong-test, that is, the existence of a superior-subordinate relationship. In that section of this commentary, it was pointed out that the prerequisite of the commanders effective ‘command and control’ or ‘authority and control’ needs to be evaluated in conjunction with what is considered to be “necessary and reasonable measures within his or her power”. These two issues can thus never be assessed in isolation from one another. Some reiteration of previous mentioned prerequisites will thus be necessary in the following.

The corrective measures available to the commander, are both dependent on his or her *de jure* (that is, ‘legal competence’) and the *de facto* (that is, ‘material’ or ‘actual’ possibility) position of the superior to control his or her subordinates. The measures need to be commensurate to the superior’s actual possession of command and control or authority and control. It is hence difficult to generalize about which measures are necessary and reasonable. What is considered to be necessary, reasonable and within the power of the commander may for instance depend on his or her position in the chain-of-command, for example, the demands of a high ranking commander may be more in line with issuing orders and initiating judicial pro-

¹ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/d9328a/>); Kai Ambos, “Superior Responsibility”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 861 (<https://www.legal-tools.org/doc/cbffe9/>).

ceedings, whereas a commander lower down in the echelons of command may be charged with a duty to have a much more hands on approach, alternatively, if the low-ranking commander lacks those possibilities, he or she may nonetheless recommend that disciplinary action be taken.² The measures available to the commander may also depend on whether he or she obtain a position that is more operational, tactical, administrative or otherwise. The measures do therefore have to be considered on a case-by-case basis. The measures that can be expected of the superior were well presented in the *Blaškić* Appeals Chamber: “What constitutes such measures is not a matter of substantive law but of evidence”.³

In this connection it is important to reiterate that the subjective incompetence of a particular commander cannot be used as an argument that forces were not under his or her effective command and control (Fenrick, 1999, p. 518). A superior’s plea of lack of authority to take the necessary measures under internal regulations does not generally free him or her from criminal responsibility.⁴

According to Arnold, “a commander’s position and possibility to intervene shall rather be assessed on the basis of what *any* commander, in such a situation, would have *objectively* done at the time of the facts”. She does however emphasize that it is important to take the available preventive measures into consideration. Arnold places much emphasis on the need for education, the responsibility of which in her view, falls on high levels of command and the government.⁵

As presented above, there are however some objective requirements as to what is considered to be necessary and reasonable. This is based on principles developed in international humanitarian law. Examples hereof are; providing instruction in international humanitarian law, creating an

² William Fenrick, “Article 28”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 520 (<https://www.legal-tools.org/doc/434159/>).

³ ICTY, *Prosecutor v. Blaškić*, Appeals Chamber, Judgement, 29 July 2004, IT-95-14-A, para. 72 (<https://www.legal-tools.org/doc/88d8e6/>).

⁴ ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Judgment 16 November 1998, IT-96-21-T, para. 395 (‘*Delalić et al.*, 16 November 1998’) (<https://www.legal-tools.org/doc/6b4a33/>).

⁵ Otto Triffterer and Roberta Arnold, “Article 28”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1101 (<https://www.legal-tools.org/doc/040751/>).

effective reporting system, supervising the monitoring system, recourse to disciplinary measures or removal of rank.⁶

As to the matter of what is considered as being within the powers of the commander, a controversial and heavily criticized part of a decision in the ICTY needs to be mentioned. In the *Hadžihasanović* case, the Appeals Chamber namely held that the “principal crime” has to have been committed *whilst* the superior had effective control over the subordinates. The reasoning behind this decision was based on the fact that a commander who was appointed after the commission of the principal crime would not have had the possibility to prevent said crimes during their commission. Considering that the duty of the commander is threefold (or rather two-fold in the ICTY statute, which was relevant to the present case), it could however be argued that the possibility exists for the commander, who assumes a position after the commission of the crime, to punish said crimes. By so doing, the superior would be fulfilling one of the main objectives of the doctrine, namely clearly condemning the actions and hence undermining chain effects hereof. It should be noted that it was a 3:2 decision with strong dissenting opinions on the matter.⁷

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

⁶ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424 (<https://www.legal-tools.org/doc/07965c/>).

⁷ ICTY, *Prosecutor v. Hadžihasanović*, Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, IT-01-47-AR72, paras. 37–56 (<https://www.legal-tools.org/doc/608f09/>).

Article 28(a)(ii): Prevent

prevent

As mentioned above, the various duties are attached to different stages in the commission of the crime. Preventive measures are expected to be undertaken at any stage *before* the crime has been committed. The issue as to what is expected of the commander in this regard has at times been linked to the matter as to whether the doctrine is applicable to inchoate offences. As noted previously in this commentary, the relationship between the doctrine of superior responsibility and inchoate crimes has not been conclusively established in the case law of the *ad hoc* tribunals (see commentary on “committed” in Article 25(3)(a) and inchoate offences in Article 25(3)(f)). The *Orić* Trial Chamber did however purport the view that the commander could be responsible for inchoate crimes.¹ The Trial Chamber in the *Orić* case correctly concluded that: “it is not only the execution and full completion of a subordinate’s crimes which a superior must prevent, but the earlier planning or preparation” and that “the superior must intervene as soon as he becomes aware of the planning or preparation of crimes to be committed by his subordinates and as long as he has the effective ability to prevent them from starting or continuing” (*Orić*, 30 June 2006, para. 328).

In the *Orić* case, the Trial Chamber furthermore formulated a normative yardstick in order to measure whether the superior has fulfilled his or her duty to *prevent*: “first, as a superior cannot be asked for more than what is in his or her power, the kind and extent of measures to be taken ultimately depend on the degree of effective control over the conduct of subordinates at the time a superior is expected to act; second, in order to be efficient, a superior must undertake all measures which are necessary and reasonable to prevent subordinates from planning, preparing or executing the prospective crime; third, 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; and fourth, since a superior is duty bound only to undertake what appears appropriate under the given conditions, he or she is not obliged to do the impossible” (*Orić*, 30 June 2006, para. 329).

¹ ICTY, *Prosecutor v. Orić*, Trial Chamber, Judgment, 30 June 2006, IT-03-68-T, para. 328 (*Orić*, 30 June 2006’) (<https://www.legal-tools.org/doc/37564c/>).

The *Bemba* Confirmation Decision gave further general guidance on how to evaluate specific preventive measures, such as the duty of the commander: “(i) to ensure that superior’s forces are adequately trained in international humanitarian law; (ii) to secure reports that military actions were carried out in accordance with international law; (iii) to issue orders aiming at bringing the relevant practices into accord with the rules of war; (iv) to take disciplinary measures to prevent the commission of atrocities by the troops under the superior’s command”.²

Despite these formulations of yardsticks and general guidance, it is however important to stress, that the assessment of what is considered to be necessary and reasonable preventive measures for a particular commander has to be made on a case-by-case basis (*Orić*, 30 June 2006, para. 330). It is hence, once again, both the *de jure* and *de facto* abilities of the commander that must be established.

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

² ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 438 (<https://www.legal-tools.org/doc/07965c/>).

Article 28(a)(ii): Repress

or repress

Failure to Punish:

The ‘failure to punish’ -requirement in the statutes of the *ad hoc* tribunals is formulated as two separate requirements in Article 28(a)(ii) of the ICC Statute, namely (1) to repress and (2) to report (or rather to ‘submit the matter to the competent authorities for investigation and prosecution’). A few words shall first be mentioned as to the interpretation of the punish-requirement provided by the *ad hoc* tribunals, after which attention subsequently shall be given to the alternative requirements found in Article 28 of the ICC Statute.

Several issues have been addressed with regard to the ‘failure to punish’ -requirement. One such issue is at what stage in the commission of the crime the punishment should be meted out. Considering that there is liability not only for completed offences in international criminal law, but also, for example, planning and attempting to commit the crime (see ICTY Statute Article 7(1), ICTR Statute Article 7(1) and ICC Statute Article 25), the conclusion must be that the punishment should be carried out as soon as any of these “punishable” actions have been undertaken, as maintained by the *Orić* Trial Chamber.¹ In that same case, the distinction between at what time the preventive as opposed to the punitive measures should be carried out, was described in the following terms; “whereas measures to prevent must be taken as soon as the superior becomes aware of the risk of potential illegal acts about to be committed by subordinates, the duty to punish commences only if, and when, the commission of a crime by a subordinate can be reasonably suspected” (, 30 June 2006, para. 336).

Another issue is the precise conditions placed on the ‘effective control’-requirement of the commander in correlation to the ‘duty to punish’ -requirement. In order for the commander to punish the subordinates he or she of course has to have effective control at the time when the punishment should be carried out. However, as already noted, the Appeals Chamber in the *Hadžihasanović* case decided that the commander also has to have had control over the subordinates during the time of the commission of the of-

¹ ICTY, *Prosecutor v. Orić*, Trial Chamber, Judgement, 30 June 2006, IT-03-68-T (‘*Orić*, 30 June 2006’) (<https://www.legal-tools.org/doc/37564c/>).

fence.² Heavy criticism has been levied against this decision. The *Orić* Trial Chamber, even expressly articulated its strong disagreement with the lack of logic in this decision (*Orić*, 30 June 2006, para. 335). However, as it considered itself bound by the Appeals Chambers decision, it could not reach an alternative conclusion. The question of challenging this issue was avoided on appeal.³

The last issue that will be addressed within the confines of this commentary as to the conditions placed on the ‘duty to punish’-requirement, is more precisely what measures that would be considered as appropriate for the commander to undertake in order to punish the perpetrators. If considered to be in effective control over the subordinates, at the right time, the superior has to either execute appropriate sanctions him or herself, alternatively conduct an investigation to establish the facts. The commander needs to undertake these actions either by him or herself, alternatively, if lacking such punitive measures within the ambit of his or her position, a report has to be transmitted to the competent authorities for further investigation and sanction. The superiors own lack of legal competence does not relieve him or her from pursuing these avenues, if he or she is considered to be in effective control of the perpetrators of the principal crime.

Failure to Repress:

Interpreted in accordance with the ordinary meaning to be given to the term, it would suggest that ‘repressive measures’ solely entails a duty of the commander to stop the *ongoing* commission of a crime,⁴ and that this concept therefore does not cover his or her obligation to *punish* the perpetrators.

However, according to the *Bemba* Confirmation Decision, the “duty to repress” arises at two different stages of the commission of the crime. Firstly, it includes the duty to stop ongoing crimes from continuing to be committed and, secondly, it entails the duty to punish the forces after their

² ICTY, *Prosecutor v. Hadžihasanović*, Appeals Chamber, Judgement, 22 April 2008, IT-01-47-A, paras. 37, 51 (<https://www.legal-tools.org/doc/2705b3/>).

³ ICTY, *Prosecutor v. Orić*, Appeals Chamber, Judgement, 3 July 2008, IT-03-68-A, para. 167 (*‘Orić*, 3 July 2008’) (<https://www.legal-tools.org/doc/e053a4/>).

⁴ Kai Ambos, “Superior Responsibility”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 863 (<https://www.legal-tools.org/doc/cbffe9/>).

commission.⁵ Hence, repressive measures also include punishment by the commander him or herself.

The measures which ought to be taken in order to stop the ongoing crimes has to be evaluated on a case-by-case basis depending on his or her power to control as explained above (*Bemba*, 15 June 2009, para. 441). Besides punishment, these measures could include, but are certainly not limited to; conducting an investigation to establish the facts, issuing orders and securing the follow through of such orders. Perhaps, even more important would be more subtler measures aiming at establishing and sustaining an environment of discipline and respect for the law.⁶

The punishment after the commission of the crime could either be done by (1) the commander's own action or, if such punitive measures are limited for that particular commander, (2) by submitting the matter to the competent authorities (*Bemba*, 15 June 2009, para. 440).

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

⁵ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 440 ('*Bemba*, 15 June 2009') (<https://www.legal-tools.org/doc/07965c/>).

⁶ *Orić*, 30 June 2006, para. 336 and ICTY, *Prosecutor v. Halilović*, Trial Chamber, Judgement, 16 November 2005, IT-01-48-T, paras. 97–100 (<https://www.legal-tools.org/doc/abda04/>).

Article 28(a)(ii): Submit Matter for Investigation and Prosecution

submit the matter to the competent authorities for investigation and prosecution

Prima facie, this may seem like a new requirement which differs from the Statutes of the ICTY, ICTR and SCSL. As such it would be filling the gap for those commanders who have themselves no disciplinary powers to ‘repress’ a crime.¹ Nevertheless, despite the fact that it is not spelled out in the *ad hoc* tribunals’ statutes, it has already been read into the concept of ‘duty to punish’ according to the case law of these tribunals.

This requirement was interpreted in the *Bemba* Confirmation decision in the following way: “The duty to submit the matter to the competent authorities, like the duty to punish, arises after the commission of the crimes. Such a duty requires that the commander takes active steps in order to ensure that the perpetrators are brought to justice. It remedies a situation where commanders do not have the ability to sanction their forces. This includes circumstances where the superior has the ability to take measures, yet those measures do not seem to be adequate”.²

The *Bemba* judgment provides an excellent example of the implementation and evaluation of this element. In determining whether Mr Bemba had fulfilled the various conditions established by this paragraph, the Trial Chamber looked into the measures that had actually been undertaken by the accused. The accused had established the Mondonga Inquiry, met with the UN representative in the Central African Republic, General Cissé and President Patassé, given a speech condemning the misbehaviour of the troops, established the Gbadolite court-martial, set up the Zongo Commis-

¹ Kai Ambos, “Superior Responsibility”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 862 (<https://www.legal-tools.org/doc/cbffe9/>).

² ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 442 (<https://www.legal-tools.org/doc/07965c/>).

sion, corresponded with regard to the International Federation for Human Rights (‘FIDH’) Report as well as established the Sibut Mission.³

The conclusion reached by the Trial Chamber after investigating said measures was that they were not properly and sincerely executed and grossly inadequate responses to the consistent information of widespread crimes committed (*Bemba*, 21 March 2016, para. 727). The Mondonga Inquiry failed to pursue various relevant leads (in particular the responsibility of commanders) and fraught with procedural irregularities. Consequently, the Gbadolite court-martial solely tried seven low-ranking soldiers for minor charges. After the public speech condemning the misbehaviour of certain troops, Mr. Bemba failed to enforce or follow up said warnings. The Zongo Commission was merely mandated to address questions of pillaged goods, where the definition of pillaging was limited to exclude some of the most commonly used contrabands. With regard to the communications with the UN representative, General Cissé, President Patassé and the FIDH President, the Chambers noted that Mr Bemba failed to take any concrete measures reflecting such communication. The Sibut Mission was also grossly inadequate. The conclusion of the Chambers was consequently that the measures undertaken by Mr. Bemba were primarily motivated by the accused’s “desire to counter public allegation and rehabilitate the public image of the MLC” (paras. 720–728). Trial Chamber III furthermore provided a list of various measures that Mr. Bemba could have taken which would have been more appropriate and within the confines of his material ability (para. 729).

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

³ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343, para. 719 (*Bemba*, 21 March 2016) (<https://www.legal-tools.org/doc/edb0cf/>).

Article 28(b)

Superior and subordinate relationships not described in paragraph (a)

In this section of the commentary to Article 28, only those requirements which differ from the ones provided in paragraph 28(a), or for any other reason needs to be commented on separately, will be discussed. For comments relating to the other prerequisites, please refer back to the commentary on 28(a).

This phrase refers to the applicability of the doctrine of superior responsibility to superiors-subordinate relationships that are not covered in Article 28(a), that is, the concept which, in this commentary is called ‘non-military superior responsibility’. This section of the Article hence encompasses those superiors who are *not* military commanders or effectively acting as military commanders (that is, *not* military or ‘quasi-military’ commanders). The reasoning behind this clear separation of the requirements placed on superior responsibility for military and quasi-military commanders from the superior responsibility of non-military superiors is that there has been some controversy as to whether the doctrine should be applicable to civilians at all. Separating the requirements into distinct section of the Article consequently seemed to be an appropriate compromise during the Rome Conference.¹ The jurisprudence of the *ad hoc* tribunals has, on several occasions, established that the doctrine of superior responsibility is applicable to non-military or civilian leaders.

One of the first cases, which basically paved the way for an argumentation as to the applicability of the doctrine of superior responsibility for civilian leader, was the *Delalić et al.* case. In the *Delalić et al.* case it was established that the term “superior” as used in, for example, the Statutes of the *ad hoc* Tribunals as well as in Article 86(2) of the Additional Protocols from 1977, is broad enough to encompass, not only strictly military commanders in a *de jure* command position, but also *de facto* superiors. A subsequent conclusion drawn hereof was that the effective control

¹ Greg R. Vetter, “Command Responsibility of Non-military Superiors in the International Criminal Court”, in *Yale Journal of International Law*, 2000, p. 8 (<https://www.legal-tools.org/doc/f781ca/>).

could exist in both “civilian and within military structures”.² This conclusion was supported upon appeal.³ The applicability of the doctrine to non-military commanders was upheld in, amongst others, the *Akayesu*, *Kayishema*, *Musema* and *Bagilishema* cases.

The Trial Chamber in the *Akayesu* case was not as bold in its pronouncements as to the applicability of the doctrine to civilian leaders. It questioned whether the doctrine should at all be applicable in general terms to purely civilian leaders, since this issue, according to the Trial Chamber, still remained controversial and therefore held that “it is appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof”.⁴ *Musema* was a Tea factory owner, hence, a position which was strictly civilian in nature. If studying the applicability of the doctrine to non-military superiors, this case would thus be an excellent point of reference. The Trial Chamber concluded that Article 6(3) was applicable to a person “exercising *civilian authority as superiors*”.⁵ It is important to note that *Musema* was convicted both on the basis of 6(1), for personally having ordered the commission of the crimes, and for superior responsibility under 6(3) (*Musema*, 27 January 2000, para. 926; see also, for example, para. 936). In stark contrast to the above mentioned cases, which voiced some concern as to the applicability of the doctrine to civilian superiors, the Trial Chamber in the *Kayishema* and *Ruzindana* case did not seem to find the applicability hereof to be at all problematic.⁶ The issue regarding the limitations of the doctrine of non-military superior responsibility was up for assessment in the *Bagilishema* Case. The Trial Chamber had, namely, ruled that the doctrine was solely applicable to superiors who exercise “*military-style command authority*” over subordinates. The Appeals Chamber however clarified, once again,

² ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Judgement 16 November 1998, IT-96-21-T, paras. 354, 378 (emphasis added) (<https://www.legal-tools.org/doc/6b4a33/>).

³ ICTY, *Prosecutor v. Delalić et al.*, Appeals Chamber, Judgement, 20 February 2001, IT-96-21-A, para. 195 (<https://www.legal-tools.org/doc/051554/>).

⁴ ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgement, 2 September 1998, ICTR-96-4-T, para. 491 (<https://www.legal-tools.org/doc/b8d7bd/>).

⁵ ICTR, *Prosecutor v. Musema*, Trial Chamber, Judgement, 27 January 2000, para. 148 (*Musema*, 27 January 2000) (<https://www.legal-tools.org/doc/1fc6ed/>).

⁶ ICTR, *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber, Judgement, 21 May 1999, ICTR-95-1-T, paras. 213–215 (<https://www.legal-tools.org/doc/0811c9/>).

that the doctrine was applicable to civilian superiors.⁷ It confirmed the finding in the *Delalić et al.* case that it was sufficient that the civilian superior “exercise a degree of control over their subordinates which is *similar to that of military commanders*” (*Bagilishema*, 3 July 2002, paras. 51–52 (emphasis added)).

The applicability of the doctrine to non-military superior responsibility has thus successively become established in the case law of the *ad hoc* tribunals and the codification of such a provision in the ICC Statute is incontestable. However, the exact contours and content of the elements of this responsibility are not as clear, even in the case law from the *ad hoc* tribunals. The exact contours hereof with regard to ICC Statute Article 28(b) is even more uncertain, however, needless to say, the text of the Article provides some guidance as to the interpretation hereof. These contours, or rather, the specific elements of the doctrine of non-military superior responsibility, shall be addressed in the following.

First however, a general comment concerning a crucial distinction between the *ad hoc* tribunals and the ICC statute, need to be mentioned. The case law of the *ad hoc* tribunals made little distinction as to the content of the doctrine of command responsibility as opposed to the doctrine of non-military superior responsibility, wherefore the question whether the superior was military, quasi-military or civilian did not lead to significant consequences. In the ICC, these consequences will however be much more significant, since the elements of the doctrine differ considerably between 28(a) and 28(b).

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

⁷ ICTR, *Prosecutor v. Bagilishema*, Appeals Chamber, Judgement (Reasons), 3 July 2002, ICTR-95-1A-A, paras. 47, 51 (<https://www.legal-tools.org/doc/e4786a/>).

Article 28(b): Superior

a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly

A Superior:

Article 28(b) is only applicable when the superior cannot be considered a military or a quasi-military commander. This sub-Article is accordingly subsidiary to Article 28(a).¹ In determining whether to charge a person under Article 28(b) it is therefore of importance both to assess the status of the defendant “upwards” and “downwards”; upwards, in order to exclude the superior’s status as a potential military or quasi military leader, and, downwards, by ascertaining his or her status as actually possessing effective control with the material ability to prevent or repress crimes of subordinates.

The *Kordić* case in the ICTY addressed the standard for what was not considered to be a military commander: “while he played an important role in military matters, even at times issuing orders, and exercising authority over Hrvatsko vijeće obrane (‘HVO’, Croatian Defence Council) forces, he was, and remained throughout the indictment period, a civilian, who was *not part of the formal command structure of the HVO*”.²

It could be argued however that the importance of making a differentiation between military, quasi-military and non-military commanders are of less importance in the judgements from the *ad hoc* tribunals as opposed to the ICC since there is considerable difference between the elements in the latter and not in the former. Arnold accordingly correctly concludes that the ICC will carefully have to address this issue (Arnold, 2016, p. 1102).

The matter as to the lower boundaries of the doctrine of non-military superior responsibility is still under debate. It has been established, in both

¹ Otto Triffterer and Roberta Arnold, “Article 28”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1102 (<https://www.legal-tools.org/doc/040751/>).

² ICTY, *Prosecutor v. Kordić*, Trial Chamber, Judgement, 26 February 2001, IT-95-14-T, para. 839 (emphasis added) (<https://www.legal-tools.org/doc/d4fedd/>).

case law and the academic debate, that, as long as the effective control test is satisfied (see below), non-military superiors can for instance include leaders within non-military components of government and political parties (such as mayors, party leaders, Heads of State (that are not at the same time the commander-in-chief), business leaders (for example, industrial leaders, tea factory owners) as well as senior civil servants. To the category of non-military commanders have also been included prison-camp commanders and chiefs of police.³

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

³ William Fenrick, “Article 28”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 521 (<https://www.legal-tools.org/doc/434159/>); Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, p. 132 (<https://www.legal-tools.org/doc/e35f82/>).

Article 28(b): Subordinates

subordinates

Subordinates are anyone under the effective authority and control of a superior, that is, any subordinate who has a superior who can direct his work or work-related activities. The middle-management in a large organization, can, needless to say, be both superiors and subordinates.¹ Examples may include, but are not limited to, subordinate members of political parties, prison guards, workers in factories, civil servants, private contractors, civil personnel in a peace keeping mission, non-governmental organizations workers.

These are formal, or in order to use a more familiar term at this point, *de jure* subordinates of a non-military superior. However, a relevant question is whether the doctrine also applies to so called ‘indirect subordinates’, that is, other people or the civilian population at large, who, somehow *de facto* are under the effective control of the superior.

The issue concerning indirect subordinates was raised in the *Musema* case. Even if reaching the conclusion that Musema did not wield *de facto* control over the indirect subordinates in this particular case, it did however conclude that it would be *possible* to view people who were not employees of the superior as his or her subordinates in accordance with the doctrine of superior responsibility.²

The range of the doctrine to indirect subordinates has, to some extent, been limited in the ICC Statute by the clause “as a result of his failure to exercise control properly” and “activities that were within the effective responsibility and control of the superior” in Article 28(b). By some scholars, these clauses have, been interpreted as limiting the reach of the superior’s *de facto* control to work-related activities and consequently also limiting the fold of indirect subordinates accordingly.³

¹ William Fenrick, “Article 28”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 521 (<https://www.legal-tools.org/doc/434159/>).

² ICTR, *Prosecutor v. Musema*, Trial Chamber, Judgement, 27 January 2000, paras. 144, 148, 881–883 (<https://www.legal-tools.org/doc/1fc6ed>/<https://www.legal-tools.org/doc/3fe9f6/>).

³ For example Fenrick, 1999, pp. 521–522; Otto Triffterer and Roberta Arnold, “Article 28”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal*

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

Article 28(2)(b): Effective Authority and Control

under his or her effective authority and control

In the commentary to Article 28(a) the concept of “effective control” as well as “authority and control” was discussed in relation to military and quasi-military commanders. In this section comments shall be limited to the specific interpretation of this requirement with regards to non-military superiors. For more extensive information, please refer to the previous commentary.

As already concluded, the doctrine of superior responsibility is applicable to non-military superiors so long as it can be established that a superior-subordinate relationship exists between the superior and the perpetrator of the principal crime. Some aspects of this relationship have already been discussed, namely the (possible) definition of the superior and the (possible) definition of the subordinate. These subsequent sections will however deal with the quality of the relationship as such. The relationship has to be characterized by the superior’s ‘effective control’, that is, his or her *de facto* material ability to prevent or punish the perpetrators.

Among others, the *Delalić et al.*, *Musema*, *Bagilishema* cases expressed similar views. “[I]t is [...] the Trial Chamber’s conclusion that a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his *de facto* position of authority”. “[I]n order for the principle of superior responsibility to be applicable, it is necessary that the superior have *effective control* over the persons committing the underlying violations of international humanitarian law, in the sense of having the *material ability to prevent and punish* the commission of these offences”;¹ “It is also significant to note that a *civilian superior* may be charged with superior responsibility only where he has *effective control*, be it *de jure* or merely *de facto*, over the persons committing viola-

¹ ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Judgement 16 November 1998, IT-96-21-T, paras. 377–378 (emphasis added) (*‘Delalić et al.*, 16 November 1998’) (<https://www.legal-tools.org/doc/6b4a33/>).

tions of international humanitarian law”;² “the *effective control* test applies to all superiors, whether *de jure* or *de facto*, military or civilian”.³

There are however some more caveats and restrictions to this ‘material ability’ that are of particular importance with regards to civilian superiors as opposed to military or quasi-military commanders. A few of these concerns and difficulties will be addressed hereinafter.

Effective Control-Test Does not Require Proof of Both de Jure and de Facto Authority:

The first issue as to the interpretation of the extent of ‘effective control’ – requirement, is whether, besides proof of *de facto* authority, the court also has to be satisfied as to the existence of a *de jure* authority. The Appeals Chamber in the *Bagilishema* case had to correct the findings of the Trial Chamber on this point: “the Trial Chamber wrongly held that both *de facto* and *de jure* authority need to be established before a superior can be found to exercise effective control over his or her subordinates. The Appeals Chamber reiterates that the test in all cases is whether the accused exercised effective control over his or her subordinates; this is not limited to asking whether he or she had *de jure* authority”, quoting what the ICTY Appeals Chamber held in the *Delalić et al.* Appeal Judgement, that “[a]s long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control” (*Bagilishema*, 3 July 2002, para. 61, with reference to *Delalić et al.*, Appeal Judgement, 20 February 2001, para. 192). It ought however to be mentioned that the *Delalić* Trial Chamber at another section of the judgment held that “[...] it is sufficient if there exists, on the part of the accused, a *de facto* exercise of authority. The Trial Chamber agrees with this view, provided the exercise of *de facto* authority is accompanied by the trappings of the exercise of *de jure* authority. By this, the Trial Chamber means the perpetrator of the underlying offence must be the subordinate of the person of higher rank and under his direct or indirect control” (*Delalić et al.*, 16 November 1998, pa-

² ICTR, *Prosecutor v. Musema*, Trial Chamber, Judgement, 27 January 2000, para. 141 (*Musema*, 27 January 2000’) (<https://www.legal-tools.org/doc/1fc6ed/>).

³ ICTR, *Prosecutor v. Bagilishema*, Appeals Chamber, Judgement (Reasons), 3 July 2002, ICTR-95-1A-A, para. 50 (emphasis added) (*Bagilishema*, 3 July 2002’) (<https://www.legal-tools.org/doc/e4786a/>).

ra. 646). Hence, the confusion of the *Bagilishema* Trial Chamber may be understandable.

Assessment of the Effective Control on a Case-By-Case Basis:

As already recognized above, the Trial Chambers in both the *Akayesu* and *Musema* cases were not convinced as to the general applicability of the doctrine superior responsibility to non-military superiors. In line herewith, both Chambers expressed that the authority of the non-military superior needed to be assessed on a case-by-case basis.⁴ A thorough assessment on a case-by-case basis may be of particular importance in civilian structures, nevertheless, it should not be forgotten the importance hereof in military and quasi-military settings as well.

Broad Interpretation, Psychological Pressure and Power of Influence as Opposed to Military-Style Command:

The issue of how to interpret the content of the “effective authority and control” – requirement of a non-military superior has been rather challenging. Differing opinions have surfaced on the subject, ranging from the authority needing to be proved solely by psychological pressure and powers of influence to the necessity of demonstrating a military style of command. The *Musema* Trial Chamber thus spoke in terms of psychological pressure: “The influence at issue in a superior-subordinate command relationship often appears in the form of psychological pressure. This is particularly relevant to the case at bar, insofar as Alfred Musema was a socially and politically prominent person in Gisovu Commune” (*Musema*, 27 January 2000, para. 140). In the *Aleksovski* case, the Trial Chamber stressed the need to interpret the civilian superior’s authority broadly.⁵ This was subsequently restricted with an alternative view in the *Kordić* case, where the ideas of substantial influence were limited: “[A] government official will only be held liable under the doctrine of command responsibility if he was part of a superior-subordinate relationship, *even if that relationship is an indirect one*. Even though arguably effective control may be achieved through *substantial influence*, a demonstration of such powers of influence will not be sufficient in the absence of a showing that he had effective con-

⁴ ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgement, 2 September 1998, ICTR-96-4-T, para. 491 (<https://www.legal-tools.org/doc/b8d7bd/>); *Musema*, 27 January 2000, para. 867.

⁵ ICTY, *Prosecutor v. Aleksovski*, Trial Chamber, Judgement, 25 June 1999, IT-95-14/1-T, para. 78 (<https://www.legal-tools.org/doc/52d982/>).

trol over subordinates, in the sense of possessing the material ability to prevent subordinate offences or punish subordinate offenders after the commission of the crimes. [...] A showing that the official merely was generally an influential person will not be sufficient”.⁶ As noted previously, an attempt was furthermore undertaken by the *Bagilishema* Trial Chamber, to restrict the boundaries of the doctrine of non-military superior responsibility to solely cover so called “military-style” command situations. The argumentation was partly supported by the fact that the *Delalić et al.* Trial Chamber had concluded that the exercise of *de facto* authority had to be accompanied by the trappings of the exercise of *de jure* authority. The *Bagilishema* Trial Chamber interpreted these trappings of authority to include “for example, awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action,” and that “[i]t is by these trappings that the law distinguishes civilian superiors from mere rabble-rousers or other persons of influence”.⁷ This attempt was however assertively shot down by the Appeals Chamber through referring to the conclusions of the *Delalić et al.* Trial Chamber which held that civilian control solely had to be similar to that of military commanders (*Bagilishema*, 3 July 2002, para. 52).

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

⁶ ICTY, *Prosecutor v. Kordić and Čerkez*, Trial Chamber, Judgement, 26 February 2001, IT-95-1-2-T, paras. 415–416 (emphasis added) (<https://www.legal-tools.org/doc/d4fedd/>).

⁷ ICTR, *Prosecutor v. Bagilishema*, Trial Chamber, Judgement, 7 June 2001, ITCR-95-1A, paras. 42–43 (<https://www.legal-tools.org/doc/6164a4/>).

Article 28(b): Causal Link

as a result of his or her failure to exercise control properly

This, like the same requirement under Article 28(a), indicates a new causality requirement under the doctrine of superior responsibility. Accordingly, the principal crime undertaken by the subordinates has to be a result of the non-military superior's failure to exercise control properly. As to a discussion about the actual content of the "result" or 'causality' requirement, see the commentary above.

According to many scholars, the sphere of the civilian superior's ability to "exercise control properly" has to be limited to work or work-related activities. Hence, what is expected of the non-military superior in order to "exercise control properly" is limited accordingly.¹ The reason being that as opposed to a military commander, a non-military superior cannot be charged with the responsibility to control his or her subordinates twenty-four hours per day, seven days per week and, furthermore, he or she is normally not involved in efforts that generally increase the risk of subordinates committing international core crimes.

However, as to what is to be expected of the non-military superior, Fenrick asserts that he or she is "obligated to establish and maintain an effective reporting system to ensure his subordinates comply with international humanitarian law in their work and work-related activities and, if he or she becomes aware of potential or actual violations, to take all practicable measures to prevent or repress such violations". Fenrick does however make a distinction as to the kind of workers or work that could result in violations of international humanitarian law; for example, care of prisoners of war, interned civilians of forced labour or factories producing poison gas for use in camps. He furthermore gives the example of workers in a paint factory who, outside working hours engage in genocidal activities. A non-military superior to these workers could not, according to Fenrick, be con-

¹ Otto Triffterer and Roberta Arnold, "Article 28", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1102 (<https://www.legal-tools.org/doc/040751/>); William Fenrick, "Article 28", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 521 (<https://www.legal-tools.org/doc/434159/>).

victed under Article 28(b) for these genocidal activities. Arnold reiterates Fenrick’s conclusions as to the description of that “failure to exercise control properly” solely entails work-related activities.²

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

² For an alternative view refer to ICTR, *Prosecutor v. Musema*, Trial Chamber, Judgement, 27 January 2000, ICTR-96-13-T, para. 148 (<https://www.legal-tools.org/doc/1fc6ed/>).

Article 28(b)(i): Knowledge

Knew or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes

Knew:

This part of the *mens rea* requirement for non-military superiors is the same as the actual knowledge standard expressed under 28(a)(i). Comments as to the content hereof are therefore referred to the information provided above.

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

Article 28(b)(i): Conscious Disregard

consciously disregarded information which clearly indicated

The “consciously disregarding information which clearly indicated” - requirement in Article 28(b)(i), does however entail a much higher *mens rea* standard than what is provided for the doctrine of command responsibility (that is, the ‘reason to know’ or ‘should have known’ -standards under ICTY Statute Article 7(3) and ICC Statute Article 28(a) respectively). This new standard has, for example, been equated to ‘wilful blindness’, that is, that the superior is *aware* of a *high probability* of the existence of a fact (as long as he actually does not believe that it exists) and, yet, he or she decides to ‘turn a blind eye’ to this fact. As such, it has furthermore been explained that this new criterion stands somewhere between ‘actual knowledge’ and ‘recklessness’ (defined as “consciously disregarding a risk”).¹

This new standard is one of the main reasons why Article 28(b) is the common understanding to provide a higher threshold and consequently more difficulties for the prosecution under the doctrine (for example, Ambos, 2002, p. 870).

One of the reasons that there has been a much higher threshold placed upon non-military superiors is that, superiors in civilian structures generally do not have as many possibilities to receive information on the conduct of their subordinates as do military commanders.² The standard has therefore been identified to entail that it is necessary to establish that: (1) *information* clearly indicating a significant risk that subordinates were committing or were about to commit offences existed, (2) this information was *available* to the superior, and (3) the superior, while aware that such a category of information existed, declined to refer to the category of information.³ Obviously the exact content of each of these conditions could be

¹ Kai Ambos, “Superior Responsibility”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 870 (<https://www.legal-tools.org/doc/cbffe9/>).

² Otto Triffterer and Roberta Arnold, “Article 28”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1102 (<https://www.legal-tools.org/doc/040751/>).

³ William Fenrick, “Article 28”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Ver-

further discussed. Fenrick briefly touched upon these additional issues in his commentary, stating for instance that considering that a superior has *a duty to be informed*, and subsequently fails to avail him- or herself of information sent to his or her office, he or she could be considered to consciously disregard said information.

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

Article 28(b)(ii)

activities that were within the effective responsibility and control of the superior

The application and interpretation of this requirement, which obviously is an additional requirement under the doctrine of non-military superior responsibility as opposed to Article 28(a), is closely connected to the comments given under “failure to exercise control properly”.

Subordinates within the meaning of Article 28(b) are according to many scholars, only within the effective responsibility and control of the superior while they are at work or while engaged in work related activities. Outside these circumstances, the activities undertaken by the subordinates are not generally considered to be under the control of the superior.¹

This is thus considerably different from a military commander who is considered to be on duty at all times. The forces under military command are, by definition, furthermore subject to an internal disciplinary system. This is not generally the case for non-military superior-subordinate relationships.

Doctrine: For the bibliography, see the final comment on Article 28.

Author: Linnea Kortfält.

¹ William Fenrick, “Article 28”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 522 (<https://www.legal-tools.org/doc/434159/>); Otto Triffterer and Roberta Arnold, “Article 28”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1103 (<https://www.legal-tools.org/doc/040751/>).

Article 28(b)(iii): Failure to Take All Necessary and Reasonable Measures

Failed to take all necessary and reasonable measures within his or her power

The measures to prevent or repress the commission of the crimes by the subordinates, has to be necessary, reasonable and within the superiors' power. The duty of the superior should hence not be beyond what can reasonably be expected of him or her. Even if this condition has the same terminology as in Article 28(a), needless to say, it would entail different conditions when applied in a civilian context.

To a certain extent, the matter as to what can be considered necessary and reasonable measures within the superior's powers, are connected to what has been addressed above concerning the requirements: 'as a result of his or her failure to exercise control properly' and 'activities that were within the effective responsibility and control of the superior'.

The non-military superior is unlikely to have disciplinary powers. Action that can be expected of the superior in lines with his or her duty to prevention and repress could, for example, be issuing orders to the subordinates that the activities should cease, immediate dismissal or repatriation when stationed abroad.

If all of these possibilities do not work, of particular importance when dealing with the doctrine of non-military superior responsibility is the possibility of submitting the matter to the competent authorities for investigation (for example, higher superiors, police, military and/or civil or criminal judicial authorities).

All of these possible avenues would subsequently have to be followed-up, especially when repatriation is involved. In this latter case it is also important to ascertain that criminal investigations are undertaken upon arrival at the country of origin.¹

¹ William Fenrick, "Article 28", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 522 (<https://www.legal-tools.org/doc/434159/>); Otto Triffterer and Roberta Arnold, "Article 28", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1103 (<https://www.legal-tools.org/doc/040751/>).

Doctrine:

1. Kai Ambos, *Critical Issues in the Bemba Decision*, in *Leiden Journal of International Law*, 2009, vol. 22, pp. 715–726 (<https://www.legal-tools.org/doc/3e4213/>).
2. Kai Ambos, “Superior Responsibility”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 823–72 (<https://www.legal-tools.org/doc/cbffe9/>).
3. Robert Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2008.
4. Otto Triffterer and Roberta Arnold, “Article 28”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1056–1106 (<https://www.legal-tools.org/doc/040751/>).
5. William Fenrick, “Article 28”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, pp. 515–522 (<https://www.legal-tools.org/doc/434159/>).
6. Linnea Kortfält, *Occupational Zoon Commanders*, LAS, OTP, ICTY, 2003 (unpublished) (<https://www.legal-tools.org/doc/736945/>).
7. Linnea Kortfält, “Internationellt straffansvar för befäl i multinationella styrkor”, in Berggren (ed.), *Människan i NBF – Att förbereda för internationella missioner*, FHS ILM, Stockholm, 2006 (<https://www.legal-tools.org/doc/72c642/>).
8. Linnea Kortfält, “Skuldkravet och personliga förutsättningar för straffbarhet”, in Jo Stigen and Morten Bergsmo (eds.), *Nordisk introduktion till Internationell Straffrätt*, 2010 (unpublished) (<https://www.legal-tools.org/doc/c86dad/>).
9. Chantal Meloni, “Command Responsibility – Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?”, in *Journal of International Criminal Justice*, 2007, vol. 5, no. 3, pp. 619–37 (<https://www.legal-tools.org/doc/42e95b/>).
10. Volker Nerlich, “Superior Responsibility under Article 28 ICC Statute – For what Exactly is the Superior Held Responsible”, in *Journal of International Criminal Justice*, 2007, vol. 5, pp. 665 (<https://www.legal-tools.org/doc/53d6e1/>).

11. Maria L. Nybondas, *Command Responsibility and its Applicability to Civilian Leaders*, Asser Press, Amsterdam, 2010 (<https://www.legal-tools.org/doc/1c8f9e/>).
12. Guénael Mettraux, *The Law of Command Responsibility*, Oxford University Press, 2009, p. 38 (<https://www.legal-tools.org/doc/1f6159/>).
13. William H. Parks, “Command Responsibility for War Crimes”, in *Military Law Review*, 1973, pp. 1–104 (<https://www.legal-tools.org/doc/c7df19/>).
14. Greg R. Vetter, “Command Responsibility of Non-military Superiors in the International Criminal Court”, in *Yale Journal of International Law*, 2000 (<https://www.legal-tools.org/doc/f781ca/>).
15. Suzanne Wennberg, *Introduktion till straffrätten*, Norstedts juridik AB, Stockholm, 2001 (<https://www.legal-tools.org/doc/03c4fd/>).
16. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005 (<https://www.legal-tools.org/doc/e35f82/>).
17. Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, para. 3527.

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Article 29

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

General Remarks:

Article 29 provides for the non-applicability of statutory limitations to the international crimes that are subject matter of the International Criminal Court.

Preparatory Works:

The establishment of the International Criminal Court is the result of initiatives taken by the General Assembly, the International Law Commission, scholars and non-governmental organisations.¹ In 1994, the ILC submitted a Draft Statute for a permanent International Criminal Court. Even though the ILC had discussed the (non-)applicability of statutory limitations previously in the Draft Code of Crimes against the Peace and Security of Mankind, this time the ILC did not address this concept.² In 1995, an independent committee of scholars introduced in an alternative draft for an International Criminal Court, the so-called ‘Siracusa-Draft’, a new provision providing that “there is no statute of limitation for genocide, serious war crimes, and crimes against humanity (or aggression)”.³ In 1995, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court. In its first report, the Ad Hoc Committee

¹ See Ruth A. Kok, *Statutory Limitations in International Criminal Law*, T.M.C. Asser Press, The Hague, 2007; M.G. Page, “Article 29 of the Rome Statute”, in S. Yee (ed.), *International Crimes and Punishment: Selected Issues*, 2nd ed., University Press of America Inc, Dallas/Lanham/Boulder/New York/Oxford, 2004, pp. 1–35; Per Saland., “International Criminal Law Principles”, in Roy S.K. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute*, Kluwer Law International, the Hague, 1999; William A. Schabas, “General Principles of Criminal Law in the International Criminal Court Statute (Part III)”, *European Journal of Crime, Criminal Law, and Criminal Justice*, 1998, vol. 6, no. 4, p. 400; Schabas, 1999, pp. 523–535; Van den Wyngaert and Dugard, 2001, pp. 873–888.

² Report of the International Law Commission on the work of its forty-sixth session (2 May 1994–22 July 1994), UN Doc. A/49/10, 2 September 1994, Volume II (Part 2), pp. 20–73, paras. 42–91 (<https://www.legal-tools.org/doc/f73459/>).

³ Association Internationale de Droit Pénal (AIDP), International Institute of Higher Studies in Criminal Sciences (ISISC) and Max-Planck-Institute for Foreign and International Criminal Law (MPI), “Draft Statute for an International Criminal Court-Alternative to the ILC Draft”, Siracusa/Freiburg, July 1995, Article 33q (‘Siracusa-Draft, 1995’) (<https://www.legal-tools.org/doc/39a534/>).

pointed at the divergences between provisions on statutory limitations contained in domestic legislation, and some delegations questioned whether they should apply with respect to serious crimes:

Some delegations felt that the question of the statute of limitations for the crimes within the jurisdiction of the court should be addressed in the Statute in the light of divergences between national laws and bearing in mind the importance of the legal principle involved, which reflected the decreasing social importance of bringing criminals to justice and the increasing difficulties in ensuring a fair trial as time elapsed. However, other delegations questioned the applicability of the statute of limitations to the types of serious crimes under consideration and drew attention to the 1968 Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity.⁴

In the same year, the General Assembly established the Preparatory Committee on the Establishment of an ICC, with the task of preparing a “widely acceptable consolidated text of a convention for an international criminal court”.⁵ In 1996, the Preparatory Committee submitted its first report, containing five proposals on the (non-)applicability of statutory limitations.⁶ The first proposal provided for prescription periods of an unidentified length, as well as detailed rules governing their application. The second proposal provided that statutes of limitation do not apply to crimes within the jurisdiction of the Court. The third proposal provided for the non-applicability of statutory limitations to such crimes, unless “owing to the lapse of time, a person would be denied a fair trial”. The fourth proposal limited the material scope of the rule to only some of the crimes within the jurisdiction of the Court. The fifth and final proposal provided for a number of detailed rules concerning the application of statutes of limitation to all crimes within the jurisdiction of the Court. The five different proposals illustrate that the delegations highly disagreed on the matter.

⁴ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, 7 September 1995, para. 127 (‘Report of the Ad Hoc Committee, 1995’) (<https://www.legal-tools.org/doc/b50da8/>).

⁵ Establishment of an international criminal court, UN Doc. A/RES/50/46, 18 December 1995 (<https://www.legal-tools.org/doc/b0cdd4/>).

⁶ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II, UN Doc. A/51/22(SUPP), 14 September 1996, Volume II, Article F (<https://www.legal-tools.org/doc/03b284/>).

The debate was even more complicated, since the material scope of a statute for an international court was not yet defined. Their comments have been summarised in the report as follows:

Some delegations [Israel, Malaysia, and Ukraine] were of the view that owing to the serious nature of the crimes to be dealt with by the court, there should be no statute of limitations for such crimes. On the other hand, some delegations felt that such a provision was mandatory and should be included in the statute, having regard to their national laws, to ensure fairness for the accused. The view was expressed that statutory limitation might apply to lesser crimes [France]. In the view of some delegations [Japan], this question should be considered in connection with the issue of the availability of sufficient evidence for a fair trial. Some delegations [Canada] suggested that instead of establishing a rigid rule the Prosecutor or President should be given flexible power to make a determination on a case-by-case basis, taking into account the right of the accused to due process. In this connection, it was noted that Article 27 of the statute was relevant to this issue. It was suggested that an accused should be allowed to apply to the court to terminate the proceedings on the basis of fairness, if there was lack of evidence owing to the passage of many years.⁷

The proposals discussed by the Preparatory Committee on the Establishment of an ICC eventually were not consolidated in the Zutphen Report of 1998.⁸ However, the 1998 Report of the Preparatory Committee on the Establishment of an International Criminal Court, which formed the basis for the negotiations during the Rome Conference, did reflect the five proposals as described supra.⁹ During the Rome Conference, the Working Group on General Principles of Criminal Law proposed a provision providing for the non-applicability of statutory limitations to all crimes within the

⁷ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, UN Doc. A/51/22[VOL-I](SUPP), 14 September 1996, paras. 195, 196 (<https://www.legal-tools.org/doc/e75432/>).

⁸ 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, pp. 57–58, Article 21(f) (<https://www.legal-tools.org/doc/7ba9a4/>).

⁹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, UN Doc. A/Conf.183/2/Add.2, 14 April 1998, pp. 53–54, Article 27: “Statute of limitations” (<https://www.legal-tools.org/doc/732f58/>).

jurisdiction of the court.¹⁰ Japan changed its previous position, but maintained that the passage of time should provide for a mitigating factor in allowing a prosecution to proceed before the ICC (Saland, 1999, p. 204). The drafters of the 1998 ICC Statute eventually adopted the proposal of the Working Group, which is contained in Article 29. The only disagreement on this provision can be found in the joint statement submitted by China and France in a footnote of the Working Group's Report. They firstly disagreed on the application of this rule with respect to war crimes, and secondly, stressed their concern with regard to the effect of the passage of time in terms of securing a fair trial (Report of the Working Group on General Principles of Criminal Law, 1998, p. 4, fn. 7). However, the proposal was adopted by the Conference without changes.

Analysis:

i. Retroactivity:

Article 29 is silent on its retroactive application. However, pursuant to Article 11, the ICC has jurisdiction only with regard to crimes committed after the entering into force of the 1998 ICC Statute. The ICC Statute entered into force on 1 July 2002. The issue of retroactivity, therefore, does not arise.

ii. Complementarity:

The so-called 'complementarity' provision contained in Article 17 of the 1998 ICC Statute provides that states have the main responsibility for the adjudication of international crimes. Schabas points out that a problem of complementarity may arise if the prosecution of a crime at a national level is barred by a domestic statute of limitations but still possible pursuant to the 1998 ICC Statute (Schabas, 1998, p. 103). The ICC could declare that this state is 'unable' to prosecute; the ICC would then be entitled to exercise its jurisdiction. For this reason, most states' parties that still had domestic provisions on statutes of limitation to crimes within the jurisdiction of the ICC have abolished or amended them, although not all states' parties have done so. However, if a state has not done so, it shows its unwillingness to prosecute these crimes, thus entailing that the case is admissible

¹⁰ Report of the Working Group on General Principles of Criminal Law, UN Doc. A/Conf.183/C.1/WGGP/L.4, 18 June 1998, p. 4 ('Report of the Working Group on General Principles of Criminal Law, 1998') (<https://www.legal-tools.org/doc/90e790/>); Schabas, 1999, p. 525.

before the ICC. Indeed, it appears that a number of states, despite their ratification of the 1998 ICC Statute, did not (fully) amend their domestic legislation in this regard, and still apply statutes of limitation to (some) international crimes. Illustrative for the divergences between Article 29 and the domestic provisions are the implementation processes in France, Germany, and the Netherlands respectively.

First, whereas the French legal system since 1964 has provided for the imprescriptibility of crimes against humanity, war crimes remain subject to statutes of limitation.¹¹ In 1999, the French Constitutional Council considered that if a crime became statutorily barred due to the expiration of the prescription period provided for in the French legal system, the ICC would incur jurisdiction over the crime.¹² Since such circumstances would infringe upon the exercise of national sovereignty, the Constitutional Court concluded that the 1994 new French Penal Code should be amended by providing for the non-applicability of statutory limitations to war crimes as well.¹³

Second, Article 5 of the German 2002 Code of Crimes against International Law, that entered into force on 30 June 2002, confines the non-applicability of statutory limitations to ‘serious criminal offences’. As a consequence, this provision does not extend to war crimes subject to less than one-year imprisonment, such as the violation of the duty of supervision and the omission to report a crime as these sections form ‘less serious criminal offences’.¹⁴ These crimes remain subject to the ordinary provisions on statutory limitations, provided for in Article 78 of the German Penal Code. The German legislature exempted these crimes from imprescriptibility because it considered them of a significantly less serious nature than some ordinary crimes that remain subject to ordinary provisions on statutory limitations provided for in the Penal Code. Theoretically, the ICC could exercise its jurisdiction with respect to these minor war crimes pursuant to the complementarity provisions. However, it seems in most circumstances

¹¹ See France, *Journal Officiel*, 29 December 1964, No. 17.788, and *Bulletin Législatif Dalloz*, December 1964, p. 33.

¹² Constitutional Court of France, Decision 98-408 DC of 22 January 1999 (Treaty on the Statute of the International Criminal Court), in *Journal Officiel*, 24 January 1999, 1317.

¹³ ICRC Report 2003, p. 1.

¹⁴ Helmut Satzger, “German Criminal Law and the Rome Statute – A Critical Analysis of the New German Code of Crimes Against International Law”, in *International Criminal Law Review*, 2002, vol. 2, p. 272.

rather unlikely that the ICC, in effect, would start adjudicating such crimes, as the ICC aims at exercising its jurisdiction with respect to the most serious and gravest core international crimes exclusively. The Preamble 1998 ICC Statute states:

[A]ffirming 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; [...] Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.

Third, the Dutch International Crimes Act, that entered into force on 1 October 2003, provides in Article 13 for the non-applicability of statutory limitations to the crimes covered by the Act.¹⁵ The International Crimes Act confines the material scope of Article 29 of the 1998 ICC Statute, by excluding war crimes subject to a maximum sentence of 10-years imprisonment from its application. On the other hand, the International Crimes Act extends this provision, since it also applies with respect to the crime of torture *sui generis*, thus not constituting a crime against humanity. The legislature decided to extend the provision to this crime, owing to the very serious nature of the crime of torture, as well as the *ius cogens* character of the prohibition on torture.¹⁶ The International Crimes Act applies retroactively with respect to the crime of torture, unless its prescription period has already expired as of the date of the entering into force of the ICC Statute.¹⁷

International Instruments and Jurisprudence:

i. The Statutes of the Ad Hoc Tribunals:

The Statutes of the International Criminal Court for the Former Yugoslavia and the International Criminal Court for Rwanda do not contain any provisions on the (non-)applicability of statutory limitations. The only reference

¹⁵ The Netherlands, International Crimes Act, 19 June 2003, Stb. 270, 3 July 2003, 28337.

¹⁶ See the Dutch government in their explanatory memorandum on the International Crimes Act, Bijl. Hand. II 2001/2002, 28 337, No. 3, p. 33.

¹⁷ Machteld Boot-Matthijssen and Richard van Elst, “Wetsvoorstel Internationale misdrijven, enkele knelpunten en mogelijke verbeteringen”, in *Netherlands Juristenblad*, 2002, vol. 77, no. 4, pp. 1745- 1747.

to the aspect of time can be found in the provisions providing for the Ad Hoc Tribunal's temporal jurisdiction. The ICTY Statute provides in Article 8: "The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991". The ICTR Statute provides in Article 7: "The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994". Even though at this stage the (non-)applicability of statutory limitations to international crimes already had been addressed frequently in various international instruments, the drafters apparently considered that a provision was unnecessary. First, too little time had passed for a possible expiration of prescription periods. After all, the ICTY was established during the armed conflict in the Socialist Federal Republic of Yugoslavia, and the ICTR in a few months after the genocide terminated in Rwanda. Secondly, both the Socialist Federal Republic of Yugoslavia and Rwanda had already become parties to the 1968 UN Convention before the events occurred on the territories in the 1990s. The Socialist Federal Republic of Yugoslavia ratified the 1968 UN Convention on 9 June 1970; Rwanda acceded to the 1968 UN Convention on 16 April 1975. Moreover, the penal codes of the Former Yugoslavia and Rwanda provide for the non-applicability of statutes of limitation to international crimes.

There is some case law of the ICTY on statutes of limitation. In 1997, the Trial Chamber in the *Tadić* case¹⁸ referred to a decision of a French domestic court in the French case of Barbie concerning the applicability of statutory limitations to crimes against humanity.¹⁹ However, the Chamber itself did not express any opinion on the permissibility of the application of statutory limitation. This is different in the judgment of the Trial Chamber in the *Furundžija* case.²⁰ In an *obiter dictum*, that Trial Chamber concluded that, considering the *jus cogens* character of the prohibition of torture, "it would seem that other consequences include the fact that torture may not be covered by a statute of limitations" (*Furundžija*, 10 December 1998, paras. 156, 157). However, the Trial Chamber did not explain how it reached such a conclusion. In addition, the Chamber recognised this rule with respect to the crime of torture as a war crime, rather than the

¹⁸ ICTY, *Prosecutor v. Tadić*, Trial Chamber, Judgment, 7 May 1997, IT-94-1-T, paras. 641–642 (<https://www.legal-tools.org/doc/0a90ae/>).

¹⁹ France, Court of Appeal, Criminal Chamber, Decision, 4 October 1985, ILR 125.

²⁰ ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Judgment, 10 December 1998, IT-95-17/1-T, para. 156 (<https://www.legal-tools.org/doc/e6081b/>).

crime of torture *sui generis*.²¹ In later judgments, no Trial Chamber has pronounced itself on the same matter. In 2004 in the case of *Mrđa*, the Trial Chamber discussed the difference between statutes of limitation versus the right to be tried without undue delay. In analysing the effect of the passage of time on the determination of the sanction, the Chamber recalled that:

[T]he importance of international prosecution of the perpetrators of such serious crimes diminishes only slightly over the years, if at all. On this point, it is important to recall Article 1 of the 1968 UN Convention (ratified by the former Yugoslavia on 9 June 1970 and currently in force in Bosnia and Herzegovina), which stipulates that such crimes are not subject to statutory limitation [...] [F]or crimes of a seriousness justifying their exclusion from statutory limitation, the Trial Chamber considers that a lapse of time of almost twelve years between the commission of the crimes and sentencing proceedings is not so long as to be considered a factor for mitigation.²²

At present, the *ad hoc* tribunals are engaged in putting into effect so-called ‘completion strategies’, which imply that they will stop trying cases in the near future. Statutes of limitation play no role in these strategies.

ii. The Statutes of the Internationalised Tribunals:

a. The Special Panels for Serious Crimes in East Timor:

By its Resolution 1272 (1999) adopted on 25 October 1999, the Security Council of the United Nations, acting under Chapter VII of the Charter of the UN, decided to establish a United Nations Transitional Administration in East Timor (‘UNTAET’).²³ Among other things, UNTAET was empowered to exercise all legislative and executive authority, including the administration of justice. In 2000, the Representative of the UN, pursuant to the authority given to him under the Security Council Resolution, adopted UNTAET Regulation 2000/15, whereby Panels with the exclusive jurisdiction with respect to serious criminal offences were established.²⁴ The Regu-

²¹ Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p. 119.

²² ICTY, *Prosecutor v. Mrđa*, Trial Chamber I, Sentencing judgement, 31 March 2004, IT-02-59-S, paras. 103–104 (<https://www.legal-tools.org/doc/d61b0f/>).

²³ Resolution 1272 (1999), UN Doc. S/RES/1272 (1999), on 25 October 1999 (<https://www.legal-tools.org/doc/b8ed17/>).

²⁴ Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/Reg./2000/15, 6 June 2000 (‘UNTAET Regulation, 2000’) (<https://www.legal-tools.org/doc/c082f8/>).

lations provide for the prosecution of genocide, war crimes, crimes against humanity, murder, sexual offences and torture. The drafters of the Regulations of the Panels did not need to fear for a possible expiration of the prescription periods as provided for in the Timor-Leste Penal Code (In Timor-Leste, Art. 78 of the Indonesia 1918 Penal Code, as well as the Portuguese Penal Code apply), since the tribunal's subject matter jurisdiction concerns crimes committed in 1999 (UNTAET Regulation, 2000, Sec. 2(3)). Nevertheless, the Regulation provides for the non-applicability of statutory limitations to crimes of genocide, war crimes, crimes against humanity, and the crime of torture. Ordinary crimes, such as murder and sexual offences, remain subject to domestic provisions providing for statutory limitations as contained in the Timor-Leste domestic Penal Code.

b. The Special Court for Sierra Leone:

In 2002, the United Nations and the government of Sierra Leone agreed on the establishment of a Special Court for Sierra Leone.²⁵ The Statute does not contain any provision providing for the (non-)applicability of statutory limitations.²⁶ Obviously, there was no reason to provide for a provision in this regard, as the Special Court has jurisdiction over crimes committed only since 30 November 1996 (Statute of the Special Court for Sierra Leone, Article 1). At the time of the Special Court's establishment (2002), too little time had passed for a possible expiration of the prescription periods. In addition, since the common law as applied within the Sierra Leonean domestic criminal law does not apply statutes of limitations to felonies, the drafters probably considered the inclusion of a provision unnecessary.

c. The Extraordinary Chambers in the Courts of Cambodia:

In 2003, the UN General Assembly in its Resolution 57/228B approved a draft agreement between the United Nations and the government of Cambodia with regard to the establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during

²⁵ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002 (<https://www.legal-tools.org/doc/797850/>).

²⁶ Kai Ambos and Mohamed Othman, *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia*, Edition iuscrim, Freiburg im Breisgau, 2003; Cesare P. R. Romano, André Nollkaemper and Jann K. Kleffner (eds.), *Internationalized Criminal Courts and tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford University Press, 2004.

the Period of Democratic Kampuchea.²⁷ The agreement between the United Nations and the government of Cambodia was signed on 6 June of the same year, and entered into force on 29 April 2005. The (non-)applicability of statutory limitations was one of the aspects debated during the drafting stage of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, adopted in 2001.²⁸ This third internationalised court has jurisdiction over crimes committed almost 30 years earlier (in the period from 1975 to 1979). At the time of the adoption of the Act in 2001, and amended in 2004 pursuant to the Law on the amendment of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (adopted by the National Assembly on 5 October 2004), many crimes had become statutorily barred pursuant to the expiration of prescription periods of a maximum of ten years as provided for in the Cambodian Criminal Code.²⁹ In order to overcome this obstacle, the 2004 Act on the Amendments of the 2001 Act on the Establishment of the Extraordinary Chambers in Article 3 extends the prescription periods of common crimes by 30 years.³⁰ Second, it provides for the non-applicability of statutory limitations to the crime of genocide and crimes against humanity in Article 4. It is unclear why war crimes remain subject to the ordinary statute of limitations in Article 6. It may be the case that the French approach towards statutory limitations for war crimes influenced the Cambodian legislature. The discrepancy between the core international crimes suggests that the drafters of the Act consider war crimes not of a similar grave nature as crimes against humanity and genocide. In addition, the Statute does not regulate its retroactivity with respect to crimes that have

²⁷ Khmer Rouge Trials, UN Doc. A/RES/57/228B, 22 May 2003 (<https://www.legal-tools.org/doc/533d2a/>).

²⁸ Cambodia, Reach Kram No. NS/RKM/0801/12, 10 August 2001, promulgating the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (<https://www.legal-tools.org/doc/88d544/>).

²⁹ Cambodia, Provisions relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period, 10 September 1992, Article 30: “Statute of Limitations” (<https://www.legal-tools.org/doc/3e1296/>): the statute of limitations is three years for misdemeanours and ten years for felonies.

³⁰ Cambodia, Law on the Amendments to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 2004, Article 3.

already become prescribed pursuant to Cambodian domestic law. The absence of a provision in this regard suggests that the Statute applies retroactively; it thus permits the reopening of cases involving already prescribed crimes.³¹

Discussion on Statutory Limitations:

i. Scholarly Organisations and Scholars:

Since the establishment of the ICC, scholarly organisations and scholars have broadened the discussions on the (non-)applicability of statutory limitations to core international crimes other than the ones committed during the Second World War. Finkelkraut emphasises the renewed interest for France’s position during the Second World War as a consequence of the war crimes trials of Barbie and Touvier.³² Moreover, they also discussed this question with respect to crimes of forced disappearance of persons and the crime of torture. Poncela points at the restrictive material scope of the French 1964 Act declaring imprescriptibility of crimes against humanity.³³ Zaffaroni discusses this concept with respect to military junta crimes through analysing the Argentinean case law.³⁴ Zimmermann carries out a similar inquiry on statutory limitations with respect to communist crimes through analysing case law and legislation in the Czech Republic, France, Germany, and Hungary.³⁵ When in 1995 an independent group of experts associated with the International Association of Penal law addressed this concept for a second time, it introduced in the so-called ‘Siracusa-Draft’ a new provision providing that “there is no statute of limitation for genocide, serious war crimes, and crimes against humanity (or aggression)” (Siracusa-Draft, 1995, Art. 33(q)). Another example is provided for by the Princeton Principles adopted in 2001, which recommends in Principle 6 the adop-

³¹ Bert Swart, “Internationalized Courts and Substantive Criminal Law”, in Romano, Nolkaemper and Kleffner (eds.), 2004, pp. 312–313.

³² Alain Finkelkraut, *Remembering in vain: The Klaus Barbie Trial and Crimes Against Humanity*, Columbia University Press, New York, 1992.

³³ Pierette Poncela, “L’imprescriptibilité”, in Alain Pellet, Adama Dieng and Malick Sow (eds.), *Droit international pénal, la formation du droit international pénal*, A. Pedone, Paris, 2000, pp. 887–895.

³⁴ Eugenio R. Zaffaroni, “Notas sobre el fundamento de la imprescriptibilidad de los crímenes de lesa humanidad”, in *Revista Nueva Doctrina Penal*, 2000, vol. 437.

³⁵ Stefan Zimmermann, *Strafrechtliche Vergangenheitsaufarbeitung und Verjährung, Rechtsdogmatische und politische Analyse mit vergleichenden Ausblicken nach Tschechien, Ungarn und Frankreich*, Edition iuscrim, Freiburg im Breisgau, 1997.

tion of a provision on the imprescriptibility of a number of international crimes. Other contemporary scholars remain hesitant in recognizing the existence of a rule of customary international law or general principle of law and rather speak of the ‘crystallization’ of such a rule.³⁶ Some consider the imprescriptibility of international crimes a rule of customary international law, or even *jus cogens*.³⁷ An example is provided for by the Advisory opinion in the case of *Bouterse*, in the proceedings before the Amsterdam Court of Appeal in 2000, in which the expert concluded that crimes against humanity are imprescriptible pursuant to customary law.³⁸ Notwithstanding this opinion, neither the Court of Appeal, nor the Supreme Court pronounced itself on this issue. Therefore, the expert opinion is of no significance in determining the customary character of the non-applicability of statutory limitations to international crimes. Despite discussions on various legal aspects, scholars hardly addressed the desirability of the imprescriptibility of international crimes from a criminological, philosophical, or moral perspective. An exception forms, for instance, the study carried out by the

³⁶ Steven R. Ratner, Jason S. Abrams and James L. Bischoff, *Accountability for Human Rights Atrocities in International Law, Beyond The Nuremberg Legacy*, Oxford University Press, 2001, p. 143, referring to Christine Van den Wyngaert, “War Crimes, Genocide and Crimes Against Humanity: Are States Taking National Prosecutions Seriously?”, in M. Cherif Bassiouni, *International Criminal Law*, 3rd. ed., Transnational Publishers, Ardsley, 1999, pp. 227 and 233; Mireille Delmas-Marty, “La responsabilité pénale en échec (prescription, amnistie, immunités)”, in Antonio Cassese and Mireille Delmas-Marty (eds.), *Juridictions nationales et crimes internationaux*, Presses universitaires de France, Paris, 2002, pp. 617, 618; Paola Gaeta, “War Crimes Trials Before Italian Criminal Courts, New Trends”, in Horst Fischer, Class Kress and Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law: Current Developments*, Spitz, Berlin, 2001, p. 766; Helmut Kreicker, “Allgemeine Strafbarkeitsvoraussetzungen”, in Albin Eser, Helmut Kreicker and Helmut Gropengießer, *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Edition Iuscrim, Freiburg im Breisgau, 2003, p. 377; Schabas, 1999, p. 524; Zimmermann, 1997, p. 251.

³⁷ M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, Nijhoff, Dordrecht, 1999, p. 227 and M. Cherif Bassiouni, “Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights”, in M. Cherif Bassiouni, *Post-Conflict justice*, Transnational Publishers, Ardsley, 2002, p. 17; Cassese, 2003, p. 319; Page, 2004, p. 47; Leopoldo Schiffrin, “De Eichmann a Schwammberger, de Priebeke a Videla: la evolución de la idea de imprescriptibilidad de los delitos de lesa humanidad en el derecho argentino”, in Oded Balaban and Amos Megged (eds.), *Impunidad y derechos humanos en América latina*, Al Margen, La Plata, 2003, p. 147; Van den Wyngaert and Dugard, 2001, p. 887.

³⁸ The Netherlands, Court of Appeals of Amsterdam, Opinion Re *Bouterse*, 7 July 2000, ELRO-No. AA 8427, para. 4.5.6.

Max Planck Institute for Foreign and International Criminal Law, presented during the Conference ‘Strafverfolgung von Staatskriminalität, Vergeltung, Wahrheit und Versöhnung nach politischen Systemwechseln’, Berlin 2004.

ii. Non-Governmental Organisations:

In 2005, the International Committee of the Red Cross (ICRC), which carried out an extensive study on customary international humanitarian law concluded that “[s]tatutes of limitation are not applicable to war crimes”.³⁹ Non-governmental organisations on various occasions actively called upon states not to apply statutory limitations to international crimes. A clear example of this activism is the establishment of the Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery, adopted by the Violence against Women in War Network Japan and other Asian women’s and human rights organizations in 2000. Article 6 of its Charter provides that “[s]tatutory limitations do not apply with respect to international crimes committed against women before and during World War II. These crimes include, but are not limited to the following acts: sexual slavery, rape, and other forms of sexual violence, enslavement, torture, deportation, persecution, murder, and extermination”.⁴⁰ Furthermore, the International Commission of Jurists, together with Amnesty International, called upon the Argentinean authorities to recognise the imprescriptibility of various human rights violations committed by former military junta regimes. Moreover, Human Rights Watch emphasised that statutes of limitation should not preclude criminal proceedings against former Chad president Hissène Habré before Belgian or Senegalese courts. Another example is provided for by the Argentinean non-governmental organisation called ‘Mothers of the Playa de la Mayo’, which emphasised for over 30 years that the ‘*desaparecidos*’ cases should not become prescribed, as long as the victims’ whereabouts have not been discovered. Finally, in 2004 Human Rights First submitted an extensive analysis on statutes of limitation to the Peruvian Truth and Reconciliation Commission, established in 2000, in which this organization concluded that crimes committed during the regime of former President Fujimori are not subject to statutes of limitation.

³⁹ Jean Marie Henckaerts and Louise Doswald-Beck, *ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, 2005, p. 614, vol. 2, chapter 43, section E.

⁴⁰ Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery, Statute, Article 6.

Doctrine:

1. Steven R. Ratner, Jason S. Abrams and James L. Bischoff, *Accountability for Human Rights Atrocities in International Law, Beyond The Nuremberg Legacy*, Oxford University Press, 2001, p. 143.
2. Kai Ambos and Mohamed Othman, *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia*, Edition iuscrim, Freiburg im Breisgau, 2003.
3. M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, Nijhoff, Dordrecht, 1999.
4. M. Cherif Bassiouni., “Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights”, in M. Cherif. Bassiouni, *Post-Conflict Justice*, Transnational Publishers, Ardsley, 2002.
5. Machteld Boot-Matthijssen and Richard van Elst, “Wetsvoorstel Internationale misdrijven, enkele knelpunten en mogelijke verbeteringen”, in *Netherlands Juristenblad*, 2002, vol. 77, no. 4, p. 1729.
6. Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003.
7. Mireille Delmas-Marty, “La responsabilité pénale en échec (prescription, amnistie, immunités)”, in Antonio Cassese and Mireille Delmas-Marty (eds.), *Juridictions nationales et crimes internationaux*, Presses universitaires de France, Paris, 2002.
8. Alain Finkelkraut, *Remembering in vain: The Klaus Barbie Trial and Crimes Against Humanity*, Columbia University Press, New York, 1992.
9. Paola Gaeta, “War Crimes Trials Before Italian Criminal Courts, New Trends”, in Horst Fischer, Class Kress and Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law: Current Developments*, Spitz, Berlin, 2001.
10. Jean Marie Henckaerts and Louise Doswald-Beck, *ICRC Study on Customary International Humanitarian Law*, volume 1: Rules, Cambridge University Press, Cambridge, 2005.
11. Ruth A. Kok, *Statutory Limitations in International Criminal Law*, T.M.C. Asser Press, The Hague, 2007.
12. Helmut Kreicker, “Allgemeine Strafbarkeitsvoraussetzungen”, in Albin Eser, Helmut Kreicker and Helmut Gropengießer, *Nationale Strafver-*

- folgung völkerrechtlicher Verbrechen*, Edition Iuscrim, Freiburg im Breisgau, 2003.
13. M.G. Page, “Article 29 of the Rome Statute”, in S. Yee (ed.), *International Crimes and Punishment: Selected Issues*, 2nd. ed., University Press of America Inc, Dalas/Lanham/Boulder/New York/Oxford, 2004.
 14. Pierette Poncela, “L’imprescriptibilité”, in Alain Pellet, Adama Dieng and Malick Sow (eds.), *Droit international pénal, la formation du droit international pénal*, A. Pedone, Paris, 2000.
 15. Per Saland., “International Criminal Law Principles”, in Roy S.K. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute*, Kluwer Law International, the Hague, 1999.
 16. Helmut Satzger, “German Criminal Law and the Rome Statute – A Critical Analysis of the New German Code of Crimes Against International Law”, *International Criminal Law Review*, 2002, vol. 2, p. 261.
 17. William A. Schabas, “General Principles of Criminal Law in the International Criminal Court Statute (Part III)”, *European Journal of Crime, Criminal Law, and Criminal Justice*, 1998, vol. 6, no. 4, p. 400.
 18. William A. Schabas, “Article 29: Non-Applicability of Statutes of Limitations”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1107–1110 (<https://www.legal-tools.org/doc/040751/>).
 19. Leopoldo Schiffrin, “De Eichmann a Schwammberger, de Priebke a Videla: la evolución de la idea de imprescriptibilidad de los delitos de lesa humanidad en el derecho argentino”, in Oded Balaban and Amos Megged (eds.), *Impunidad y derechos humanos en América latina*, Al Margen, La Plata, 2003.
 20. Bert Swart, “Internationalized Courts and Substantive Criminal Law”, in Cesare P. R. Romano, André Nollkaemper and Jann K. Kleffner (eds.), *Internationalized Criminal Courts and tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford University Press, 2004.
 21. Christine Van den Wyngaert, “War Crimes, Genocide and Crimes Against Humanity: Are States Taking National Prosecutions Seriously?”, in M. Cherif Bassiouni, *International Criminal law*, 3rd. ed., Transnational Publishers, Ardsley, 1999.

22. Eugenio R. Zaffaroni, “Notas sobre el fundamento de la imprescriptibilidad de los crímenes de lesa humanidad”, in *Revista Nueva Doctrina Penal*, 2000, vol. 437.
23. Stefan Zimmermann, *Strafrechtliche Vergangenheitsaufarbeitung und Verjährung, Rechtsdogmatische und politische Analyse mit vergleichenden Ausblicken nach Tschechien, Ungarn und Frankreich*, Edition iuscrim, Freiburg im Breisgau, 1997.

Author: Ruth Bonnevalle-Kok.

Article 30

Mental Element

General Remarks:

For the first time in the history of international criminal law, and unlike the Nuremberg and Tokyo Charters and the ICTY and ICTR Statutes, Article 30 of the ICC Statute has provided for a general definition of the mental element triggering the criminal responsibility of individuals for core international crimes.

This provision, which is applicable and binding within the jurisdiction of the ICC, has not put an end to the lively debate on *mens rea* that during the last two decades has confronted the jurisprudence of the ICTY and ICTR. Quite the contrary, the negotiations on Article 30 ICC Statute involved actors coming from different legal cultural experiences, who engaged in an effort of comparative law synthesis.¹ Despite the attempt to find a shared grammar, practitioners and scholars still disagree in relation to the exact meaning of the standards of culpability set out in the norm in question. Professor Joachim Vogel notes that the main reason of such confusion “is that intent and knowledge are defined in Articles 30(2) and (3) ICC Statute under clear influence of the common law principles, but in a manner that is a compromise and therefore not consistent and not without overlaps, and applies to *dolus eventualis* in the German understanding (awareness that a circumstance exists or a consequence will occur in the ordinary course of events)”.²

Doctrine: For the bibliography, see the final comment on Article 30.

Author: Mohamed Elewa Badar.

¹ On the drafting history of Article 30 ICC Statute see Roger S. Clark, “The Mental Element in International Criminal Law: the Rome Statute of the International Criminal Court and the Elements of Offences”, in *Criminal Law Forum*, 2001, vol. 12 (<https://www.legal-tools.org/doc/554e66/>).

² Joachim Vogel, “Vor § 15, Laufhütte”, in Heinrich Wilhelm *et al.* (eds.), *Strafgesetzbuch Leipziger Kommentar*, 12th ed., De Gruyter, Berlin, 2007, margin 95 (<https://www.legal-tools.org/doc/0511e4/>).

Article 30(1)

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.

Article 30 of the ICC Statute is based on a rule-exception dynamic. Criminal responsibility for core international crimes can normally be attached only to those who realized the material elements with ‘intent and knowledge’, even though exceptions to the default rule on the mental element are to some extent allowed (“[u]nless otherwise provided” – this wording will be addressed below).

The use of the terms ‘intent and knowledge’ could appear to point to two distinct types of mental element. However, according to the early practice of the ICC and commentators this formula refers to will and cognition as being both necessary components of the one mental element of intent.¹ The choice of the terms ‘intent’ and ‘knowledge’ is rather unfortunate. Criminal systems of civil law countries generally consider ‘knowledge’ (*Wissen, conscience*) to be a requirement of intent alongside the element of will (*Wollen, volonté*).² In criminal systems of common law countries, ‘knowledge’ can even be a kind of intent, namely intent based on perception of the unlawful outcome with a level of likelihood bordering with certainty.³ It can be said, hence, that “[i]n comparative criminal law [...]

¹ See, *inter alia*, ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, para. 529 (<https://www.legal-tools.org/doc/67a9ec/>); Abin Eser, “Mental Elements – Mistake of Fact and Mistake of Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, p. 907 (<https://www.legal-tools.org/doc/01addc/>).

² Hans-Heinrich Jescheck and Thomas Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil*, 5th. ed., Duncker and Humblot, Berlin, 1996, p. 293 (<https://www.legal-tools.org/doc/f75a20/>); on the French criminal system, see Jean-Claude Soyér, *Droit pénal et procédure pénale*, 18th. ed., LGDJ, Paris, 2004, p. 98 (<https://www.legal-tools.org/doc/50184e/>); John Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law*, Oxford University Press, 1998, p. 225 (<https://www.legal-tools.org/doc/03bee8/>).

³ On the United States criminal system, see Model Penal Code, Section 2.02(2)(b) (<https://www.legal-tools.org/doc/08d77d/>); Mohamed E. Badar, *The Concept of Mens Rea in International Criminal Law. The Case for a Unified Approach*, Hart Publishing, Oxford, 2013, pp. 107 ff. (<https://www.legal-tools.org/doc/a80f60/>).

‘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)”⁴

As a point of reference for the agent’s “intent and knowledge”, Article 30(1) of the ICC Statute mentions the “material elements” of the crime. The ICC Statute, however, lacks a general provision on the definition of the material elements of the crime or *actus reus*. The deficiency is partially remedied in Article 30(2) and (3) of the ICC Statute. These provisions, which will be addressed in detail below, set out the notions of intent and knowledge in relation not to the crime as a whole, but to the elements of conduct, consequence and circumstance separately. Such a drafting technique assigns different levels of culpability to each of the material elements of the crime. This represents a notable move from an ‘offence analysis’ approach to *mens rea* to an ‘element analysis’ approach to *mens rea*⁵ that finds a remarkable precedent in Section 2.02 of the US Model Penal Code. The move from ‘offence analysis’ to ‘element analysis’ has historically aimed to achieve “a rational, clear, and just system of criminal law”⁶. Determining the level of culpability required for criminality in relation to each single material element improves the precision of the offence definition, what in turn provides fair notice of the extent of the criminal ban and reduces the possibilities of extensive interpretation (Robinson and Grall, 1983, pp. 703 ff.; on this point, see also Badar and Porro, 2015, p. 652).

According to the opening clause at the beginning of Article 30(1) of the ICC Statute, the requirement of “intent and knowledge” applies “[u]nless otherwise provided”. It is widely accepted that this formula allows the ICC to infer exceptions to the default rule on the mental element

⁴ Mohamed E. Badar and Sara Porro, “Rethinking the Mental Elements in the Jurisprudence of the ICC”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 651 (<https://www.legal-tools.org/doc/729159/>); on this aspect see also Sara Porro, *Risk and Mental Element: An Analysis of National and International Law on Core Crimes*, Nomos, Baden-Baden, 2014, p. 176 (<https://www.legal-tools.org/doc/8aa23a/>).

⁵ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber, Decision on the Confirmation of Charges, 15 June 2009, ICC-01/05-01/08-424, para. 356 (<https://www.legal-tools.org/doc/07965c/>), endorsing *inter alia* Mohamed E. Badar, “The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective”, in *Criminal Law Forum*, 2008, vol. 19, pp. 475 ff. (<https://www.legal-tools.org/doc/e53965/>); Badar, 2013, pp. 384 ff.

⁶ Paul H. Robinson and Jane A. Grall, “Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond”, in *Stanford Law Review*, 1983, vol. 35, p. 685 (<https://www.legal-tools.org/doc/a8a58a/>).

from other provisions of the ICC Statute, such as Article 6 on genocide or Article 28 on superior responsibility. It is controversial, in contrast, whether departures from the standard of “intent and knowledge” can also derive from the Elements of Crimes,⁷ or even customary international law (in this sense, *inter alia*, Werle and Jeßberger, 2005, pp. 45 ff.). The early practice of the ICC has sustained the view that both the ICC Statute and the Elements of Crimes can provide ‘otherwise’. Paragraph (2) of the General Introduction to the Elements of Crimes asserts in this direction that:

[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 Crimes 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 [...].

Doctrine: For the bibliography, see the final comment on Article 30.

Author: Mohamed Elewa Badar.

⁷ In this sense, *inter alia*, Gerhard Werle and Florian Jeßberger, “Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes Under International Criminal Law”, in *Journal of International Criminal Justice*, 2005, vol. 3, pp. 45 ff. (<https://www.legal-tools.org/doc/dc34fe/>); Badar, 2008, p. 501; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 628 ff.; Porro, 2014, pp. 192 ff.

Article 30(2)

2. For the purposes of this article, a person has intent where:

Adhering to the already mentioned ‘element analysis’ approach to *mens rea*, paragraph (2) of Article 30 ICC Statute defines intent in relation to the material elements of conduct and consequence separately.

Doctrine: For the bibliography, see the final comment on Article 30.

Author: Mohamed Elewa Badar.

Article 30(2)(a): Intent in Relation to Conduct

(a) In relation to conduct, that person means to engage in the conduct;

Concerning the definition of intent in relation to conduct, which the early practice of the ICC has not yet addressed, commentators have proposed two competing interpretations.

According to a first approach, Article 30(2)(a) ICC Statute would merely require that the conduct be accomplished as a result of the agent's free determination to act. Intent in relation to conduct would in other words be established unless the action or omission was performed during unconsciousness, was due to an automatism, or in other ways was involuntary.¹

Other commentators, and in particular Ambos, have instead opined that the voluntariness to accomplish a certain conduct would be part already of the notion of act relevant to the criminal law. Article 30(2)(a) ICC Statute would impose an additional element of conscious will to engage in the conduct, or awareness to engage in it. In either case the agent would be required to have known the factual circumstances qualifying the action or omission as relevant to the criminal law.²

¹ In this sense, *inter alia*, Abin Eser, "Mental Elements – Mistake of Fact and Mistake of Law", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, p. 913 (<https://www.legal-tools.org/doc/01addc/>); Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd. ed., Oxford University Press, 2014 (<https://www.legal-tools.org/doc/01710e/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 631 (<https://www.legal-tools.org/doc/b7432e/>); Sara Porro, *Risk and Mental Element: An Analysis of National and International Law on Core Crimes*, Nomos, Baden-Baden, 2014, pp. 177 ff. (<https://www.legal-tools.org/doc/8aa23a/>).

² In this sense, *inter alia*, see Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung*, Duncker and Humblot, Berlin, 2002., pp. 765 ff. (<https://www.legal-tools.org/doc/3e7799/>); Sarah Finnin, *Elements of Accessorial Modes of Liability: Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court*, Nijhoff, Leiden-Boston, 2012, pp. 163 ff. (<https://www.legal-tools.org/doc/3257b4/>); Sarah Finnin, "Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: a Comparative Analysis", in *International and Comparative Law Quarterly*, 2012, vol. 61, pp. 341 ff. (<https://www.legal-tools.org/doc/cfd03f/>); Mohamed E. Badar, *The Concept of Mens Rea in International Criminal Law. The Case for a Unified Approach*, Hart Publishing, Oxford, 2013, p. 388 (<https://www.legal-tools.org/doc/a80f60/>).

The latter interpretation of intent in relation to conduct relies on the concept of act relevant to the criminal law acknowledged in continental European countries such as Austria, Germany, Italy and Spain that includes a component of free determination to act.³ However, this concept of criminal act has not attained world-wide diffusion, since for instance Section 1.13(2) of the US Model Penal Code provides that ““act” or “action” means a bodily movement whether voluntary or involuntary”.⁴ It can be questioned whether the notion of criminal act as including an element of voluntariness is representative enough to establish a general principle of law common to the major legal systems of the world pursuant to Article 21(1)(c) ICC Statute.⁵ Only such a general principle of law might legitimately play a role in the interpretation of Article 30(2)(a) ICC Statute (on this point see also Porro, 2014, pp. 177 ff.).

Doctrine: For the bibliography, see the final comment on Article 30.

Author: Mohamed Elewa Badar.

³ On the German criminal system, see Hans-Heinrich Jescheck and Thomas Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil*, 5th. ed., Duncker and Humblot, Berlin, 1996, pp. 219 ff. (<https://www.legal-tools.org/doc/f75a20/>).

⁴ United States, Model Penal Code, s. 1.13(2) (<https://www.legal-tools.org/doc/08d77d/>).

⁵ Mohamed E. Badar and Noelle Higgins, “General Principles of Law in the Early Jurisprudence of the ICC”, in Triestino Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity*, Routledge, London, 2014 (<https://www.legal-tools.org/doc/729159/>).

Article 30(2)(b): Intent in Relation to Result

(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.

While the former alternative of Article 30(2)(b) of the ICC Statute refers to cases where the agent aimed to bring about the consequence or result, the latter one applies to situations where the agent foresaw the result with a certain degree of likelihood.

Competing Interpretations:

The main issue that has arisen in respect to intent as awareness that the result “will occur in the ordinary course of events” concerns the level of likelihood with which the agent must have foreseen the result.

A first school of thought has argued that the default rule of Article 30 of the ICC Statute would not accommodate any standard of *mens rea* below the threshold of knowledge of result in terms of practical certainty.¹

¹ In this sense, *inter alia*, ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, paras. 359 ff. (*‘Bemba*, 15 June 2009’) (<https://www.legal-tools.org/doc/07965c/>); *Prosecutor v. Lubanga*, Trial Chamber, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 1011 (*‘Lubanga*, 14 March 2012’) (<https://www.legal-tools.org/doc/677866/>); *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, paras. 441 ff. (*‘Lubanga*, 1 December 2014’) (<https://www.legal-tools.org/doc/585c75/>); Abin Eser, “Mental Elements – Mistake of Fact and Mistake of Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, pp. 915 ff. (<https://www.legal-tools.org/doc/01addc/>); Johan/ D. van der Vyver, “The International Criminal Court and the Concept of Mens Rea in International Criminal Law”, in *University of Miami International and Comparative Law Review*, 2004, vol. 57, pp. 70 ff. (<https://www.legal-tools.org/doc/c05fb1/>); Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst (eds.), *An Introduction to International Criminal Law and Procedure*, 2nd. ed., Cambridge University Press, 2010, pp. 385 ff. (<https://www.legal-tools.org/doc/f691a2/>); Kevin J. Heller, “The Rome Statute of the International Criminal Court”, in Kevin J. Heller and Markus D. Dubber (eds.), *The Handbook of Comparative Criminal Law*, Stanford Law Books, Stanford, 2011, p. 604 (<https://www.legal-tools.org/doc/32e9bf/>); Sarah Finnin, *Elements of Accessorial Modes of Liability: Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court*, Nijhoff, Leiden-Boston, 2012, pp. 172 ff. (<https://www.legal-tools.org/doc/3257b4/>); Sarah Finnin, “Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: a Comparative Analysis”, in *International and Comparative*

Other voices have on the contrary maintained that also some forms of conscious risk-taking in relation to result that in domestic criminal laws satisfy the standards of *dolus eventualis* or recklessness could meet the requirements of Article 30 ICC Statute.²

The Lubanga Dyilo Decision on the Confirmation of Charges:

The early practice of ICC addressed this crucial problem already in 2007, in its first decision on the confirmation of charges issued in the *Lubanga Dyilo* case. Pre-Trial Chamber I of the ICC stated that the volitional element appearing in Article 30 ICC Statute includes also:

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 (also known as *dolus eventualis*) (*Lubanga*, 29 January 2007, para. 352(ii)).

Law Quarterly, 2012, vol. 61, p. 358 (<https://www.legal-tools.org/doc/cfd03f/>); Mohamed E. Badar, *The Concept of Mens Rea in International Criminal Law. The Case for a Unified Approach*, Hart Publishing, Oxford, 2013, p. 392 (<https://www.legal-tools.org/doc/a80f60/>); Jens D. Ohlin, “Targeting and the Concept of Intent”, in *Michigan Journal of International Law*, 2014, vol. 35, p. 23 (<https://www.legal-tools.org/doc/2d2ec4/>); Sara Porro, *Risk and Mental Element: An Analysis of National and International Law on Core Crimes*, Nomos, Baden-Baden, 2014, pp. 179 ff. (<https://www.legal-tools.org/doc/8aa23a/>); Antonio Vallini, “La Mens Rea”, in Enrico Amati *et al.* (eds.), *Introduzione al diritto penale internazionale*, 3rd. ed., Giappichelli, Torino, 2016, pp. 151 ff.

² In this sense, *inter alia*, ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-TEN, paras. 352 ff. (*Lubanga*, 29 January 2007’) (<https://www.legal-tools.org/doc/b7ac4f/>); *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, para. 251 fn. 329 (*Katanga and Ngudjolo*, 30 September 2008’) (<https://www.legal-tools.org/doc/67a9ec/>); Hans-Heinrich Jescheck, “The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute”, in *Journal of International Criminal Justice*, 2004, vol. 2, p. 45 (<https://www.legal-tools.org/doc/fl5093/>); Thomas Weigend, “Intent, Mistake of Law, and Co-Perpetration in the Lubanga Decision on the Confirmation of Charges”, in *Journal of International Criminal Justice*, 2008, vol. 6., p. 484 (<https://www.legal-tools.org/doc/a56516/>); Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell and Alex Whiting, in Antonio Cassese (ed.), *International Criminal Law*, 3rd. ed., Oxford University Press, 2013, p. 56 (<https://www.legal-tools.org/doc/7ca295/>); Alicia 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”, in *International Criminal Law Review*, 2014, vol. 14, pp. 86 and 107 (<https://www.legal-tools.org/doc/2c8afb/>).

After having set out a concept of *dolus eventualis* based on the idea of acceptance of a criminal risk, the Pre-Trial Chamber added the following specification:

[t]he Chamber considers that in the latter type of situation, two kinds of scenarios are distinguishable. 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 realization of the objective elements of the crime; and
- ii. the decision by the suspect to carry out his or her 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 or her actions or omissions (*Lubanga*, 29 January 2007, paras. 353 ff., footnotes omitted).

Pre-Trial Chamber I of the ICC appears first of all to assert that a literal interpretation of the element of awareness that the result ‘will occur in the ordinary course of events’ laid down in Article 30 ICC Statute would refer to a level of substantial criminal risk. Moreover, the Pre-Trial Chamber seems to further enlarge the concept of intent applicable within the jurisdiction of the ICC. It does so by stating that even the perception of a low risk of bringing about the objective elements of the crime can satisfy the requirements set out in the provision in question, if the agent explicitly accepted the occurrence of such objective elements. Lacking the component of acceptance of the crime – as ‘[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’ – the threshold of intent pursuant to Article 30 ICC Statute would not be attained.³

Subsequent ICC Jurisprudence:

The broad interpretation of intent put forward in the *Lubanga* decision on the confirmation of charges was endorsed in principle in *Katanga and Ngudjolo* (*Katanga and Ngudjolo*, 30 September 2008, para. 251 fn. 329), with Judge Anita Ušacka dissenting (Partly Dissenting Opinion of Judge Anita Ušacka, in *Katanga and Ngudjolo*, 30 September 2008, para. 22). Subsequently, however, it was turned down in the *Bemba* decision on the confirmation of charges of 2009, where Pre-Trial Chamber II of the ICC argued that:

[w]ith respect to *dolus eventualis* as the third form of dolus, recklessness or any lower form of culpability, the Chamber is of the view that such concepts are not captured by Article 30 of the Statute. This conclusion is supported by the express language of the phrase “will occur in the ordinary course of events”, which does not accommodate a lower standard than the one required by *dolus directus* in the second degree (oblique intention) (*Bemba*, 15 June 2009, para. 360).

³ *Lubanga*, 29 January 2007, para. 355 fn. 437; on the discussion on the mental element in this decision see also Badar, 2013, pp. 394 ff.; Mohamed E. Badar and Sara Porro, “Rethinking the Mental Elements in the Jurisprudence of the ICC”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, pp. 657 ff. (<https://www.legal-tools.org/doc/729159/>); Porro, 2014, pp. 182 ff.

The Pre-Trial Chamber developed a reasoning based on the principles of treaty interpretation pursuant to Articles 31 and 32 of the Vienna Convention on the Law of Treaties, stressing again that a literal interpretation of ‘the words “will occur”, read together with the phrase “in the ordinary course of events”, clearly indicates that the required standard of occurrence is close to certainty. In this regard, the Chamber defines this standard as “virtual certainty” or “practical certainty”” (*Bemba*, 15 June 2009, para. 362). “This standard is undoubtedly higher than the principal standard commonly agreed upon for *dolus eventualis* – namely, foreseeing the occurrence of the undesired consequences as a mere likelihood or possibility. Hence, had the drafters of the Statute intended to include *dolus eventualis* in the text of Article 30, they could have used the words “may occur” or “might occur in the ordinary course of events” (para. 363, footnotes omitted).

In support of its analysis, the *Bemba* decision on the confirmation of charges drew upon the drafting history of Article 30 of the ICC Statute, and in particular a proposal that the Preparatory Committee put forward in 1996. In the relevant parts, it reads as follows:

2. For the purposes of this Statute and unless otherwise provided, a person has intent where: [...] (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. [...]

[4. For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if: [...]

Note. The concepts of recklessness and *dolus eventualis* should be further considered in view of the seriousness of the crimes considered.

Therefore, paragraph 4 would provide a definition of “recklessness”, to be used only where the Statute explicitly provides that a specific crime or element may be committed recklessly. In all situations, the general rule, as stated in paragraph 1, is that crimes must be committed intentionally and knowingly [...].⁴

⁴ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/51/22, Vol. II, 14 September 1996 (<https://www.legal-tools.org/doc/03b284/>), reprinted in this part in M. Cherif Bassiouni, *The Legislative History of the*

ICC Pre-Trial Chamber II reported that the references to *dolus eventualis* and recklessness disappeared from the general provision on the mental element at later stages of the negotiations (*Bemba*, 15 June 2009, para. 366). It also highlighted that ‘the fact that paragraph 4 on recklessness and its accompanying footnote, which stated that “recklessness and *dolus eventualis* should be further considered”, came right after paragraph 2(b) in the same proposal, indicates that recklessness and *dolus eventualis* on the one hand, and the phrase “will occur in the ordinary course of events” on the other, were not meant to be the same notion or to set the same standard of culpability (*Bemba*, 15 June 2009, para. 368).⁵

The Pre-Trial Chamber concluded therefore that “the suspect could not be said to have intended to commit any of the crimes charged, unless the evidence shows that he was at least aware that, in the ordinary course of events, the occurrence of such crimes was a virtually certain consequence of the implementation of the common plan” (*Bemba*, 15 June 2009, para. 369; on the discussion on the mental element in this decision, see also Badar, 2013, pp. 397 ff.; Badar and Porro, 2015, pp. 660 f.; Porro, 2014, pp. 185 f.).

This restrictive interpretation of the concept of intent is at present the leading view in the early practice of the ICC.

In the first trial judgment issued in the *Lubanga* case, in 2012, Trial Chamber I of the ICC accepted the approach of Pre-Trial Chamber II of the ICC to the notion of intent (*Lubanga*, 14 March 2012, para. 1011). Yet, the Trial Chamber also added in paragraph 1012 of the judgment that the prognosis underlying the awareness that result will occur in the ordinary course of events “involves consideration of the concepts of “possibility” and “probability”, which are inherent to the notions of “risk” and “danger” (para. 1012). In the context of a narrow interpretation of the concept of intent, such a mention of the notion of risk, that is a notion referring to a dimension of mere possibility as opposed to virtual certainty, was sharply criti-

International Criminal Court: An Article-by-Article Evolution of the Statute, vol. 2, Transnational Publishers, Ardsley, 2005, p. 226 (<https://www.legal-tools.org/doc/8786c9/>).

⁵ On the drafting history of Article 30(2) the ICC Statute see Mohamed E. Badar, “Dolus Eventualis and the Rome Statute without it?”, in *New Criminal Law Review*, 2009, vol. 12, pp. 444 ff. (<https://www.legal-tools.org/doc/14915b/>).

cized within the ICC itself as “potentially confusing”, or even “out of place”.⁶

In March 2014, Trial Chamber II of the ICC adjudicating upon *Katanga* opined that “this form of criminal intent presupposes that the person knows that his or her actions will necessarily bring about the consequence in question, barring an unforeseen or unexpected intervention or event to prevent its occurrence. In other words, it is nigh on impossible for him or her to envisage that the consequence will not occur”.⁷

The Appeals Chamber of the ICC pronounced itself on the notion of intent under Article 30 ICC Statute in December 2014 (*Lubanga*. 1 December 2014, paras. 441 ff.). The *Lubanga* appeal judgment confirmed the interpretation put forward in the Bemba decision on the confirmation of charges, that under Art. 30 of the ICC Statute “the standard for the foreseeability of events is virtual certainty’. The Appeals Chamber confirmed also that this standard of virtual certainty had already emerged from the *Lubanga* trial judgment. In relation to the use of the word ‘risk’ by Trial Chamber I of the ICC in *Lubanga*, the Appeals Chamber claimed 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””.

Doctrine: For the bibliography, see the final comment on Article 30.

Author: Mohamed Elewa Badar.

⁶ Respectively, Separate Opinion of Judge Adrian Fulford to *Lubanga*, 14 March 2012, para. 15; ICC, *Prosecutor v. Ngudjolo*, Trial Chamber, Concurring Opinion of Judge Christine van der Wyngaert, 18 December 2012, ICC-01/04-02/12-4, para. 38 (<https://www.legal-tools.org/doc/7d5200/>).

⁷ ICC, *Prosecutor v. Katanga*, Trial Chamber, Judgment, ICC-01/04-01/07-3464-tENG, 7 March 2014, para. 777 (<https://www.legal-tools.org/doc/f74b4f/>).

Article 30(3)

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.

Adhering to the already mentioned ‘element analysis’ approach to *mens rea*, paragraph (3) of Article 30 ICC Statute defines knowledge in relation to the material elements of circumstance and consequence separately.

The early practice of the ICC has not yet addressed the definition of knowledge in relation to circumstance in Article 30(3) first sentence first alternative ICC Statute. A strict interpretation of the wording “awareness that a circumstance exists” appears to limit the meaning of this standard of culpability to actual awareness of the relevant fact. This would exclude from the notion of knowledge cases of constructive knowledge, that is, where a reasonable person would have recognized the circumstance, as well as cases of ‘wilful blindness’, that is, where the agent was aware that the fact probably existed, but deliberately refrained from obtaining the final confirmation.¹ It has however also been claimed that “should reliable means to resolve one’s suspicions be available, we are faced with something more than mere suspicion”.²

On the other hand, the definition of knowledge in relation to consequence or result in Article 30(3) first sentence second alternative ICC Statute overlaps substantially with the definition of intent based on foresight of result as a virtual certainty in Article 30(2)(b) second alternative ICC Statute. Due to the cumulative reference to “intent and knowledge” in Article 30(1) ICC Statute, the requirement of knowledge in relation to result should apply even to an agent who clearly wanted to bring about the result

¹ Williams Glanville, *Criminal Law: the General Part*, 2nd. ed., Stevens & Sons, London, 1961, p. 159 (<https://www.legal-tools.org/doc/760a88/>).

² Robert Sullivan, “Knowledge, Belief, and Culpability”, in Stephen Shute and A.P. Simester, *Criminal Law Theory: Doctrines of the General Part*, Oxford University Press, 2002, p. 214 (<https://www.legal-tools.org/doc/068b65/>); on the interpretation of art. 30(3) first sentence first alternative ICC Statute see also Mohamed E. Badar and Sara Porro, “Rethinking the Mental Elements in the Jurisprudence of the ICC”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, pp. 664 ff. (<https://www.legal-tools.org/doc/729159/>).

pursuant to the first alternative of Article 30(2)(b) ICC Statute. Finnin illustrates the practical outcome of this by inviting the reader 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 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 30.³

Doctrine:

1. Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung*, Duncker & Humblot, Berlin, 2002 (<https://www.legal-tools.org/doc/3e7799/>).
2. Mohamed E. Badar, “Dolus Eventualis and the Rome Statute without it?”, in *New Criminal Law Review*, 2009, vol. 12, pp. 433–467 (<https://www.legal-tools.org/doc/14915b/>).
3. Mohamed E. Badar, *The Concept of Mens Rea in International Criminal Law. The Case for a Unified Approach*, Hart Publishing, Oxford, 2013 (<https://www.legal-tools.org/doc/a80f60/>).
4. Mohamed E. Badar, “The Mental Element in *The Rome Statute of the International Criminal Court: A Commentary* from a Comparative Criminal Law Perspective”, in *Criminal Law Forum*, 2008, vol. 19, pp. 473–518 (<https://www.legal-tools.org/doc/e53965/>).
5. Mohamed E. Badar and Noelle Higgins, “General Principles of Law in the Early Jurisprudence of the ICC”, in Triestino Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity*, Routledge, London, 2014 (<https://www.legal-tools.org/doc/729159/>).

³ Sarah Finnin, *Elements of Accessorial Modes of Liability: Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court*, Nijhoff, Leiden-Boston, 2012, p. 165 (<https://www.legal-tools.org/doc/3257b4/>); Sarah Finnin, “Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: a Comparative Analysis”, in *International and Comparative Law Quarterly*, 2012, vol. 61, p. 343 (<https://www.legal-tools.org/doc/cfd03f/>); on this point see also Badar and Porro, 2015, pp. 653 ff.

6. Mohamed E. Badar and Sara Porro, “Rethinking the Mental Elements in the Jurisprudence of the ICC”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015 (<https://www.legal-tools.org/doc/729159/>).
7. M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute*, vol. 2, Transnational Publishers, Ardsley, 2005 (<https://www.legal-tools.org/doc/8786c9/>).
8. John Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law*, Oxford University Press, 1998 (<https://www.legal-tools.org/doc/03bee8/>).
9. Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell and Alex Whiting, in Antonio Cassese (ed.), *International Criminal Law*, 3rd. ed., Oxford University Press, 2013 (<https://www.legal-tools.org/doc/7ca295/>).
10. Roger S. Clark, “The Mental Element in International Criminal Law: the Rome Statute of the International Criminal Court and the Elements of Offences”, in *Criminal Law Forum*, 2001, vol. 12, pp. 291–334 (<https://www.legal-tools.org/doc/554e66/>).
11. Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilms-hurst (eds.), *An Introduction to International Criminal Law and Procedure*, 2nd. ed., Cambridge University Press, Cambridge, 2010 (<https://www.legal-tools.org/doc/f691a2/>).
12. Abin Eser, “Mental Elements – Mistake of Fact and Mistake of Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd ed., Oxford University Press, 2002, pp. 889–948 (<https://www.legal-tools.org/doc/01addc/>).
13. Sarah Finnin, *Elements of Accessorial Modes of Liability: Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court*, Nijhoff, Leiden/Boston, 2012 (<https://www.legal-tools.org/doc/3257b4/>).
14. Sarah Finnin, “Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: a Comparative Analysis”, *International & Comparative Law Quarterly*, 2012, vol. 61, pp. 325–59 (<https://www.legal-tools.org/doc/cfd03f/>).

15. Alicia 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”, in *International Criminal Law Review*, 2014, vol. 14, 82–114 (<https://www.legal-tools.org/doc/2c8afb/>).
16. Kevin J. Heller, “The Rome Statute of the International Criminal Court”, in Kevin J. Heller and Markus D. Dubber (eds.), *The Handbook of Comparative Criminal Law*, Stanford Law Books, Stanford, 2011, pp. 593–634 (<https://www.legal-tools.org/doc/32e9bf/>).
17. Hans-Heinrich Jescheck, “The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute”, in *Journal of International Criminal Justice*, 2004, vol. 2, pp. 38–55 (<https://www.legal-tools.org/doc/fl5093/>).
18. Hans-Heinrich Jescheck and Thomas Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil*, 5th. ed., Duncker & Humblot, Berlin, 1996 (<https://www.legal-tools.org/doc/f75a20/>).
19. Jens D. Ohlin, “Targeting and the Concept of Intent”, in *Michigan Journal of International Law*, 2014, vol. 35, p. 147 ff. (<https://www.legal-tools.org/doc/2d2ec4/>).
20. Sara Porro, *Risk and Mental Element: An Analysis of National and International Law on Core Crimes*, Nomos, Baden-Baden, 2014 (<https://www.legal-tools.org/doc/8aa23a/>).
21. Paul H. Robinson and Jane A. Grall, “Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond”, in *Stanford Law Review*, 1983, vol. 35, pp. 681–762 (<https://www.legal-tools.org/doc/a8a58a/>).
22. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).
23. Jean-Claude Soyer, *Droit penal et procedure pénale*, 18th. ed., LGDJ, Paris, 2004 (<https://www.legal-tools.org/doc/50184e/>).
24. Robert Sullivan, “Knowledge, Belief, and Culpability”, in Stephen Shute and A.P. Simester, *Criminal Law Theory: Doctrines of the General Part*, Oxford University Press, Oxford, 2002, pp. 207–26 (<https://www.legal-tools.org/doc/068b65/>).

25. Antonio Vallini, “La Mens Rea”, in Enrico Amati et al. (eds.), *Introduzione al diritto penale internazionale*, 3rd. ed., Giappichelli, Torino, 2016, pp. 137–87.
26. Joachim Vogel, “Vor § 15, Laufhütte”, Heinrich Wilhelm *et al.* (eds.), *Strafgesetzbuch Leipziger Kommentar*, 12th ed., De Gruyter, Berlin, 2007 (<https://www.legal-tools.org/doc/0511e4/>).
27. Johan D. van der Vyver, “The International Criminal Court and the Concept of Mens Rea in International Criminal Law”, in *University of Miami International and Comparative Law Review*, 2004, vol. 57, pp. 57–149 (<https://www.legal-tools.org/doc/c05fb1/>).
28. Thomas Weigend, “Intent, Mistake of Law, and Co-Perpetration in the Lubanga Decision on the Confirmation of Charges”, in *Journal of International Criminal Justice*, 2008, vol. 6, pp. 471–87 (<https://www.legal-tools.org/doc/a56516/>).
29. Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd. ed., Oxford University Press, 2014 (<https://www.legal-tools.org/doc/01710e/>).
30. Gerhard Werle and Florian Jeßberger, “Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes Under International Criminal Law”, in *Journal of International Criminal Justice*, 2005, vol. 3, pp. 35–55 (<https://www.legal-tools.org/doc/dc34fe/>).
31. Williams Glanville, *Criminal Law: the General Part*, 2nd. ed., Stevens & Sons, London, 1961 (<https://www.legal-tools.org/doc/760a88/>).

Author: Mohamed Elewa Badar.

Article 31

Grounds for Excluding Criminal Responsibility

General Remarks:

This provision concerns defences that may lead to the exclusion of criminal responsibility. Defences serves the purpose that the accused is ensured fairness in a substantive sense, meaning that prohibited acts under certain circumstances are justifiable.

The provision does not cover all defences, other defences that were neither recognized nor rejected during the negotiations of the ICC Statute include: alibi, consent of victims, conflict of interests or collision of duties, reprisals, general and/or military necessity, the *tu quoque* argument, and immunity of diplomats. Article 31(3) allows the consideration of other grounds than those referred to in paragraph 1 for excluding criminal responsibility derived from international or national sources through the reference to Article 21.

The Charter of the International Military Tribunal in Nuremberg and the statutes of the *ad hoc* tribunals did not allow for defences. Instead, defences such as superior orders and official capacity were excluded (IMT Charter, Articles 7 and 8, ICTY Statute, Article 7(2) and (4), ICTR Statute, Article 6(2) and (4)).

Doctrine: For the bibliography, see the final comment on Article 31.

Author: Mark Klamberg.

Article 31(1)

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

The *chapeau* avoids using the common law term of ‘defence’. Instead the provisions speak of “excluding criminal responsibility” where “criminal responsibility” should be understood in a broad sense, meaning that exclusion may not only be procured by exculpatory factors connected to the subjective capability of the actor (such as incapacity, paragraph 1(a)) but also genuine justifications concerning that may negate the objective wrongfulness of the act (such as self-defence, paragraph 1(c)).

The *chapeau* indicates that there are other grounds provided for in the Statute. These include: abandonment (Article 25(3)(f)), exclusion of jurisdiction of persons under 18 (Article 26), mistake of fact and mistake of law (Article 32), superior order and prescription of law (Article 33).

Doctrine: For the bibliography, see the final comment on Article 31.

Author: Mark Klamberg.

Article 31(1)(a)

(a) The person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

This defence concerns the mental state of the defendant at the time of the commission of the crime, not at the time of the trial.

One question is whether the defendant should conclusively prove the defence of insanity, or merely raise the defence shifting the burden of negating it to the prosecutor? In *Delalić et al.*, one of the accused pleaded lack of mental capacity, or insanity. The Trial Chamber considered that the accused was presumed to be sane. It was for the accused to rebut the presumption of sanity on the balance of probabilities. The Trial Chamber held that “[t]his is in accord and consistent with the general principle that the burden of proof of facts relating to a particular peculiar knowledge is on the person with such knowledge or one who raises the defence”.¹ Turning to the ICC, the combined effect of Articles 66(2) and 67(1)(i) would render it appropriate to rule in such cases that the accused is only required to raise a reasonable doubt as to the mental condition.

Rule 79(1) provides, *inter alia*, that the defence shall notify the Prosecutor of its intent to raise a ground for excluding criminal responsibility provided for in Article 31(1).

Doctrine: For the bibliography, see the final comment on Article 31.

Author: Mark Klamberg.

¹ ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Judgement, 16 November 1998, IT-96-21-T, paras. 78, 603, 1157–1160, 1172 (<https://www.legal-tools.org/doc/6b4a33/>).

Article 31(1)(b)

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

This provision allows a narrow defence for intoxication by alcohol or drug consumption. The defence is denied in cases of voluntary intoxication in an attempt to exclude cases where a person puts himself or herself in a state of non-responsibility with objective of committing a crime and later invoke this as a ground of excluding criminal responsibility. It is less clear whether this defence excludes cases where a defendant disregarded the risk that he or she would commit crimes when intoxicated.

Rule 79(1) provides, *inter alia*, that the defence shall notify the Prosecutor of its intent to raise a ground for excluding criminal responsibility provided for in Article 31(1).

Doctrine: For the bibliography, see the final comment on Article 31.

Author: Mark Klamberg.

Article 31(1)(c)

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

This paragraph concerns self-defence, defence of other persons and in the case of war crimes defence of property essential for accomplishing a military mission. It does not concern the defensive use of force by States (or equivalent non-State actors) as provided for in Article 51 of the UN Charter.

The ICTY Trial Chamber in *Kordić and Čerkez* has stated that the principle of self-defence enshrined in Article 31(1)(c) “reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law”.¹ According to the same Trial Chamber “[t]he notion of ‘self-defence’ may be broadly defined as providing a defence to a person who acts to defend or protect himself or his property (or another person or person’s property) against attack, provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack” (*Kordić and Čerkez*, 26 February 2001, para. 459).

From the requirement the danger has to be “imminent” and “unlawful use of force” it follows that the defence cannot be used for pre-emption, prevention or retaliation. Further the defensive reaction must be reasonable in the sense that it is necessary and it must be proportionate.

Rule 79(1) provides, *inter alia*, that the defence shall notify the Prosecutor of its intent to raise a ground for excluding criminal responsibility provided for in Article 31(1).

¹ ICTY, *Prosecutor v. Kordić and Čerkez*, Trial Chamber, Judgement, 26 February 2001, IT-95-14/2-T, para. 451 (*Kordić and Čerkez*, 26 February 2001’) (<https://www.legal-tools.org/doc/d4fedd/>).

Doctrine: For the bibliography, see the final comment on Article 31.

Author: Mark Klamberg.

Article 31(1)(d)

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

The defence duress concerns the situation when a person is compelled to commit a crime as a result of a threat to his or her life or another person. Necessity is a related defence, the difference is that the threat is the result of natural circumstances. They have a close affinity and paragraph (d) is an attempt to blend into one norm the traditional necessity and duress defence, as known in national criminal justice systems. In *Aleksovski* the Appeals Chamber considered the defence of necessity, but rejected its application to the case. The Appeals Chamber considered it “unnecessary to dwell on whether necessity constitutes a defence under international law, whether it is the same as the defence of duress”.¹

Duress is often confused with the defence of superior orders, but the two defences should be treated as distinct and different.

The question whether the defence of duress could amount to a ground for excluding criminal responsibility or merely a mitigating circumstance was addressed in the *Erdemović* case. The majority found that duress “cannot afford a complete defence”² while Judge Cassese in minority considered that the defence of duress could be accepted taking into account at minimum the following four criteria: (1) a severe threat to life or limb; (2) no adequate means to escape the threat; (3) proportionality in the means taken to avoid the threat ; (4) the situation of duress should not have been

¹ ICTY, *Prosecutor v. Aleksovski*, Appeals Chamber, Judgement, 24 March 2000, IT-95-14/1-A (<https://www.legal-tools.org/doc/176f05/>).

² ICTY, *Prosecutor v. Erdemović*, Appeals Chamber, Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, IT-96-22, para. 88 (<https://www.legal-tools.org/doc/f91d89/>).

self-induced.³ The drafters of the ICC Statute effectively adopted the minority view of Judge Cassese.

Rule 79(1) provides, *inter alia*, that the defence shall notify the Prosecutor of its intent to raise a ground for excluding criminal responsibility provided for in Article 31(1).

Doctrine: For the bibliography, see the final comment on Article 31.

Author: Mark Klamberg.

³ ICTY, *Prosecutor v. Erdemović*, Appeals Chamber, Judgement, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, IT-96-22, para. 41 (<https://www.legal-tools.org/doc/a7dff6/>).

Article 31(2)

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

Paragraph 2 dates from early drafting stages when some delegations held the view that defence should not be codified, the judges should determine them on a case-by-case basis. In the end defences were codified in paragraph 1 and paragraph 2 was a concession to those delegations that had favoured a minimalist approach. Eser argues that “paragraph 2 provides that the Court may alter, in the interests of justice, each and every of the Statute’s codified grounds for excluding criminal responsibility according to the facts of the individual case”.¹ Schabas finds this an “extravagant interpretation” meaning that the Court is not bound by Article 31(1) and (3). Instead he argues that paragraph 2 confirms the role of the Court in determining the applicability of various defences on a case-by-case basis within the general framework of the rest of Article 31 and other relevant provisions.²

Doctrine: For the bibliography, see the final comment on Article 31.

Author: Mark Klamberg.

¹ Albin Eser, “Article 31 – Grounds for Excluding Criminal Responsibility”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1156 (<https://www.legal-tools.org/doc/040751/>).

² William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 647 (<https://www.legal-tools.org/doc/b7432e/>).

Article 31(3)

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

Paragraph 3 concerns uncodified defences to the extent they can be found in the applicable law as set forth in Article 21. This may include the defences listed in the comment to Article 31(1). The reference in Article 21(b) to the “established principles of the international law of armed conflict” is of particular relevance.

Rule 79(1) provides that the defence shall notify the prosecution of its intent to raise the existence of an alibi, and contains special instructions, including that the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi. Rule 80 regulates the procedural way of how the defence may raise an exclusionary ground under paragraph 3.

Cross-references:

Rules 79 and 80.

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 635–654 (<https://www.legal-tools.org/doc/b7432e/>).
2. Albin Eser, “Article 31 – Grounds for Excluding Criminal Responsibility”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1125–1160 (<https://www.legal-tools.org/doc/040751/>).
3. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 121, 124, 127 (<https://www.legal-tools.org/doc/0d524b/>).

Author: Mark Klamberg.

Article 32

Mistake of Fact or Mistake of Law

General Remarks:

Throughout history defendants have sometimes relied on claims of mistake of fact or law to establish their innocence. A mistake of fact implies that the defendant mistakenly interpreted a situation or the facts of the case. It is, for example, forbidden to kill civilians in an armed conflict. If a defendant – who stands trial for killing civilians in an armed conflict – can demonstrate that he honestly mistook the civilians for soldiers he may successfully invoke the defence of mistake of fact. A mistake of law, on the other hand, implies that the defendant erroneously evaluated the law.¹ A defendant who claims that he did not know that the law prohibited killing civilians in an armed conflict relies on a mistake of law. Yet, ignorance of the law can never be an excuse (*ignorantia iuris nocet*) unless the defendant acted upon superior orders or if the mistake negated the mental element of the crime.²

The defences of mistake of fact and law are codified in the ICC Statute. Article 32 of the ICC Statute 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 provided for in Article 33.

This comment will discuss both defences under the ICC Statute. Before turning to both defences, it will start with describing how the defences found their way into the ICC Statute.

¹ Kai Ambos, “Defences in International Criminal Law”, in Bertram S. Brown (ed.), *Research Handbook on International Criminal Law*, Cheltenham, Elhar, 2011, p. 318).

² Shane Darcy, “Defences to International Crimes”, in William A. Schabas and Nadia Bernaz (eds.), *Handbook of International Criminal Law*, Routledge, 2011.

Preparatory Works:

The question whether or not to include the defences of mistake of law and fact in the ICC Statute was for the first time discussed by the International Law Commission in 1986 during its work on a revised Draft Code of Offences against the Peace and Security of Mankind.³ This Code was drafted in 1954 in the wake of the Second World War; the UN General Assembly established the International Law Commission in 1948, which was tasked with undertaking the progressive development and codification of international law. In 1954, the Draft Code of Offences against Peace and Security of Mankind, consisting of four Articles, was developed. Defendants at Nuremberg had already invoked defences of mistake of fact or law during their trials before the International Military Tribunal ('IMT') or in the subsequent proceedings conducted under Control Council Law No. 10 of 1945 (Triffterer and Ohlin, 2016, p. 1163). While a defence based on a mistake of fact could be found admissible, defences based on a mistake of law were generally dismissed.⁴ The defence of mistake was raised in the infamous doctors' trials before the Nuremberg Military Tribunal ('NMT'). Physicians stood trial for war crimes as they had committed medical experiments on human beings. A defence of mistake of fact can be successful if the physician honestly and reasonably believed "that there existed factual circumstances making the conduct lawful".⁵ The mistake of fact defence was invoked in combination with the defence of superior orders. One of the arguments raised by the defendants was that the "research subjects" could avoid punishment by participating in the "medical" experiments or that they were "condemned to death and in any event marked for legal execution".⁶ It cannot be said, however, that the defendants lacked *mens rea* and that they were honestly and reasonably mistaken about the unlawfulness of their actions (Mehring, 2011, p. 273). In another case, the Almelo Trial before the British Military Court for the Trial of War Criminals, the Judge Advocate advised the court that:

³ Otto Triffterer and Jens David Ohlin, "Article 32", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1161–1181 (<https://www.legal-tools.org/doc/040751/>).

⁴ Triffterer and Ohlin, 2016, p. 1163; United States Military Tribunal at Nuremberg, *US v. Milch*, Judgement, 15 April 1947, p. 64 (<https://www.legal-tools.org/doc/9701a9/>).

⁵ Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p. 251.

⁶ United States Military Tribunal at Nuremberg, *US v. Brandt et al.*, Judgment, 20 August 1947, pp. 296–298 (<https://www.legal-tools.org/doc/c18557/>); Mehring, 2011, p. 271.

if [...] the existing circumstances were such that a reasonable man might have believed that a victim whose killing was charged had been tried according to law and that a proper judicial legal execution had been carried out, than it would be open to the court to acquit the accused.⁷

Mistake of fact also surfaced in the *Hostages Trial* before the NMT:

In determining the guilt or innocence of an army commander when charged with a failure or refusal to accord a belligerent status to captured members of the resistance forces, the situation as it appeared to him must be given first consideration. Such commander will not be permitted to ignore obvious fact in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a correct decision and if he wilfully refrains from so doing for any reason, he will be held criminally responsible for wrongs committed against those entitled to the rights of a belligerent. Where room exists for an honest error in judgment, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence.⁸

In 1991, however, mistake of fact and law (at that time: error of law and fact) were removed from the 1986 ILC Draft Code, which probably had to do with the sensitive nature of these defences *vis-à-vis* international crimes as well as the perceived limited function in law practice of including these defences (Triffterer and Ohlin, 2016, p. 1164). Several reasons thereto can be identified.

First, mistake of fact and law were perceived as part of “general principles of law”, as these concepts had legal standing in both national and international jurisdictions. The two defences were not incorporated in the statutes of the IMT, ICTY and ICTR; yet, the defendants could nevertheless rely on them since “generally accepted legal rules” did apply (Triffterer and Ohlin, 2016, p. 1164). This does not take away that generally recognized principles may still be subject to controversy; the *Erdemović* case consti-

⁷ Law Reports of the Trials of War Criminals, Volume XV, Digest of Laws and Cases, 1949, p. 184, referring to the Almelo Trial, British Military Court for the Trial of War Criminals, *Sandrock et al.*, Judgement, 24–26 November 1945, p. 41 (<https://www.legal-tools.org/doc/350253/>).

⁸ Law Reports of the Trials of War Criminals, Volume XV, Digest of Laws and Cases, 1949, p. 184, referring to the *Hostages Trial*, United States Military Tribunal at Nuremberg, *US v. List et al.*, Judgment, 19 February 1948, p. 58 (<https://www.legal-tools.org/doc/9df653/>).

tutes a clear example thereof. Although the defence of duress raised by Erdemović is an admissible defence in numerous domestic law systems, it was heavily disputed whether this defence could be invoked in cases of crimes against humanity.⁹ Secondly, the differences between certain legal systems may have contributed to the hesitancy in codifying these defences. In 1986, the ILC considered that written law, which predominates in certain legal systems, could not adapt and express “all the contours and nuances of a reality that is ever-changing”.¹⁰ Common law systems, where written law is less relevant, evaded this problem:

An offence is constituted by a material element, which is the act, and a moral element, which is the intention. The intervention of written law is not necessary (Yearbook of the International Law Commission, 1986, para. 189).

Another reason why the defence of mistake could supposedly be excluded from the statute relates to the “mental element”. For a defense on the basis of mistake of law or fact to succeed, the mistake as such is not decisive; rather the criterion is whether the defendant lacked *mens rea* (Article 32 includes the provision that a mistake of law or fact “shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime”).¹¹ Yet, this requirement was already encapsulated in Article 30 of the ICC Statute which deals with *mens rea*, providing that a person only incurs criminal responsibility if the material elements of a crime have been committed with “intent and knowledge”. The defences of “mistake” in Article 32 of the ICC Statute are a reflection thereof, as the defendant must demonstrate that the mental element was lacking (lack of *mens rea*), rather than the prosecution having to prove intent and knowledge (existence of *mens rea*).

⁹ Thomas Weigend, “The Harmonization of General Principles of Criminal Law: The Statutes and Jurisprudence of the ICTY, ICTR, and the ICC: An Overview”, in *International Criminal Law: Quo Vadis?*, Association Internationale de Droit Penal, 2004, p. 321; ICTY, *Prosecutor v. Erdemović*, Appeals Chamber, Judgment, 7 October 1997, IT-96-22, paras. 75–79 (<https://www.legal-tools.org/doc/f49012/>), the Majority held that duress was not a defence if innocent life was taken.

¹⁰ Yearbook of the International Law Commission, vol. II, Part 1, Documents of the thirty-eighth session, UN Doc. A/CN.4/SER.A/1986/Add.1, 11 July 1986, para. 187 (“Yearbook of the International Law Commission, 1986”) (<https://www.legal-tools.org/doc/436aac/>).

¹¹ See also Yoram Dinstein, *The Defence of ‘Obedience to Superior Orders’ in International Law*, Oxford University Press, 2012, pp. xxiii–xxv.

The issue whether or not to include the defence of mistake of law and fact was still not settled in the ILC's Consolidated Draft of 14 April 1998 (it was stated that there were still "widely divergent views on this Article").¹² Two options for mistake of fact or law – at that time enshrined by draft Article 30 – were under consideration. The first option was:

Unavoidable mistake of fact or of law shall be a ground for excluding criminal responsibility provided that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of fact or of law may be considered in mitigation of punishment. (Article 30 option 1 in Consolidated Draft Statute, Establishment of an International Criminal Court, 14 April 1998).

Even though this option did not make it into the final Statute, it still bears relevance for interpreting the law on mistake as the issue of (un)avoidability prominently featured in the drafting history of Article 32.¹³ This option encompassed a *culpa in causa* element, which means that resorting to a mistake of law defence can be barred if the mistake was 'avoidable'. If a defendant has done everything within his power to inform himself of the law or a particular rule then the defense of mistake of law may be open to him as a result of his "excusable" ignorance.¹⁴ Despite the fact that this option was left out of the final Statute, some legal scholars argue that it is still an implicit element of mistake of law, as it is covered by general principles of criminal law (Van Sliedregt, 2003, p. 305; Triffterer and Ohlin, 2016, p. 1173; see Article 21(1)(c) of the ICC Statute). Yet, others argue that this observation is incorrect as the common law tradition explicitly rejects the notion of reasonableness, thus, it cannot be considered as a "general principle" of criminal law (Heller, 2008, p. 441).

The second option in the Consolidated Draft consisted of two separate paragraphs; mistake of fact and mistake of law respectively. There was discussion as to whether or not to include mistake of fact as some delega-

¹² United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998, fn. 20 ('Consolidated Draft Statute, Establishment of an International Criminal Court, 14 April 1998') (<https://www.legal-tools.org/doc/816405/>).

¹³ See, for example, Kevin Jon Heller, "Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute. A Critical Analysis", in *Journal of International Criminal Justice*, 2008, vol. 6, p. 440; Cassese, 2003, p. 256.

¹⁴ Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, T.M.C. Asser Press, The Hague, 2003, p. 305.

tions opined that it was already covered by *mens rea* (fn. 21 in Consolidated Draft Statute, Establishment of an International Criminal Court, 14 April 1998). In fn. 22 to the provision on mistake of law it was observed that “whether a particular type of conduct is a crime under the Statute or whether a crime is within the jurisdiction of the Court, is not a ground for excluding criminal responsibility”, which became the basis for the final wording in the ICC Statute (Triffterer and Ohlin, 2016, p. 1166).

Doctrine: For the bibliography, see the final comment on Article 32.

Author: Geert-Jan Alexander Knoops.

Article 32(1)

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

Mistake of fact actually pertains to a false representation of a material fact. If a soldier, for example, mistook a hospital for a military target, he may successfully invoke the defence of mistake of fact, as long as the mistake was reasonable.¹ Even though Article 32(1) of the ICC Statute does not expressly state that the mistake must be reasonable, the likelihood of succeeding with this defence increases if the reasonableness of the mistake increases. The defendant claiming a mistake of fact has the burden of making probable that he or she was honestly mistaken.²

The ILC, in its 1986 Draft Statute, underlined the distinction between avoidable and unavoidable mistakes. As follows from Article 30 of the ICC Statute crimes within the jurisdiction of the Court must have been committed with “intent and knowledge” in order to hold a person criminally responsible, unless there is a regulation that provides otherwise, such as Article 28 of the ICC Statute on command responsibility which encompasses a negligence standard. This negligence standard may apply to defendants who were mistaken about a certain fact while this could have been avoided (as opposed to an unavoidable mistake of fact).³ Article 28 of the ICC Statute excludes the defence of mistake of fact, if the defendant should have known of the relevant facts; a requirement that is also embedded in certain Elements of the Crimes (Article 8(2)(b)(xxvi), War crime of using, conscripting or enlisting children. A perpetrator may be held criminally responsible for this war crime if he ‘knew or *should have known*’ that persons enlisted in the national armed forces or used to actively participate in hos-

¹ Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, T.M.C. Asser Press, The Hague, 2003, p. 303.

² Geert-Jan Knoops, *Defenses in Contemporary International Law*, Martinus Nijhoff, Leiden, 2008, pp. 143–144.

³ Otto Triffterer and Jens David Ohlin, “Article 32”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1171 (<https://www.legal-tools.org/doc/040751/>).

tilities were under the age of 15 years.⁴ Thus, if the error was avoidable, for example, an error due to negligence or imprudence, a defendant will incur criminal responsibility. Yet, such errors may be used in mitigation of a sentence.⁵

In its 1986 Draft Statute, the ILC considered that a mistake of fact can be invoked as a defence against war crimes, if the defendant can demonstrate that the mistake was “unavoidable”. The defense must include characteristics of *force majeure*, as only such characteristics may lift a person from criminal responsibility in this regard (United Nations, Yearbook of the International Law Commission, 1986, para. 215). A mistake of fact can never be a defence to crimes against humanity or genocide:

A person who mistakes the religion or race of a victim may not invoke this error as a defence, since the motive for his act was, in any case, of a racial or religious nature. (United Nations, Yearbook of the International Law Commission, 1986, para. 214).

Another question that arises is whether a mistake of fact may be a defence to perpetrators who were ignorant about the facts. According to Triffterer both states of mind (that is, ignorance and mistake) have to be treated equally as a perpetrator who does not perceive one or more of the material elements cannot fulfil the requisite mental element as the basis thereto is lacking (Triffterer and Ohlin, 2016, p. 1169). Triffterer argues that mistake and error as well as lack of knowledge and awareness can be subsumed under the concept of “mistake of fact”:

They do not have to be differentiated because they both lead to the result that the basis to build the required *mens rea* upon is missing and, therefore, this element does not exist, which is a ground for ‘excluding criminal responsibility’ (Triffterer and Ohlin, 2016, p. 1169).

Ignorance of the law – as opposed to ignorance of the facts – can never constitute a ground for excluding criminal responsibility.⁶ The ra-

⁴ See also Robert Cryer, Håkan Friman, Daryll Robinson and Elizabeth Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 2nd ed., Cambridge University Press, 2010, p. 415.

⁵ Yearbook of the International Law Commission, Volume II Part One, Documents of the thirty-eighth session, UN Doc. A/CN.4/SER.A/1986/Add.1, 11 July 1986, para. 215 (‘Yearbook of the International Law Commission, 1986’) (<https://www.legal-tools.org/doc/436aac/>).

⁶ Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p. 294.

tionale thereof is clear: if defendants could successfully defend themselves by arguing that they were not aware of the existence of a legal ban, this would open the road to a state of lawlessness (Cassese, 2008, p. 295).

In practice, the defence of mistake of law and fact are frequently intertwined. Cassese, as did the US Military Court, cited the case against Lieutenant William A. Calley, who stood trial for a US Military Court for killing unarmed civilians in custody of US troops during the Vietnam war, as an example of mistake of fact.⁷ Calley had argued that he genuinely thought that the civilians had no right to live as they were the enemy and that he had been ordered by his superiors to kill the inhabitants of My Lai (that is, civilians). The Court held:

To the extent that this state of mind reflects a mistake of fact, the governing principle is: to be exculpatory, the mistaken belief must be of such a nature that the conduct would have been lawful had the facts actually been as they were believed to be [...] An enemy in custody may not be executed summarily.⁸

It seems that Calley was not mistaken about whether the inhabitants were civilians, but he was mistaken about the legality of killing civilians. A distinction must be made between descriptive and normative elements. The former concern mistakes of fact, which are mistakes related to the non-recognition of certain facts, and the latter concern mistakes of law, which are mistakes related to erroneous evaluations (Van Sliedregt, 2003, p. 302; according to Van Sliedregt, “[m]istakes relating to normative elements can qualify as both mistakes of fact and mistakes of law, depending on the way the mistake is made: as failed recognition or as erroneous evaluation”, p. 303). These two are often intertwined, as noted by Van Sliedregt:

Elements are seldom purely descriptive or purely normative. The material elements of a crime often have a double nature. After all, normative material elements are not abstract legal definitions but legal evaluations of facts, the false perception of which can qualify both as mistake of fact and law. (Van Sliedregt, 2003, p. 302).

The relationship between “mistake” and “superior orders” also surfaced in the Calley case, as the Court held that superior orders will not ex-

⁷ Antonio Cassese, *International Criminal Law*, 2nd. ed., Oxford University Press, 2008, p. 291.

⁸ United States Court of Military Appeal, *Calley v. Callaway*, Judgement, 21 December 1973 (“*Calley v. Callaway*, 1973”) (<https://legal-tools.org/doc/7fd3d0/>).

culpate a defendant if the order “is one which a man of ordinary sense and understanding would [...] know to be unlawful, or if the order in question is actually known to the accused to be unlawful” (*Calley v. Callaway*, 1973).

Doctrine: For the bibliography, see the final comment on Article 32.

Author: Geert-Jan Alexander Knoops.

Article 32(2)

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 provided for in Article 33.

Mistake of law encompasses a normative element of the definition of a certain offence. It arises if a defendant erroneously evaluated the law.¹ An example thereof could be a soldier throwing a grenade to a cultural building and subsequently claiming he did not know that the law prohibited destroying cultural property during an armed conflict. Yet, as follows from Article 32(2) ICC Statute a mistake of law related to whether a particular type of conduct is a crime within the jurisdiction of the court can never exclude criminal responsibility. It stems from the principle that ignorance of the law can never be an excuse (*ignorantia iuris nocet*), unless the defendant acted upon superior orders or if the mistake negated the mental element of the crime.² This provision reflects ICTY case law which also rejected the defence of mistake of law, but accepted the defense of mistake of fact.³ It is questionable whether a mistake of law based on an honest but unreasonable believe negates the mental element of a crime. Before turning to this question, the historical background of mistake of law will be discussed.

Early Discussions on Mistake of Law:

In its 1986 Draft Code the ILC considered the following acts as an “error of law”:

Error of law is clearly related to the implementation of an order which has been received, when the agent is called upon to assess the degree to which the order is in conformity with the law. It may also exist independently of an order, when the

¹ Kai Ambos, “Defences in International Criminal Law”, in Bertram S. Brown (ed.), *Research Handbook on International Criminal Law*, Cheltenham, Elhar, 2011, p. 318.

² Shane Darcy, “Defences to International Crimes”, in William A. Schabas and Nadia Bernaz (eds.), *Handbook of International Criminal Law*, Routledge, 2011, pp. 231–245.

³ ICTY, Association of Defence Counsel, Manual on International Criminal Defence, 2011, para. 69 (‘ICTY-ADC, Manual on International Criminal Defence, 2011’).

agent acts upon his own initiative, believing that his action is in conformity with the rules of law.⁴

If there is a conflict between internal and international law, then the latter should prevail (Yearbook of the International Law Commission, 1986, para. 206). This principle was first established in the Nuremberg Charter and subsequently in the Control Council Law No. 10, which nullified the benefits of national amnesty laws and reinstated the criminality of the acts (para. 206). Thus, if an act would be in conformity with national legislation, while it would violate international law, then the defendant cannot rely on a defence of mistake of law.

The defence of mistake of law may not be as successful under national law as it is under international law. One is expected to know – or at least be aware – of the national legislation, while this cannot (always) be expected of all international legislation. The latter is sometimes based on ‘customary practice’, which means that it is not based on an agreed rule. Moreover, the evolution of international law and the advent of warfare make certain concepts obsolete, while other concepts emerge, which contributes to the diffuse nature of international law (Yearbook of the International Law Commission, 1986, para. 207). As a result of this ambiguity mistakes about such rules may be judged more leniently. Antonio Cassese identified four factors that a court should take into account when judging upon alleged mistakes of international criminal law:

1. The universality of the international rule that has allegedly been breached, whether the rule, on the one hand, has been written down in legal documents of which the defendant is apprised or, on the other hand, is controversial, obscure or subject to discussion;
2. The defendant’s intellectual status (for example a layperson could more easily rely on the defence of mistake of law than a lawyer or someone working in the criminal justice system, as the latter are supposed to know the law as a result of their educational background);
3. The defendant’s position within the military hierarchy (the higher the rank the more the defendant is expected and required to know the law);

⁴ Yearbook of the International Law Commission, vol. II, Part 1, Documents of the thirty-eighth session, UN Doc. A/CN.4/SER.A/1986/Add.1, 11 July 1986, para. 204 (‘Yearbook of the International Law Commission, 1986’) (<https://www.legal-tools.org/doc/436aac/>).

4. The importance of the value of the rule that has allegedly been breached (human life and dignity are protected under both national and international rules, as such, one may be more demanding in protecting these values).⁵

Difficulties regarding ‘customary international law’ were already expressed by the US Military Tribunal sitting at Nuremberg in the *I.G. Farben* case. In this case it was argued that private industrialists could not be held responsible for carrying out economic measures in occupied territories at the direction – or approval – of their government. Moreover, the limits of permissible action related to the crimes charged, were not clearly defined in international law and the Hague Regulations were said to be outdated by the concept of total warfare.⁶ Yet, this defence was dismissed as the Tribunal held that:

It is beyond the authority of any nation to authorize its citizens to commit acts in contravention of international penal law. A custom is a source of international law, customs and practices may change and find such general acceptance in the community of civilized nations as to alter the substantive content of certain of its principles [...]. Technical advancement in the weapons and tactics used in the actual waging of war may have made obsolete, in some respects, or may have rendered inapplicable, some of the provisions of the Hague Regulations having to do with the actual conduct of hostilities and what is considered legitimate warfare. (*Krauch*, 30 July 1948, p. 1138).

As with mistake of fact, doubts related to the rules in question may arise with respect to the scope of war crimes, but this is much less likely for crimes against humanity. The ILC considered that mistake of law cannot be an excuse for crimes against humanity as: “No error of law can excuse a crime which is motivated by racial hatred or political prejudices”. It follows that a mistake of law can also never excuse a defendant for the crime of genocide, which is, by definition, a crime motivated by hatred or political prejudices (that is the intent to destroy certain groups; Article 6 ICC Statute defines genocide as “any of the following acts [listed sub (a)-

⁵ Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford University Press, 2008, pp. 296–297.

⁶ United States Military Tribunal at Nuremberg, *US v. Krauch et al.*, Judgement, 30 July 1948, p. 1137 (*‘Krauch, 30 July 1948’*) (<https://legal-tools.org/doc/f7be0f/>).

(e) committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”). Given the nature of crimes against humanity and the judicial precedents, it is unimaginable that such crimes can be justified on the basis of any error, as:

the error must have been unavoidable [...] the agent must have brought into play all the resources of his knowledge, imagination and conscience and, despite that effort, he must have found himself unable to detect the wrongful nature of his act (Yearbook of the International Law Commission, 1986, para. 209).

Faith in a certain political ideology or acts committed due to a regime’s propaganda cannot exonerate a defendant for crimes against humanity on the basis of an error of law, as:

He should have known, by consulting his conscience, that the act of which he is accused was wrongful. (Yearbook of the International Law Commission, 1986, para. 209).

Thus, a defence of mistake of law can only succeed if the error on part of the defendant is an *excusable* fault (Yearbook of the International Law Commission, 1986, para. 202). Unawareness of a certain rule of law is an inexcusable fault, as is the blindness to detect the wrongfulness of an act (para. 210).

Contemporary Case Law:

Mistake of law surfaced in several contempt cases before the ICTY. In the *Hartmann* case, the defendant, who was a former employee of the ICTY, faced contempt charges because she allegedly revealed confidential information through the publication of her book. The defence argued that the defendant was not aware of the illegality of her conduct, as she could reasonably believe that the information in her book was no longer confidential as a result of the public discussions in the media that took place prior to publication.⁷ The Trial Chamber rejected this argument holding that the defendant’s “misunderstanding of the law does not, in itself, excuse a violation of it” (*Hartmann*, 14 September 2009, para. 65). The Chamber recalled the standard set in the *Jović* case that “if mistake of law were a valid defence [...] orders would become suggestions and a Chamber’s authority to control its proceedings, from which the power to punish contempt in part

⁷ ICTY, *Prosecutor v. Hartmann*, Judgement, 14 September 2009, para. 63 (*Hartmann*, 14 September 2009’) (<https://www.legal-tools.org/doc/462946/>).

derives, would be hobbled” (para. 65; see also ICTY-ADC, Manual on International Criminal Defence, 2011, para. 71). This consideration is congruent with the mentioned rationale behind Article 32(2) ICC Statute, namely that if defendants could successfully argue that they were not aware of the existence of a legal ban, a state of lawlessness could arise (Cassese, 2008, p. 295).

The defence team of *Kanu* before the SCSL also invoked a mistake of law. The defence held that Kanu was not aware of the unlawfulness of conscripting, enlisting or using child soldiers below the age of 15, because “the ending of childhood [in the traditional African setting] has little to do with achieving a particular age and more to do with physical capacity to perform acts reserved for adults”.⁸ Furthermore, the defence contended that various governments in Sierra Leone, prior to the war, had recruited persons under the age of 15 into the military (*Brima*, 20 June 2007, para. 730). The Trial Chamber rejected this defence holding the crime of enlisting and conscripting child soldiers had attained the status of customary international law, and that this customary status required that the victim to be younger than 15 years of age (para. 731). The Trial Chamber was furthermore not persuaded that the defence of mistake of law could be invoked in this particular case:

The rules of customary international law are not contingent on domestic practice in one given country. Hence, it cannot be argued that a national practice creating an appearance of lawfulness can be raised as a defence of conduct violating international norms (*Brima*, 20 June 2007, para. 732).

The Trial Chamber rejected all defences related to the definition of childhood and the cultural differences thereto (*Brima*, 20 June 2007, para. 1251). Likewise, mistake of law defenses based on the *tu quoque* argument were also rejected. The Trial Chamber refused to evaluate evidence related to the conditions of the Sierra Leonean State prior to 1997 because this had “no bearing on the perpetration of international crimes by individuals within the state” (para. 1251). Yet, when taking into account the ambiguous nature of ‘customary international law’, as was already recognized by the ILC in 1986, while one is expected to know or be aware of national legislation,

⁸ SCLS, Trial Chamber, *Prosecutor v. Brima et al.*, 20 June 2007, para. 730 (*‘Brima*, 20 June 2007’) (<https://www.legal-tools.org/doc/87ef08/>).

it is not surprisingly that the defendant relied on the policy practice of the Sierra Leonean government – or at least raised this as a defense.

Mistake of law also surfaced during the confirmation of the charges phase in the *Lubanga* case before the ICC. The defence team submitted that *Lubanga* could not have known that conscripting and enlisting child soldiers could result in individual criminal responsibility now that neither Uganda nor the DRC “brought to the knowledge of the inhabitants of Ituri the fact that the Rome Statute had been ratified”.⁹ Under the heading “the principle of legality and mistake of law” the Trial Chamber elaborated on the issue and concluded that “absent a plea under Article 33 of the ICC Statute, the defence of mistake of law can succeed under Article 32 only if [the defendant] was unaware of a normative objective element of the crime as a result of not realizing its social significance (its everyday meaning)” (*Lubanga*, 29 January 2007, para. 316). Thus, the principle of morality is essential: blindness to the wrongfulness of an act is not deemed to be an excuse (Yearbook of the International Law Commission, 1986, para. 210).

To conclude, mistake of fact and law were heavily debated prior to their codification in the ICC Statute. It was questioned whether mistake of fact had to be included in the Statute, as it was already covered by the *mens rea* provision. Mistake of fact is deemed to be a valid defence; yet, “mistakes” are seldom of such a nature that this defence can be successfully raised in cases of international crimes. Even though mistake of law should be interpreted very strictly – as expressed in the wording of Article 32(2) ICC Statute – the defence has been raised in several cases. In principle, mistake of law cannot exonerate an accused. Yet, due to the complex nature of international criminal law, in particular related to war crimes, one should perhaps differentiate between international and national laws in terms of the unavoidability of the error. Future judgments of the ICC will have to learn whether alleged war criminals are expected to bear the same level of knowledge of international law as the level expected of own national laws. Despite the limited successfulness of a mistake of law defence, it did create case law as to its boundaries, which may serve future cases; these factors relate to a defendant’s status and position, the universality of the rule and the value that the rule is trying to protect (Cassese, 2008, pp. 296–297). The importance of these precedents cannot be underestimated, as the ‘gen-

⁹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803, para. 296 (<https://www.legal-tools.org/doc/b7ac4f/>).

eral principles of criminal law' are often subject to discussion. The codification of the defence in the ICC Statute, and the discussions that preceded it, have been essential for the proliferation of international criminal law.

Doctrine:

1. Kai Ambos, "Defences in International Criminal Law", in Bertram S. Brown (ed.), *Research Handbook on International Criminal Law*, Cheltenham, Elhar, 2011.
2. Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003.
3. Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford University Press, 2008.
4. Robert Cryer, Håkan Friman, Daryll Robinson and Elizabeth Wilms-hurst, *An Introduction to International Criminal Law and Procedure*, 2nd ed., Cambridge University Press, 2010.
5. Shane Darcy, "Defences to International Crimes", in William A. Schabas and Nadia Bernaz (eds.), *Handbook of International Criminal Law*, Routledge, 2011, pp. 231–45.
6. Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law*, Oxford University Press, 2012.
7. Kevin Jon Heller, "Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute. A Critical Analysis", in *Journal of International Criminal Justice*, 2008, vol. 6, pp. 419–45.
8. Geert-Jan Knoops, *Defenses in Contemporary International Law*, Martinus Nijhoff, Leiden, 2008.
9. Sigrid Mehring, "Medical War Crimes", in *Max Planck Yearbook of United Nations Law*, Vol. 15, Brill/Nijhoff, 2011, pp. 229–279.
10. Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, T.M.C. Asser Press, The Hague, 2003.
11. Otto Triffterer and Jens David Ohlin, "Article 32", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1161–1181 (<https://www.legal-tools.org/doc/040751/>).

12. Thomas Weigend, “The Harmonization of General Principles of Criminal Law: The Statutes and Jurisprudence of the ICTY, ICTR, and the ICC: An Overview”, in *International Criminal Law: Quo Vadis?*, Association Internationale de Droit Penal, 2004.

Author: Geert-Jan Alexander Knoops.

Article 33

Superior Orders and Prescription of Law

General Remarks:

Article 33 attempts to resolve the quandary which arises when a soldier, bound by law to obey his superiors, is ordered to commit an act that would amount to an international crime. Plainly, it could be read in three steps: (i) in the usual course of action, obedience to superior orders cannot be invoked as a defence, (ii) unless the three requirements prescribed in (a), (b) and (c) are cumulatively met, (iii) however, this does not apply when orders were given to commit genocide or crimes against humanity. In this vein, Article 33 departs from the ‘Nuremberg model’ where subordinates were always responsible for crimes committed while following orders. Conversely, it represents a compromise between the two opposing approaches, where the first (‘conditional liability approach’) is adopted for war crimes and the crime of aggression and the second (‘principle of absolute liability’) was chosen for genocide and crimes against humanity.

The ‘conditional or limited approach’ was propounded in a decision of the Austro-Hungarian Military Court in 1915.¹ Subsequently, it was further reaffirmed in the two famous cases before the Leipzig Court after the First World War: the *Llandovery Castle* and *Dover Castle* cases.

However the subordinate obeying an order is liable to punishment if it was known to him that the order of the superior involved the infringement of civil or military law [...] It is certainly to be urged, in favour of the military subordinates, that they are under no obligation to question the order of their superior officer and they can count upon its legality. But no such confidence can be held to exist if such an order is universally known to everybody including the accused, to be without any doubt whatever against the law.²

¹ Paola Gaeta, “The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law”, in *European Journal of International Law*, 1999, vol. 10, p. 175 (<https://www.legal-tools.org/doc/f3c502/>).

² United Kingdom, Imperial Court of Justice, *Dithmar and Boldt* (the *Llandovery Castle* case), Judgement 16 July 1921, in *American Journal of International Law*, 1922, vol. 16, no. 4, pp. 721–722.

The court stipulated that basically if the order is “universally known to everybody, including also the accused, to be without any doubt whatever against the law”, or in other words “manifestly unlawful”, the subordinate is liable to the punishment. Therefore, the ‘conditional liability approach’ asserts as a rule that the plea of superior order is a complete defence. In this vein, a soldier can be held responsible only if the order was manifestly illegal, or, he knew or should have known that the order was illegal.

The ‘principle of absolute liability’ was introduced in the London Agreement establishing the International Military Tribunal at Nuremberg (‘IMT’). The prevailing view at the time was that the crimes prosecuted were too grave to relieve accused from liability using the plea of superior orders. Thus, Article 8 of the Charter of the IMT unequivocally rejected the defence of superior orders, prescribing that “[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires”. Later on the IMT held that “[t]he provisions of this Article [8] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the IMT Charter here provides, the order may be urged in mitigation of the punishment”. Furthermore, it stated that “[t]he true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether *moral choice* was in fact possible”.³

Contrary to the ‘conditional liability approach’, the plea of following orders is never a defence and can only mitigate the sentence since a soldier ought to always assess the orders of his superiors, and if they are illegal he is not bound to obey them. Similarly, Article 6 of the Charter of the Tokyo Tribunal had a provision stipulating that “[n]either the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires”. This was considered by some

³ IMT, *United States of America, France, the United Kingdom and the Union of Soviet Socialist Republics v. Goring et al.*, Judgment, 1 October 1946, p. 221 (<https://www.legal-tools.org/doc/45f18e/>).

to be a more flexible and a more logical provision than the one from Nuremberg.⁴

In the 1990's, both the ICTY and ICTR Statutes embraced the 'principle of absolute liability'. The ICTY adopted the view that a defence of superior orders is possible through duress. Judge Cassese argued that a soldier has a duty to disobey orders only in instance of a manifest unlawfulness, otherwise he has a right to plea of duty to superior orders as a defence.⁵

As for Article 33 of the ICC Statute, the drafters have conflated two separated approaches and opted for a negative formulation. Accordingly, paragraph 1 ('conditional liability') prescribes that if a person was under a legal obligation to obey orders, and he did not know that the order was unlawful and the order was not manifestly unlawful, he or she could be relieved of criminal responsibility. Paragraph 2 ('absolute liability') articulates the impossibility of defence of superior orders in cases of genocide and crimes against humanity. In this vein, the plea of superior orders can be made exclusively in the context of the crime of aggression and war crimes. This provision however begs the question whether there is an example of a war crime under the ICC Statute which can be considered as "not always manifestly illegal", so the plea of superior orders has an actual sense.

It should also be borne in mind that the importance of Article 33 is far from paramount, as the main focus of the ICC is on leaders and not on low-ranking officers or foot soldiers for whom conventionally the plea of superior orders is reserved. However, the ICC is not constrained only to the prosecution of 'big fish'. This was confirmed when Article 33 was invoked by the Appeals Chamber during the discussion on the 'gravity' requirement in Article 17(1)(d) of the ICC Statute. The Appeals Chamber held that the existence of Article 33 substantiates the view that the Rome Statute is not reserved only to "senior leaders".⁶

⁴ Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law*, Oxford University Press, 2012., p. 157.

⁵ ICTY, *Prosecutor v. Erdemović*, Appeals Chamber, Judgement, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, IT-96-22, para. 15 (<https://www.legal-tools.org/doc/a7dff6/>).

⁶ ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, 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", 13 July 2006, ICC-01/04-169, para. 78 (<https://www.legal-tools.org/doc/8c20eb/>).

Doctrine: For the bibliography, see the final comment on Article 33.

Author: Nikola Hajdin.

Article 33(1)

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

The heading of Article 33 is “Superior orders and prescription of law”. The second part (“prescription of law”) was emphasized since superior orders can come from a legislative or other organ of a state, which has the power to enact laws. Or, in different key, not only an order, but also prescription by legislation and regulation regardless of the type thereof, shall not absolve the subordinate of criminal responsibility, unless he or she fulfilled the conditions enunciated in paragraph 1(a) to (c).

From the words “crime within the jurisdiction of the court” follows that Article 33 is only applicable for the crimes listed in Article 5 – namely, genocide, crimes against humanity, war crimes and the crime of aggression – and it does not regulate whether other crimes should be treated in the same way.

The term “order” in its broadest sense is ought to be understood as a request for certain behaviour of a group or a single individual, given by the legitimate authority. Such behaviour could be either an act or omission. The order articulates a form of communication between a superior and his subordinates, where the former has a right to demand certain pattern of action from the latter. Whilst the form is less relevant, an order should be direct, unequivocal, and should therefore be acknowledged by a subordinate. If it is given to a number of people – for example a detachment – it should be understood as an order given to every individual therein.

There should be a causal connection between order and conduct, in a way which Article 33 prescribes “by a person *pursuant to* an order”. According to this provision, a subordinate must have intended to execute the order. Otherwise, if he commits a crime separately from the order, on his own wish and even though the order existed at the time of the commission, Article 33 does not apply.

“[O]rders of a Government” means that this provision applies to everyone whose actions might be attributed to the Government. However, an order which emanate in such instances must be issued by a competent person and has to be formally legitimate. Otherwise, there would be no legal

obligation to obey such orders. This however does not mean that “a Government or of a superior” provides for an alternative, and superiors outside the Government should not be considered in the context of this article. Consequently, the relationship between superiors and subordinates within a criminal organisation is not a subject for the defence of superior orders.

The wording “military or civilian” stipulates that a superior could be either a military officer or high-ranking Government agent. This provision however demands another interpretation of the superior-subordinate relationship, unlike the one from Article 28. In the realm of commander responsibility (Article 28), the ICTY held that

in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences. With the caveat that such authority can have a *de facto* as well as a *de jure* character, the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.¹

In this context *de facto* relationships are based on effective control. Accordingly, this includes any commander who do not necessarily have a nexus with the Government, as long as “they exercise a degree of control over their subordinates which is similar to that of military commanders”. In other words, if a civilian superior has a duty and the ‘material ability’ to thwart his minions of committing crimes, or punish them if they have committed crimes, he or she is liable under Article 28.

On the other hand, Article 33 does not apply to superiors outside the government authority and *de facto* superior-subordinate relationships. A ‘civilian’ in this context is a political superior or government agent.² Nonetheless, if a *de facto* superior is effectively acting as *de jure* military commander under the government aegis, the orders which emanate thereof can

¹ ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Judgment, 16 November 1998, IT-96-21-T, para. 388 (<https://www.legal-tools.org/doc/6b4a33/>).

² Elies van Sliedregt, *Individual Criminal Responsibility*, Oxford University Press, 2012, p. 294 (<https://www.legal-tools.org/doc/a6b7d9/>).

be taken into account in the context of Article 33 as such commander is not *de facto* in traditional meaning ('being so close to *de jure* command').

The reason for the two different approaches in Article 28 and 33 is the very essence of a plea of superior orders: it is reserved exclusively for the relationship between military superiors and their subordinates, which is, on the other hand, "based on the military duty to obey and the ensuing presumption of legality of orders" (van Sliedregt, 2012, p. 294).

The word "unless" is followed by three conditions set out in subparagraphs (a)-(c) that all have to be fulfilled in order to relive the accused of criminal responsibility.

Doctrine: For the bibliography, see the final comment on Article 33.

Author: Nikola Hajdin.

Article 33(1)(a)

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

The condition that the accused “was under a legal obligation to obey orders of the Government or the superior in question” relates to whether there was an obligation under domestic law within which the superior and the subordinate acted. Orders must exist at the time when the crime was committed. If a subordinate erroneously believed that he had an obligation to obey orders, Article 33 would not apply as a defence option. Conversely, he would have a defence pursuant to Article 32. Furthermore, if an order is accompanied with a threat, the subordinate can plead a defence of duress. In this case the nature of the order, whether legal or illegal, is not relevant.

Doctrine: For the bibliography, see the final comment on Article 33.

Author: Nikola Hajdin.

Article 33(1)(b)

(b) The person did not know that the order was unlawful; and

To be relieved of responsibility the person has to “not know that the order was unlawful”. This is a subjective condition and the subordinate has to demonstrate that he did not know that the order was unlawful. It is a low threshold for the defendant and in cases of doubt, the subordinate has to be treated as if he had known that the order was unlawful.

Doctrine: For the bibliography, see the final comment on Article 33.

Author: Nikola Hajdin.

Article 33(1)(c)

(c) The order was not manifestly unlawful.

The third condition is an objective one and it is formulated in a negative way (not manifestly unlawful). It is applicable when it cannot be proven (based on the available evidence) that the order was manifestly unlawful. The condition appears to contain a contradiction in the sense that all crimes under the jurisdiction of the Court are manifestly unlawful. As Schabas argues even experts may disagree on the existence and scope of a prohibition which may justify a defence of superior orders.¹

Nonetheless, the manifest unlawfulness test is subject to a *Garantenstellung*, as van Sliedregt averred: “What is manifestly unlawful for the specialized military personnel is not necessarily manifestly unlawful for the average soldier. [...] *Garantenstellung* should be applied as a ‘particularizing standard’, where individual circumstances such as rank and experience are taken into account as well”.²

Doctrine: For the bibliography, see the final comment on Article 33.

Author: Nikola Hajdin.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 668 (<https://www.legal-tools.org/doc/b7432e/>).

² Elies van Sliedregt, *Individual Criminal Responsibility*, Oxford University Press, 2012, pp. 295–296 (<https://www.legal-tools.org/doc/a6b7d9/>).

Article 33(2)

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

The second paragraph excludes the defence of superior orders for genocide and crimes against humanity. It represents a compromise made during the drafting process to the delegates supporting the absolute liability approach.

This provision makes a distinction between war crimes and the crime of aggression on the one hand (where the defence of superior orders is available under the circumstances listed in the first paragraph), and genocide and crimes against humanity on another (where the defence is always denied). This division is not based on customary international law nor can be traced in domestic law. It appears that the prevailing opinion amongst the delegates in Rome was that war crimes are less grave than crimes against humanity and genocide.¹

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 663–674 (<https://www.legal-tools.org/doc/b7432e/>).
2. Albin Eser, “Article 31”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1125–1160 (<https://www.legal-tools.org/doc/040751/>).
3. Andreas Zimmerman, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 957–74 (<https://www.legal-tools.org/doc/01addc/>).
4. Paola Gaeta, “The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law”, in *European Journal of International Law* 1999, vol. 10, pp. 172–91 (<https://www.legal-tools.org/doc/f3c502/>).

¹ Andreas Zimmerman, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 972 (<https://www.legal-tools.org/doc/01addc/>).

5. Elies van Sliedregt, *Individual Criminal Responsibility*, Oxford University Press, 2012, pp. 287–306 (<https://www.legal-tools.org/doc/a6b7d9/>).
6. Otto Triffterer and Stefanie Bock, “Article 33 – Superior orders and prescription of law”, in Otto Triffterer and Kai Ambos (eds.), 2016, pp. 1182–1196.
7. Kai Ambos, *Treatise on International Criminal Law*, Volume I, Oxford University Press, 2013 (<https://www.legal-tools.org/doc/9a54bb/>).

Author: Nikola Hajdin.

PART 4.
COMPOSITION AND ADMINISTRATION OF THE COURT

Article 34

Organs of the Court

The Court shall be composed of the following organs:

- (a) The Presidency;*
- (b) An Appeals Division, a Trial Division and a Pre-Trial Division;*
- (c) The Office of the Prosecutor;*
- (d) The Registry.*

General Remarks:

Unlike the ICTY, ICTR and SCSL, which were comprised of three organs: Chambers, the Office of the Prosecutor and the Registry, the ICC has a separate organ for the Presidency. Article 38 sets out the function and structure of the Presidency. The role and structure of the remaining organs of the ICC – Chambers, the Office of the Prosecutor, and the Registry – are elucidated in Articles 39, 42 and 43 of the Statute.

Cross-references:

Articles 39, 42 and 43.

Regulation 3.

Author: Yvonne McDermott Rees.

Article 35

Service of Judges

General Remarks:

The drafters of the Statute envisioned that there may be times in the Court's lifetime when the full complement of judges would not be needed to sit on a full-time basis.¹ In a sense, the structure for service of judges as set out in Article 35 is akin to that of the Mechanism for the International Criminal Tribunals and the Residual Special Court for Sierra Leone, which were established to continue the mandate of the ICTY, ICTR, and SCSL once all of their trials and appeals were completed. These residual mechanisms function with a skeleton staff and sitting Presidency, but have a roster of judges who can be called upon should any *ad hoc* functions (for example review of convictions or acquittals; contempt of court proceedings) arise. In practice, this provision has had little significance, since all of the judges have sat on a full-time basis for the majority of the Court's lifetime.

Preparatory Works:

Article 35 reflects the drafters' perception of the ICC as a type of standby *ad hoc* tribunal, which could be called into action when the need arose (Schabas, 2016).

Doctrine: For the bibliography, see the final comment on Article 35.

Author: Yvonne McDermott Rees.

¹ William, A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

Article 35(1)

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.

Article 35(1), stating that elected judges are to be available “as full-time members of the Court”, may seem at odds with Article 35(3), which outlines that the Presidency may decide which remaining judges are to sit on a full-time basis. However, the key word here is ‘available’. In principle, judges are free to take on other work, but their key priority is to the Court as full-time judges. As such, they must make themselves available as soon as the need arises.¹

Doctrine: For the bibliography, see the final comment on Article 35.

Author: Yvonne McDermott Rees.

¹ Odo Annette Ogwuma, “Article 35”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1207 (<https://www.legal-tools.org/doc/040751/>).

Article 35(2)

2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.

The three judges who make up the Presidency, a stand-alone organ of the Court whose functions are set out in Article 38, are required to sit on a full-time basis from the moment they are elected. This is logical, given that the Presidency is responsible for the proper administration of the Court (except for the Office of the Prosecutor), according to Article 38. The President and two Vice-Presidents are elected for a three-year renewable term.

Doctrine: For the bibliography, see the final comment on Article 35.

Author: Yvonne McDermott Rees.

Article 35(3)

3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of Article 40.

The Presidency is given the discretion to decide which of the remaining judges are to sit on a full-time basis. This provision is made without prejudice to Article 40 on judicial independence. Presumably, the cross-reference is made to copper fasten the provisions in Article 40 that judges may not engage in other professional activity that may create the appearance of bias or partiality, and that judges who are sitting on a full-time basis may not take on any other employment that might jeopardize their appearance of impartiality.

In September 2003, the then-President of the Court, Philippe Kirsch, informed the Assembly of State Parties that it was expected that the judges of the Pre-Trial and Appeals Chambers would be required to sit on a full-time basis from 2004.¹ By 2006, all three judicial divisions had become fully operational and only two trial judges were serving on a non-full-time basis.²

In early 2019, the Presidency of the Court granted Judge Ozaki's request to change her status from full-time to part-time judge, within the meaning of Article 35(3).³ It later transpired that the 'personal reasons' cited for this request was that the Judge had been appointed Japan's Ambassador to Estonia, raising questions of judicial independence as discussed in the commentary to Article 40.

¹ ZHU Wen-qi and Sureta Chana, "Article 35", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008 (<https://www.legal-tools.org/doc/a9e9f7/>); William, A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., Oxford University Press, 2016, pp. 678–682, 938 (<https://www.legal-tools.org/doc/b7432e/>).

² ICC ASP, Proposed Programme Budget for 2007 of the International Criminal Court, 22 August 2006 (<https://www.legal-tools.org/doc/f24d71/>).

³ ICC, *Prosecutor v. Ntaganda*, Presidency, Annex 1 to Notification of the Decision of the Plenary of Judges pursuant to Article 40 of the Rome Statute, 22 March 2019, ICC-01/04-02/06-2326-Anx1 (<https://www.legal-tools.org/doc/5a27d1/>).

Doctrine: For the bibliography, see the final comment on Article 35.

Author: Yvonne McDermott Rees.

Article 35(4)

4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with Article 49.

Article 49 leaves matters of remuneration in the hands of the Assembly of States Parties, and the Assembly is charged with making financial arrangements for judges not sitting full-time. Pursuant to the Conditions of Service and Compensation of the Judges of the International Criminal Court, part-time judges are entitled to an annual allowance of 20,000 Euro, and may have their income supplemented up to 60,000 Euro if their annual declared income falls short of that amount.¹ If judges are sitting on a non-full-time basis and the need arises for them to sit full-time, they are paid from the contingency fund.²

Cross-references:

Articles 38, 40 and 49.

Regulation 9 Term of office, para. 1.

Doctrine:

1. William, A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 678–682 (<https://www.legal-tools.org/doc/b7432e/>).
2. Odo Annette Ogwuma, “Article 35”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1204–1215 (<https://www.legal-tools.org/doc/040751/>).

Author: Yvonne McDermott Rees.

¹ ZHU Wen-qi and Sureta Chana, “Article 35”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008 (<https://www.legal-tools.org/doc/a9e9f7/>).

² ICC ASP, Proposed Programme Budget for 2007 of the International Criminal Court, 22 August 2006 (<https://www.legal-tools.org/doc/f24d71/>).

Article 36

Qualifications, Nomination and Election of Judges

General Remarks:

The Statute contains detailed provisions on the appointment and qualifications of judges, which are designed to ensure adequate global and gender representation. The provision on the increase and reduction of the number of judges is a pragmatic innovation, doubtlessly inspired by the issues that arose in the *ad hoc* tribunals when the workload became disproportionate to the number of judges over the course of their lifetimes.

Preparatory Works:

The key debates on this Article centred on the number of judges; whether States or the General Assembly would elect judges; and the term of office for elected judges.¹

Doctrine: For the bibliography, see the final comment on Article 36.

Author: Yvonne McDermott Rees.

¹ William, A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

Article 36(1)

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.

During the negotiations there was apparently some debate as to whether 17 or 19 judges would be most appropriate.¹ The agreed figure of 18 judges represents a compromise in this regard.

Doctrine: For the bibliography, see the final comment on Article 36.

Author: Yvonne McDermott Rees.

¹ William, A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

Article 36(2)

2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with Article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and Article 37, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

It may be necessary, in line with the future workload of the Court, to appoint additional judges. Article 36(2) envisions that the Presidency can propose an increase in the number of judges, which is to be considered by the Assembly of States Parties. If the proposal is passed by a two-thirds majority of the Assembly of States Parties, and Presidency later decides that additional judges are no longer needed, it can propose a reduction in the number of judges to the Assembly of States Parties. The number of judges shall never be lower than 18.

Doctrine: For the bibliography, see the final comment on Article 36.

Author: Yvonne McDermott Rees.

Article 36(3)

3. (a) *The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.*

(b) *Every candidate for election to the Court shall:*

(i) *Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings;*
or

(ii) *Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;*

(c) *Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.*

The Statutes of the ICTY, ICTR and SCSL stated that judges had to be persons of ‘high moral character, impartiality and integrity’ who would be qualified to hold the highest judicial office in their home countries. However, the imprecision of these tribunals’ Statutes on the qualifications required has been criticised.¹ The ICC Statute, by contrast, requires established competence and experience in either relevant fields of international law, such as international humanitarian law and human rights law, or criminal law and procedure. Given that the ICC is first and foremost a criminal court, that has to decide on the guilt or innocence of the accused, albeit for international crimes, it is logical that a slightly higher value is given to competence in criminal law over international law. The Statute dictates that at least half the judges (but no more than 13 of the 18) should be elected on the basis of their knowledge and experience of criminal law and procedure.

¹ Michael Bohlander, “The International Criminal Judiciary: Problems of Judicial Selection, Independence and Ethics”, in Michael Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, Cameron May, London, 2007 (<https://www.legal-tools.org/doc/774cfc/>); Christoph Safferling, *International Criminal Procedure*, Oxford University Press, 2012 (<https://www.legal-tools.org/doc/50a9f2/>).

Doctrine: For the bibliography, see the final comment on Article 36.

Author: Yvonne McDermott Rees.

Article 36(4)

- 4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:*
- (i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or*
 - (ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.*
- Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.*
- (b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.*
- (c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.*

States parties have the right to nominate one individual to sit as a judge of the ICC at each election. The candidate does not need to be a national of that state, but must be a national of a State Party. This contrasts with the arrangements in the International Court of Justice, where judges do not need to be nationals of states that have accepted the compulsory jurisdiction of the Court. Nominations can be made either through the process for nominating judges to the highest judicial offices nationally, or through the procedure followed for nominating judges to the International Court of Justice, which requires ‘national groups’ of sitting members of the Permanent Court of Arbitration to make nominations. States must accompany their nominations with a supporting statement, outlining why the individual nominee possesses the required amount of competence and experience in the fields of criminal or international law.

Doctrine: For the bibliography, see the final comment on Article 36.

Author: Yvonne McDermott Rees.

Article 36(5)

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

For elections, candidates are divided into two lists – List A for those candidates with experience and competence in criminal law and procedure, and List B for those candidates nominated on the basis of their expertise in international law. If candidates are potentially eligible for inclusion on both lists, it will be for the candidates themselves to decide which list they wish to be included on. At least nine candidates from List A will be elected, and at least five candidates will be elected from List B, and future elections are to maintain that proportion of expertise in criminal and international law. In 2014, the bare minimum of five List B (that is, international law) judges was in office, with the remaining 13 coming from List A. Because only three of the List B judges were to remain in office beyond 2015, there was an *ex ante* requirement that at least two List B candidates be appointed.

Doctrine: For the bibliography, see the final comment on Article 36.

Author: Yvonne McDermott Rees.

Article 36(6)

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under Article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

Elections are held at a session of the Assembly of States Parties, and successful candidates are those who have received the highest number of votes, provided that two-thirds majority of the States Parties present and voting. The Bureau of the Assembly of States Parties has encouraged states to refrain from entering into reciprocal voting arrangements.¹

Doctrine: For the bibliography, see the final comment on Article 36.

Author: Yvonne McDermott Rees.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

Article 36(7)

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

The ICTR and ICTY Statute required that no two permanent judges may hold the same nationality, and no two ad litem judges could hold the same nationality. Therefore, it was possible for two sitting judges to hold the same nationality, as was seen in 2014, when Judge Pocar (Italian) was the sitting President of the ICTY, and Judge Lattanzi (also Italian) was serving as a judge *ad litem*. The ICC Statute similarly states that no two judges may hold the same nationality, and in the case of judges who hold more than one nationality, they will be deemed to be a national of the state where they normally exercise their civil and political rights. This wording on dual nationality is a reflection of Article 12(4) of the ICTY Statute (and later Article 11(4) of the ICTR Statute), which was introduced by an amendment in 2002, via Security Council Resolution 1411 of 2002.¹

Doctrine: For the bibliography, see the final comment on Article 36.

Author: Yvonne McDermott Rees.

¹ Resolution 1411 (2002), UN Doc. S/RES/1411 (2002), 17 May 2002 (<https://www.legal-tools.org/doc/eef868/>).

Article 36(8)

- 8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:**
- (i) The representation of the principal legal systems of the world;**
 - (ii) Equitable geographical representation; and**
 - (iii) A fair representation of female and male judges.**
- (b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.**

The ICC has been described as a ‘gender-sensitive court’.¹ The provisions of Article 36(8) add greatly to this impression, by providing not only for gender balancing in the judicial composition of the Court, but also recommends that States Parties should take into account the need to include judges with specific expertise on issues such as violence against women and children. Such expertise will not be seen as invoking reasonable apprehension of bias on those issues, if the *Furundžija* Appeals Judgment is to be followed. In that case, Judge Mumba’s prior involvement with the UN Commission on the Status of Women was seen as evidence of her experience in international human rights law and therefore forming part of the statutory requirements for election, as opposed to a factor that might lead to her disqualification.² Similarly, the SCSL held that Judge Winter’s previous involvement with children’s rights issues attested to her competence in the field of juvenile justice, and would not lead a reasonable observer to apprehend bias on her part.³

In the 2014 judicial elections, the nomination period was extended, owing to a shortage of candidates from Asia. Because only two judges from Asia were to remain in office past 2015, there was an *ex ante* requirement for one Asian judge and two judges from Eastern Europe to be elected.

¹ Valerie Oosterveld, “Prosecution of Gender-Based Crimes in International Law”, in Dyan Mazurana, Angela Raven-Roberts and Jane Parpart (eds.), *Gender, Conflict and Peacekeeping*. Rowman and Littlefield Publishers, Lanham, 2005 (<https://www.legal-tools.org/doc/857459/>).

² ICTY, *Prosecutor v. Furundžija*, Appeals Chamber, Judgement, 21 July 2000, IT-95-17/1-A, para. 205 (<https://www.legal-tools.org/doc/660d3f/>).

³ SCSL, *Prosecutor v. Norman*, Appeals Chamber, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004, SCSL-2004-14, para. 30 (<https://www.legal-tools.org/doc/d5dbaf/>).

There was also a need to elect at least one male judge, to ensure an appropriate gender balance.

Doctrine: For the bibliography, see the final comment on Article 36.

Author: Yvonne McDermott Rees.

Article 36(9)

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to Article 37, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

As a general rule, judges serve for a period of nine years and are not eligible for re-election. The only exception to this rule is where a judge was elected for a three-year term under the transitional arrangements for the first set of elected judges of the Court, and where a judge has been elected to fill a judicial vacancy and the remainder of the predecessor's term is less than three years.

Doctrine: For the bibliography, see the final comment on Article 36.

Author: Yvonne McDermott Rees.

Article 36(10)

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with Article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Where a judge's term of office has completed but she or he is sitting on an ongoing case, they are permitted to remain in office until the case is complete. This was the situation of Judge Blattmann, for example, who was elected in 2003 for a period of six years. Although he was not eligible for re-election in 2009, Judge Blattmann was permitted to remain sitting as a judge until 2012, when the *Lubanga* case ended. This arrangement is sensible and will alleviate many of the difficulties faced by the *ad hoc* tribunals when judges were not re-elected. Rule 15 *bis* of the ICTY and ICTR Rules of Procedure and Evidence were amended in 2003 to allow proceedings to continue with a substitute judge where a judge of the original bench had not been re-elected. This was less than satisfactory, because the substitute judge would not have had the opportunity to watch the witnesses testify in person and thus observe their credibility, and in cases involving protected witnesses, that testimony might not have been recorded.¹

Cross-reference:

Article 37.

Doctrine:

1. Michael Bohlander, "The International Criminal Judiciary: Problems of Judicial Selection, Independence and Ethics", in Michael Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, Cameron May, London, 2007, pp. 325–90 (<https://www.legal-tools.org/doc/774cfc/>).
2. Valerie Oosterveld, "Prosecution of Gender-Based Crimes in International Law", in Dyan Mazurana, Angela Raven-Roberts and Jane Parpart (eds.), *Gender, Conflict and Peacekeeping*, Rowman and Littlefield

¹ See ICTR, *Prosecutor v. Nyiramasuhuko et al.*, Appeals Chamber, Decision on the Matter of Proceedings under Rule 15bis, Dissenting Opinion of Judge David Hunt, 24 September 2003, ICTR-97-21-A (<https://www.legal-tools.org/doc/c56e1a/>).

- Publishers Inc., Lanham, 2005, pp. 67–82 (<https://www.legal-tools.org/doc/857459/>).
3. Christoph Safferling, *International Criminal Procedure*, Oxford University Press, 2012, p. 130 (<https://www.legal-tools.org/doc/50a9f2/>).
 4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 683–695 (<https://www.legal-tools.org/doc/b7432e/>).
 5. Michael Bohlander, “Article 36”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1216–1225 (<https://www.legal-tools.org/doc/040751/>).

Author: Yvonne McDermott Rees.

Article 37

Judicial Vacancies

1. *In the event of a vacancy, an election shall be held in accordance with Article 36 to fill the vacancy.*
2. *A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.*

General Remarks:

This Article is relatively uncontroversial. It merely states that where a judge is unable to carry on with proceedings, a substitute judge will be elected in accordance with the procedure set out in Article 36 to serve the remainder of his or her term. The successor judge will not be eligible for re-election, unless the predecessor's remaining term of office is less than three years.

Preparatory Works:

The main controversies in drafting this provision were whether the replacement judge's qualifications should match those of his or her predecessor, and the question of eligibility for re-election.¹ It was soon decided that any attempt to match the successor's expertise with that of their predecessor would be too complex, and the idea was abandoned (Schabas, 2016). The International Law Commission had initially proposed that where the predecessor's term was five years or less, the replacement judge should be eligible for re-election; this was ultimately reduced to three years (*ibid.*).

Analysis:

The wording of this provision seems to suggest that as soon as a judicial vacancy arises, an election to appoint a replacement judge shall take place. In reality, this has not been the case. In 2012, an election was held to replace the vacancies left by Judges Blattmann, Fulford and Odio-Benito. Judge Blattmann's term of office had ended in 2009, and the terms of office of his colleagues on Trial Chamber I had ended on 10 March 2012, but all three remained in office until the *Lubanga* judgment was issued on 14 March. When three replacement judges were elected, it was unclear which

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

of the new judges had replaced Judge Blattmann, and which had succeeded the other two judges. Ultimately, lots were cast to decide upon this question (Schabas, 2016).

Under Rule 36 of the Rules of Procedure and Evidence, the Presidency must inform the Presidency of the Bureau of the Assembly of States Parties of the death of a judge, presumably so that an election for the judge's replacement can be organised. Pursuant to Rule 37, when a judge wishes to resign, they should inform the Presidency (who will in turn inform the Assembly of States Parties) with ideally six months' notice.

Cross-references:

Article 36

Rules 36, 37, 38 and 39.

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 696–699 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Yvonne McDermott Rees.

Article 38

The Presidency

General Remarks:

The Presidency is a unique organ to the International Criminal Court. It is responsible for the proper administration of the Court, and other functions as set out in the ICC Statute, such as excusing judges from the exercise of their judicial functions under Article 41, and proposing an increase in the number of judges pursuant to Article 36. Some functions are conferred on the President as an individual, such as concluding the relationship agreement with the United Nations on the Court's behalf under Article 2.

Preparatory Works:

One of the proposed functions of the Presidency, to determine whether the Prosecutor or Deputy Prosecutor should be disqualified on the basis of their prior involvement with a case or any other ground relating to their independence, was rejected by delegates at the Rome Conference. It was felt that such a power might risk the Presidency wielding excessive influence over the Office of the Prosecutor.¹ The final Article 38 is careful in maintaining the independence of the Prosecutor from the Presidency.

Doctrine: For the bibliography, see the final comment on Article 38.

Author: Yvonne McDermott Rees.

¹ Medard R. Rwelamira, "Composition and Administration of the Court", in Roy S. Lee (ed.), *The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999 (<https://www.legal-tools.org/doc/d71078/>).

Article 38(1)

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

The President and two Vice-Presidents sit for terms of office of three years each, and may be re-elected once. They are elected by a majority of the judges.

Doctrine: For the bibliography, see the final comment on Article 38.

Author: Yvonne McDermott Rees.

Article 38(2)

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

When the President is unable or disqualified from conducting one of his or her tasks, the first Vice-President acts in his or her place. If neither the President nor the first Vice-President is available, the second Vice-President will step in. In September 2013, the second Vice-President, Judge Cuno Tarfusser, corresponded with the African Union on the Court's behalf, in response to a request received to defer prosecutions in the Kenya situation before the Court.

Doctrine: For the bibliography, see the final comment on Article 38.

Author: Yvonne McDermott Rees.

Article 38(3)

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred upon it in accordance with this Statute.

The Presidency is tasked with the proper administration of the Court, with the exception of the Office of the Prosecutor. It can be seen from other provisions of the Statute (for example Articles 35, 37) that there is a particular focus on organising the work of the judicial divisions of the Court in this regard. The Presidency also bears some important functions as regards the external relations of the Court. For example, the President presents a statement to the Assembly of States Parties annual meeting every year. Perhaps most importantly, the Presidency is responsible for the direct supervision of the Registrar as the principal administrative officer of the Court, pursuant to Article 43(2). There has been some jurisprudence on the meaning and precise scope of the expression “proper administration of the Court” as it relates to the Presidency’s functions. In 2006, the Prosecutor requested the Presidency to take steps to ensure that an individual, who had previously worked for the Office of the Prosecutor as a Legal Adviser and had gone on to become Senior Legal Adviser to the Pre-Trial Chamber in the same case, be removed from the case. The Presidency declared that it lacked competence in the matter, holding that issues relating to staff competence fell outside the scope of “proper administration of the Court”, and communicated the matter to the Pre-Trial Chamber for its consideration.¹ The Appeals Chamber has thus far declined to comment on whether matters of the payment of legal assistance and the appointment of counsel could fall within the scope of the Presidency’s duties, although it has held that the Registrar

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber, Decision on the Prosecutor’s Application to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice Regarding the Case, 27 October 2006, ICC-01/04-01/06-623 (<https://www.legal-tools.org/doc/0409c1/>).

may “have recourse to the President for necessary advice and guidance”, pursuant to Article 43(2).²

Doctrine: For the bibliography, see the final comment on Article 38.

Author: Yvonne McDermott Rees.

² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision of the Appeals Chamber upon the Registrar’s Requests of 5 April 2007, 27 April 2007, ICC-01/04-01/06-873 (<https://www.legal-tools.org/doc/d2f8f4/>).

Article 38(4)

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Where matters of mutual concern to both the Prosecutor and the Presidency are at issue, the Presidency shall consult with “and seek the concurrence of the Prosecutor”. Such matters might include such issues as security arrangements for defendants and witnesses, or matters concerning the functioning of the Registry.¹ Some have argued that this is an unwelcome provision in the Statute, on the basis that the relationship between the Presidency and the Prosecutor should not be too collegiate, and given that the Presidency is not obliged to consult the Defence on such matters of mutual concern.²

Cross-references:

Articles 35, 37 and 43.

Rule 8.

Regulation 11.

Doctrine:

1. Medard R. Rwelamira, “Composition and Administration of the Court”, in Roy S. Lee (ed.), *The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 153–73 (<https://www.legal-tools.org/doc/d71078/>).
2. John R. W. D. Jones, “Composition of the Court”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, pp. 235–69 (<https://www.legal-tools.org/doc/01addc/>).
3. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 700–710 (<https://www.legal-tools.org/doc/b7432e/>).

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

² John R. W. D. Jones, “Composition of the Court”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002 (<https://www.legal-tools.org/doc/01addc/>).

Author: Yvonne McDermott Rees.

Article 39

Chambers

General Remarks:

The ICC's 18 judges are divided into three divisions: Appeals (five judges); Trial (six judges) and Pre-Trial (six judges), with one alternate judge.

Preparatory Works:

The ILC Draft Statute proposed that the Presidency would bear responsibility for assigning judges to the different divisions. Article 39 remains silent on the question of whose role it is to assign judges to divisions, simply stating that “the Court shall organize itself” into divisions. Rule 4 *bis* of the Rules of Procedure and Evidence, however, makes it clear that the Presidency is to decide on the assignment to divisions in consultation with the judges.

Doctrine: For the bibliography, see the final comment on Article 39.

Author: Yvonne McDermott Rees.

Article 39(1)

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in Article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications 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. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

The Court is organized in three judicial divisions:

- the Appeals Division, comprised of the president and four other judges;
- the Trial Division, comprised of not less than six judges;
- the Pre-Trial Division, comprised of not less than six judges.

Regulation 10 sets the precedence of the judges. However, in the exercise of their judicial functions, the judges are of equal status.

One or more judges may remain as an alternate, see Articles 39(4), 74(1), Rule 39 and Regulation 16 on alternate judges. Considering the words “[a]ll the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations” in Article 74(1) it appears that it is not possible to appoint an alternate judge during the proceedings. A Danish proposal to allow the appointment of alternate judges during the proceedings was not retained in Rule 39.

The assignment of Judges shall be based on the nature of the functions to be performed by each division as well as the competence of the individual judge. Thus, the competence of the judges is an important element when they are assigned to a judicial division.

It will be recalled that under Article 36, judges are elected on ‘lists’ in line with their expertise; they are put forward as candidates either on the basis of their competence in international law or on the grounds of their experience in criminal law. Article 39(1) provides that each division shall be comprised of an appropriate balance between the two categories of

judge and that the assignment of judges to divisions “shall be based on the qualifications and experience” of those judges.

Considering that “[t]he Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience” it is logical to assume that the Appeals Chamber should be composed mostly of lawyers specialised in humanitarian law and human rights.

There is no guidance, in the rules of procedure and evidence and the regulations of the Court, on how to strike the proper balance concerning composition of the judicial divisions. It appears as the Presidency has assumed this burden.

Regulation 14 permits the judges elected to each division to appoint a President of the Division.

According to Regulation 15 the Presidency shall be responsible for the replacement of a judge.¹

The Pre-Trial Division shall, in accordance with Regulation 17, have a duty judge.

In order to give the Court additional flexibility and avoid difficulties in administration the two first sentence of Article 39(1) may be amended by the Assembly of States Parties at any time, even before the expiry of the seven year freeze on the ICC Statute (Article 122(1)).

Doctrine: For the bibliography, see the final comment on Article 39.

Author: Yvonne McDermott Rees.

¹ See, for example, ICC, *Prosecutor v. Lubanga*, Presidency, Decision replacing a judge in Pre-Trial Chamber I, 22 June 2007, ICC-01/04-01/06-930 (<https://www.legal-tools.org/doc/33702d/>).

Article 39(2)(a)

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.

The work of the three divisions is done through Chambers.

In order to give the Court additional flexibility and avoid difficulties in administration the present provision may be amended by the Assembly of States Parties at any time, even before the expiry of the seven year freeze on the ICC Statute (Article 122(1)).

Doctrine: For the bibliography, see the final comment on Article 39.

Author: Yvonne McDermott Rees.

Article 39(2)(b)(i)

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

This sub-paragraph provides that each of the judges appointed to the Appeals Division shall make up the Appeals Chamber. The judges of the Appeals Chamber do not rotate (Article 39(4)). In the event that a member of the Appeals Chamber is disqualified, or unavailable for a substantial reason, the Presidency shall attach to the Appeals Chamber on a temporary basis a judge from either the Trial or Pre-Trial Division (Regulation 12).

The judges of the Appeals Chamber shall decide on a Presiding Judge for each appeal (Regulation 13(1)). The Appeals Chamber shall also, in accordance with Regulation 18, have a duty legal officer.

In order give the Court additional flexibility and avoid difficulties in administration the present provision may be amended by the Assembly of States Parties at any time, even before the expiry of the seven year freeze on the ICC Statute (Article 122(1)).

Doctrine: For the bibliography, see the final comment on Article 39.

Author: Yvonne McDermott Rees.

Article 39(2)(b)(ii)

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

In comparison with the Appeals Chamber, the composition of Trial and Pre-Trial Chambers from the judges appointed to each division is a little more flexible. There can be more than one Trial Chamber and Pre-Trial Chamber in existence at any one time and judges can sit on more than one Chamber. In 2014, there were five Trial Chambers in operation, serviced by the six assigned judges and three judges who were continuing in office in order to complete their trials, pursuant to Article 36(10).

The judges of each Trial Chamber shall elect from amongst their members a Presiding Judge who shall carry out the functions conferred upon him or her by the ICC Statute, Rules or otherwise (Regulation 13(2)). The Trial Chambers shall also, in accordance with Regulation 18, have a duty legal officer.

The Trial Chamber may hold status conferences (Regulation 54).

In order to give the Court additional flexibility and avoid difficulties in administration the present provision may be amended by the Assembly of States Parties at any time, even before the expiry of the seven year freeze on the ICC Statute (Article 122(1)).

In the absence of Judge Blattman, the two other judges of Trial Chamber I scheduled a hearing. At the hearing, it was first attempted to establish whether, given that Judge Blattman was abroad on leave, two judges could investigate the matter at a hearing. The majority of the Chamber decided that the hearing should not continue, and would be postponed until Judge Blattman returned from his leave.¹

Doctrine: For the bibliography, see the final comment on Article 39.

Author: Yvonne McDermott Rees.

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Order for submissions on whether two judges of the Trial Chamber may hold a hearing, 14 February 2008, ICC-01/04-01/06-1168, para. 6 (<https://www.legal-tools.org/doc/978cf1/>).

Article 39(2)(b)(iii)

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

The Presidency shall constitute permanent Pre-Trial Chambers with fixed compositions (Regulation 46).

The judges of each Pre-Trial Chamber shall elect from amongst their members a Presiding Judge who shall carry out the functions conferred upon him or her by the Statute, Rules or otherwise, Regulation 13(2).¹

The functions of a Pre-Trial Chamber may be carried out by a single judge of that Chamber, as was the case in the *Bemba et al.* contempt case.² Rule 7(1) states that the designation of a single judge shall be done “on the basis of objective pre-established criteria” which is set in Regulation 47(1).

The duties and responsibilities of a single judge may in certain situations be linked to the efficiency and fairness of the proceedings. Thus, the judges have not been granted full discretion to decide for which specific tasks a single judge can be designated. According to Article 57(2)(a), orders or rulings of the Pre-Trial Chamber issued under Articles 15 (review of investigation), 18 (admissibility), 19 (jurisdiction), 54, paragraph 2 (investigative steps without agreement on co-operation), 61, paragraph 7 (confirmation of charges), and 72 (national security information) must be concurred in by a majority of its judges. All questions on which decision by the full Chamber is not expressly provided for in the Statute or the Rules shall be decided by the single judge (Article 57(2)(b) and Rule 7(2)).³

The Pre-Trial Chambers shall also, in accordance with Regulation 18, have a duty legal officer.

¹ See for example ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber, Election of the Presiding Judge of the Pre-trial Chamber I, 16 September 2004 (<https://www.legal-tools.org/doc/9d81f6/>).

² See for example ICC, *Prosecutor v. Bemba et al.*, Decision Requesting Observations on the “Defence Request for the Exercise of Judicial Functions by the full Pre-Trial Chamber II”, 14 May 2014, ICC-01/05-01/13-398 (<https://www.legal-tools.org/doc/acdae4/>).

³ See for example ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber, Decision designating a Single Judge on Victim’s issues, 22 November 2006, ICC-02/04-01/05-130 (<https://www.legal-tools.org/doc/1a93cb/>).

In order give the Court additional flexibility and avoid difficulties in administration the present provision may be amended by the Assembly of States Parties at any time, even before the expiry of the seven year freeze on the ICC Statute (Article 122(1)).

Doctrine: For the bibliography, see the final comment on Article 39.

Author: Yvonne McDermott Rees.

Article 39(2)(c)

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

There may be parallel Chambers within both the Pre-Trial and Trial Divisions. In addition, considering the practice of the Pre-Trial Division, it is clear that a judge may be a member of two parallel Chambers.

In order give the Court additional flexibility and avoid difficulties in administration the present provision may be amended by the Assembly of States Parties at any time, even before the expiry of the seven year freeze on the ICC Statute (Article 122(1)).

Doctrine: For the bibliography, see the final comment on Article 39.

Author: Yvonne McDermott Rees.

Article 39(3)(a)

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.

Pursuant to Article 39(3)(a), judges of the Trial and Pre-Trial Divisions sit in those divisions for three years, and remain in office until any commenced hearings they were sitting on are completed. The Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years. Should a case be proceeding when the formal end of the term is reached, the term of the judges may be extended. This is consistent with Article 74(1) which states that “[a]ll the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations”. There is no provision equivalent to Article 74(1) concerning the pre-trial stage.

Given that judges are elected for nine-year terms, the provision suggests that judges might possibly be ‘promoted’ from one division to the other during their term of office (Jones, 2002). However, this raises an issue of so-called ‘contaminated’ judges who have served in either Trial or Pre-Trial Divisions (or, indeed, both) and who are later designated to the Appeals Chamber. They are obviously unable to sit in the appeals of the cases that they have already adjudicated on, but since there is only one Appeals Chamber, this becomes problematic. In 2009, two serving members of the Court, Judges Kuenyehia and Ušacka, were moved to the Appeals Chamber following the departure of two Appeals Chamber judges whose term had expired; this decision was not welcomed by the Assembly of States Parties.¹ There seems to be no ideal solution to this problem: if only newly-elected judges could serve on the Appeals Chamber to avoid ‘contamination’, then only the least experienced judges could sit on the Court’s highest Chamber.

Doctrine: For the bibliography, see the final comment on Article 39.

Author: Yvonne McDermott Rees.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

Article 39(3)(b)

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

The appeal judges sit during their full mandate, that is, nine years, and their term may not be extended.

Doctrine: For the bibliography, see the final comment on Article 39.

Author: Yvonne McDermott Rees.

Article 39(4)

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this Article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Once a judge has been appointed to the Appeals Chamber, he or she cannot serve in a Trial or Pre-Trial Chamber. However, Article 39(4) permits some rotation between Pre-Trial and Trial Chambers, and vice versa, provided that no judge sits on both pre-trial and trial stages of the same case. Rwelamira states that the reason for the provision on non-rotation of Appeals Chamber judges was that delegates wished to ensure that the same judge did not hear the same case at an earlier stage as well as on appeal, as discussed above.¹ However, this possibility is precluded by Regulation 12 of the Regulations of the Court, which states that, “Under no circumstances shall a judge who has participated in the pre-trial or trial phase of a case be eligible to sit on the Appeals Chamber hearing that case”, and permits for a Pre-Trial or Trial Chamber judge to be temporarily moved to the Appeals Chamber in such circumstances. Thus, the provisions formally precluding Appeals Chamber judges from mobility were probably unnecessary. Potential problems of partiality with Appeals Chamber judges who have served in other judicial divisions can and have been solved on a much more flexible manner.

In order to give the Court additional flexibility and avoid difficulties in administration the present provision may be amended by the Assembly of States Parties at any time, even before the expiry of the seven year freeze on the ICC Statute (Article 122(1)).

Cross-references:

Articles 15, 18, 19, 54(2), 57(2), 61(7), 72, 74 and 122(1).

¹ Medard R. Rwelamira, “Composition and Administration of the Court”, in Roy S. Lee (ed.), *The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999 (<https://www.legal-tools.org/doc/d71078/>).

Rules 7 and 39.

Regulations 10, 12, 13, 14, 15, 16, 17, 18, 46, 47, 54.

Doctrine:

1. Hirab Abtahi and Rebecca Young, “Article 39”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1247–1252 (<https://www.legal-tools.org/doc/040751/>).
2. John R. W. D. Jones, “Composition of the Court”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 235–69 (<https://www.legal-tools.org/doc/01addc/>).
3. Socorro Flores Liera, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 310–14 (<https://www.legal-tools.org/doc/e34f81/>).
4. Medard R. Rwelamira, “Composition and Administration of the Court”, in Roy S. Lee (ed.), *The Making of the Rome Statute, Kluwer Law International, The Hague*, 1999, pp. 153–73.
5. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 711–722 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Yvonne McDermott Rees.

Article 40

Independence of the Judges

General Remarks:

The right to be tried by an independent tribunal is a key component of the right to a fair trial. Article 40 sets out the conditions for judicial independence, meaning the freedom from external interference with the exercise of judicial functions.

Preparatory Works:

The original proposal that a judge could not sit on a case where the accused bears the same nationality as him or her was dropped during the drafting of the ICC Statute.¹ Article 10 of the ILC's draft statute proposed that judges could not hold office in a state concurrently with a judicial position in the ICC; in order to recognise that individuals can occasionally merely hold a title, this was later replaced with a more practical examination of whether they actively engaged in the judicial process of a state (Jones, 2002). Another proposal that the Presidency would be responsible for deciding questions of judicial independence was also replaced with the current arrangements under Article 40(4) (Jones, 2002).

Doctrine: For the bibliography, see the final comment on Article 40.

Author: Yvonne McDermott Rees.

¹ John R. W. D. Jones, "Composition of the Court", in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002 (<https://www.legal-tools.org/doc/01addc/>).

Article 40(1)

1. The judges shall be independent in the performance of their functions.

Article 40(1) states that judges shall be independent in carrying out their judicial functions. This provision is supplemented by the ICC's Code of Judicial Ethics, which was adopted in 2005. Article 3 of the Code states that judges shall uphold the "independence of their office and the authority of the Court" in their conduct, and shall not engage in any conduct that would give rise to questions about their independence. Article 10 of the Code stresses that judges have the right to freedom of expression, but that this right should be exercised in a manner consistent with their independence and impartiality, and that they should not comment on pending cases or express views "which may undermine the standing and integrity of the Court".

One issue that arises is that judges, particularly those who sit on the Presidency, have a role in the external relations of the Court and are frequently asked to give speeches on the work of the Court.¹ This can affect confidence in their independence and impartiality. For example, in the *Lubanga* case, the defence asked that Judge Song be recused from hearing the appeal, on the basis of remarks he had made in his capacity as President of the Court.² Judge Song had referred to the *Lubanga* conviction as a 'landmark judgment' and one that "sets a crucial precedent in the fight against impunity". The Plenary of Judges held that a fair-minded observer would not see these statements in their context as a comment on the merits of the appeal or on any legal or factual aspect of the appeal.

Doctrine: For the bibliography, see the final comment on Article 40.

Author: Yvonne McDermott Rees.

¹ Robert Cryer, "The International Criminal Court and its Relationship to Non-Party States", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Nijhoff Publishers, Leiden, 2009 (<https://www.legal-tools.org/doc/5d1db6/>).

² ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision of the Plenary of Judges on the Defence Application of 20 February 2013 for the Disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, 11 June 2013, ICC-01/04-01/06-3040-Anx (<https://www.legal-tools.org/doc/329b4b/>).

Article 40(2)

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

The Statute and the Code of Judicial Ethics both state that judges shall not exercise any extra-judicial function that might reasonably call their independence or impartiality into question, with Article 11 of the Code adding that “judges shall not exercise any political function”. In *Lubanga*, an alleged incompatibility arose between Judge Song’s position as a judge and his concurrent role as President of UNICEF Korea, given that the accused was charged with the conscription and use of child soldiers. This argument was rejected by a majority of the judges.¹ This decision follows precedent from the ICTY and SCSL, where involvement with related interest groups or intergovernmental organisations tends not to give rise to the dismissal of a judge on the grounds of independence or impartiality.² In *Ntaganda*, the accused challenged the independence of Judge Ozaki, who had been appointed as Ambassador of Japan to Estonia.³ An earlier decision of the Plenary of Judges found, by majority, that this role was not incompatible with the judge’s position as a part-time judge of the Court.⁴ This decision was based on the fact that Judge Ozaki had committed to remain available for any judicial activities and, furthermore, that ‘neither Japan nor Estonia was connected to any case before the Court’ (*Ntaganda*, 22 March 2019, para.

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision of the Plenary of Judges on the Defence Application of 20 February 2013 for the Disqualification of Judge Sang-Hyun Song from the case of The Prosecutor v. Thomas Lubanga Dyilo, 11 June 2013, ICC-01/04-01/06-3040-Anx (<https://www.legal-tools.org/doc/329b4b/>).

² SCSL, *Prosecutor v. Norman*, Pre-Trial Chamber, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004, SCSL-2004-14 (<https://www.legal-tools.org/doc/d5dbaf/>); ICTY, *Prosecutor v. Furundžija*, Appeals Chamber, Judgment, 21 July 2000, IT-95-17/1-A (<https://www.legal-tools.org/doc/660d3f/>).

³ ICC, *Prosecutor v. Ntaganda*, Appeals Chamber, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, 30 March 2021, ICC-01/04-02/06-2666, paras. 50–92 (*Ntaganda*, 30 March 2021’) (<https://www.legal-tools.org/doc/zy5pmd/>).

⁴ ICC, *Prosecutor v. Ntaganda*, Presidency, Annex 1 to Notification of the Decision of the Plenary of Judges pursuant to Article 40 of the Rome Statute, 22 March 2019, ICC-01/04-02/06-2326-Anx1 (*Ntaganda*, 22 March 2019’) (<https://www.legal-tools.org/doc/5a27d1/>).

13). A minority of three judges disagreed, finding that a sitting judge's performance of a political role on behalf of a state was entirely likely to impact public confidence in judicial independence (para. 15). A later decision dismissed Ntaganda's request for the disqualification of Judge Ozaki, finding that a well-informed, reasonable observer would not hold concerns about the appearance of a lack of impartiality based on the judge's appointment as Ambassador of Japan to Estonia.⁵ The Appeals Chamber considered that the legal framework of the ICC does not allow for appeal against decisions taken by an absolute majority of judges pursuant to Article 40 (*Ntaganda*, 30 March 2021, paras. 85–86). Judge Ibáñez Carranza disagreed, finding that the accused has the right to raise any issue pertaining to the fairness of proceedings on appeal (*Ntaganda*, 30 March 2021, para. 89).

Doctrine: For the bibliography, see the final comment on Article 40.

Author: Yvonne McDermott Rees.

⁵ ICC, *Prosecutor v. Ntaganda*, Presidency, Public Redacted Version of Confidential Annex 1 to Decision of the Plenary of Judges on the Defence Request for the Disqualification of Judge Kuniko Ozaki from the case of *The Prosecutor v. Bosco Ntaganda*, 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para. 39 (<https://www.legal-tools.org/doc/16b113/>).

Article 40(3)

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

Full-time judges may not engage in any other occupation of a professional nature. A greater leeway is afforded to judges who are not full-time members of the Court; they are merely to refrain from any activity likely to interfere with their judicial functions or give rise to questions over their independence, under Article 40(2).

Doctrine: For the bibliography, see the final comment on Article 40.

Author: Yvonne McDermott Rees.

Article 40(4)

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Decisions on questions of independence are to be decided by an absolute majority of the remaining judges, pursuant to Article 40(4). Although the link is not made explicit, presumably the provisions of Article 41 and the related rules on excusal, and the due process safeguards inherent thereto, would attach to such a decision.

Cross-references:

Articles 38 and 41.

Doctrine:

1. Robert Cryer, “The International Criminal Court and its Relationship to Non-Party States”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Nijhoff Publishers, Leiden, 2009, pp. 115–33.
2. Christopher Staker, Hirab Abtahi and Rebecca Young, “Article 40”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1253–1257 (<https://www.legal-tools.org/doc/040751/>).
3. John R. W. D. Jones, “Composition of the Court”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 235–69.
4. Anja Seibert-Fohr, “International Judicial Ethics”, in Cesare Romano, Karen J. Alter and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, 2013, pp. 757–79.

Author: Yvonne McDermott Rees.

Article 41

Excusing and Disqualification of Judges

General Remarks:

While Article 40 is primarily concerned with the independence or freedom from external influence of judges, Article 41 sets out the procedure for excusal or disqualification on the grounds of perceived or actual bias on the part of the judge. Rule 35 of the Rules of Procedure and Evidence requires a judge to request recusal if any circumstances exist that might call his or her impartiality into question. Article 41 sets down some examples of such circumstances, and is complemented by Rule 34 of the Rules in this regard. It also outlines the procedure to be followed for the disqualification of a judge.

Preparatory Works:

In the International Law Commission's 1993 draft, it suggested that the majority of the remaining judges in a Chamber would decide on the disqualification of their colleague, in conjunction with the Presidency.¹ By 1994, this had been amended to leave the decision solely to the remaining judges of the Chamber concerned. The Preparatory Committee later decided that the question should be decided by a majority of the judges of the Court, and it is this formulation that remains in Article 41(2)(c) today.

At the Rome Conference, there was some discussion as to whether States could make requests for recusal of judges, and also about whether nationality might be a factor giving rise to doubts of the impartiality of a judge (Schabas, 2016). Ultimately, these questions were answered in the negative, insofar as they were not included in the final text of Article 41. Nevertheless, it would certainly remain open to the Assembly of States Parties to amend the Rules of Procedure and Evidence accordingly, if it were to later decide that nationality of judges should be a factor in considering impartiality and/or that states should be able to lodge requests for disqualification of a judge.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

Doctrine: For the bibliography, see the final comment on Article 41.

Author: Yvonne McDermott Rees.

Article 41(1)

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

Article 41(1) deals with ‘excusal’, or what might be called ‘recusal’ in other courts. This is where a judge requests that he or she be excused from their judicial functions on the basis of a conflict of interest. Such requests are made in writing to the Presidency, and pursuant to Rule 33, the request and the decision are kept confidential (unless the judge involved gives his or her consent for the decision to be made public). In *Katanga*, two judges of the Appeals Chamber requested excusal from hearing an interlocutory appeal on the basis that they had previously sat on the Pre-Trial Chamber for the same case.¹

Doctrine: For the bibliography, see the final comment on Article 41.

Author: Yvonne McDermott Rees.

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, Decision on the Request to be Excused from Sitting on the Appeal against the Decision on Admissibility in the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui pursuant to Article 41 of the Rome Statute, 3 July 2009, ICC-01/04-01/07-1266-AnxII (<https://www.legal-tools.org/doc/6b0639/>).

Article 41(2)(a)

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

Article 41(2) explicitly mentions *inter alia* two circumstances that might give rise to disqualification. The first is the involvement with any prior stage of the case that they have been allocated to in any capacity. For example, a new judge elected on the basis of their expertise in international law might previously have given legal assistance given to a state in challenging the admissibility of a case; this would disqualify them from later hearing that case, even though the admissibility issue has long since been settled. The second ground listed in Article 41(2) is the involvement at national level in a “related criminal case”. An example might be where a judge who was elected on the basis of their judicial experience had earlier sat on a case involving atrocities committed by an armed group that the accused was a commander of.

Rule 34 supplements this list by adding four potential further grounds for disqualification. First, if the judge has a close relationship (personal or professional) with any of the parties, his or her impartiality might reasonably be doubted. Before the ICTR, the impartiality of Judge Vaz was challenged on the basis that she was living with a member of the prosecution team. The remaining judges on the Trial Chamber dismissed this challenge, finding that there was no question of her impartiality notwithstanding this fact.¹ The Appeals Chamber later held that a reasonable apprehen-

¹ ICTR, *Prosecutor v. Karemera et al.*, Appeals Chamber, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera’s Motion for Leave to Consider New Material of Judge Shahbuddeen, 22 October 2004, ICTR-98-44-AR15bis.2, para. 68 (<https://www.legal-tools.org/doc/7e9d02/>).

sion of bias could be found against the Chamber as a whole on the basis of that decision.²

Second, Rule 34 states that involvement in a private capacity in any legal proceedings where the suspect or accused is an opposing party will be a ground for disqualification. It seems highly unlikely that a judge of the International Criminal Court will be involved in a civil suit against an accused before the Court, initiated either before or during their involvement in the case. One wild hypothetical might be where the accused person publishes some material or makes a statement that would seriously lower a judge's reputation in the eyes of right-thinking members of society, and the judge seeks to take a defamation action against him or her. It goes without saying that this hypothetical is exceptionally improbable, not least because judges have traditionally shown resilience in the face of insults and allegations made by obstreperous defendants in the past, but also because privilege attaches to court proceedings in many jurisdictions.

Third, the performance of functions prior to taking office “during which he or she could be expected to have formed an opinion on the case in question” or on the parties or their legal representatives that could affect their impartiality as a judge is a further potential ground for dismissal. Many international criminal judges tend to have had some scholarly involvement in the issues at hand, or have served on advisory boards, prior to their judicial appointments. This will not be a cause for recusal in and of itself, and the extent to which it affects the impartiality of the individual judge will be decided on a case-by-case basis. Before the SCSL, Judge Winter's involvement in children's rights causes generally was not seen to give rise to actual or perceived bias in a case involving child soldiers.³ Similarly, in *Furundžija*, it was held that Judge Mumba's past involvement with the United Nations Committee on the Status of Women similarly did not risk an apprehension of bias on her part; indeed, involvement with such

² *Ibid.*, para. 69; see also ICTR, *Prosecutor v. Karemera et al.*, Decision on Severance of André Rwamakuba and Amendments of the Indictment, 7 December 2004, ICTR-98-44-PT, para. 21 (<https://www.legal-tools.org/doc/3c592a/>).

³ SCSL, *Prosecutor v. Norman*, Appeals Chamber, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004, SCSL-2004-14-PT (<https://www.legal-tools.org/doc/d5dbaf/>).

organisations or interest groups may serve as proof of the judge's suitability for the job.⁴

Fourth, the expression of opinions that could give rise to objective doubts as to the impartiality of the judge will be a ground for dismissal. This was the case in *Sesay* before the SCSL, where a judge's publication that specifically mentioned the armed group of which the accused was a member was held to give rise to a reasonable apprehension of bias.⁵ A request for disqualification of Judge Eboe-Osuji on the basis of a blog post was dismissed by a majority of the plenary of judges in *Banda and Jerbo*.⁶ The blog post, written before Judge Eboe-Osuji was appointed to the Court, discussed the relationship between the African Union and the Court and the *Situation in Sudan*, of which the *Banda and Jerbo* case was a part. The majority found that this general comment cast no doubt on the impartiality of the judge.

As mentioned above, nationality was one debated ground for impartiality challenges that ultimately did not make it into the final ICC Statute. In the *Banda and Jerbo* disqualification decision, however, the fact that Judge Eboe-Osuji shared a nationality with the alleged victims was raised as a ground in the challenge. This was dismissed by the plenary of the judges. This appears to be justified by national jurisprudence, where more often than not the judge shares the nationality of the victim; human rights law, which says nothing on nationality as a ground for lacking impartiality, and international criminal procedure where, in courts including the SCSL and the ECCC, a certain number of domestic judges share the bench with their international counterparts.

In *Lubanga*, a question arose as to whether Article 41(2) could also apply to judicial assistants, as well as to judges. The Prosecutor argued that “[a]n adviser or clerk to a judge has no greater freedom to work on cases in which he or she has already been involved as a prosecuting lawyer, than the

⁴ ICTY, *Prosecutor v. Furundžija*, Appeals Chamber, Judgment, 21 July 2000, IT-95-17/1-A (<https://www.legal-tools.org/doc/660d3f/>).

⁵ SCSL, *Prosecutor v. Sesay*, Appeals Chamber, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004, SCSL-2004-15-AR15 (<https://www.legal-tools.org/doc/d83edd/>).

⁶ ICC, *Prosecutor v. Banda and Jerbo*, Presidency, Decision of the Plenary of the Judges on the ‘Defence Request for the Disqualification of a Judge’, 5 June 2012, ICC-02/05-03/09-344-Anx (<https://www.legal-tools.org/doc/a15116/>).

judge to whom the adviser or clerk provides legal advice”.⁷ It would seem reasonable to suggest that an individual advising a judge on a case on which he or she previously worked for the prosecution should recuse himself or herself from that position, but there is nothing in the Statute or Rules on the impartiality of judicial advisors. The Pre-Trial Chamber ultimately requested the President to convene a plenary of judges to consider whether Article 41 could apply to a senior legal adviser to the Chamber. The President, in turn, declined this request on the basis that the remaining judges in a later meeting unanimously held that Article 41 did not apply, since the request had nothing to do with the disqualification of a judge.⁸

Doctrine: For the bibliography, see the final comment on Article 41.

Author: Yvonne McDermott Rees.

⁷ ICC, *Prosecutor v. Lubanga*, Office of the Prosecutor, Prosecutor's Application to Separate the Senior Legal Adviser to the Pre-Trial Division from rendering Legal Advice Regarding the Case, 31 August 2006, ICC-01/04-01/06-373, p. 2 (<https://www.legal-tools.org/doc/5e1228/>).

⁸ ICC, *Prosecutor v. Lubanga*, Decision of the President on the request of the President of the Pre-Trial Division of 20 October 2006, ICC-01/04-01/07, 7 November 2006, annexed to ICC, *Prosecutor v. Lubanga*, Ordonnance demandant au Greffier d'enregistrer un document au dossier de l'affaire, ICC-01/04-01/06-677, 7 November 2006 (<https://www.legal-tools.org/doc/6c7874/>); see also *Prosecutor v. Kony et al.*, Pre-Trial Chamber III, Decision on the Prosecutor's Request to Separate the Senior Legal Adviser to the Pre-Trial Division from rendering Legal Advice Regarding the Case, 31 October 2006, ICC-02/04-01/05-124 (<https://www.legal-tools.org/doc/2aeeb1/>).

Article 41(2)(b)

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

Procedure for Disqualification

Pursuant to Rule 35, judges are expected to ask to be excused from judicial duty where circumstances exist that could give rise to doubt as to their impartiality, rather than waiting for an Article 41(2) decision to be issued against them. Failure to do is a breach of duty giving rise to possible expulsion further to Article 46.¹

Under Article 41(2)(b), only the prosecution or the defence may make requests for disqualification. Rule 34 states that, “The request shall state the grounds and attach any relevant evidence, and shall be transmitted to the person concerned”. The challenged judge is entitled to present written submissions in response to the request for disqualification, although of course they may not participate in the decision of their judicial colleagues. In *Katanga*, the victims’ representative filed an application for the disqualification of Judge van den Wyngaert. The majority of the judges found that the request was inadmissible, as the victims had no locus standi pursuant to Article 41(2)(b). They said:

The Majority considered that the ordinary meaning of Article 41(2)(b) of the Statute was neither ambiguous nor unreasonable. Nor was there any lacuna in the law which called for further judicial interpretation. The law was plain and determinate as to who was entitled to bring an application for the disqualification of a judge. That right was limited to the Prosecutor and the person being investigated or prosecuted.²

Cross-references:

Articles 40 and 46.

Rules 33, 34 and 35.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

² ICC, *Prosecutor v. Katanga*, The Presidency, Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the disqualification of Judge Christine Van den Wyngaert from the case of The Prosecutor v. Germain Katanga, 22 July 2014, ICC-01/04-01/07-3504-Anx, para. 44 (<https://www.legal-tools.org/doc/a5a572/>).

Doctrine:

1. Steven W. Becker, “The “Presumption of Impartiality” and other Errors in the International Criminal Court’s Plenary Decision Concerning Judicial Disqualification of the President of the Court in The Prosecutor v. Thomas Lubanga Dyilo”, in *Global Community Yearbook of International Law and Jurisprudence*, 2013, vol. 1, pp. 111–24.
2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 728–735 (<https://www.legal-tools.org/doc/b7432e/>).

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Article 42

The Office of the Prosecutor

General Remarks:

In order for the ICC to retain credibility, it is imperative that it is staffed by a competent and independent Office of the Prosecutor. Article 42 sets out the functions and composition of this Office, as well as the required qualifications of the Prosecutor and Deputy Prosecutor, the process of election and disqualification, and the role of special advisers.

Preparatory Works:

Very early drafts suggested that ‘complaining states’ would appoint the Prosecutor and take responsibility for the conduct of the case.¹ It quickly became clear, however, that the Prosecutor should be an independent and permanent member of staff. There was some discussion on the length of the Prosecutor’s term of office and the extent of experience required, but these issues were resolved without too much difficulty (Schabas, 2016).

Doctrine: For the bibliography, see the final comment on Article 42.

Author: Yvonne McDermott Rees.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

Article 42(1)

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

Article 42(1) sets out the functions of the Office of the Prosecutor, namely: receiving referrals, pursuant to Article 14 of the Statute; receiving information on crimes and conducting investigations, pursuant to Article 15, and conducting prosecutions before the Court. In addition, Article 42(2) states that the Prosecutor has authority over the management and administration of the Office, including over its staff, facilities and resources. This is an exception to the general rule in Article 38 that tasks the Presidency with responsibility over the proper administration of the Court. As part of this administrative and management role, Rule 9 requires the Prosecutor to put in place “regulations to govern the operation of the Office”. These Regulations ultimately entered into force in 2009. An additional Code of Conduct for the Office of the Prosecutor entered into force in September 2013.

Rule 10 notes that the Prosecutor bears responsibility for the retention, security and storage of information and evidence received in the course of investigations. This corresponds with the Prosecutor’s power under Article 54(3)(f) to “[t]ake 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”. However, there has been some tension between this apparent power of the Prosecutor to provide protective measures and the ultimate authority of the Registry under Article 43(6) to undertake (“in consultation with the Office of the Prosecutor”) witness protection measures.¹

Although it is not explicitly listed as a role of the Office of the Prosecutor, the Prosecutor does, in practice, play a role in the external relations

¹ ICC, *Prosecutor v. Katanga*, Appeals Chamber, 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, 25 November 2008, ICC-01/04-01/07-776 (<https://www.legal-tools.org/doc/7c6b2d/>).

of the Court. For example, the Prosecutor presents a report to the Security Council every year. Further, when an arrest warrant is sought or issued, the Prosecutor tends to become the ‘voice of the Court’ in the press. This is not without its difficulties, as outlined below in relation to independence.

Doctrine: For the bibliography, see the final comment on Article 42.

Author: Yvonne McDermott Rees.

Article 42(2)

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

Article 42(2) allows the Prosecutor to be assisted by ‘one or more’ Deputy Prosecutors. In the early days of the Court’s operation, there were two Deputy Prosecutors in existence – one responsible for investigations and the other responsible for prosecutions. Since then, there has only been one Deputy Prosecutor; the most recent, James Stewart, was elected in 2012. Article 42(2) states that the Prosecutor and Deputy Prosecutors serve on a full-time basis, and that they shall be of different nationalities. It is not clear whether this means that all Deputy Prosecutors and the Prosecutor must bear distinct nationalities, or merely that no Deputy Prosecutor can share a nationality with the Prosecutor. It might be possible for two Deputy Prosecutors to be of the same nationality, provided that the Prosecutor has a different nationality.

The Deputy Prosecutor(s) are entitled to “carry out any of the acts required of the Prosecutor under this Statute”. Under Rule 11 of the Rules of Procedure and Evidence, either the Prosecutor or a Deputy Prosecutor may authorize staff members of the Office of the Prosecutor, other than the gratis personnel described under Article 44(4) of the Statute, to represent him or her in the exercise of his or her prosecutorial functions. There is an exception to this Rule, which explicitly excludes the “inherent powers of the Prosecutor set forth in the Statute, *inter alia*, those described in Articles 15 and 53”. The non-exhaustive nature of the reference to Articles 15 and 53 is unhelpful; it would be much clearer if the rules explicitly set out a list of non-delegable prosecutorial functions. One might wonder, for example, whether the provisions on ‘unique investigative opportunities’ under Article 56 classifies as an inherent power of the Prosecutor or Deputy Prosecutor, or whether it can be delegated to a more junior member of staff. Moreover, it is not entirely certain that the power to initiate investigations *proprio motu* under Article 15 is an ‘inherent power’ of the Prosecutor, as such. Had

the drafters of the Rome Statute ultimately decided to omit the provisions of Article 15, it is difficult to imagine that the Prosecutor could nevertheless proceed with investigations *proprio motu*, on the basis that she has the inherent power to do so.

Doctrine: For the bibliography, see the final comment on Article 42.

Author: Yvonne McDermott Rees.

Article 42(3)

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

As might be expected, the Statute requires the Prosecutor and Deputy Prosecutor(s) to be of high moral character, be highly competent, and have fluency in at least one of the working languages of the Court. As well as ‘fluency’, Article 42(3) also demands that he or she should have “excellent knowledge” in one such language – this seems rather superfluous, given that linguistic fluency and extensive knowledge of a language are broadly synonymous.

In addition, the Prosecutor and his or her Deputies must have “extensive practical experience in the prosecution or trial of criminal cases”. The reference to “prosecution or trial” recognises that in some legal systems, the judiciary is a professional career that one can enter without having practiced as a lawyer beforehand.

Doctrine: For the bibliography, see the final comment on Article 42.

Author: Yvonne McDermott Rees.

Article 42(4)

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

Both the Prosecutor and Deputy Prosecutor(s) are elected via secret ballot by a majority of the Assembly of States Parties. The Prosecutor provides the ASP with three nominations for each Deputy Prosecutor vacancy to be filled. Each Prosecutor and Deputy Prosecutor is elected for a nine-year, non-renewable term of office. It is possible for a Deputy Prosecutor to later become Prosecutor, as was the case with the second Prosecutor of the Court, Fatou Bensouda.

Doctrine: For the bibliography, see the final comment on Article 42.

Author: Yvonne McDermott Rees.

Article 42(5)

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.

The Office of the Prosecutor is a separate organ of the Court, and Article 42(1) sets down the rule that no “member of the Office” (which presumably extends to all categories of staff enumerated in Article 44) shall seek or act upon instructions from any external source. To this end, the Prosecutor and Deputy Prosecutor(s) are prohibited from engaging in any activity likely to affect confidence in their independence. They are also prohibited from carrying out any other professional occupation or any activity likely to interfere with their prosecutorial functions.

Doctrine: For the bibliography, see the final comment on Article 42.

Author: Yvonne McDermott Rees.

Article 42(6)

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

Akin to judges, the Prosecutor or Deputy Prosecutor can ask to excuse him or herself from acting in a particular case. Under Rule 33, this request is to be dealt with by the Presidency in confidence.

Doctrine: For the bibliography, see the final comment on Article 42.

Author: Yvonne McDermott Rees.

Article 42(7)

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

Like Article 41 for judges, Article 42(7) makes explicit that Prosecutors or Deputy Prosecutors cannot work on cases that they have previously been involved with, at international or national levels. For example, ICC Prosecutor Karim A.A. Khan recused himself from working on cases in the Kenya situation, having previously served as defence counsel for an accused in that situation. Rule 34 sets out four additional grounds that may give rise to disqualification: the existence of a personal or professional relationship that might call their impartiality into question; the involvement with legal proceedings involving the suspect or the accused; the existence of a prior employment that may have led him or her to form opinions about the case, the accused, or counsel; or the expression of opinions that suggest a lack of impartiality.

Doctrine: For the bibliography, see the final comment on Article 42.

Author: Yvonne McDermott Rees.

Article 42(8)

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this Article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;

Challenges to the impartiality of the Prosecutor or Deputy Prosecutor(s) are to be decided by a majority of the Appeals Chamber, pursuant to Article 42(8) and Rule 34(3).

In practice, only the fourth enumerated ground in Rule 34 – the expression of opinions that could adversely impact upon the perceived impartiality of the Prosecutor or Deputy Prosecutor – has been adjudicated to date. The remarks made by Prosecutor Luis Moreno-Ocampo following the issuance of an arrest warrant for Sudanese President Omar Al Bashir might provide an example. In an article for *The Guardian*, Moreno-Ocampo made statements like, “Bashir’s forces continue to use different weapons to commit genocide” and failed to qualify his remarks by pointing out that these were allegations that the Court had yet to adjudge upon. The remarks were subject to a challenge brought by *ad hoc* defence counsel for Bashir, but were deemed inadmissible as falling outside of the *ad hoc* counsel’s mandate.¹

Doctrine: For the bibliography, see the final comment on Article 42.

Author: Yvonne McDermott Rees.

¹ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the “Requête pour l’obtention d’une ordonnance condamnant les déclarations du Procureur en date du 15 juillet 2010”, 24 August 2010, ICC-02/05-01/09-106 (<https://www.legal-tools.org/doc/921207/>).

Article 42(9)

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

The Prosecutor can appoint advisers with specific legal experience in particular areas. It would appear that these positions are *pro bono*, but there is nothing in the Regulations of the Office of the Prosecutor that precludes these advisers from getting paid for their assistance. Some of the areas that special advisers have been appointed in are: gender, genocide, crimes against and affecting children, knowledge transfer, working climate, Darfur, gender persecution, international criminal law discourse, crime of aggression, public international law, war crimes, Islamic law, crimes against humanity, sexual violence in conflict, slavery crimes and investigations.¹

Cross-references:

Articles 14, 15, 38, 40, 41, 44, 53 and 54.

Rule 9, 10 and 11.

Doctrine:

1. Luc Reydam, Jan Wouters and Cedric Ryngaert, *International Prosecutors*, Oxford University Press, 2012.
2. Arman Savarian, *Professional Ethics at the International Bar*, Oxford University Press, 2013.
3. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 736–749 (<https://www.legal-tools.org/doc/b7432e/>).
4. Sergey Vasiliev, *The Role and Legal Status of the Prosecutor in International Criminal Trials*, Grotius Center for International Legal Studies, 2010.

Author: Yvonne McDermott Rees.

¹ ICC OTP, “ICC Prosecutor Mr Karim A.A. Khan QC appoints seventeen Special Advisers”, 17 September 2021, ICC-CPI-20210917-PR1611 (<https://www.legal-tools.org/doc/m810hc/>); ICC OTP, “ICC Prosecutor Mr Karim A.A. Khan QC appoints eminent experts as his Special Advisers”, 22 October 2021, ICC-CPI-20211022-PR1621 (<https://www.legal-tools.org/doc/nuqxzs/>).

Article 43

The Registry

General Remarks:

The Registry is the principal administrative organ of the Court. Article 43 sets out the role of the Registry and its head, the Registrar, as well as the conditions of service, means of election, and requisite qualifications of the Registrar.

Preparatory Works:

One of the key debates in the drafting of the ICC Statute was the issue of responsibility over the Victims and Witnesses Unit. Some advocated for this Unit to be shared with the Office of the Prosecutor.¹

Doctrine: For the bibliography, see the final comment on Article 43.

Author: Yvonne McDermott Rees.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

Article 43(1)

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with Article 42.

As mentioned in the commentary to Article 42, the Office of the Prosecutor is an independent organ of the Court, responsible for its own administration. Therefore, there is some interplay and possible tension between its operation and the role of the Registry. Article 43(1) underscores this by noting that the powers of the Registry are “without prejudice to the functions and powers of the Prosecutor”. The Office of the Prosecutor, in creating Regulations for its operation pursuant to Rule 9, is to consult with the Registrar ‘on any matters that may affect the operation of the Registry’.

The Registry has primary for the “non-judicial aspects of the administration and servicing of the Court”, pursuant to Article 43(1). This role involves keeping records on behalf of the court (Rule 15); serving as the channel of communication of the Court (without prejudice to the OTP’s right to establish such channels of communication in the course of its investigations) (Rule 13), and ensuring the security of Court premises (Rule 13). The Registrar is responsible for ensuring the safety of detained persons,¹ for organizing the surrender to the Court of suspects abroad (Rule 184); the transfer of persons in custody (Rule 192) and the transfer of convicted persons to the state where they will serve their sentence (Rule 206).

The Registry bears a significant role in ensuring that the defence rights of the accused under Article 67 are respected. It is responsible for providing ‘access to appropriate and reasonable administrative assistance’ to defence counsel and ensuring their professional independence. According to Rule 20, for the purpose of promoting the rights of the defence,

the Registrar shall, *inter alia*:

(a) Facilitate the protection of confidentiality, as defined in Article 67, para. 1 (b);

¹ See ICC, *Prosecutor v. Lubanga*, Registrar, Decision to classify the ‘registrar’s decision pursuant to Regulation 196(1) of the Regulations of the Registry’ as a public document, 23 March 2006, ICC-01/04-01/06-52 (<https://www.legal-tools.org/doc/4acd1/>).

- (b) Provide support, assistance, and information to all defence counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the defence;
- (c) Assist arrested persons, persons to whom Article 55, para. 2, applies and the accused in obtaining legal advice and the assistance of legal counsel;
- (d) Advise the Prosecutor and the Chambers, as necessary, on relevant defence- related issues;
- (e) Provide the defence with such facilities as may be necessary for the direct performance of the duty of the defence;
- (f) Facilitate the dissemination of information and case law of the Court to defence counsel and, as appropriate, cooperate with national defence and bar associations or any independent representative body of counsel and legal associations referred to in sub-rule 3 to promote the specialization and training of lawyers in the law of the Statute and the Rules.

As laid out in Regulation 83 of the Regulations of the Court, adopted on 26 May 2004, the Registrar has responsibility over the payment of legal assistance. The Registrar also maintains a list of counsel eligible to practice before the Court. Pursuant to Regulation 77 of the Regulations of the Court, an Office of Public Counsel for the Defence ('OPCD') was established. This Office falls under the remit of the Registry for administrative purposes but it otherwise functions independently. It is responsible for such matters as assisting counsel by providing legal research; representing suspects at the earliest stages of proceedings, and acting as duty counsel where permanent legal representation is not yet in place. In 2012, the Pre-Trial Chamber in the Libya situation appointed the OPCD to represent Saif Gaddafi in proceedings before the Court. The Libyan authorities initially refused to co-operate with the OPCD, and declined its confidentiality in its meetings with the accused. Ultimately, it was agreed that a confidential meeting between Gaddafi and OPCD representatives could take place in June 2012, but at that meeting, documents were seized and four members of OPCD staff were detained by Libyan authorities, allegedly on the basis of 'treason'. While the staff members were released a short time later, this incident shows how perilous the work of the OPCD can be when acting as legal counsel for accused persons in unco-operative states.

As well as the provisions on the Victims and Witnesses Unit in Article 43(6), the Registrar bears some responsibility for victims. Where there

is a challenge to jurisdiction or admissibility, the Registrar will inform the victims who have already communicated with the Court in relation to that case or their legal representatives, as well as any referring state (Rule 59). The Registrar is also responsible for receiving applications for victims' participation under Article 68(1) of the Statute, and to provide a copy of same applications to the prosecution and defence. Akin to the OPCD, there is an autonomous organ within the Registry called the Office of Public Counsel for Victims (OPCV), which provides support and legal assistance to participating victims and their legal representatives.

Where the Registrar requests guidance on his or her functions or duties, these should be addressed to the Presidency (Article 43(2)).²

Doctrine: For the bibliography, see the final comment on Article 43.

Author: Yvonne McDermott Rees.

² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision of the Appeals Chamber upon the Registrar's Requests of 5 April 2007, 27 April 2007, ICC-01/04-01/06-873 (<https://www.legal-tools.org/doc/d2f8f4/>).

Article 43(2)

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

The Registrar, as is obvious, is the director of the Registry and “principal administrative officer of the Court”. He or she may be assisted by a Deputy Registrar, upon his or her own recommendation.

Doctrine: For the bibliography, see the final comment on Article 43.

Author: Yvonne McDermott Rees.

Article 43(3)

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

The familiar criteria of high moral character, competence and fluency in one of the working languages of the Court also apply to the Registrar and Deputy Registrar. Like the Prosecutor and Deputy Prosecutor, the Registrar and Deputy Registrar must take an oath undertaking to perform their functions “honourably, faithfully, impartially and conscientiously”. However, unlike the Prosecutor and Deputy Prosecutor, there is no procedure for disqualification outlined in the Rules for a breach of impartiality for a Registrar or his or her Deputy. He or she might still be subject to removal from office under Article 46, if a serious breach of duty has occurred, or disciplinary measures under Article 47 for less serious breaches.

Doctrine: For the bibliography, see the final comment on Article 43.

Author: Yvonne McDermott Rees.

Article 43(4)

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

A list of candidates for the post of Registrar is drawn up by the Presidency, which transmits that list to the Assembly of States Parties with a request for any recommendations (Rule 12). Having received any recommendations, the President then transmits the list and recommendations to a plenary of judges, who elect the candidate in a secret ballot by absolute majority. The Deputy Registrar is elected in the same manner, if the Registrar recommends that one be appointed.

Doctrine: For the bibliography, see the final comment on Article 43.

Author: Yvonne McDermott Rees.

Article 43(5)

5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

The Registrar holds office for a five-year term, renewable once. The Deputy Registrar's term of office is more fluid – he or she can hold office for up to five years; the term of office may be shorter if the plenary of judges deems it appropriate. The Deputy Registrar may also be elected on the basis that he or she “shall be called upon to serve as required”. Lachowska notes that, in the disposable and non-essential manner of the role of Deputy Registrar as envisioned by the ICC Statute, the role bears far less weight than it did in the *ad hoc* tribunals' practice. There, the Deputy Registrar bore responsibility for the court-related servicing work of the Tribunal.¹ As of 2015, no Deputy Registrar had ever served before the ICC.

Doctrine: For the bibliography, see the final comment on Article 43.

Author: Yvonne McDermott Rees.

¹ Anna Lachowska, “The Support Work of the Court’s Registry”, in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Memory of Professor Igor Blishchenko*, Brill, Leiden, 2009, p. 390 (<https://www.legal-tools.org/doc/2bee50/>).

Article 43(6)

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit 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 others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Possibly the most controversial role of the Registry has been its responsibility over the Victims and Witnesses Unit ('VWU'), which is tasked under Article 43(6) with protective measures and security arrangements, counselling, and other appropriate assistance for those witnesses and victims that appear before the Court. There has been some tension in practice between this Unit and the Office of the Prosecutor, with the prosecution submitting that the level of protection offered by the VWU is insufficient, and refusing to disclose material on the basis of fears for the security of the witness(es).¹

The Registrar bears the responsibility of providing notice to victims or their representatives; assisting them in obtaining legal advice and representation; assisting their participation in accordance with the Statute and Rules, and taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings (Rule 16). Some of these roles have been subsumed by the Office of Public Counsel for Victims ('OPCV'), created under Regulation 115, in practice. The Registry is also responsible for assisting witnesses when they are called to the Court; taking gender-sensitive measures to facilitate the testimony of victims of sexual violence; informing witnesses of their rights and obligations; assisting witnesses in obtaining medical or other requisite treatment, and ensuring witness protection. It has also been held that the practice of 'witness familiarisation' (known as 'witness proofing' in earlier international criminal tribunals) falls within the remit of the VWU and not the parties, as witnesses are to be considered witnesses of the Court, regardless of which

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber, Annex 2 of Decision issuing a confidential and a public redacted version of "Decision on disclosure issues, responsibilities for protective measures and other procedural matters", 24 April 2008, ICC-01/04-01/06-1311-Anx2 (<https://www.legal-tools.org/doc/a44dab/>).

party called them.² The Unit is also responsible for providing training to the parties and the Court on such issues as trauma, sexual violence, and confidentiality (Rule 17). As such, Rule 19 suggests a number of roles that might be filled within the Unit, including those with expertise on legal matters; psychological aspects; children; older people, and counselling. The Pre-Trial Chamber found in *Lubanga* that measures such as witness familiarization is not only admissible but mandatory (*Lubanga*, 8 November 2006, paras. 23 and 24).

In *Katanga and Ngudjolo* the Pre-Trial Chamber concluded that the practice of the Prosecutor to “preventively relocate” witnesses who were not included in the Protection Programme was exceeding the mandate of the Prosecutor and decided that the Prosecutor “shall immediately put an end to the practice of preventive relocation of witnesses”. The Pre-Trial Chamber reasoned that Article 43(6) of the Statute and Regulation 96 of the Regulations of the Registry establish a single Protection Programme, which is run by the Registry and in which the roles of the Prosecutor and the defence are limited to the making of applications to the Registrar.³ The Pre-Trial Chamber noted that there was no provision in the Statute, the Rules of Procedure and Evidence, the Regulations of the Court or the Regulations of the Registry that expressly provides the Prosecutor with the authority to relocate witnesses preventively (*Katanga and Ngudjolo*, 21 April 2008, paras. 22–23, 32 and p. 54).

The Appeals Chamber found on appeal that any disagreement between the VWU and the Prosecutor about the relocation of a witness should ultimately be decided by the Chamber dealing with the case – and should not be resolved by the unilateral and unchecked action of the Prosecutor. The Appeals Chamber agreed with the Pre-Trial Chamber that the general mandate of the Prosecutor pursuant to Article 68(1) of the Statute does not extend to the preventive relocation of witnesses. The Appeals Chamber therefore resolves both parts of the question on this appeal (see para. 64 above) in the negative: The Prosecutor cannot unilaterally “preventively

² ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679 (*‘Lubanga*, 8 November 2006’) (<https://www.legal-tools.org/doc/dd3a88/>).

³ ICC, *Prosecutor v. Katanga and Ngudjolo*, 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, 21 April 2008, ICC-01/04-01/07-428, paras. 22–23, 32 and p. 54 (*‘Katanga and Ngudjolo*, 21 April 2008’) (<https://www.legal-tools.org/doc/595408/>).

relocate” witnesses either before the Registrar has decided whether a particular witness should be relocated or after the Registrar has decided that an individual witness should not be relocated. The Appeals Chamber confirmed with a 3–2 majority the decision of the Pre-Trial Chamber.⁴

Cross-references:

Articles 42, 46, 47 and 67.

Rules 12, 13, 14, 15, 16, 17, 18, 19, and 20.

Regulations 19 and 81.

Doctrine:

1. Marc Dubuisson, *Anne-Aurore Bertrand and Natacha Schauder*, “The Contribution of the Registry to Greater Respect for the Principles of Fairness and Expeditious Proceedings Before the International Criminal Court”, in Göran Sluiter and Carsten Stahn (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, 2009, pp. 565–84.
2. Anna Lachowska, “The Support Work of the Court’s Registry”, in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Memory of Professor Igor Blishchenko*, Brill, Leiden, 2009, pp. 387–400.

Author: Yvonne McDermott Rees.

⁴ ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, 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, 26 November 2008, ICC-01/04-01/07-776, paras. 93, 99, and 109 (<https://www.legal-tools.org/doc/7c6b2d/>).

Article 44

Staff

General Remarks:

Article 44 sets out provisions on the qualifications of, and regulations applicable to, staff appointed by the Prosecutor and Registrar. Importantly, it sets out the status of so-called gratis personnel.

Preparatory Works:

Article 44 was introduced into the Statute at a late stage of the drafting process. It was initiated by a request from a representative of the United States to include something on the status of gratis personnel, and this later was subsumed into a more general provision on personnel before the Court.¹

Doctrine: For the bibliography, see the final comment on Article 44.

Author: Yvonne McDermott Rees.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

Article 44(1)

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

As the Statute notes numerous times, while the Registrar is the chief administrative officer of the Court, the Prosecutor has independence over the running of his or her office under Article 42(2). Article 44(1) reiterates this distinction, stating that the Prosecutor and Registrar shall appoint such staff as may be required “to their respective offices”. It adds, perhaps unnecessarily, that the Prosecutor will appoint investigators under Article 44. One possible reason for this inclusion is to underscore the fact that investigators are staff, not independent contractors, and as such, they bear all of the duties set out in the Staff Regulations.

Doctrine: For the bibliography, see the final comment on Article 44.

Author: Yvonne McDermott Rees.

Article 44(2)

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, mutatis mutandis, to the criteria set forth in Article 36, paragraph 8.

The Registrar and Prosecutor are to have regard to the provisions of Article 36(8) when hiring staff. In other words, they should be mindful of the need to have representation of the principal legal systems of the world, equitable geographical representation and gender balance. According to a Report released by the Registry in 2013, “as at 31 March 2013, out of 319 professionals, 54 come from Africa, 20 from the Asia- Pacific Group, 23 from Eastern Europe, 26 from the Group of Latin American and Caribbean States and 196 from the Group of Western European and Other States”.¹ The gender balance was quite good, with 49.4 percent of staff at Professional or Director level being female, and 50.6 percent being male.

Staff members are mandated by Article 44(2) to embody the highest standards of efficiency, competency and integrity. The ICC Staff Regulations add that they must “uphold and respect the principles embodied in the Rome Statute, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women”. The standard reference request used by the Court asks whether the individual is free from prejudice or intolerance with regard to race, gender, religious and ethnic background. The core competencies to work at the Court are set out as including honesty, integrity, attitude towards others, temperament, and ability to work harmoniously in a large diverse multicultural environment.

Doctrine: For the bibliography, see the final comment on Article 44.

Author: Yvonne McDermott Rees.

¹ ICC ASP, “Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court”, 15 November 2013, ICC-ASP/12/49.

Article 44(3)

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

Article 44(3) tasks the Registrar with proposing Staff Regulations including the terms and conditions on which recruitment, remuneration and dismissal of Court staff are to be based. These Regulations were adopted in 2003. They include such matters as the independence of staff members, the confidentiality of investigations and prosecutions, disciplinary measures and payment of staff.

Doctrine: For the bibliography, see the final comment on Article 44.

Author: Yvonne McDermott Rees.

Article 44(4)

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Under Article 44(4), the Court can “in exceptional circumstances” accept the services individuals on secondment from States, intergovernmental organisations or non-governmental organisations. These people are known as ‘gratis personnel’, given that they are not paid directly by the Court. Guidelines for the selection and engagement of gratis personnel were adopted in 2005. Pursuant to these guidelines, gratis personnel must accept the independence of the Court, and must not accept instruction from their sending state or organisation, or indeed from any external authority. They cannot be hired to replace a paid member of staff. The Prosecutor or Deputy Prosecutor may not delegate their prosecutorial functions to gratis personnel serving in the Office of the Prosecutor (Rule 11).

Cross-references:

Articles 36 and 42.

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 764–770 (<https://www.legal-tools.org/doc/b7432e/>).
2. Magda Karagiannakis, “Article 44”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1289–1295 (<https://www.legal-tools.org/doc/040751/>).

Author: Yvonne McDermott Rees.

Article 45

Solemn Undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

General Remarks:

Article 45 sets out that judges, the Prosecutor, Deputy Prosecutor, Registrar, and Deputy Registrar shall make a ‘solemn undertaking’ to exercise their functions impartially and conscientiously.

Preparatory Works:

Early drafts of the Statute placed a duty on judges to make such an undertaking; this was later extended to other senior officers of the Court.

Analysis:

It is commonplace in the majority of legal systems that judges should make an oath declaring that they will exercise their functions impartially. At the ICC, the requirement to make such a “solemn undertaking” extends not just to judges, but to the Prosecutor, Deputy Prosecutors, Registrar and Deputy Registrar as well. This clearly relates to the accused’s right to be tried by an impartial court, under Article 67, and the duty of impartiality imposed on judges, the Prosecutor, and Deputy Prosecutors under Articles 41 and 42. Article 43 does not set down a requirement that the Registrar or Deputy Registrar be impartial, but this was clearly obvious to the drafters that this should be the case, given their inclusion in Article 45.

In some domestic legal systems, judges are required to swear an oath on a religious text. The ICC’s solemn declaration under Article 45, like the solemn declaration for witnesses under Article 69(1), is non-denominational. Judges make the following declaration, set out in Rule 5: “I solemnly undertake that I will perform my duties and exercise my powers as a judge of the International Criminal Court honourably, faithfully, impartially and conscientiously, and that I will respect the confidentiality of investigations and prosecutions and the secrecy of deliberations”. The undertaking made by the Prosecutor, Registrar, and their Deputies is almost

identical, save for the “secrecy of deliberations” element, which clearly does not apply.

Although it is not required under Article 45, the Rules also include a solemn undertaking to be made by every staff member of the Office of the Prosecutor and the Registry, to carry out their duties honourably, faithfully, impartially and conscientiously, and to respect the confidentiality of investigations. Interpreters and translators must also make a solemn undertaking, before commencing any duties, to perform their duties honourably, faithfully, impartially, conscientiously and with full respect for the duty of confidentiality.

Cross-references:

Articles 41, 42, 43, 45, 67 and 69.

Rules 5 and 6.

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2nd. ed., Oxford University Press, 2016, pp. 771–772 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Yvonne McDermott Rees.

Article 46

Removal from Office

General Remarks:

The Statutes of the *ad hoc* Tribunals contained no provision for removal from office of judges or any other senior staff member of the Court. Article 46 of the ICC Statute, by contrast, sets out the reasons for removal, and the process that is to be followed in reaching a decision on removal from office.

Preparatory Works:

The drafting of this provision was relatively uncontroversial. Some delegations at the Rome Conference took the view that a distinction should be drawn between those who were to be removed from office because they were no longer in a position to fulfil their functions, for example because of ill health, and those whose misconduct necessitated removal from office.¹

Doctrine: For the bibliography, see the final comment on Article 46.

Author: Yvonne McDermott Rees.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

Article 46(1)

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

(a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or

(b) Is unable to exercise the functions required by this Statute.

Article 46(1) sets out two separate grounds for removal of a judge, Prosecutor, Deputy Prosecutor, Registrar, or Deputy Registrar: inability to carry out their functions under the Statute, and ‘misconduct of a serious nature’ or a ‘serious breach of duty’. Pursuant to Rule 24, misconduct of a serious nature might include: disclosing confidential facts, where such disclosure is seriously prejudicial to the judicial proceedings or to any person; concealing information that would have precluded him or her from holding office, and abuse of office in order to obtain unwarranted favourable treatment. Such misconduct can also occur outside the course of official duties, if the conduct is ‘of a grave nature causes or is likely to cause serious harm to the standing of the Court.’ An obvious example would be the commission of a serious crime.

A ‘serious breach of duty’ implies gross negligence in the conduct of an individual’s functions. Two examples are given in Rule 24: (a) the failure to request to be excused, where there are grounds for doing so (for example if one of the judges had a close relationship with one of the parties), and (b) repeatedly causing unwarranted delay in the initiation, prosecution or trial of cases. An example of the latter might be where a Prosecutor or Deputy Prosecutor is disorganized and continually fails to file their submissions on time.

Doctrine: For the bibliography, see the final comment on Article 46.

Author: Yvonne McDermott Rees.

Article 46(2)

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

(a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;

(b) In the case of the Prosecutor, by an absolute majority of the States Parties;

(c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

Articles 46(2) and (3) set out precisely which organ can decide on the removal of office of an individual high-ranking member of the Court's staff, and a great deal of detail is included in the Rules of Procedure and Evidence on the procedure to be followed. This is doubtless an improvement on the *ad hoc* tribunals where in practice, judges decided on the removal of a fellow judge in a plenary session, but, as Judge Shahabuddeen pointed out, there was nothing in the Statute granting this power to the plenary, and thus its competence to pass judgment on such a question was uncertain.¹ Further, there is an added safeguard against arbitrariness in that the Assembly of State Parties makes the final decision on the question of removal of a judge, Prosecutor or Deputy Prosecutor (Article 46(2)).

For a judge to be removed from office, the other judges must meet in plenary session and a two-thirds majority must recommend that he or she be removed. This recommendation is communicated by the Presidency to the President of the Bureau of the Assembly of States Parties. The Assembly of States Parties then decides on the matter in a secret ballot; a two-thirds majority of the States Parties is needed to effectuate a removal from office. For a Prosecutor to be removed, a secret ballot of the Assembly of States Parties is taken, and an absolute majority of States Parties is needed before he or she can be removed from office. In the case of a Deputy Prosecutor, the Prosecutor must recommend his or her removal to the Assembly of States Parties, which decides on the matter by absolute majority.

¹ ICTY, *Prosecutor v. Delalić et al.*, Appeals Chamber, Decision of the bureau on motion to disqualify judges pursuant to Rule 15 or in the alternative that certain judges recuse themselves, 25 October 1999, IT-96-21 (<https://www.legal-tools.org/doc/d0270c/>).

Doctrine: For the bibliography, see the final comment on Article 46.

Author: Yvonne McDermott Rees.

Article 46(3)

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

An absolute majority of the judges is needed to remove a Registrar or Deputy Registrar from office, and the Presidency then communicates that decision to the Assembly of States Parties.

Doctrine: For the bibliography, see the final comment on Article 46.

Author: Yvonne McDermott Rees.

Article 46(4)

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

It may be decided that the conduct is more appropriately classified as “misconduct of a less serious nature” pursuant to Article 47, and the individual concerned can be reprimanded accordingly.

In both Article 46 and Article 47 proceedings, some due process rights attach: the individual concerned has the right to present and receive evidence, to put forward his or her own submissions on the matter, and to be represented by counsel.

Cross-references:

Article 47.

Rules 23, 24, 26, 27, 28, 29 and 31.

Regulations 119, 120, 121, 122, 123, 124 and 125.

Doctrine:

1. John R.W.D. Jones, “Duties of Officials”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 285–88.
2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 773–779 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Yvonne McDermott Rees.

Article 47

Disciplinary Measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in Article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

General Remarks:

This short Article sets out the grounds and procedure for the invocation of disciplinary measures against senior members of the Court's staff.

Preparatory Works:

There was no provision on disciplinary measures in the Statutes of the *ad hoc* tribunals, and according to Schabas, this provision only arose in the drafting of Article 46 on removal from office. One discussion arose as to whether the Rules of Procedure and Evidence or the Regulations was the best place to set out the procedure for enacting disciplinary proceedings; ultimately, this was included in the Rules.¹

Analysis:

Article 47 is notable in its brevity on the types of act that might be considered “misconduct of a less serious nature”, the nature of disciplinary measures that can be imposed, and the procedure to be followed in the event of such alleged misconduct. However, it is heavily supplemented by the Rules of Procedure and Evidence.

Rule 25 defines ‘misconduct of a less serious nature’ as conduct that causes or is likely to cause harm to the proper internal functioning of, or administration of justice before, the Court, if committed in the course of official duties. An example might be the leaking of sensitive information that did not reach the level of seriousness envisioned under Article 46. The Rule outlines three examples of its own: interfering in the exercise of the functions of a judge, Prosecutor, Registrar, or Deputy Prosecutor or Registrar; failing to comply with request made by the Presiding Judge or the Presidency in the exercise of their lawful duty; or (in the case of judges)

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

failing to enforce disciplinary measures when the judge is aware or should be aware of a serious breach of duty on their part. Misconduct of a less serious nature can also be committed outside the course of official duty, and is described as conduct that causes or is likely to cause harm to the standing of the Court.

Of course, the boundaries between serious misconduct and misconduct of a less serious nature are blurred, and in reality, violations as outlined in Rule 25 might constitute ‘serious misconduct’ or a ‘serious breach of duty’ giving rise to action under Article 46, depending on the circumstances. Thus, Rule 25 quite wisely notes that nothing in the rule precludes the examples set out in sub-rule 1(a) from being classified as serious misconduct or a serious breach of duty, for the purposes of Article 46.

The Rules outline two types of disciplinary measure for misconduct under Article 47 – a reprimand, or a pecuniary sanction that may not exceed six months of the salary paid by the Court to the individual concerned (Rule 32). The Rules mandate that any decision to impose a disciplinary measure on a judge, Registrar or Deputy Registrar will be taken by the Presidency. There does not seem to be any provision made for when a judge who is a member of the Presidency has carried out the alleged misconduct. Presumably, the other two judges would decide upon any disciplinary measure, but as they would be two, it would raise difficulties if they could not reach a consensus. Any decision to impose a disciplinary measure on the Prosecutor shall be made by the Bureau of the Association of States Parties, by majority. The Prosecutor can issue a reprimand to the Deputy Prosecutor, but the Bureau of the ASP, by majority, must approve pecuniary sanctions (Rule 30).

The Rules set out a procedure for complaints of alleged misconduct under Article 47 that aim to ensure procedural justice. Complaints shall be confidentially transmitted to the Independent Oversight Mechanism, which has the right to “set aside those complaints which are manifestly unfounded”, before investigating all other complaints and transmitting the results of such investigations to the Assembly of States Parties, along with its recommendations, and “any other competent organ(s)”. Rule 27 establishes that the person who is subject to such disciplinary proceedings has the right to be informed of the complaint, to submit and receive evidence, to make written submissions, to answer any questions put to him or her, and to be represented by counsel.

Cross-references:

Article 46.

Rules 25, 26, 28, 30 and 32.

Doctrine:

1. Milan Marković, “The ICC Prosecutor’s Missing Code of Conduct”, in *Texas International Law Journal*, 2011, vol. 47, pp. 201–36.
2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 780–783 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Yvonne McDermott Rees.

Article 48

Privileges and Immunities

General Remarks:

The International Criminal Court and its staff require some privileges and immunities to exercise their functions independently and without interference from states. Article 48 recognises a ‘sliding scale’ of privileges and immunities, from full diplomatic privileges and immunities being afforded to judges, the Registrar and the Prosecutor and Deputy Prosecutor when they are on court business, to a limited reference to “treatment as is necessary” given to counsel, experts, witnesses, and other persons required to be present at the seat of the Court.

Preparatory Works:

It was obvious that judges should be afforded some level of diplomatic immunity when on Court business. Most of the debate in the drafting of Article 48 centred on the extent to which the Prosecutor, investigators and counsel needed and should be afforded such immunity to guarantee the effective carrying out of their functions.

Doctrine: For the bibliography, see the final comment on Article 48.

Author: Yvonne McDermott Rees.

Article 48(1)

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

The Court itself is entitled to “such privileges and immunities as are necessary for the fulfilment of its purposes”, pursuant to Article 48(1). This means that, pursuant to the Headquarters Agreement, the property and funds of the Court are “immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action”.¹

Doctrine: For the bibliography, see the final comment on Article 48.

Author: Yvonne McDermott Rees.

¹ Headquarters Agreement between the International Criminal Court and the Host State, 1 March 2008, ICC-BD/04-01-08, Article 11 (<https://www.legal-tools.org/doc/45e340/>).

Article 48(2)

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

Judges, the Prosecutor, Registrar and Deputy Prosecutor(s) are entitled to privileges analogous to those afforded to a head of a diplomatic mission. This means, practically, that they cannot be arrested or be subject to the legal process in any way; they cannot be obliged to pay taxes; they are exempt from national service and restrictions on immigration; they are entitled to repatriation in times of emergency; their official papers and documents are inviolable, as is any personal baggage carried with them, and so forth.

These individuals cannot be sued for remarks made during their time in office as part of their official functions, even after that time has expired. So, an acquitted person who was affronted by remarks made by the Prosecutor alleging him or her to be guilty of heinous crimes during trial cannot later sue the former Prosecutor for defamation.

Doctrine: For the bibliography, see the final comment on Article 48.

Author: Yvonne McDermott Rees.

Article 48(3)

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

Staff of the Office of the Prosecutor and the Registry, along with the Deputy Registrar, are entitled to such privileges and immunities as are necessary for the performance of their functions. So, for example, their right to liberty cannot be restricted by states attempting to thwart their investigations in that state. It is most unfortunate that the same functional immunity was not extended to defence counsel or members of defence investigating teams within this provision. A defence counsel practicing before the ICTR was arrested and detained by Rwanda in 2011 on charges of ‘genocide denial’, linked to statements made in the course of his client’s defence, and four members of ICC staff acting on behalf of Saif Gaddafi were detained by Libyan authorities in 2012.

An Agreement on Privileges and Immunities of the ICC was adopted by the Assembly of State Parties in 2002, and it came into force in 2004.¹ The agreement defines ‘counsel’ as including “defence counsel and the legal representatives of victims”. Article 18 entitles such counsel to inviolability of documents and papers, immunity from legal process of any kind in respect of acts or words spoken or written as part of their official function; immunity from arrest and detention; and free communication as part of their role. Righteous as it may be, it is unlikely that this Article represents customary international law, and thus it is unfortunate that only 74 states have thus far acceded to the agreement. As regards the duty of non-Party States to the ICC, such as Libya, to respect the immunities afforded to staff under Article 48, it has been argued that this is an obligation pursuant to the Security Council’s referral of that state to the ICC, demanding Libya to “fully cooperate” with the Court.²

¹ Agreement on the Privileges and Immunities of the International Criminal Court, 9 September 2002, ICC-ASP/1/3 (<https://www.legal-tools.org/doc/6eefbc/>).

² Kevin Jon Heller, “Why I Think the Detained ICC Personnel Are Entitled to Diplomatic Immunity”, in *Opinio Juris*, 15 June 2012 (available on its web site).

Doctrine: For the bibliography, see the final comment on Article 48.

Author: Yvonne McDermott Rees.

Article 48(4)

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

Article 48(4) applies to “counsel, experts, witnesses or any other person required to be present at the seat of the Court” and states that they are entitled to “such treatment as is necessary for the proper functioning of the Court, in accordance with the Agreement on Privileges and Immunities of the Court”. For some authors, the wording of this provision suggests that such treatment will just be afforded at the seat of the Court itself, given that it extends to “any other person required to be present at the seat of the Court”.¹ The International Bar Association appears to be of the view that it applies in any state, and not just the seat of the Court.²

The latter interpretation appears to be correct for two reasons. First, the word ‘witnesses’ is not followed by a comma in the list, which would make the terms ‘witnesses’ and ‘any other person’ disjunctive, therefore applying the ‘seat of the Court’ proviso to all those on the list. Without that comma, the terms are conjunctive, meaning that the treatment is owed to: (a) counsel, (b) experts, (c) witnesses required to be present at the seat of the Court, and (d) anyone else required to be present at the seat of the Court. Second, the reference to the Agreement on Privileges and Immunities of the Court would be curious if this provision were only to apply at the seat of the Court, given that the Headquarters agreement would surely be the more relevant instrument.

‘Such treatment’ clearly falls short of the privileges and immunities offered to others in Article 48. The Agreement on Privileges and Immunities of the Court suggests some types of treatment that may be owed to witnesses, including immunity from arrest and detention; immunity from legal processes of any kind; exemption from immigration restrictions, and inviolability of documents, provided that such measures are necessary for their appearance before the Court for purposes of giving evidence.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2016.

² International Bar Association, “Counsel Matters before the International Criminal Court”, November 2012, pp. 31–33.

Doctrine: For the bibliography, see the final comment on Article 48.

Author: Yvonne McDermott Rees.

Article 48(5)

5. The privileges and immunities of:

- (a) A judge or the Prosecutor may be waived by an absolute majority of the judges;**
- (b) The Registrar may be waived by the Presidency;**
- (c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;**
- (d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.**

Immunities can be waived where they are not necessary for the proper functioning of the Court, for example where a member of staff has sought to avoid paying a parking fine on the basis of their immunity. Article 48(5) establishes that an absolute majority of the judges can waive the privileges and immunities of a judge or the Prosecutor; the Presidency can waive the Registrar's privileges and immunities; the Prosecutor can waive the privileges and immunities of OTP staff or the Deputy Prosecutor, and the Registrar can waive the privileges and immunities of Registry staff or the Deputy Registrar.

Doctrine:

1. Stuart Beresford, "The Privileges and Immunities^[1] of the International Criminal Court: Are they sufficient for the proper functioning of the Court or is there still room for improvement?", in *San Diego International Law Journal*, 2002, vol. 3, pp. 83–132.
2. Kevin Jon Heller, "Why I Think the Detained ICC Personnel Are Entitled to Diplomatic Immunity", in *Opinio Juris*, 15 June 2012.
3. International Bar Association, "Counsel Matters before the International Criminal Court", November 2012, pp. 31–33.
4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., Oxford University Press, 2016, pp. 784–792 (<https://www.legal-tools.org/doc/b7432e/>).
5. Hannah Woolaver, "The Immunity of Defence Team Members at the ICTR: Lessons from the Jurisprudence of the ICTR, ICTY and the ICC", in *African Yearbook of International Humanitarian Law*, 2013, vol. 134, p. 134.

Author: Yvonne McDermott Rees.

Article 49

Salaries, Allowances and Expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

General Remarks:

The ICC has to strike a delicate balance on salaries, allowances and expenses; it must pay a reasonable and fair wage suffice to attract the most talented individuals, but these benefits must not be so excessive as to draw criticism. In addition, these conditions must be decided by a body not directly impacted by them, but must not be subject to interference where that body is dissatisfied with some aspect of the Court's work. Article 49 attempts to strike that balance.

Preparatory Works:

The International Law Commission's Draft Statute initially proposed that the judges of the Court might receive 'allowances and expenses' from the Court, with their home state paying a salary. This proposal was not successful. There was some discussion as to whether the salaries of the judges of the International Court of Justice might be used as a basis for calculation, but overall, the drafting of this provision seems to have been relatively uncontroversial.¹

Analysis:

In analysing this provision, it must be borne in mind that full-time judges are not permitted to exercise any external professional function, pursuant to Article 40. In addition, it is imperative that they be seen to be independent in the exercise of their functions, so any payment that could be interfered with by one state would give rise to questions about that independence.

The Assembly of States Parties in its 'Conditions of Service' Resolution agreed that the remuneration for judges would be €180,000 per annum. The President receives an additional €18,000. There are allowances built in

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016.

for the education of dependants, and travel/relocation allowances. Judges are entitled to join a pension scheme similar to that available to the judges of the International Court of Justice. Non-full-time judges receive an annual allowance of €20,000, but where a judge declares his or her total annual income to be less than €60,000, he or she will receive an allowance, payable monthly, to supplement his or her declared net income up to that amount.

Judges' salaries and allowances cannot be reduced during their terms of office under Article 49.

Cross-reference:

Article 40.

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 793–800.

Author: Yvonne McDermott Rees.

Article 50

Official and Working Languages

General Remarks:

The Statute distinguishes between ‘official languages of the Court’, of which there are six, and its “working languages”, English and French. All documents must be in one of the two working languages, and certain decisions and judgments are to be published in all six official languages. Translation and interpretation are the responsibility of the Registry (Regulation 40).

Preparatory Works:

Throughout the drafting process, it was clear that the working languages of the Court were to be the official languages of the United Nations, French and English. According to Schabas, the distinction between official and working languages and the addition of Arabic, Russian, Chinese and Spanish came at the final stage of negotiations, owing to intense lobbying from a group of Spanish-speaking countries.¹

Doctrine: For the bibliography, see the final comment on Article 50.

Author: Yvonne McDermott Rees.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016.

Article 50(1)

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

It is clear that all final judgments on guilt or innocence of the accused should be published in each of the official languages. In addition, the Statute mandates that ‘other decisions resolving fundamental issues before the Court’ should also be published in Arabic, Chinese, English, French, Russian and Spanish. Article 50(1) permits the Presidency to determine which decisions may be considered ‘fundamental’ for these purposes. That authority must be exercised in accordance with the Rules of Procedure and Evidence, and Rule 40 declares four types of decision to be considered as resolving fundamental issues: all decisions of the Appeals Chamber; all admissibility and jurisdiction decisions; all Trial Chamber decisions on guilt or innocence, sentencing and reparations, and all decisions on Article 57(3)(d) (investigative steps in the absence of state co-operation). This seems to spread the net of translation, which is a costly and wieldy process, very wide. In practice, however, the Court appears to have been quite lackadaisical on its obligations to translate these documents into all of the official languages. Three years after its issuance, the *Lubanga* judgment remained available in English and French only.

Rule 40 further determines that decisions on the confirmation of charges and offences against the administration of justice shall be published in all official languages of the Court ‘when the Presidency determines that they resolve fundamental issues’. This provision is rather superfluous, given that any decision is to be published in all six languages if the Presidency sees it as a decision resolving fundamental issues before the Court. The Rules offer further discretion to the Presidency to have any decisions involving ‘major issues relating to the interpretation or the implementation of the Statute or concerning a major issue of general interest’ published in all of the official languages.

Doctrine: For the bibliography, see the final comment on Article 50.

Author: Yvonne McDermott Rees.

Article 50(2)

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

English and French are the working languages of the Court. Some have criticised the Court for its excessive Anglophonism, but there is a delicate balance to be achieved between hiring staff from a wide geographic distribution and those who are competent in both working languages of the Court.¹

Many of the first accused persons before the Court were from Francophone African countries. Thus, the provisions on working languages strongly interplayed with their right to a fair trial. Pursuant to Article 67(1)(f), the accused has the right to free interpretation of proceedings into a language he or she fully understands and speaks, and to translation of any documents that are necessary to ensure fairness. The “fully understands and speaks” proviso goes further than the “in a language which he understands” formulation found in the ICCPR, and the ‘fully’ is not to be overlooked.² In *Lubanga*, it was held that, since the majority of the defence team spoke only French whereas the majority of the prosecution were English-speaking, the fact that simultaneous transcripts of the trial were only made available in English put the defence at a significant disadvantage *vis-à-vis* the prosecution. Thus it was ordered that live transcripts should be provided in both languages.³

Article 50(2) permits the Presidency to designate one of the official languages of the Court as a working language for a case. The circumstances of such an authorisation are set down in Rule 41, namely where the language is spoken by the majority of those involved in a case and any of the

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016.

² ICC, *Prosecutor v. Katanga*, Appeals Chamber, Judgment on the appeal of Mr. Germain Katanga against the decision of the Pre-Trial Chamber I entitled ‘Decision on the defence request concerning languages’, 27 May 2008, ICC-01/04-01/07-522 (<https://www.legal-tools.org/doc/62dbba/>).

³ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision on defence’s request to obtain simultaneous French transcripts, 14 December 2007, ICC-01/04-01/06-1091 (<https://www.legal-tools.org/doc/af7079/>).

participants have requested it to become a working language, or where “the Prosecutor and the defence so request”. This wording suggests that both parties need to make a request for one of the other official languages to be used as a working language. The Presidency may authorise such a request “if it considers that it would facilitate the efficiency of the proceedings” (Rule 41). There is no record of any such request having been made to date.

Doctrine: For the bibliography, see the final comment on Article 50.

Author: Yvonne McDermott Rees.

Article 50(3)

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 50(3) permits the Court to authorise the use of another language by any party or by any State intervening in a proceeding, provided that it believes such an authorisation to be adequately justified. There is no inherent limitation to any of the other official languages of the Court in the wording of Article 50(3), which simply refers to “a language other than English or French”.

Cross-references:

Article 67.

Rules 40, 41, 42 and 43.

Regulation 40.

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 801–809 (<https://www.legal-tools.org/doc/b7432e/>).
2. Flores Liera Socorro, “Publications, Languages and Translation”, in Roy S. Lee (ed.), *The Making of the Rome Statute: Issues, Negotiations and Results*, Kluwer Law, The Hague, 1999, pp. 314–20.
3. Magda Karagiannakis, “Article 50”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1323–1331 (<https://www.legal-tools.org/doc/040751/>).

Author: Yvonne McDermott Rees.

Article 51

Rules of Procedure and Evidence

General Remarks:

At the *ad hoc* Tribunals, Judges had the power to make and amend Rules of Procedure and Evidence, which led to significant fluidity of the Rules to adjust to individual circumstances.¹ At the ICC, this power is vested in the Assembly of States Parties. Article 51 sets down the conditions for the Rules of Procedure and Evidence's adoption and operation.

Preparatory Works:

The main debate on this Article concerned the degree of freedom to be afforded to judges in the adoption and amendment of Rules of Procedure and Evidence. It was decided at the Rome Conference to leave the drafting of the Rules of Procedure and Evidence until after the Conference.²

Doctrine: For the bibliography, see the final comment on Article 51.

Author: Yvonne McDermott Rees.

¹ Yvonne McDermott, "The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis", in *Leiden Journal of International Law*, 2013, vol. 27.

² William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016.

Article 51(1)

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

The Rules of Procedure and Evidence were drafted by the Preparatory Commission after the successful conclusion of the Rome Conference. Article 51(1) states that the Rules will be adopted by a two-thirds majority of the Assembly of States Parties, and will enter into force immediately thereafter. The Rules were adopted by consensus and entered into force in 2002.

Doctrine: For the bibliography, see the final comment on Article 51.

Author: Yvonne McDermott Rees.

Article 51(2)

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority; or

(c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

Rule amendments can be proposed by: any State Party; the judges acting in absolute majority, or the Prosecutor, and enter into force when adopted by a two-thirds majority of the Assembly of States Parties.

While the Rules of Procedure and Evidence are undeniably comprehensive in nature, and indeed, as Schabas notes, many procedural issues are extensively discussed in the Statute itself, there were certain issues of procedure that could not have been envisioned at the time of their drafting. For example, the Court had to deal with requests for non-attendance of high-ranking political figures in Kenya, who were simultaneously on trial before the Court. In 2013, a new Rule 134 *quater* was adopted to cover the situation of those accused persons who are “mandated to fulfil extraordinary public duties at the highest national level”. It states that the Trial Chamber shall grant a request for excusal from trial received from such persons, where it is convinced that it is in the interests of justice and not prejudicial to the rights of the accused to do so.¹

Doctrine: For the bibliography, see the final comment on Article 51.

Author: Yvonne McDermott Rees.

¹ ICC ASP, Amendments to the Rules of Procedure and Evidence, Resolution ICC-ASP/12/Res.7, 27 November 2013 (<https://legal-tools.org/doc/c50839/>).

Article 51(3)

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

Article 51(3) allows a two-thirds majority of judges to draw up provisional Rules “in urgent cases where the Rules do not provide for a specific situation before the Court”. These Rules are to be applied until the next session of the Association of States Parties, where they can be adopted, rejected or amended.

In practice, as can be seen from the *Kenya* situation, judges tend not to draw up such provisional rules, but rather rely on judicial interpretation of the Statute to justify a particular solution or course of action. They can later seek a change of the Rules to retroactively include that solution within the Court’s procedural framework.

Doctrine: For the bibliography, see the final comment on Article 51.

Author: Yvonne McDermott Rees.

Article 51(4)

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

Importantly, Article 51(4) stresses that new or provisional Rules cannot be applied retroactively to the detriment of a suspect, accused, or convicted person. The retroactive application of amended Rules was controversial before the ICTR. At the time of the case of *Nyiramasuhuko et al.*, Rule 15 *bis* stated that continuation of a trial in the long-term absence of one of the judges could “only be ordered with the consent of the accused”. This was changed in May 2003 to allow the trial to continue without the accused’s consent, and in November 2003, a decision was made to proceed with a substitute judge, even though five of the six accused had not consented to this.

Doctrine: For the bibliography, see the final comment on Article 51.

Author: Yvonne McDermott Rees.

Article 51(5)

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 51(4) states that the Rules and any amendments thereto must be consistent with the Statute. Pursuant to Article 51(5), the Statute shall prevail where there is any conflict between the Statute and the Rules. The primacy of the Statute over any subsidiary instruments was previously noted in the *Milošević* case, in which the ICTY held that:

The Rules and all other applicable instruments, including the Directive and the ICTY Code, are to be read and applied subject to the Statute. That is the natural relationship between an enabling instrument and any other instrument, including Rules, made thereunder – a point not specifically covered in the Statute of the ICTY, but expressly set out in the ICC Statute.¹

Cross-references:

Article 21.

Rule 3.

Regulation 5.

Doctrine:

1. Yvonne McDermott Rees, “The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis”, in *Leiden Journal of International Law*, 2013, vol. 27, pp. 971–89.
2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 810–820.

Author: Yvonne McDermott Rees.

¹ ICTY, *Prosecutor v. Milošević*, Trial Chamber, Decision on assigned counsel’s motion for withdrawal, 7 December 2004, IT-02-54-T, para. 13 (<https://www.legal-tools.org/doc/2ff5d0/>).

Article 52

Regulations of the Court

General Remarks:

Article 52 entrusts judges with the power to draw up Regulations of the Court “necessary for its routine functioning”.

Preparatory Works:

Early drafts of the Statute distinguished between “rules of the tribunal” and “internal rules of the Court”. The United States of America proposed the formulation of “Regulations of the Court”.¹

Doctrine: For the bibliography, see the final comment on Article 52.

Author: Yvonne McDermott Rees.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

Article 52(1)

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

Pursuant to Article 52(1), the judges shall adopt, by majority, such Regulations as are ‘necessary for the routine functioning of the Court’. The Regulations were adopted in 2004, and they cover such matters as broadcasts of Court proceedings (Regulations 20–21); the required content of the document outlining the charges (Regulation 52); choice of defence counsel (Regulation 75), and legal assistance (Regulation 84).

By far the most controversial Regulation adopted to date has been Regulation 55, which permits the Court to reclassify “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”. In *Lubanga*, the status of this rule as ‘necessary for the routine functioning of the Court’ was challenged, but a request to declare it contrary to Statute and Rules was denied.¹ More controversially, in *Katanga and Ngudjolo*, the defendants had initially been charged with co-perpetration as a mode of liability under Article 25(3)(a). In 2012, after the trial proceedings had ended, the Trial Chamber opted to use Regulation 55 to recharacterize Katanga’s mode of liability to common purpose liability under Article 25(3)(d)(ii). He was later convicted, while his co-accused was acquitted.² Regulation 55 has been heavily criticised for its operation in the *Katanga* case and the resultant impact on the ability of the accused to prepare for trial and launch a defence against the charges, given that those charges could change at any time. In this way, it clearly risks jeopardising the right to be informed of the charges under Article 67(1).

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084 (<https://www.legal-tools.org/doc/257c48/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons, 21 November 2012, ICC-01/04-01/07-3319 (<https://www.legal-tools.org/doc/f5cbd0/>).

Doctrine: For the bibliography, see the final comment on Article 52.

Author: Yvonne McDermott Rees.

Article 52(2)

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

The Prosecutor and Registrar are to be consulted in the drafting and amendment of the Regulations (Article 52(2)).

Doctrine: For the bibliography, see the final comment on Article 52.

Author: Yvonne McDermott Rees.

Article 52(3)

3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

Although (unlike the Rules of Procedure and Evidence) drafting of the Regulations is left primarily in the hands of the judges, there is some supervision by the Assembly of States Parties over these Regulations. Article 51(3) notes that amendments shall take effect immediately upon adoption, unless otherwise decided by the judges. Upon adoption, they are to be circulated to States Parties for comments and if there are no objections from a majority of States Parties within six months, they remain in force.

Cross-references:

Articles 21 and 67.

Regulations 4 and 6.

Doctrine:

1. Sophie Rigney, “‘The Words Don’t Fit You’: Recharacterisation of the Charges, Trial Fairness, and *Katanga*”, in *Melbourne Journal of International Law*, 2015, vol. 15, pp. 515–33.
2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 821–824 (<https://www.legal-tools.org/doc/b7432e/>).
3. Carsten Stahn, “Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation”, in *Criminal Law Forum*, 2005, vol. 55, pp. 1–31.

Author: Yvonne McDermott Rees.

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